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Unwritten Constitutions, Unwritten Law

Walter O. Weyrauch*

The power of state law to regulate society is not exclusive. A large body of unwritten law, based on oral legal traditions, coexists autonomously within any setting. It is supported by informal but effective sanctions. The rules of unwritten law may be layered in fundamental principles, constitutional in character, and provisions of lesser significance dealing with matters of daily concern. Jurisprudential questions may be asked as to how multitudes of autonomous legal systems, many of them of ephemeral nature, compete with and often support the law of the state. Empirical information is provided describing highly disparate communities: an experimental group on the Berkeley campus, the isolated population on the British island of Tristan da Cunha, and the Romani people (Gypsies) who reside in groups throughout the world but share a largely unknown legal culture. All these societies are subject to oral legal traditions and to the written laws of the respective nations and states in one form or another. In spite of their differences they have common features that can also be observed within American society. Autonomous unwritten law is only accessible to external controls within limits, but knowledge of its characteristics is critical for legal theory and practice. Awareness of unwritten law, as illustrated by individual cases, can offer strategic advantages and defenses.

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I. Preface

By unwritten constitutions I mean the fundamental principles by which the people in any form of organization govern themselves.¹ Unwritten law is layered, just as written law, and can be found any place where a group gathers to pursue common objectives.² The layers may extend from unwritten consti-

1. See generally Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 23 (1984) (maintaining that judges should supplement written constitution with unwritten one "in terms of the homely intuitive ethnography of the common law tradition"). See also Anthony Chase, *Unwritten Constitution, Invisible Government*, 18 NOVA L. REV. 1703 (1994). An early source is Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 2 n.5 (1934) (stating that United States has unwritten constitution, "whether anyone likes that fact or not").

Unwritten constitutional law had an impact on the impeachment trial against President William Jefferson Clinton before the United States Congress. See *infra* notes 47 and 78.

2. Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the "Gypsies"*, 103 YALE L.J. 323, 327-28 (1993) (quoting THOMAS A. COWAN & DONALD A. STRICKLAND, *THE LEGAL STRUCTURE OF A CONFINED MICROSOCIETY*, at i (Space Sciences Laboratory, University of California, Berkeley, Internal Working Paper No. 34, 1965)). Lon L. Fuller has described law in similarly broad terms, distinguishing between the legal system of states and the law of smaller systems, such as labor unions, professional associations, clubs, churches, and universities. Lon L. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1 (1969).

The important work of Robert C. Ellickson has described customary systems of social control as operating within neighborhoods and how they often prevail over the law of the state. Ellickson describes these systems as containing informal norms and confines his definition of law to rules emanating from the government. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 127 (1991). While this limited definition corresponds to conventional usage, it de-emphasizes the historical evolution of law. See *infra* note 5 and

tutional principles to lesser laws dealing with ordinary social discourse. Threat of informal but effective sanctions assures compliance.³ Most recently Michael Reisman has asserted that fundamental aspects of law also can be traced in short-term encounters.⁴ Even on this level one can probably distinguish between basic norms protecting physical integrity and survival and lesser provisions regulating daily occurrences. This essay submits empirical evidence in support of these propositions and invites further discussion.

Unwritten constitutional law, as I will demonstrate, exists in any social unit, whether formal or informal, more or less permanent or of transitory existence. Marriage and any form of business or governmental unit, including the United States as a whole, are mere illustrations. My definition is tied to a more general conception of law as being an inevitable and necessary consequence of any purposeful human association. In other words, law as perceived this way is not necessarily dependent on any formal lawgiving body of the state. The conception of law as emanating exclusively from the state is misleading and too limited. It has its historical base in the last centuries and the transformation of absolute monarchy into contemporary forms of powerful states.⁵

accompanying text. A definition of law limited to governmental rules, although valid for many purposes, is not used in the present article because it stresses and impliedly legitimizes the exclusive power of the state to legislate. It also insulates state law from comparison with competing sources of law. Cf. Weyrauch & Bell, *supra*, at 369 (discussing problems of terminology).

3. See, e.g., ELLICKSON, *supra* note 2, at 124-26, 208-10 (describing sanction and reward-based social controls); Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 489 (1997) [hereinafter LoPucki, *Systems Approach*] (contrasting "autonomous law" that naturally grows within social groups with formal, state-made law and concluding that latter is marginal and has relatively minor role in structuring society); Weyrauch & Bell, *supra* note 2, at 387-89 (suggesting that violations of unwritten codes often may carry sanctions that cannot be remedied by written law). In a separate publication LoPucki has maintained, based on empirical data, that written law is too complex to be remembered. Lawyers have therefore developed simplified mental models of what the law is in any given area. These models, LoPucki posits, are not expressed in words, as is true of written law, but are readily available in lawyers' minds. Essentially, the models represent oral traditions that may vary from community to community, although seemingly the same written law may apply. Lynn LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498 *passim* (1996) [hereinafter LoPucki, *Legal Culture*]; see also *id.* at 1504-07 (discussing instances of communal legal traditions prevailing over written law); *id.* at 1530-31 (describing sanctions against lawyers who insist on written law and deviate from communal norms favoring unwritten tradition).

4. See generally W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* (1999) (discussing "microlaw").

5. Unwritten law did not disappear with the invention of print and the rise of the modern state. It went underground and continued to be highly effective, as vividly exemplified by

Throughout my professional life, I have been involved in experimentation, observation and analysis of informal, not necessarily legally recognized social units and their law-creating activities.⁶ I will discuss three examples of such units and whether it is appropriate to talk in this context of constitutional law. I will refrain from going into further detail of the three associations that are submitted here as empirical support for my hypotheses because, at this point, it is essential to set forth their rudimentary common features. The units involved are highly disparate and are merely given as illustrations of basic characteristics that they share with other forms of human associations. I will present them in the following order: In Part II, an experimental group of nine young men living in the spring of 1965 for three months under highly controlled conditions in a penthouse on the Berkeley campus; in Part III, the population of about three hundred persons living on the isolated island of Tristan da Cunha in the South Atlantic; and in Part IV, the Romani people, commonly referred to as "Gypsies"; in Part V, I submit some illustrations and hypotheses on layers of autonomous lawmaking in American law. I conclude, in Part VI, with general thoughts on fundamental notions of unwritten law.

One may ask, why rely on highly exceptional and unconventional social units to demonstrate what can be observed in more familiar settings? Yet, once the commonality of private lawmaking is demonstrated in wholly unre-

Reisman's data. REISMAN, *supra* note 4, at 1-20. Beginning in the sixteenth century in Europe, judges became officials of the state, who were trained on the basis of printed sources and were no longer required to be familiar with unwritten law. From the end of the eighteenth century, oral legal traditions had to be pleaded and proven as facts by the parties. See EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 14-38 (Walter L. Moll trans., 1936) (describing historical evolution).

Suzanne Last Stone has suggested that theories of legal centralism, until recently dominant, are on the decline. She describes legal centralism as holding "that law is synonymous with the state and that the state's laws are part of a unitary hierarchical legal system." Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 835 (1993) (footnote omitted) (commenting on Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983)).

6. See Alfred de Grazia & Charles L. Ruttenberg, *Innovators in the Study of the Legal Process*, AM. BEHAV. SCIENTIST, Dec. 1963, at 48, 49 tbl. 3 (referring to "Embryonic, Vestigial and other Formally Unrecognized Legal Systems").

The seminal work of Reisman comes perhaps closest to a description of "embryonic" legal systems. The laws of brief encounters are not necessarily created on the spur of the moment, but could be part of a preexisting fundamental, though unwritten, legal system governing such encounters. See generally REISMAN, *supra* note 4; Michael Reisman, *Lining Up: The Microlegal System of Queues*, 54 U. CIN. L. REV. 417 (1985); Michael Reisman, *Looking, Staring and Glaring: Microlegal Systems and Public Order*, 12 DENV. J. INT'L L. & POL'Y 165 (1983); Michael Reisman, *Rapping and Talking to the Boss: The Microlegal System of Two People Talking*, in CONFLICT AND INTEGRATION: COMPARATIVE LAW IN THE WORLD TODAY 61 (The Institute of Comparative Law in Japan ed., 1988).

lated and anomalous groups, the reader can easily verify the hypotheses in any setting that is close at hand, for example, at home, in a university faculty, a law firm, or a governmental agency. Beginning with the familiar could be distracting because daily routines are not likely to be perceived as discrete forms of informal lawmaking. One practical implication of these oral legal traditions, as I will discuss in Part V which deals with American law, is in an unexpected area. It relates to the role of strategy in legal analyses, planning and litigation. Strategy, I suggest, gains whatever persuasive power it may possess from invocation of fundamental principles, based on the unwritten legal traditions of the people concerned.

I begin my observations with an account of an experiment in which I participated more than thirty years ago.

II. The Berkeley Penthouse Group⁷

The experiment, financed by the National Aeronautics and Space Administration (NASA), lasted three months in 1965. It tested a diet for purposes of space exploration. The experimental rules were nutritional in design and required far-reaching isolation from external influences that could have disturbed minute scientific measurements. Nine male volunteers, all in their twenties, developed their own rules. They reacted in part to the compulsory scientific regime, but their rules were also significant beyond the scope of the experiment. The nutritionists believed, based on the peculiar orientation of their discipline, that digestive factors, social behavior and lawmaking might be interrelated. NASA's interest was not merely focused on the physical well-being of

7. An abundance of factual detail is given throughout this article, because without facts empirical studies lack foundation. See Elizabeth Warren & Jay Lawrence Westbrook, *Searching for Reorganization Realities*, 72 WASH. U. L.Q. 1257, 1260 *passim* (1994) (criticizing in legal scholarship "speculation without reference to reality" and calling for empirical research as essential element of any policy debate). Extensively presented hypothetical facts have sometimes served as a substitute for reality in jurisprudential discussion. See generally Lon L. Fuller, *The Case of the Speluncean Explorers in the Supreme Court of Newgarth*, 4300, 62 HARV. L. REV. 616 (1949) (discussing imaginary criminal case for murder, brought against explorers who, after having been trapped in cavern by landslide, survived by killing and eating one member of their group); *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium*, 112 HARV. L. REV. 1834 (1999). The facts that are submitted in the present article, although unusual, are real.

