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David Tabachnick

Land Tenure Center

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UNIVERSITY OF WISCONSIN —
MADISON

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# Contents

## NOTE TO READER

This paper is long partly because it illustrates arguments with detailed examples and because it travels widely both in time and space. The core thesis is that Western neo-classical economics and law (particularly Anglo-American) have a peculiar cultural history that biases Western-trained economists and lawyers against common property systems like those found among Africans and American Indians. This Western cultural bias is expressed through the recurrent focus on individuals as atomistic and independent of each other in contract and property law, as well as in economic theory. The bias derives in part from the historical suppression of community property rights that once overlapped individual property rights, as in the case of the enclosure of the commons in England. Well-meaning Western advisors may depart for foreign communities that possess common property systems and year after year, decade after decade, century after century, propose the replacement of existing legal and economic ideas and institutions with Western imports—not realizing the limited utility and contested history, even in the West, of these imported forms. To borrow a line from the film "Cool Hand Luke:" "What we have heah is a failure to communicate." While many of these issues are not new, the oldness of these debates becomes an issue in itself. How does one break the repetitive cycle, the cultural reproduction of bias, by provoking self-assessment?

In addition to theoretical concerns, the paper addresses a current and practical problem—what legal (and thus economic) steps should be taken to render common property systems legally visible and less economically vulnerable to distant state authorities? How can evolution of common property to individual private property, where it occurs, be fairly and locally managed so that common property rights are not expropriated without due compensation?

The roving line of argument starts with a statement of the practical problem the Land Tenure Center of the University of Wisconsin-Madison has encountered in promoting legally and socially valid local contracts over the use of natural resources in Guinea; the argument moves on to a discussion of the source for the cultural bias that led to the recent World Bank sponsorship and subsequent adoption of a Land Code in Guinea; that discussion leads to an illustration of the bias in Western contract and property law forms and consequent limited utility of Western law in the West as well as in Africa; suggestions are then made for appropriate cultural and legal approaches to African natural resource and land law; finally, the history of United States bias in its dealings with American Indian common property is explored and lessons are drawn both for Africa and the West from the bad and good consequences that came from those U.S. dealings.

## DISCUSSION

How does one make a valid contract in rural Africa concerning the use of land and its natural resources? What is a contract, who do you make it with, what is an acceptable object of a contract, who do you take the contract to in the event of dispute, what legal concepts are made use of in resolving disputes? Getting people to agree not to cut down trees on a plot of land raises questions of the institutional construction of discourse, of the cultural construction of knowledge, of power and language.

> Each society has its regime of truth, its 'general politics' of truth: that is, the *types* of discourse which it accepts and makes function as true; the *mechanisms* and *instances* which enable one to distinguish true and false statements, the *means* by which each is sanctioned; the *techniques* and *procedures* accorded value in the acquisition of truth; the *status* of those who are charged with saying what counts as true. (Foucault 1980: 131; emphasis mine)

In place of the word "truth" in the above passage, one could substitute "legal." In either case, one is concerned with the relation between power and the construction of valid, or persuasive, or simply enforceable discourse in a society.

For example, in Guinea, West Africa, a number of foreign donors and lenders have been at work promoting the restructuring of Guinea's legal system and natural resource management (Fischer 1994/95; Gaudreau 1990). Natural resource management is of great importance in Guinea because Guinea's rivers have been drying up. Guinea has been considered the "water tower" of West Africa: a number of West African rivers have their sources there. The water flow in these rivers has diminished and scientists link the diminished flow to the deforestation of watersheds in Guinea Fischer 1993; Fischer 1994/95). United States Agency for International Development (USAID), among other donors, is attempting to promote forest preservation to protect watersheds and rivers. The Land Tenure Center of the University of Wisconsin-Madison (LTC) has been working in Guinea as part of that protective effort. USAID has promoted the development of village natural resource management committees under the "amenagement du terroir villageois" model (Painter 1991). Villagers are encouraged to form committees to survey natural resources, make rules regarding use of those resources, and make contracts with landowners, where appropriate, to ensure resource conservation use. LTC has been researching local social and land rules to advise USAID on ways to set up committees and support contracting consistent with local practices and rules (Fischer 1993). To that end, LTC has tried to develop contracts between committees and landowners that it hopes will be considered legitimate and enforceable. Let us say, hypothetically, the contract is an agreement by the landowner not to cut the trees on a plot of land for twenty years. LTC obtains the signature of the landowner to that agreement, as well as signatures of the village committee, of the local district council or communauté rurale de developpement (CRD) head (district councils or CRDs are state-created local authorities elected by local people), and of a court notary (i.e. Le Greffier en Chef-Notaire). In doing so, LTC will have tried to work within the local society's general politics of truth, or in this case, of law, by ensuring that signatories to the contract represent those with local status to say an enforceable deal has been made.