The specific Berkeley Penthouse Experiment in the text is described in WALTER O. WEYRAUCH, *THE LAW OF A SMALL GROUP: A REPORT ON THE BERKELEY PENTHOUSE EXPERIMENTS WITH EMPHASIS ON PENTHOUSE V* (Space Sciences Laboratory, University of California, Berkeley, Internal Working Paper No. 54, 1967) [hereinafter WEYRAUCH, PENTHOUSE EXPERIMENTS]. For a published shorter version, see Walter O. Weyrauch, *Law in Isolation: The Penthouse Astronauts - An Experimental Group Cut Off from the World Makes Its Own Rules*, TRANS-ACTION, June 1968, at 39 [hereinafter Weyrauch, *Law in Isolation*].

future astronauts, but also on maintaining its legal authority during their prolonged separation from ground control. There had been past incidents during space flight in which wives of astronauts had been asked to communicate with their husbands in critical situations because their authority proved to be more durable than the commands of ground control, in other words, of the state.⁸

NASA was concerned about the potential growth of competing legal systems in case of prolonged space flights and eventual space exploration. I was brought into the experiment as a law professor. I met regularly with the volunteers, interviewed them and conducted with them joint sessions that are reported in a detailed log as part of my general report.⁹ I am not concerned here with discussing the purposes of NASA in conducting the experiment or with the nutritional or legal design of its execution, merely with reporting some of my more significant observations. The laws that were developed within the group under conditions of strict confinement were sufficiently specific that I could restate them in a published document having the appearance of a basic law or constitution.¹⁰ What emerged was an elaborate and extremely complex set of rules, some being more fundamental than others, and all of them enforceable by sanctions.

The participants, including one African-American, one Asian (native Chinese), and people of various religious and ideological persuasions, were mostly part of the general American culture. They brought American values with them to the penthouse. Many rules that they generated reflected the ambivalence that can also be found on the outside. The rules were contradictory and often disturbingly hypocritical. One should realize, though, that this

8. See WALTER O. WEYRAUCH, "THE LEGAL STRUCTURE OF A CONFINED MICRO-SOCIETY": A TENTATIVE EVALUATION OF THE COWAN-STRICHLAND PENTHOUSE EXPERIMENTS 7 (Space Sciences Laboratory, University of California, Berkeley, Internal Working Paper No. 42, 1966) (on file with the Legal Information Center, University of Florida) (citing incident).

These early concerns of NASA have been proven to be legitimate, most recently in connection with the mishaps of the Russian Mir Space Station. In several instances, the crews of spacecrafts have set up their own rule systems, sometimes in direct violation of orders from ground control. William J. Broad, *On Edge in Outer Space? It Has Happened Before*, N.Y. TIMES, July 16, 1997, at A6 (enumerating incidents, starting with Apollo 7 in 1968); David Filipov & David L. Chandler, *Mir's Crisis a Test of Stress: Human Errors Reveal Strain*, BOSTON GLOBE, July 20, 1997, at A1 (referring to one incident as "mutiny").

9. See generally WEYRAUCH, PENTHOUSE EXPERIMENTS, *supra* note 7, at 69-307.

10. See Walter O. Weyrauch, *The "Basic Law" or "Constitution" of a Small Group*, 25 J. SOC. ISSUES 49, 59-62 (1971), reprinted in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY 41, 46-49 (June L. Tapp & Felice J. Levine eds., 1977) [hereinafter Weyrauch, *Basic Law*] (reproducing constitution of group). The restatement of basic laws of this particular group involved twenty-eight rules of considerable specificity, many of them having an impact on the conduct and outcome of the experiment. None of this had been considered in the design of the experiment.

unwritten constitution was behavioral rather than aspirational in nature. Any unwritten constitution, although influenced by ideals, is largely a reflection of behavior. It is likely to contain common beliefs and even prejudices, side by side with ideals, that would not likely be expressed in a formal constitutional document. Rule 9 maintained, for example, that "[a]ll persons are born equal. If discrimination because of race or religion occurs, the fact of discrimination is to be denied."¹¹ Often the ambivalence expressed itself in the form of a basic rule and in exceptions. Rule 7 related to experimenters and staff members who were female. It dealt with the phenomenon that today might be referred to as sexism. "Women, if present, are to be treated with chivalry. Derogatory or obscene remarks can be made about them if they are absent. Obscene language is excusable if used as some form of relief in a stressful situation."¹² Rule 10 could be restated as follows: "In matters considered as crucial, each member of the group has an absolute veto. However, a lone dissenter or a dissenting minority may be harassed to reach a desired unanimity."¹³

Of particular interest was the main rule 1, making the efficacy of rules dependent on their level of articulation. This rule has also been discussed in the literature. It has been observed in families, law firms and law faculties.¹⁴ Because of its importance, I restate it in full, adding the related rule 2:

1. Rules are not to be articulated. In case of articulation they are to be discarded, regardless of whether such articulation was accidental or deliberate. If a substantial segment of the group has in fact talked about the rule, the level of articulation is reached and its existence acknowledged.

A rule that has become spurious by articulation and acknowledgment can be discarded by any form of behavior designed to destroy its effective-

11. Weyrauch, *Basic Law*, *supra* note 10, at 60.

12. *Id.* at 59.

13. *Id.* at 60.

14. Within functioning families, articulation of rules is frowned upon. See Fuller, *supra* note 2, at 27-28; Walter O. Weyrauch et al., *The Family as a Small Group*, in *GROUP DYNAMIC LAW: EXPOSITION AND PRACTICE* 153, 164-66 (David A. Funk ed., 1988). Numerous informal rules, most of them not articulated, have been observed in law firms. See, e.g., ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 199 (describing reluctance to articulate internal agreements); *id.* at 216 (describing blurred memory on whatever rules may exist); *id.* at 228-34 (describing unacknowledged status hierarchy). David A. Funk has discussed nonarticulation of rules in law school settings:

I frequently observe this rule operating at this law school. We do certain things in fact, though we sometimes do not want to admit it. If someone identifies and articulates what we really do, the group may change its actions. Our prior rule of behavior has changed because we cannot face its articulation.

GROUP DYNAMIC LAW: EXPOSITION AND PRACTICE, *supra*, at 178; see also William L. Richard, *Faculty Regulations of American Law Schools (A Survey)*, 13 CLEV.-MARSHALL L. REV. 581, 585 (1964) (noting absence of articulated regulations, except in regard to tenure).

ness, for instance by deliberate disregard in a demonstrative fashion without the normal group sanctions which otherwise would have been imposed.

2. The closer a rule comes to a taboo area, the less articulate it should be. Minor administrative matters may be articulated.

The stringency of a rule is determined by the level of its articulation. The more articulate it is, the less it has to be followed.¹⁵

In spite of common characteristics of age and gender, the subjects were not homogeneous. Subgroupings developed soon during the experiment. The opposing viewpoints caused a wide range of discussions on the experimental regime and almost any aspect of life. Although these discussions were often chaotic, they had positive aspects. They made visible the implicitly created rule structure which otherwise, because of the basic rule against articulation, would have been more difficult to detect. Race and violation of civil rights played important roles in these respects.

The ethnic factor caused problems almost from the beginning.¹⁶ The native Chinese and African-American members of the experimental group were subjected to ill treatment. The participants, possibly even the victims, were wholly unaware of any racism being involved. They were of above average educational level, some of them graduate students, and considered themselves strongly supportive of civil rights, condemning racism in any form. Yet their behavior, perhaps due to the stresses of the experiment, belied their expressed beliefs. Their conduct, under contemporary standards and even in 1965, was highly offensive.

The Chinese man, born outside of the United States, was persistently treated badly and called "stupid" to his face. The most liberal member of the group, in crude language although supposedly in jest, compared the African-American member to a primate. The targets of these insults reacted in different fashion. The Chinese member became depressed and sullen. Probably as a release from tension, he started to drink water excessively, thereupon being

15. Weyrauch, *Basic Law*, *supra* note 10, at 59. The rule against articulation probably has a much broader application than commonly known. It may have a profound impact on the law of the state, for example, counteracting the effect of statutes meant to be stringent. It also may have a bearing on effective strategy. The more specific the legal argument, the more it may lose in effectiveness. Hints and innuendo, because of their lower level of articulation, may tend to be more persuasive. On the other hand, some rules, like the rule against murder, are so universally beneficial that they can survive articulation. Most rules do not fit into this category and thus prove to be vulnerable.

Using Biblical illustrations, Cover has emphasized the importance of written texts (scripture), but has also pointed out that multiple conflicting interpretations may modify and sometimes vitiate meaning. Divine revelation may be invoked to bring about results opposite to what is expressed in the scripture. Cover, *supra* note 5, at 11-25.

16. Further details can be found in Weyrauch, *Law in Isolation*, *supra* note 7 (summarizing impact of race).

derided as an "aquaholic" by the other participants. Ultimately, the experimenters intervened and removed him from the experiment because he had violated dietary rules. The African-American, a powerful individual, sustained himself successfully throughout the experiment. He reacted to insults by becoming noisy, an effective sanction within the crowded environment.

Toward the conclusion of the experiment certain irregularities occurred, including the smuggling of a "mood-altering agent," as the matter was referred to in the experimental reports.¹⁷ Interestingly, only the most conservative white member of the group and the African-American were wholly uninvolved in the violations. A form of quasi-judicial procedure followed, conducted by the nutritionists, resulting in docking of compensation in various degrees, depending on the seriousness of the individual offence and its impact on the scientific data. A nurse uncovered a plot to send the uninvolved black member to "Coventry," subjecting him to ostracism. The plot aimed to make him react foolishly and commit some violation to reduce his compensation too. In an independent incident, the African-American received a deep gash on his hand when a sharp-edged can was thrown at him with the shout "catch." Throughout these events the subjects, including the victim, denied that racism was involved. The insults were referred to as mere joking or teasing, and even the injury was characterized as an accident, caused by horseplay.¹⁸

One may view these events as detrimental to the whole experimental undertaking, but they also can be viewed as instructive. The experiment was not purely nutritional; it included my task of observing the law that emerged among the confined subjects. From that perspective, the infractions were most valuable. They exposed the very core of the norms that had been generated to a stress test. In addition, even the value of the nutritional data may have been enhanced. Infractions are bound to occur in any setting. In a congenial group they are more likely to be covered up successfully, while in a mixed group they tend to become visible. There is some evidence that this happened also in the Penthouse experiment.

The African-American member of the group established a relation of confidence to a nurse, who was of the same ethnic background.¹⁹ This ethnically determined subgroup, its membership cutting across the division be-

17. WEYRAUCH, PENTHOUSE EXPERIMENTS, *supra* note 7, at 220-73 (reporting infractions and resulting proceedings). The "mood-altering agent" was marijuana. How this incident became known to the experimenters is not entirely clear. Supposedly unexplained variations in the nutritional data caused an investigation. According to rumors there had been a link of communication between one member of the group and a member of the experimental staff.

18. *Id.* at 274-75.

19. *Id.* at 221 (discussing relation of confidence between African-American nurse and volunteer); *see also id.* at 226-30 (containing written statement by nurse about her observation of racism).

tween volunteers and experimenters, probably helped in exposing the irregularities that, otherwise, would have remained undetected. Thus, what appeared to have been a flaw in design may actually have improved the experimental rigor and the reliability of the nutritional data. Similarly, the presence of a law professor may have brought into the open matters that in a homogeneous group of nutritional scientists may never have been noticed, and, if noticed, may have been suppressed.

My second illustration deals with empirical data, collected from an island population.

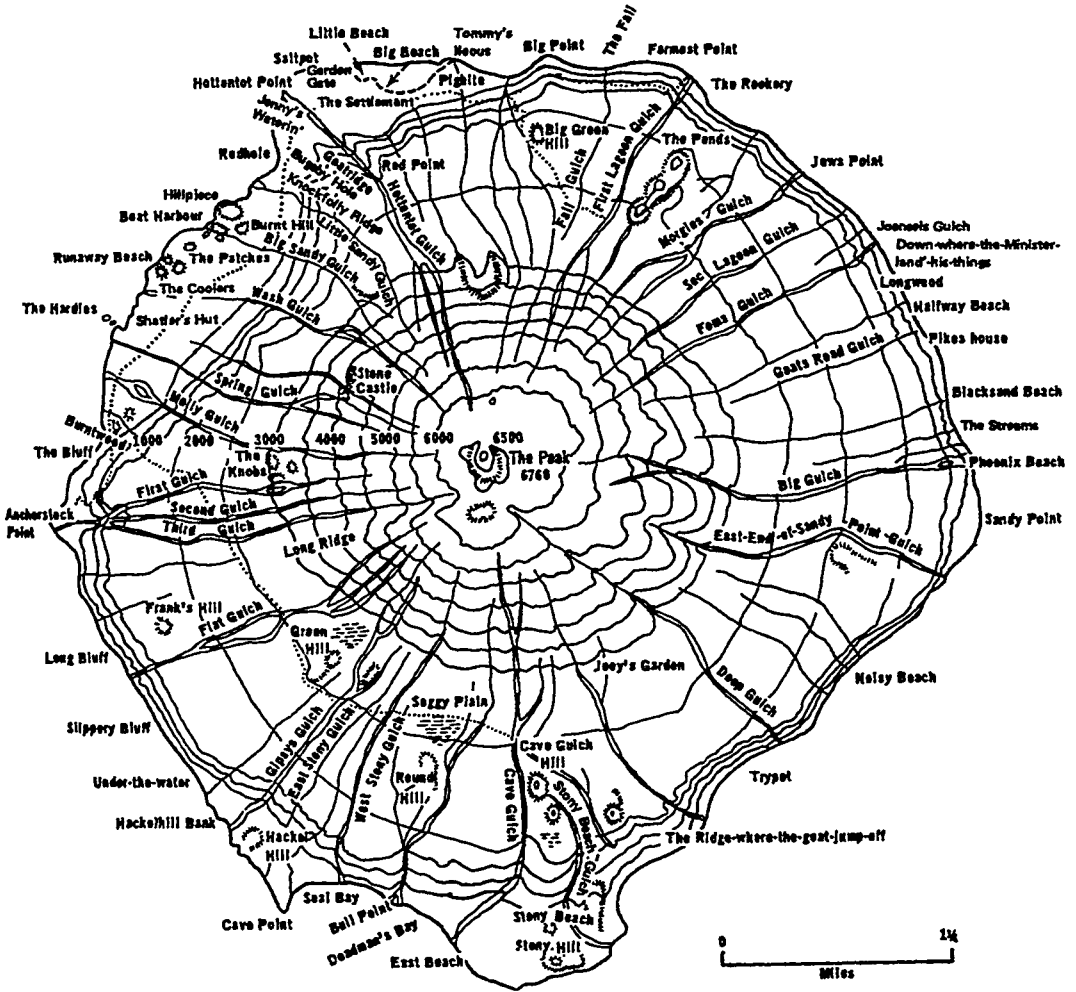
III. *Tristan da Cunha*

Tristan da Cunha is an isolated island in the South Atlantic, thousands of miles distant from Cape Town, Rio de Janeiro, and Buenos Aires.²⁰ The closest inhabited place is Saint Helena, another isolated island, some 1,500 miles to the north. Tristan is a British colony and a dependency of Saint Helena. It is of about seven miles in diameter and has a volcanic mountain of 6,760 feet above sea level, snow covered in winter and last active in 1961. There is only very limited livable space for the population of about 300. The inhabitants originated from three settlers of Scottish and English descent, later joined in the earlier parts of the nineteenth century by a few men from whaling fleets and shipwrecked sailors. In 1827 the settlers, having grown by five in number, asked the captain of a passing sailboat to bring them five women from Saint Helena who were in search of husbands. These women were of mixed African, Malayan and European origin.²¹

20. ELLICKSON, *supra* note 2, at 178 n.38; see LAWRENCE M. FRIEDMAN, AMERICAN LAW 31-33 (1984) (discussing Tristan da Cunha); Ginger Gould, The Functioning and Consequences of an Informal Legal System: Tristan da Cunha (Dep't Pol. Sci. U. Cal. Berkeley, paper for Professors Walter O. Weyrauch & William Muir, June 1969) (on file with author). My discussion of Tristan da Cunha is based on PETER A. MUNCH, SOCIOLOGY OF TRISTAN DA CUNHA (1945) [hereinafter MUNCH, SOCIOLOGY] (describing results of Norwegian Scientific Expedition to Tristan da Cunha, 1937-1938) and PETER A. MUNCH, CRISIS IN UTOPIA: THE ORDEAL OF TRISTAN DA CUNHA (1971) [hereinafter MUNCH, CRISIS] (relating to volcanic eruption of 1961 and its aftermath, evacuation to England and eventual return to Tristan); see also The Peter A. Munch Tristan da Cunha Collection, housed in St. Louis Room of the Rare Book Department, Pius XII Memorial Library, Saint Louis University, St. Louis, Missouri 63108.

Munch's description of Tristan da Cunha as *Utopia* refers in classical Greek to a "nowhere place." In its literary sense, it connotes an imaginary island with ideal legal and political conditions of life. The term was coined by Sir Thomas More in his *LIBELLUS VERE AUREUS, NEC MINUS SALUTARIS, QUAM FESTIVUS, DE OPTIMO REPUBLICAE STATU DESQUE NOVA INSULA UTOPIA* ("On the Highest State of a Republic and on the New Island Utopia") (1516). See *NEW ENCYCLOPAEDIA BRITANNICA* (Micropaedia) 220 (15th ed. 1987). Tristan da Cunha, however, is real.

21. See MUNCH, *CRISIS*, *supra* note 20, at 47-49 (describing historical events surrounding arrival of women).



*Relief Map of Tristan da Cunha*²²

22. East Stony Gulch is in reality to the west of West Stony Gulch. According to Tristan custom "east" means in a clockwise direction, while "west" refers to a counterclockwise location. *Reproduced from* MUNCH, CRISIS, *supra* note 20, at 23, with permission of Harper Collins Publishers of Jan. 28, 1999.

Before 1816 the island, except for a few temporary occupants, was essentially uninhabited, but a small garrison of British soldiers was stationed there during the first year of Napoleon's exile in Saint Helena. The concern was that he might try to escape with French assistance. One member of this detachment, William Glass, asked for permission to stay when his unit returned to England. He was joined by two of his compatriots. Glass had married a young woman in South Africa, at that time a mere thirteen years old, with whom he later had sixteen children. His wife had been described as Cape Coloured or Cape Creole.²³ In the later part of the nineteenth century the island was becoming increasingly isolated. Steamers replaced sailboats, and there was no longer a need to stop at Tristan for provisions and fresh water.

The isolation seems to have increased the need for autonomy and probably has aided in bringing about the distinct Tristan character traits that prevail today. At this point only seven family names exist, Glass, Green, Hagan, Lavarello, Repetto, Rogers, and Swain, all members of these families being more or less closely related through intermarriage. A fairly large percentage of marriages, possibly up to thirty percent, appear to be between cousins. Yet marriages between persons of the same family name, although not prohibited, are, in a jocular vein, disparaged ("a Green upon a Green," "a Swain upon a Swain").²⁴

In spite of possible genetic problems that may have existed, the population is of extraordinary health and longevity. Unless men die accidentally by drowning, reaching ages in the nineties is not uncommon. The people retain their original teeth fully intact until old age. Their diet is monotonous, consisting mainly of cooked fish and potatoes three times a day.²⁵ On the

23. See *id.* at 28 (giving details about William Glass family, eight sons and eight daughters, as entered in the Glass Family Bible, now preserved in British Museum).

24. See MUNCH, SOCIOLOGY, *supra* note 20, at 52-54 (explaining ethnic origins as well). Concern about marriage between close relatives seems to have been introduced to Tristan by missionaries from England. The islanders have been described, "their faces all had a strangely similar look, as though they might be close cousins." SIMON WINCHESTER, *THE SUN NEVER SETS: TRAVELS TO THE REMAINING OUTPOSTS OF THE BRITISH EMPIRE* 80 (1985).