However, LTC's efforts are necessarily ad hoc. No legal code exists that spells out how to make this kind of village-level contract regarding the use of land and trees. No legal text tells who should decide in the event of dispute: a local authority, such as the local council of elders, or local Islamic council, or the state court system: Or is there a hierarchy between the local and state systems of authority? In our example, the contract was signed by the landowner. What does that mean, "landowner"? The land was not registered in the name of anyone with the state land registry office; the "landowner" does not possess private individual title (a state-certified document) in the manner of a United States landowner. While individuals in rural highland Guinea will say that they "own" their land, they may also acknowledge that as individuals they cannot sell the land without family authorization. In such a case, the "landowner's" family apparently has ultimate rights to the land. Could family members legally object to the contract on grounds that they have use rights to the land at issue; they did not sign the contract and are not bound by it, and therefore they can legally cut trees? If so, the better approach to ensuring that those trees will not be cut may by local zoning, perhaps, which prohibits cutting trees in environmentally sensitive areas. Such a local regulation would bind all people, inside and outside the community. Or at least it would be binding, if made legally, in a community in the United States. But how does one make an enforceable zoning regulation in Guinea? Does the village natural resource committee have the authority? If not, what legal entity does? If only a Ministry has such power, would the local community resist advocating local restrictions imposed by a distant, untrustworthy state entity?

What is particularly disturbing in Guinea is not just that LTC is forced to some degree to invent or improvise legal procedures designed to conserve land and hope that its procedures hold up under future attack, but a state legal system does exist, including a state legal code, that is conceptually at odds with local customary conceptions of land law (Tabachnick 1994). Even if LTC manages to resolve all issues relevant to making an enforceable contract at the local level, how can it be sure that state authorities will respect the contract? What legal status do such contracts have in a state court? In the eyes of a state Ministry? African customary property rights are only effective where local rights holders can exclude outsiders and discipline opportunistic insiders. Will the state recognize and enforce local power to exclude and regulate?

The local and state conceptions of land ownership in Guinea are at odds in the way they conceive of land ownership. The Guinean land code assumes that land is held by government entities or by owners of land as private property (Tabachnick 1994). Private owners have the power to sell land and to use land as collateral, and creditors can seize land for nonpayment of debts (Tabachnick 1994). Informal owners of land can register and receive private title to land, and creditors can request courts to forcibly register informally held land so it can be auctioned in the event of nonpayment of debt (Tabachnick 1994). The state legal conception of land as a privately owned saleable commodity is not accepted as legally valid by many rural Guineans (Tabachnick 1994). Rural Guineans differ as to exact rules by ethnic group, but they generally hold that land is not a saleable commodity and is held ultimately by families, although individuals may have secure use rights to plots of land (Tabachnick 1994).

If a dispute involving one of LTC's contracts ended up in state court, and if the state court tried to apply the land code, it might not make sense of such a contract (as a lawyer, however, I know that a court can manufacture sense where it likes). The court could say that only the owner (which is to say someone with exclusive rights to use and sell the land) should have the capacity to make

such a contract, and the person who signed it cannot claim to be an owner within the meaning of the land code as the family has ultimate control over alienation of the land as well as potentially some concurrent use rights; the contract, therefore, was not validly made by someone with the capacity to exclude all others from use of the land and so with the capacity to concede that power through the contract to the village committee. This hypothetical problem, however, probably would not arise (would not be brought to a state court), if local people made the disputed agreement among themselves rather than between local people and outsiders, as communities generally resolve disputes over land locally and avoid state courts (Mark Schoonmaker Freudenberger 1994a). Nonetheless, LTC promotes contracts in which one group relinquishes rights over land to another group, knowing that members of the group relinquishing rights have physically left the area and cannot be contacted to give consent (Fischer 1994). Obtaining actual consent of every member of a landholding group is not always physically possible, and yet agreements over land use that preserve natural resources must be made.

I visited Guinea in 1993 and asked a judge on the Guinean Supreme Court how a dispute over a transaction in land, that occurred under local and not land code rules, would be settled in state court. He told me that the court would apply "modern" law. A lawyer in the Justice Ministry said to me about this issue that a dispute arising out of a transaction under customary rules should not be resolved using the land code but that yet-to-be drafted implementing decrees should be applied (Tabachnick 1994). These implementing decrees presumably would create a legal rationale permitting courts to apply customary rules (See Fischer 1994/95).