25. Members of the Norwegian Scientific Expedition of 1937-1938 have assumed that the longevity and healthy teeth of the Tristan population are largely due to the fish and potato diet. Sverre Dick Henriksen, *Kartoffeln, Fisch und hohes Alter*, in ERLING CHRISTOPHERSEN, *TRISTAN DA CUNHA: DIE EINSAMSTE INSEL DER WELT* 146 (1939); Reidar Sognaes, *Fische, Kartoffeln und gesunde Zähne*, in CHRISTOPHERSEN, *supra*, at 137; see SVERRE DICK HENRIKSEN & PER OEDING, *MEDICAL SURVEY OF TRISTAN DA CUNHA* 54, 141-42 (Results of the Norwegian Scientific Expedition to Tristan da Cunha 1937-1938, No. 5, Det Norske Videnskap-Akademi I Oslo, 1940) (describing absence of tuberculosis, venereal disease and other infectious diseases, of heart disease and even of cancer, except for original settler William Glass, pipe smoker, who died of cancer of lips).

other side of the island and difficult to reach is an apple orchard. The apples are consumed rapidly, preferably when still green, and no effort is made to store them. There are cows and sheep, providing milk, wool, and occasional meat.²⁶

The people of Tristan are intelligent and resourceful, have a well-developed sense of humor and are quick-witted. They are fundamentally trusting, hospitable and honest. In their communications with visiting foreigners they are polite but have developed a reticence to revealing their innermost thoughts and feelings. Their frankness has been abused by reports that have depicted them as simpleminded and backward.²⁷ One visiting author, after initially being denied admission to stay overnight, was told, "Mr. Winchester – you'll be careful with us now, won't you . . . ? We'll have to live with what you write for years to come. We'll read your words a thousand times. So be careful, for our own sakes."²⁸ To some extent the Tristanians are protected by the extreme difficulty of access. Actually, getting to Tristan might be easier than arranging for how and when to leave, because transportation is only sporadically available.

The Tristan population has one basic law of absolute equality that, significantly, originated from the written articles of a business partnership between the initial three settlers, William Glass, Samuel Burnell and John Nankevel, and witnessed by the commander of the British garrison and an officer of the Royal Navy. The document is dated November 17, 1817, and the original preserved in the British Museum in London. It reads as follows:

We, the Undersigned, having entered into Co-Partnership on the Island of Tristan da Cunha, have voluntarily entered into the following agreement – Viz

- 1st That the stock and stores of every description in possession of the Firm shall be considered as belonging equally to each –
- 2nd That whatever profit may arise from the concern shall be equally divided –
- 3rd All Purchases to be paid equally by each –
- 4th That in order to assure the harmony of the Firm, No member shall assume any superiority whatever, but all to be considered as equal

26. See MUNCH, *SOCIOLOGY*, *supra* note 20, at 114-35 (discussing Tristan agriculture). The nutritional aspect of green apples is important because of the scarcity of vitamin C. See *id.* at 122-23. For contemporary additional food items, see *infra* note 35.

27. See, e.g., Carl Mydans, *Strange Story of a Flight from Our Century: Far-Off Exiles of Tristan*, *LIFE*, July 12, 1963, at 72-74 (describing islanders as physically and mentally impaired because of prolonged, close inbreeding). The positive character traits of the Tristan population are amply documented in MUNCH, *CRISIS*, *supra* note 20, at 16-18, 131-37 (mentioning also patronizing attitudes of some visitors and temporary residents).

28. WINCHESTER, *supra* note 24, at 84.

- in every respect, each performing his proportion of labour, if not prevented by sickness –
- 5th In case any of the members wish to leave the Island, a valuation of the property to be made by persons fixed upon, whose valuation is to be considered as final –
- 6th William Glass is not to incur any additional expence on account of his wife and children –²⁹

This partnership agreement was later amended by a written document of December 10, 1821, a copy being in possession of the British Museum, providing in part:

- 7th No person subscribing to these articles are [*sic*] to continue reminding particular persons of their Duty in point of Work, or otherwise, as in such Case nothing but *Disunion* will be the consequence; Wm. Glass being at the head of the firm, will allot each individual every evening, his work for the following Day, not by way of task but merely for the purpose of causing all to do their best for the general good, which will be the means of insuring [*sic*] peace, and good will among the people, as well as benefitting the Establishment, in which all are concerned.³⁰

Although the actual wording is no longer available on the island and has been forgotten by later generations, these unusual documents, which can be called the constitution of Tristan da Cunha, have been transformed in the collective memory of the population into an understanding of fundamental equality. Numerous derivative rules have been generated over time that can be viewed as a highly effective body of unwritten law. In the almost two hundred years of its existence, this island community has experienced virtually no crime, no divorce or other social disruption.³¹ Occasional irregulari-

29. MUNCH, *CRISIS*, *supra* note 20, at 29-30 (reproducing full text, preserving original spelling and style).

30. *Id.* at 37 (emphasis in original). The full text of the amended partnership agreement is reproduced in MUNCH, *SOCIOLOGY*, *supra* note 20, at 22-24. Although the amendment seems to establish a privileged position of the original settlers, the principle of equality was later fully restored by informal consensus. See also Peter A. Munch, *Anarchy and Anomie in an Atomistic Community*, 9 *MAN* 243 (1974) (describing Tristan da Cunha).

The 1821 Amendment was signed by all male members of the community, in presence of and cosigned by a witness. MUNCH, *SOCIOLOGY*, *supra* note 20, at 22-24. Ordinarily, autonomous constitutions of this nature do not provide for the possibility of amendments. Changes are likely to be made by implicit and unanimous understanding, or the group may dissolve. In the case of Tristan da Cunha, the written articles of partnership, in other words the presence of a document, may explain the difference. In regard to the Berkeley Penthouse Group, see *supra* text accompanying note 13.

31. FRIEDMAN, *supra* note 20, at 31 (noting that "[n]obody could remember a time when

ties, such as what might be called petty theft in our society, are not treated as crimes under Tristan law. The only communal demand would be for return of the property to the owner, not even for damages in any form if a return is not possible.³²

There is really no need for police or any other form of authority, although a policeman has been appointed in recent years.³³ The Colonial Office, through the Governor of Saint Helena and the Tristan Administrator, has tried to establish some formal procedures, elections and popular representation, also some rudimentary forms of civil service. The main effect of the latter seems to have been to enhance the position of women, the men being unavailable because of farming and fishing.³⁴ In other respects, these efforts, as is

a serious crime was committed on the island"); MUNCH, *CRISIS*, *supra* note 20, at 63-64, 78 (noting absence of crime); *see also* Interview with John Heminway with Carlene Rogers, a young Tristan woman ("It could be a thing as divorce, but is so much palaver involved in it. . . . There's never been a divorce on Tristan.") (Videotape: Tristan da Cunha (John Heminway, narrator; Granada Television International 1989) (Travels, Box 2284, South Burlington, VT 05407)).

In mentioning the idealized law of an imaginary world, Cover has described the reality of Tristan da Cunha, apparently without being aware that such a community could exist:

In an imaginary world in which violence played no part in life, law would indeed grow exclusively from the hermeneutic impulse – the human need to create and interpret texts. Law would develop within small communities of mutually committed individuals who cared about the text, about what each made of the text, and about one another and the common life they shared. Such communities might split over major issues of interpretation, but the bonds of social life and mutual concern would permit some interpretive divergence.

Cover, *supra* note 5, at 40. In a footnote to this passage, Cover clarifies that by referring to texts he means "not only self-conscious, written verbal formulae, but also oral texts." *Id.* at n.115.

32. *See* MUNCH, *SOCIOLOGY*, *supra* note 20, at 304 (reporting that if stolen thing has been consumed, there is no further consequence).

33. Since the nineteenth century, the colonial authorities have persistently tried to impose administrative standards. Under a recent administrator, an islander was sent to England for training at the Metropolitan Police College at Hendon and then installed on Tristan as a uniformed constable. The Tristanians' reacted, as in the past, with amusement. As one of them expressed, "Albert is all right, he don't cause any trouble." MUNCH, *CRISIS*, *supra* note 20, at 296-97.

34. WINCHESTER, *supra* note 24, at 86. A comparison of Tristan da Cunha with Pitcairn provides a striking contrast. Pitcairn, an island located in the Pacific halfway between Australia and South America, is another British Crown Colony. It is even smaller and more isolated than Tristan, with a population of less than one hundred. These people, of mixed English and Tahitian ancestry, are the descendants of the mutineers of the Bounty. The early history of Pitcairn was characterized by anarchy, betrayal, murder and mayhem, decimating the mutineers to a sole survivor, John Adams, his nine Tahitian consorts and the children of the men who had met a violent death. In spite of this history – and perhaps because of it – for a period of two

true of English common law that applies in theory, have stayed on the surface and do not actually govern the life of the community. Even the British Administrator, although treated with deference, has remained an outsider.

Commercial enterprise may have had some impact, especially since 1963 when the islanders returned to Tristan after being temporarily evacuated to England because of a volcanic eruption. An emerging fishing industry introduced electricity to the island. Free schooling and medical services are now available. By 1985, movies were shown, radio and even taped television programs were available in individual households. Reportedly, at least two automobiles cruised on the road of seven miles. According to an ordinance, relayed by the Governor of Saint Helena, they are required to drive on the left side, following English custom. None of these innovations, some of which are of quixotical character, seem to have changed the traditional rules that govern the island.³⁵

Anglican ministers, sent by an English religious organization since 1851, have occasionally attempted to impose their authority on the islanders, in one instance even assuming the right of censorship of outgoing mail. The islanders, who are deeply religious and regular churchgoers, have treated these attempts with amused tolerance. When in one instance the clerical power was felt to be oppressive, a number of the islanders declared themselves to be Catholics, to avoid the jurisdiction of the Church of England.³⁶ Assertion of leadership in any form by a Tristanian is perceived as a major violation of the basic rule of equality and is sanctioned by teasing or possible shunning.³⁷

hundred years, starting under the leadership of John Adams, the population has developed a detailed written legal system with penalties for infractions, culminating in an elaborate criminal code. They have an annually elected magistrate who must be born on the island and an inspector of police, a courthouse and a prison. For details, including a reproduction of the Pitcairn Criminal Code, see IAN M. BALL, PITCAIRN: CHILDREN OF MUTINY 317-28 (1973). Since November 30, 1838, Pitcairn has had a written constitution granting equal voting rights for men and women above eighteen and mandating compulsory school attendance for children, a document drafted upon request of the islanders by the captain of a passing English ship. TREVOR LUMMIS, PITCAIRN ISLAND: LIFE AND DEATH IN EDEN 153-54 (1997); BALL, *supra* at 308-09; see also PETER CLARKE, HELL AND PARADISE: THE NORFOLK-BOUNTY-PITCAIRN SAGA 127 (1986) (claiming that 1838 constitution demonstrates Pitcairn islanders, rather than Australians, were first in world to grant equal voting rights to women).

35. See WINCHESTER, *supra* note 24, at 85-88; MUNCH, CRISIS, *supra* note 20, at 160-79, 296-98 (describing modernization of island). Because of increased outside contacts, canned food, coffee and tea are more readily available than in the past. Presumably satellite dishes have improved access to televised programs.

36. See MUNCH, SOCIOLOGY, *supra* note 20, at 254-55.

37. See Letter from Peter A. Munch, Professor of Sociology, Southern Illinois University at Carbondale, to Walter O. Weyrauch (May 5, 1977) (on file with author) (referring to Gould, *supra* note 20:

Since there is no place to go, these sanctions appear to be formidable and effective.

Although the mixed ethnic origin of the population continues to be visible, some islanders being fair, some dark in complexion, there is no racial discrimination, because this would violate the basic tenet of equality. Perhaps a qualification should be added. Being fair skinned is perceived to be desirable and results, for instance, in improved marital chances for young women. This form of differentiation did not exist in the early years of the settlement. It appears that the awareness of skin color was imposed on the islanders from the outside, and one source states that English missionaries were responsible for importing this distinction.³⁸

Yet skin color has no relation to achieving respect in the community through personal conduct and work. Indeed, merit achieved through personal effort is the main exception to equality, and repeated disregard of oral tradition may result in decline of status and communal respect. One may view the great dignity in personal conduct and in going about daily tasks, common to the islanders, as a means through which violation of their unwritten laws are avoided. If such dignity were not a common trait, the threat of its loss would become meaningless.

My third illustration deals with the unwritten basic laws of the Romani people, commonly referred to as Gypsies.

IV. *The Romani People*

The Romani people (Gypsies) are a nation without a territory. As any nation, unless one considers territory an essential element of sovereignty, they

Looking for "leaders" and instruments of communal "decisions," she did not seem to recognize that at the time she was concerned with, no instrument of communal decision existed on the island, and anyone who would assume the role of a "leader" would find himself without followers and would be the object of the subtle sanction of avoidance because he would have deviated from the accepted pattern of proper behavior . . .).

On teasing as sanction, see FRIEDMAN, *supra* note 20, at 31-32; MUNCH, *SOCIOLOGY*, *supra* note 20, at 306-08.

38. MUNCH, *SOCIOLOGY*, *supra* note 20, at 233-34. Simon Winchester has observed that the islanders, regardless of their ethnic origin or skin color, appear to possess the same traits and demeanor, a factor that speaks for their fundamental equality:

Their similarity – of dress, of face, of mannerism – they were all given to broad smiles, to courtly politeness, and to an air that managed to be at once proud and deferential – was vaguely frightening, as though these were aliens from a different planet, making their first contact with what they called "the houtside warl."

WINCHESTER, *supra* note 24, at 80.

may assert autonomy and have their own laws.³⁹ The Roma originated from India, which they left about one thousand years ago when driven out by an invasion of Islamic forces. They have retained their language which is related to Sanskrit. Their legal system, *Romaniya*, depending on oral tradition, is based on behavior that is pure (*vujo*) or impure (*marime*). *Romaniya* is meant to help in achieving a state of spiritual equilibrium that contains religious elements and is similar to western concepts of grace.

The Roma arrived in central Europe in the fifteenth century. They were enslaved in Romania for about five hundred years and ferociously persecuted elsewhere, culminating in the Nazi holocaust. An undetermined number of Roma, possibly more than one million, were murdered in concentration camps or summarily shot or hanged as alleged partisans, often without any other reason than being "Gypsies."⁴⁰ The first Roma appeared on this continent with Columbus on his third voyage in 1498. Later, they were deported from England and Sweden or fled from the persecution in Germany. Many came to the United States with the waves of immigration in the late nineteenth century. Their actual number is purely speculative because the United States Census has no appropriate category for them. Because of past persecution and as a nonwhite minority, they are disinclined to characterize themselves as Gypsies. The majority of the Roma in the United States belong to the Vlach group originating from the Wallachian region in Romania. This group has courts called *kris*, a term deriving from the Greek word, *krisis* (judgment), the judges being elected by their peers for individual cases.⁴¹

One may ask whether the oral legal traditions of the Roma are all basic, thereby eliminating any distinction between constitutional law and ordinary laws. Yet some fundamental notions also exist here. All the laws of *Romaniya* can be traced to zones of the human body, which acquire symbolic signifi-

39. My presentation of Romani law (*Romaniya*) is based on Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323 (1993). For further details, see *Gypsy Law Symposium*, 45 AM. J. COMP. L. 225 (1997). Specific reference to this literature will only be made when needed for clarity.

40. RAJKO DJURIĆ et al., OHNE HEIM – OHNE GRAB: DIE GESCHICHTE DER ROMA UND SINTI 266-86 (1996). Rajko Djurić is a past President of the International Romani Union. See also Weyrauch & Bell, *supra* note 39, at 336 n.41 (discussing estimates of Gypsy fatalities).

41. Elena Marushiakova and Vesselin Popov have maintained that judicial proceedings similar to the *kris* of the Vlach or Vlax exist also, under different names, in other Romani groups. ELENA MARUSHIAKOVA & VESSELIN POPOV, GYPSIES (ROMA) IN BULGARIA 155-65 (Studien zur Tsiganologie und Folkloristik No. 18, 1997). But see, e.g., Thomas Acton et al., *Theorizing Gypsy Law*, 45 AM. J. COMP. L. 237, 247-49 (1997) (hypothesizing that *kris* courts of Vlach Gypsies evolved under conditions of slavery in Romania because as slaves they could not resolve their conflicts by moving away, as could free nomadic Romanichal and Kaale Gypsies).

cance, the upper parts being pure and the lower parts impure. Metaphorically these zones of purity and impurity are extended to other areas of human conduct and interaction. The borderlines between the immediate and metaphorical applications of law are hazy. Hands have to be constantly washed because they may have touched polluted matters, for example, parts of the lower body. Food has to be prepared and served in specific ways. Male-female contact, especially of a sexual nature, can be severely contaminating. Childbirth takes place under extreme restriction.⁴² Contact with members of the dominant cultures, although permissible for earning a livelihood, is potentially contaminating because they do not adhere to the taboos.

Metaphorical expansion of the physical taboos may affect any phase of human conduct. Theft from another Rom is severely contaminating. According to orthodox views of some groups, apartments cannot be rented because the presence of women on the higher floors may contaminate the inhabitants of lower floors through the ceiling. If a house is purchased, kitchen sinks may have to be replaced by new ones because of an assumed improper use made by earlier occupants. Toilet facilities are problematical and should be segregated by gender, even in private living quarters. Women in general have the power to pollute because of menstruation. They may have, for example, the power to break up fights among men by the threat of symbolically tossing their skirts.⁴³ Many of the rules are self-executory and prevent certain forms of infractions that are common in the non-Gypsy world. Crimes of violence are highly unusual among the Roma. Rape, in particular, would be such a serious offense that, if it were to occur, the culprit would be automatically expelled from the community of Roma, even in his own mind, thereby eliminating the need for a specific sentence.

Whether these rules of *Romaniya* make any sense under western notions is irrelevant as far as the Roma are concerned. They probably consider many of the dominant societies' laws absurd. Rationality is really little more than consistency within any system of beliefs.⁴⁴ Few truly universal standards of rationality exist. Moreover, the efficacy of a legal rule may be enhanced by its being irrational, even within any given culture. Irrationality may imply

42. For details, see Weyrauch & Bell, *supra* note 2, at 342-51, and the literature cited there. Taboos of a similar nature exist also in western cultures, although not necessarily recognized as such. See Joseph Epstein, *How Revolting: Why What Disgusts Us Defines Us*, NEW YORKER, July 14, 1997, at 78 (reviewing WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997) (discussing societal reactions to incest, feces, menstrual blood, and semen)).

43. See Walter O. Weyrauch, *Oral Legal Traditions of Gypsies and Some American Equivalents*, 45 AM. J. COMP. L. 407, 427-35 (1997) (discussing power of Romani women).

44. See HANNA FENICHEL PITKIN, WITTGENSTEIN AND JUSTICE 247-50 (1972) (describing logic and consistency in tribes that practice magic).

that a rule of law has its source in divine forces, rather than in human reasoning.⁴⁵ In addition, that the rules of *Romaniya* appear to make no sense to western thinking protects the integrity of the culture from being corrupted and makes it less likely that intermarriage with outsiders eventually leads to assimilation. Romani men are not inclined to enter prolonged intimate relations with non-Gypsy women and, in the reverse, it would be difficult for a woman from the dominant culture to put up with the demands of a Romani mother-in-law and with the orthodoxy of the rules to which she is expected to submit. Romani women, on the other hand, can expect to become *marime* when living with or marrying an outsider and be banished from their culture.⁴⁶

A comparison with the previously discussed groups offers some striking parallels. For example, shared communal values, as in Tristan da Cunha, prevent major infractions and crime among the Romani people, although the de facto isolation of the Roma from the dominant environment does not quite match the extreme territorial isolation of Tristan. Even in the Berkeley Penthouse experiment, involving an artificially and temporarily isolated group, one member expressed after the project's termination that the internal pressures to conform to shared values were enormous, a surprising observation because the group was more or less haphazardly thrown together. By way of illustration, the subject explained that, soon after the start of the experiment, the group labeled each participant in a specific way, for example, in regard to personality and intelligence. Thereafter, little could be done by the so characterized person to change this perception. The denial of recognition according to some preconceived "image," as the subject called it, thus became a powerful tool to sanction individuals and to keep them in line with group expectations.⁴⁷

Conceptions of shaming that were the basis of the rule making and application in the Berkeley Penthouse could be noticed in modified form in Tristan da Cunha and among the Romani people. These conceptions also apply to our society and legal system.⁴⁸ A heavy price, consisting of a decrease or loss of

45. See Calum Carmichael, *Gypsy Law and Jewish Law*, 45 AM. J. COMP. L. 269, 281-84 (1997) (discussing concept of "irrationality").