The 1992 Guinea Land Code was adopted at the urging of the World Bank, according to informants in Guinea. Two Ministries had fought over the issue: the Ministry of Urbanism and Habitat and the Ministry of Agriculture and Animal Resources (Fischer 1994/95; Tabachnick 1994). Not surprisingly, perhaps, given its focus on rural rather than urban issues, the Ministry of Agriculture and Animal Resources had preferred the adoption of a law which recognized that village land was inalienable and available on equitable basis to all members of the community (Tabachnick 1994). The legal department of the Food and Agriculture Organization of the United Nations had drafted a proposed version of the law preferred by the Ministry of Agriculture, and apparently FAO backed it. The Ministry of Urbanism and Habitat, however, again not surprisingly, backed the code proposed by the World Bank—that code eventually was adopted (Code foncier et domanial, O/92/O19). A necessary byproduct of the widespread application of that land code would be a grand titling program throughout rural Guinea (the code has not yet been widely applied). At least one bureaucrat saw this need for titling as a sort of full employment program for his office. He knew I came on behalf of USAID, and he told me: "Only my department has the responsibility for administering the land code and the titling process. Be sure to tell USAID that money allocated for titling must come to my office."

Why did the World Bank promote the adoption of a land code that contained a conception of land as individually-held, private, saleable property that rural Guineans generally reject as not legitimate? The tale of two discourses around land in Africa is an old one, dating at least to colonial times. In an article published in 1988, a researcher in Guinea-Bissau wrote: "The Brassa speak of selling Bolanha (swamp paddy) as tantamount to destroying their society. One man told me that anyone who would sell would be killed." (Funk 1988: 42) I gave a talk to a group of students interested in development and Steven Leisz, a student at the talk, commented that

recently he had interviewed farmers in Madagascar about a state policy promoting individual titling of land as private property and one elderly farmer recalled that his father had, in the time of French colonialism, titled family land in his individual name. A week after he had finished titling the land and marking out its boundaries, he was speared to death (Leisz 1994). Many rural Africans react so strongly to titling land as individual property because the social and political function of the family, and the interests of every family member in the family rights to land, is threatened by such titling. Such conversion of common family property to individual property may be seen as damaging the political and social functions of the family as well as expropriating from other family members their common property rights (See, e.g.: Bohannan 1964: 148). Why have the World Bank and others promoted state-imposed conversion of land from inalienable family tenure to titled individual private property (see the critical discussion of policies imposing land titling in Bruce and Migot-Adholla 1994), despite a history of rejection of such state-imposed conversions in Africa? (I distinguish here between state imposition of titling, through legislation that withholds legal recognition of existing family or community common property ownership and regulation, and state legislation that permits individual titling of land while legally recognizing existing common property ownership and regulation.) The World Bank, one presumes, must consider its policies as beneficial to Guineans, not a means to expropriate them.

Swynnerton, in Kenya in 1955, wrote in favor of individual titling of land as saleable private property (perhaps as a counterinsurgency as well as "development" strategy), saying: "[A]ble, energetic or rich Africans will be able to acquire more land and bad or poor farmers less, creating a landed and a landless class. This is a normal step in the evolution of a country" (Shipton 1992: 366; Barrows 1974: 402). Swynnerton's notion that through the discipline of the market land should be concentrated in the hands of the able is standard neoclassical economic theory. He is rather impolitic, in contemporary terms, as he also points out that the rich will accumulate land and a landless class will result. Granted, he did not expect the operation of a land market to concentrate land immediately. In fact, the Machakos district in Kenya is one example where land sales do occur, but land, so far, despite skewed distribution, is not highly concentrated in the hands of the rich (Tiffen, Mortimore and Gichuki 1994: 66-67). However, Swynnerton's reference to the promotion of landed and landless classes as a "normal step in the evolution of a country" is based on the idea that England industrialized by forcing people off the land through enclosures, making labor available for its industries, and that modernization involves forcing people off the land one way or another (Polanyi 1944). In the case of England, the "force" that pushed people off land and into cities consisted of a combination of factors: private, piece-meal enclosures of land by farmers responding to the market for wool, enclosures by acts of parliament, agricultural recessions and rising rural population (Turner 1984; Tawney 1912). Intellectually, though, many people linked modernization, or "improvement," with enclosure, or the conversion of common property to individual private property:

> Sir John Sinclair, the President of the Board of Agriculture, said in 1803: "Let us not be satisfied with the liberation of Egypt, or the subjugation of Malta, but let us subdue Finchley Common; let us conquer Hounslow Heath, let us compel Epping Forest to submit to the yoke of improvement." The wastes were reduced from something like one-fifth to one-fifteenth of the land area of England and Wales in the first three-quarters of the nineteenth century. Enclosure was not the only agent of reclamation, but it was clearly one of the most important. (Citations omitted; Turner 1984: 23)