46. For an account of a young Romani woman who had entered bad marriages and later had a non-Romani boyfriend, see ISABEL FONSECA, *BURY ME STANDING: THE GYPSIES AND THEIR JOURNEY* 129-39 (1995). Substantial variations exist among different Romani groups. The Sinti, for example, who have been located in Germany for centuries, have in many respects adapted to local customs without giving up their separate identity. Thus, the basic law of purity and pollution is interpreted by various Romani groups in different fashions. This corresponds to Cover's statement that oral legal traditions may also be subject to multiple interpretations. Cover, *supra* note 5, at 40 n.115 and accompanying text.

47. WEYRAUCH, *PENTHOUSE EXPERIMENTS*, *supra* note 7, at 300-05.

48. Application of these unwritten rules and sanctions can be observed in any setting, for instance, in academic life, where people are labeled on their merits from the start. An example

individuality, appears to be paid for recognized status within any institutional setting or community. One has to be cautious, though, in using the term "individuality," which is based on western notions that are not universally shared and were not always present in western history.

V. *Fundamental Informal Lawmaking in American Law*

The three illustrations of private lawmaking – the participants in the Berkeley Penthouse Experiment, the islanders of Tristan da Cunha, and the Romani people (Gypsies) – may seem to be entirely unrelated to each other. Yet they show some common characteristics that, because of their universality, may also affect American law. This impact is not readily apparent, but may gain in clarity as I outline the issues. Autonomous private lawmaking, for example, may be closely related to practical considerations, in particular the role of strategy in legal processes. Adjustments in legal theory may be needed to include these aspects of legal practice. The phenomenon of informal lawmaking appears to be fairly obvious at this stage, but what could it mean in actual application?

In all groups discussed, unwritten law is layered in prescriptions of fundamental nature and those of lesser significance. Some basic principles can be observed that take the place of what traditionally is referred to as constitution. These basic legal notions are meant to be inviolate and not subject to change, except under extreme conditions. For example, tenets of equality in Tristan da Cunha could be temporarily suspended during the volcanic eruption, which occurred in 1961, or in an emergency on the ocean. Prohibitions

of an unwritten rule having wide application is expressed in the Biblical saying, "A prophet is not without honour, save in his own country, and in his own house." *Matthew* 13:57 (King James). See Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645 (1997); Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880 (1991); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998) (evaluating reemergence of shame sanctions in American law). Sanctions are extensively discussed in REISMAN, *supra* note 4, at 12-15, 25-29, 85-96, 140-47, 167-71.

The detailed discussion of sexual transgressions in the impeachment proceedings against President William Jefferson Clinton was presented by Special Prosecutor Kenneth Starr for purposes of supporting charges of perjury. It also may have had the function of shaming the President, especially in case of an acquittal. The extraordinary detail of the presentation may have violated unwritten taboos that sexual topics are not supposed to be made a matter of public debate. The sanctions in this instance may have contributed to low ratings of the Special Prosecutor in opinion polls and a loss of professional opportunities. Cf. Lawrence E. Walsh, *Kenneth Starr and the Independent Counsel Act*, N.Y. REV. OF BOOKS, Mar. 5, 1998, at 4 (discussing unwritten rules of prosecutorial judgment); *infra* note 79 (comparing Clinton's impeachment proceedings with tribal courts).

against intimate body contact among the Roma may be sufficiently relaxed to permit procreation, although some orthodox Romani groups, such as the Kaale in Finland, perceive even marriage as a contaminating concept.⁴⁹

One could view the distinction between fundamental constitutional notions and ordinary law as imaginary and merely theoretical in contexts of the Berkeley experiment, Tristan da Cunha, and the Romani people, but I disagree. The distinction has profound significance. The presence of deeply held basic legal notions within groups, regardless of their nature and whether one agrees with them, is probably the source of the vitality, internal strength, and persuasive power of the more derivative autonomous law that these basic notions generate. Without these fundamental notions, groups are likely to lack internal cohesion and are bound to disintegrate.

Since the three groups are mere illustrations of what may happen or be present in any group,⁵⁰ even within our culture, some lessons can be suggested. To disregard the oral legal traditions that are generated within groups and human associations could have serious consequences. While a judge's decision may be facilitated by a belief that the letter of written law governs, to adhere to this kind of limited view could hurt other participants in the legal process. Lacking awareness of unwritten law could jeopardize the cause of an attorney in any phase of his activities, in counseling, in planning, in negotiating, and in arguing before the court. An example may illustrate this problem.

A. *Texaco, Inc. v. Pennzoil Co.*

In an openly adversarial system, as in American law, the multitude of interacting groups and the de facto autonomous law that they generate are

49. Martti Grönfors, *Institutional Non-Marriage in the Finnish Roma Community and Its Relationship to Rom Traditional Law*, 45 AM. J. COMP. L. 305 (1997); see also *supra* note 42 and accompanying text (describing Gypsy law of impurity).

50. For illustrations from contemporary law, see generally REISMAN, *supra* note 4; ELLICKSON, *supra* note 2; Lynn LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 8-13 (1996). Even imaginary groups are governed by their unwritten basic laws, and whole novels, plays, and scripts have been structured in this fashion. See, e.g., WILLIAM GOLDING, *LORD OF THE FLIES* (1954) (describing laws of group of boys stranded on island).

The decisions of the United States Supreme Court are governed not only by the Constitution and written law, including precedent, but also by unwritten law that governs the relationship of the Justices to each other and, indirectly, their disposition of individual controversies. The process of how this happens is unavoidable and only limitedly subject to control. Walter O. Weyrauch, *Oral Legal Traditions of Gypsies and Some American Equivalents*, 45 AM. J. COMP. L. 407, 437-42 (1997). However, Justice Clarence Thomas has maintained that nothing in this kind of analysis, although of value to some readers, "will ever help a student understand doctrine, help a practitioner make an argument, or help a judge deciding a case." Clarence Thomas, *Speech: Cordell Hull Speakers Forum*, 25 CUM. L. REV. 611, 615 (1995) (referring to article by Weyrauch & Bell, *supra*, note 2).

bound to have a critical impact on strategy. The *Texaco, Inc. v. Pennzoil Co.* litigation, involving more than eleven billion dollars and resulting almost in the destruction of a major industrial empire, was won and lost on that level, as becomes apparent from a summary of the case.⁵¹

The controversy was caused by Texaco's alleged tortious interference with the merger contract between the Pennzoil and Getty Oil interests, represented by the Getty Oil Company, the Sarah C. Getty Trust, Gordon Getty, and the John Getty Museum.⁵² The contract was in a preliminary phase; its existence was essential to Pennzoil's cause of action. A formal writing had not been executed between all of the parties, and important steps to the completion of the transaction, such as shareholders' approval, were missing. Yet hands had been shaken, the supposedly concluded deal had been celebrated in a champagne reception, and identical press releases had been issued by Pennzoil and Getty Oil.⁵³ New York law, stipulated by the parties to be applicable, was less than clear, and its application by Texas courts was not necessarily in accordance with what New York courts might have done.⁵⁴

Legal and financial experts on the Eastern Seaboard favored the view that preliminary steps to a merger, even if they are in contractual form, are conditional and do not preclude later acceptance of better offers from third parties, such as Texaco. Trade custom in the large commercial centers of the East assumes that prospective mergers are primarily concerned with maximizing shareholder benefits and are therefore open to competing offers until the deal

51. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987). My account is aided by the facts and analysis presented in Michael Ansaldi, *Texaco, Pennzoil and the Revolt of the Masses: A Contracts Postmortem*, 27 HOUS. L. REV. 733 (1990). For further details, see Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 Duke L.J. (forthcoming 2000).

52. See *Texaco*, 729 S.W.2d at 785-87 (providing additional factual details of case).

53. Ansaldi, *supra* note 51, at 745. A merger situation similar to Texaco-Pennzoil-Getty Oil has arisen between Rolls-Royce, Bayerische Motorenwerke (BMW) and Volkswagen (VW). An apparent acceptance of the BMW bid to acquire Rolls-Royce was superseded by a higher bid by VW, resulting in a threat by BMW to discontinue its contract with Rolls-Royce for delivery of engines, transmissions, air conditioners and the entire electronic systems of Rolls-Royce and Bentley automobiles. Brandon Mitchener, *BMW May Sweeten Bid for Rolls*, WALL ST. J., May 11, 1998, at A14. The unwritten laws involved are complicated because different countries, languages and customs are concerned, not to mention the element of national pride. The written legal situation, on the other hand, can be resolved by resort to private international law. The controversy appears to be settled. Brandon Mitchener & Charles Goldsmith, *BMW Buys Rights to Rolls-Royce Name as VW Now Must Make Do with Bentley*, WALL ST. J., July 29, 1998, at A6.

54. An inherent conflict arose because the intermediate appellate court in Texas tried to apply New York substantive law to check the sufficiency of a jury verdict under Texas procedure. See *Texaco*, 729 S.W.2d at 787-88, 796.

is finally closed.⁵⁵ It has also been maintained that major transactions of this nature require written form to be binding, regardless of a local statute of frauds.⁵⁶

The case was initially filed in Delaware Chancery Court. After its request for a preliminary injunction was denied,⁵⁷ Pennzoil proceeded to refile the complaint in Texas for a trial by jury.⁵⁸ Thus, the litigation shifted from Eastern Seaboard conceptions of law, influenced by experts in corporate affairs, to the quite different notions of a state with a history in cattle ranching. To the Texas jury a handshake is a handshake, regardless of what New York law and corporate experts might say. Jurors' pronouncements after the verdict made this quite clear.⁵⁹ In his published report, former juror James Shannon wrote, "[a]s a jury, I believe we were unwilling to accept the idea that different standards of justice apply, depending on what state you're in and how much money you have."⁶⁰ The jury foreman Rick Lawler stressed, "[w]e won't tolerate this sort of thing in corporate America."⁶¹ The strategy of the plaintiff's lawyers was geared toward this frame of mind, as revealed in the closing argument:

You people here, you jury, are the conscience, not only of this community now in this hour, but of this country. What you decide is going to set the standard of morality in business in America for years to come.

55. Ansaldo, *supra* note 51, at 785-834.

56. *Texaco*, 729 S.W.2d at 795 (recognizing that signed contract is generally expected in large transactions); Anthony T. Kronman, *Between Corporations, A Handshake Is Not Enough*, N.Y. TIMES, Jan. 30, 1986, at 20. *But see* Ansaldo, *supra* note 51, at 767-69 (outlining problems with rule requiring all complex transactions to be in writing).

57. *Pennzoil Co. v. Getty Oil Co.*, No. 7425, 1984 WL 15664 (Del. Ch. Feb. 6, 1984).

58. Diversity of citizenship was lacking for federal jurisdiction, both *Texaco* and *Pennzoil* being Delaware corporations. However, *Texaco* had its principal place of business in New York and *Pennzoil* in Texas. To litigate in Texas state court before a Texas jury was strategically advantageous to *Pennzoil*. *See generally Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1986) (denying post-trial relief to *Texaco*). The concurring opinion of Justice Marshall, in particular, discusses aspects of jurisdiction and "the odor of impermissible forum shopping which pervades this case." *Id.* at 24 (Marshall, J., concurring).

59. Quoting jurors and the plaintiff's closing argument, Ansaldo, *supra* note 51, at 834-40, speaks of a "revolt of the masses" against elite values. According to the present essay, fundamental legal notions of one subgroup, the Texas jury, clash with those of another subgroup, the legal and financial experts of the eastern commercial centers. In effect, the prevailing view of the jurors is merged into the law of the state. Since only sufficiency of a jury verdict was involved in *Texaco*, other litigation may result in a different constellation and outcome.

60. Jim Shannon, *Pennzoil - Texaco: Inside the Jury Room*, HOUS. CHRON., Nov. 24, 1985, § 6, at 4, reprinted in JAMES SHANNON, *TEXACO AND THE \$10 BILLION JURY* 497 (1988).

61. THOMAS PETZINGER, JR., *OIL & HONOR: THE TEXACO-PENNZOIL WARS* 409 (1987) (reporting oral statement of Rick Lawler after verdict).

Now, you can turn your back on Pennzoil and say, "Okay, that's fine, we like that kind of deal. That's slick stuff. Go on out and do this kind of thing. Take the company, fire the employees, loot the pension fund. You can do a deal that's already been done."

That's not going to happen.

....

I have a chance. Me. Juror.

I can stop this. And I am going to stop it. And you might pull this on somebody else, but you are not going to run it through me and tell me to wash it for you.

....

You can send a message to corporate America, the business world. Because it is just people who make up those things. It isn't as though we are numbers and robots. We are people. And you can tell them that "you are not going to get away with this."

I ask you to remember that you are in a once-in-a-lifetime situation. It won't happen again. It just won't happen. You have a chance to right a wrong, a grievous wrong, a serious wrong.

....

It's going to take some courage. You got that. . . . You are people of morality and conscience and strength.

Don't let this opportunity pass you.⁶²

The conflicting private legal systems in *Texaco*, including their fundamental conceptions, are easy to identify. All of them pulled in different directions and were firmly persuaded of the inherent correctness of their views on facts and law. The lay-standards of the jury, however, clearly prevailed in the outcome. While the financial experts on mergers and the corresponding legal experts submitted by *Texaco* were in basic agreement on the legality of the transaction, there seems to have been little serious question in the minds of the jury that *Texaco's* behavior was morally blameworthy.

Of special interest is the role of the courts in *Texaco*. Except for the almost one-hundred-page opinion of the intermediate appellate court,⁶³ the Texas courts involved in this complex litigation offer little guidance. The opinion of the trial court is unreported. The Texas Supreme Court dismissed *Texaco's* appeal without opinion.⁶⁴ Because American courts are under no

62. *Id.* at 398-99 (reporting closing argument by Joseph D. Jamail). Full articulation of strategy and underlying rules is not free of risks, but Jamail, lead counsel for Pennzoil, apparently knew how far he could go.

63. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987).

64. *See Texaco, Inc. v. Pennzoil Co.*, 748 S.W.2d 631 (Tex. Ct. App. 1988) (stating history of case and dismissing all further action upon final settlement by parties); Ansaldi, *supra* note 51, at 752 n.102 (reporting on history of case).

duty to write opinions, and in fact issue their decisions in an overwhelming majority of the cases without written reasons, the bases of judgment are largely left in the dark. If one adds that most legal controversies are settled and that the vast majority of lower court decisions are not appealed, and if appealed are affirmed, the extent to which the written law of the state is actually applied is left to speculation.⁶⁵ Notions of unwritten law, essentially unchecked, are bound to determine these outcomes. *Texaco*, because of the magnitude of the result, is a prime illustration in which this reality is fairly visible. Legal analysis, in theory and in practice, must therefore include efforts to determine this untapped vast body of unwritten law. To characterize unwritten law as anything other than law, for example as custom, discredits an efficacy that is often more powerful than the law of the state.⁶⁶

Overreliance on written law of the state by *Texaco*'s lawyers contributed to, if not caused, the loss of the case. It would be mistaken, though, to view private law as being always antagonistic to the law of the state. Within the multitude of interacting social units, it is often a fundamental belief in the righteousness of their positions and actions that fans the powers of persuasion; the groups' private law informs their decisions as powerfully as does the United States Constitution.⁶⁷ An analysis of this dynamic may aid in interpret-

65. The actual burden of handling disputes has shifted from the courts to practicing lawyers. There is little incentive for judges to write opinions in the small minority of cases that are fully litigated on their merits. The annual statistics of the United States Supreme Court, even when the special functions of the Court are considered, basically confirm this situation. *The Supreme Court, 1996 Term—Leading Cases, IV. The Statistics*, 111 HARV. L. REV. 197, 431-39 (1997). See, e.g., Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997); LoPucki, *Legal Culture*, *supra* note 3, at 1530 n.159 (providing statistics on actions filed and appeals commenced); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); see also Walter O. Weyrauch, *Aspirations and Reality in American Law*, in LAW, MORALITY, AND RELIGION 217 (Alan Watson ed., Robins Collection 1996) (discussing ethical dilemmas of legal scholars teaching in bargaining system of this kind).

66. See LoPucki, *Legal Culture*, *supra* note 3, at 1499 n.9 (listing scholarly works that recognize existence of prevailing unwritten rules); LoPucki, *Systems Approach*, *supra* note 3, at 489 (referring to marginal role of state law in structuring society); Weyrauch & Bell, *supra* note 2, at 330-331, 387-89 (illustrating how private law tends to prevail over state law); see also JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 19-30 (1983) (describing laws of religious communities as being more effective than law of state); ELLICKSON, *supra* note 2 (arguing that neighborhoods frequently resolve disputes with no regard to applicable state laws).

67. Cf. Cover, *supra* note 5, at 28 (maintaining that, for purposes of constitutional meaning, Mennonite law assumes equal, if not superior, status to understanding accorded to Justices of United States Supreme Court).

ing state law that is often sterile as written, giving it a measure of vitality without which it could not serve its intended purpose.

B. Manifestations of Strategy

Autonomous private law that grows spontaneously within groups and the law of the state are in a symbiotic relationship to each other. Even if at first impression the answer appears to be clear under the law of the state, room for argument nearly always exists to cast doubt on outcomes. In *Texaco*, for instance, the case could have been decided in either direction.⁶⁸ To rely on one's interpretation of the law of the state can then be severely damaging. It could narrow the lawyer's perspective and interfere in and limit the choices of legitimate strategies. It could diminish the capacity to appraise the strategies available to the opponent. These choices and appraisals can only be made if unwritten law is also considered.

Quite generally, the significance of strategy in legal analysis has not been fully realized. Private lawmaking has a crucial role in these respects. Strategy is a means to invoke, often in veiled form, the power of oral legal traditions as embodied in autonomous law. It suggests to the judge or jury that rules exist that are not adequately expressed in the law of the state as written. The persuasive power of strategy is due to this factor, but it also raises the question of how a possible conflict between clashing legal traditions is resolved. Issues of due process are of concern, because autonomous private law does not necessarily adhere to standards of procedural fairness meant to govern the law of the state. Unwritten constitutions have no due process.

I have maintained that in clashes between the law of the state and unwritten legal tradition the latter often tends to prevail.⁶⁹ This position is hard to accept by participants in the legal process who have been reared in the belief that the state is an adequate arbiter for resolving human conflict. Furthermore, the impact of unwritten legal tradition is not always clearly noticeable. Numerous legal devices may mask such impact. I will give a few examples.

Private lawmaking may be presented as fact, rather than as law. Value choices that are part of the oral legal tradition of a given culture are likely to

68. See Ansaldi, *supra* note 51 (analyzing mutual strategies that were involved). The certainty of language in appellate opinions, although attenuated by concurrences and dissents, is misleading. See generally LoPucki & Weyrauch, *supra* note 51 (discussing legal strategy).

69. Weyrauch & Bell, *supra* note 2, at 331 n.16, 379 n.243 and accompanying text, 389 n.269 and accompanying text; see also *supra* note 66 (citing works arguing that role of state law is limited when compared with unwritten rules). But see W. Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 YALE L.J. 401, 411 (1993) (suggesting that, without further information, this proposition seems too broad).

be perceived as facts by the members of that culture, or they are strategically submitted as facts by their representatives. Thus, rules of relevance and evidence may become applicable to the outcome of disputes, depending on whether the scope of inquiry is perceived in narrow or broad terms.⁷⁰ Similarly, canons of interpretation and construction that govern the law of the state openly invite the influx of oral legal tradition. What actually happens is a fusion of the law of the state and unwritten legal tradition. The United States Constitution and the official laws that are promulgated under it would be anemic and could lose efficacy but for the influx and support of unwritten private law. Participants in legal processes and scholars may think that traditional analyses of written law mandate specific outcomes of legal controversies, while their perception of written law is colored by unwritten legal traditions of which they are not necessarily fully aware.⁷¹

C. Cisneros v. City of San Antonio

A recent controversy may illustrate some of the aspects of law that are discussed here. The issue concerned the proper color for a house that was located in a historic district of San Antonio, Texas, a district originally inhabited by wealthy merchants and not accessible to the previously less affluent Mexican-Americans who tended to be subject to discrimination. The city's Historic Design and Review Commission insisted on approved muted colors according to Anglo-American preference, such as "Colonial Revival Tan," "Plymouth Green" and "Chelsea Gray," while the Mexican-American owner, Sandra Cisneros, a well-known author, had painted the house in a light bluish purple according to the more lively Mexican tradition.⁷² The following exchange took place before the commission:

70. See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 269, 511-16 (1898) (discussing substantive disposition of issues in guise of rules of evidence); Walter O. Weyrauch, *Law as Mask: Legal Ritual and Relevance*, 66 CAL. L. REV. 699, 706-13 (1978) (examining manner in which relevancy requirements "mask" humanity of participants in legal process).

71. LoPucki, *Legal Culture*, *supra* note 3, at 1543 (suggesting that written law, to be effective, requires medium of simplified mental models and that those who think they apply written law are actually influenced by shared legal traditions).

72. For details, see Jesse Katz, *Purple Passions Swirl About Texas Abode - Home: 'Color is a Language,' Latina Author Says; It's Too Loud for Some*, L.A. TIMES, Aug. 11, 1997, at A1. Sandra Cisneros was born December 20, 1954 in Chicago, as the daughter of a Mexican father and a Mexican-American mother. She has published novels, short stories and poetry and is a recipient of several awards, including a \$255,000 MacArthur Foundation grant in 1995. See WHO'S WHO IN AMERICA 791 (53d ed. 1999).

Commissioner Ron Gossen addressing Cisneros: "I don't see what the convincing argument is to make [sic] for purple, other than you like it to be purple."

Cisneros: "According to my history, purple is a historical color."

Commissioner: "The color purple is not, *according to fact*, historic to that house or that neighborhood."

Cisneros: "But that depends *on how we define fact*."

Commissioner: "If you, because of your heritage, are allowed to paint it whatever color you choose, *then we have no rules*."⁷³

After the fact approach proved to be inconclusive, the commission shifted to written rules, assumed to be based on San Antonio's historic-design ordinance.⁷⁴ The sensitive hidden issue was whether the history of San Antonio should be perceived in Anglo-American or Mexican terms, a matter of the unwritten basic laws of the respective people. The wording of the commission's rules did not deal with the question of the degree to which the San Antonio community as a whole, including the feelings of its Mexican-American population, should be considered in the interpretation.

The commission seemed to have favored a restrictive interpretation of its own rules that excluded any consideration beyond the history of the specific house and neighborhood as irrelevant. This narrow view coincided with the

73. Wording adopted from Katz, *supra* note 72, at A12 (hearing of Aug. 6, 1997) (emphasis added). The city's preservation director, Ann McGlone, took the position that taste was not relevant to the dispute, but that only historical context mattered. Cisneros, in reply, stressed the connection between color and history. "We don't have beautiful showcase houses to tell the story of the class of people I come from . . . But our inheritance is our sense of color — and it's something that has withstood a conquest, plagues, genocide, death, defeat. Our colors have survived." *Id.* The persons who spoke for the city had Anglo-American rather than Hispanic names, although the majority of San Antonio's population is Mexican-American.

74. San Antonio Municipal Code ch. 35 Unified Development Code, art. VII Historic Preservation and Urban Design. Jose Garcia De Lara, an architect representing Sandra Cisneros, has maintained that the city's code does not contain any provisions relating to color. In a contested procedure, they were issued by the city's preservation officer and backed by the Historic Design and Review Commission. Professor Elmer LeRoy Hunt, who participated in the drafting of the San Antonio historic-design ordinance, has confirmed that reference to colors was deliberately excluded from the ordinance. The drafters felt that prescribing specific colors for renovation of houses had proven to be controversial and unworkable in other cities. Interview with Elmer LeRoy Hunt, Distinguished Service Professor Emeritus, Levin College of Law, University of Florida, Gainesville, Florida (June 25, 1999).

According to last reports, the colors of Sandra Cisneros' house remain the same, except for small additions of minor trim colors. E-mail from Jose Garcia De Lara to Walter O. Weyrauch, October 14, 1999 and July 14, 1998, on file with author (mentioning also that Cisneros' now settled case had been pending for almost two years, application having been filed on Sept. 18, 1996). See also Dave Ackerman, *The Color Purple*, PRESERVATION, Nov.-Dec. 1997, at 23 (interviewing Sandra Cisneros).

expressed preference of at least some members of the commission that implicitly favored Anglo-American tastes and perspectives. A broader interpretation might consider the cultural context of a community that prides itself on its bicultural heritage. An attorney faced with this kind of impasse may try to attack the unwritten rule of interpretation of the commission by fully articulating it. In application of the rule against articulation, as observed in the Berkeley Penthouse Experiment,⁷⁵ the commission, rather than admit its unwritten rule of interpretation, conceivably may discard it and decide in favor of the Mexican-American owner or, in order to save face, agree to a settlement.

Generally speaking, any written rule is really indeterminate and leaves the decision to standards of interpretation which are taken from oral legal tradition. In the specific instance, the concepts of neighborhood and even of historic preservation are seemingly neutral, but can be used in a politically charged atmosphere to propagate fundamental notions of unwritten law of one ethnic group over those of another. Interpretation is the means by which this process is accomplished.⁷⁶

VI. Conclusion

Legal theory faces a difficult task. Is it the task of legal scholarship to engage in a pursuit of truth regardless of consequences, or is one to focus on appellate case law that, in its cumulative effect, is often more aspirational than real? There may not be a clear answer to this question, because both approaches have validity. The law of the state, as a basis of legal insight, has legitimate functions in establishing ideals and the means to render peace, if these ideals have not been met. For these purposes, it does not really matter whether the reasoning in individual cases is adequate or realistic.

As perceived from the perspective of the state, an unlimited quest for truth could have undesirable consequences, ultimately resulting in cynicism. It may lead to views, in accordance with the pre-Socratic sophists that, since no final truth can ever be established with certainty, only the power of persuasion remains.⁷⁷ Creating an awareness of a multitude of autonomous legal

75. See *supra* notes 14, 15 and accompanying text.

76. Weyrauch & Bell, *supra* note 2, at 381 n.249 and accompanying text.

77. Gorgias (485-380 B.C.) maintained that nothing can be proven to exist and that, in any event, any knowledge of existence cannot be communicated. *Gorgias*, COLUM. ENCYC. 1110 (Barbara A. Chernow & George A. Vallasi eds., 5th ed. 1993). Protagoras (490-421 B.C.) posited that knowledge of truth is limited to the individual who has it and that, beyond this, no objective truth exists. *Protagoras*, *id.* at 2229; see also THEODOR VIEHWEG, TOPICS AND LAW: A CONTRIBUTION TO BASIC RESEARCH IN LAW (W. Cole Durham, Jr. trans., 1993) (discussing relation of rhetoric and law on basis of Greek sources).

systems within the realm of American law, some may argue, may lead to endless rhetoric and anarchy.⁷⁸ The agencies of the state, including the courts, may be disinclined to acknowledge any claims of autonomy.

In application of this line of reasoning, the State of California could hardly be expected to recognize the internally generated laws of the Berkeley Penthouse Experiment. The Colonial Government of Great Britain will assume the power of its jurisdiction and the validity of English common law in Tristan da Cunha, regardless of the laws by which the islanders actually govern themselves. The dominant countries likely attempt to impose their state powers on the Romani people, although realistically they may not be able to enforce every aspect of written state law. Even though none of these assertions of state power can be expected to be abandoned, legal scholarship traditionally has demonstrated that law is infinitely more complex than the law of the state, as promulgated by its legislators, judges, and administrators, makes it appear.

Regardless of one's feelings in these matters, the unwritten legal traditions, especially in their basic constitutional aspects, are essentially outside the control of both the state and of scholarship.⁷⁹ Individual groups themselves have little control over their generation of law and mostly are not even conscious of this process. On the other hand, those persons who are aware of

78. Cf. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAL. U. L. REV.* 179, 181 (1985) (suggesting that his position comes close to classical anarchist theories). See also Stone, *supra* note 5, at 823-27 (tracing Cover's views to his critique of Supreme Court's opinion in *Bob Jones University v. United States*, 461 U.S. 574 (1983)).

79. The televised impeachment trial against William Jefferson Clinton before the United States Congress shows characteristics that have also been observed in tribal courts: (1) most of the adjudicators are male; (2) the standards applied are based on oral tradition; (3) no clear distinctions between facts and opinion are maintained; (4) the distinctions between substance and procedure are hazy; (5) standards of relevance are interpreted in the widest possible sense; (6) no exclusionary rules of evidence are applied; (7) the adjudicators and witnesses play to a wider audience; (8) the audience, although not physically present, plays a major role in the adjudication, in that the presumed reaction of the audience affects all participants. These characteristics of tribal adjudication were developed by the Dutch scholar J.F. Holleman in his article, *Disparities and Uncertainties in African Law and Judicial Authority: A Rhodesian Case Study*, 17 *AFR. L. STUD.* 1, 5-9 (1979).

The same characteristics could be observed in an entirely different political context, the televised confirmation hearings on Clarence Thomas before the Senate Judiciary Committee. Dennis E. Curtis, *The Fake Trial*, 65 *S. CAL. L. REV.* 1523 (1992) (analyzing Thomas confirmation hearings); see also Weyrauch & Bell, *supra* note 2, at 332 n.23 (same). Legal scholarship, being focused on traditional constitutional law, is not likely to reach the tribal aspects of impeachment and confirmation proceedings, although considerations of "due process" arguably might be involved. See REISMAN, *supra* note 4, at 171 (identifying due process concerns whenever potential sanctions against individuals become severe, regardless of whether sanctions are based on written or unwritten law).

autonomous lawmaking around them have an advantage, not because they can affect unwritten law, but because they can more readily perceive strategic possibilities. Still, there is power in ignorance, too, because those who deny the existence of unwritten autonomous law or are unaware of it are bound to become its unwitting proponents. Thus, the substance of autonomous lawmaking is unaffected by state power and is also essentially unaffected by those with insight into how it operates.⁸⁰

80. Michael Reisman has suggested the means of appraising the social utility of micro-legal systems and to intervene in their operation if necessary. REISMAN, *supra* note 4, at 149-73. I believe that, because of the amorphous nature of unwritten law, such efforts can be effective only up to a point. Even Reisman has acknowledged in his concluding remarks that intervention has its limits. *Id.* at 171-73.

NOTES