Since Swynnerton's day, some still link modernization to the conversion of land held as common private property—frequently inalienable—to land held as alienable individual private property, as the Guinea land code, promoted by the World Bank, makes evident. However, justifications for conversion change. People now argue that Africa should still convert common property to individually titled, saleable private property, but it should do so to ensure security of tenure so farmers can invest, to make land available for collateral so credit will be extended, (see the critical review of these arguments in Bruce 1993; Shipton 1992; Bruce and Migot-Adholla 1994; Bromley and Cernea 1989; Barrows 1974), and to promote ecological use of land. Garrett Hardin argues that land that is not made individual private property gets abused by overuse, a phenomenon he calls the tragedy of the commons (Hardin 1968). The tragedy of the commons occurs where everyone has the same rights to use land and no one takes care of the land, as individuals maximize their use to the point where all are harmed. Individual privatization of such openly available land allows owners to exclude other users, thus preventing bad ecological practices. Hardin's notion of common property ignores the variety of regulated common property systems that exist in Africa and elsewhere, for example family and clan land, and equates common property with open access, unregulated land. (See, for example, critique by Bromley and Cernea 1989). Security of tenure and Hardin's tragedy of the commons arguments say nothing about the desirability of making a landless class or of concentrating land in the hands of the rich, but neither do they deny that concentration of land may occur, as Swynnerton expected. A critical review of post-colonial attempts to promote individually titled private, saleable, real property noted that, "[T]he logic of the economic model [favoring private titling of land in Africa] was compelling" (Bruce and Migot-Adholla 1994: 251). Why did the economic model advocating the same old colonial policy of private individual titling of land seem compelling to the advocators, especially to those academic consultants who did not have a personal economic stake in promoting land titling?

The security of tenure and Hardin's tragedy of the commons justifications are derived from the same central idea of "people" in economic theory. Neoclassical (and classical) economic theory imagines people as autonomous, independent, self-interest maximizing individuals (Zey 1992). Such individuals rely on Leviathan, or the state to enforce private agreements or protect property rights. Individuals in rural Africa thus have insecure tenure because they cannot call on the state to fend off the other members of their family group (or are insecure borrowers of other families' land or are women denied fee simple individual ownership under customary rules). If as individuals they own the land they use (if they have state-enforced individual relationships to the land), then they can afford to invest more as the family cannot take away their land and so deprive them of returns to their investment. Researchers apparently maintain that this issue of tenure security within the customary system is a serious issue despite the fact that frequently Africans have devised a fiercely secure form of tenure for the family. Hardin's tragedy of the commons thesis, in the same manner as the insecure tenure thesis, focuses on the individual: individuals in rural Africa abuse family and village common property. Individuals are out to maximize their individual self-interest, and in a commons, unfenced by rules of private ownership, individuals take as much as they can for themselves to the point that all are harmed. But the individuals are not aware of what they do, as they are autonomous, independent, trapped in their self-interested gaze.

Where did this disconnected idea of the individual come from? It seems particularly absurd in those parts of rural Africa where the individual is so bound up with the family group that if a man steps outside the group, taking family land with him, he can be killed. In Africa, and probably even in the West, someone who actually lived in the manner of this theorized individual would be considered a social monster (cf. Macauley 1994, 1963). Why has this peculiar idea of the economically rational individual been so blinding to Western observers of Africa? One is inclined to take up Thorsten Veblen's idea of the trained incapacity of economists (and lawyers and Darwinian biologists). What is the history of this training?

The economist's foundational idea of the rational economic agent came out of utilitarian theorists such as Hobbes, Bentham, Ricardo, Smith and Locke who lived in England in the 1600s, the late 1700s and early 1800s (Parsons 1968; Macpherson 1962). Daniel Defoe's Robinson Crusoe is an interesting example of how to construct the utilitarian idea of economic man (Defoe 1781). Robinson Crusoe starts off on board a ship—that is to say, in society. The ship is wrecked, he washes overboard and onto a deserted island, where only nature lived. On this island, Crusoe makes himself into the exemplar of economic man, maximizing his self-interest without regard to social bonds (at least until Man Friday—the Third World?—shows up). But to do so, Crusoe had to be separated from society. Perfect ownership is only possible in perfect isolation.

What led Defoe and others to theorize a social monster (an atomized individual capable of acting without regard to social bonds) as the building block of economic society? One explanation is that the idea of the atomized, asocial individual emerged out of capitalism's breakdown of feudal relations and the growth of market society (Marx 1973: 83-85, Polanyi 1944; MacPherson 1962). Marx ridiculed the idea of economic man in classical economic theory and argued in favor of a theory of the individual as social (Marx 1973), but apparently to little effect with respect to neoclassical economists (See, e.g. Zey 1992). However, the source for the idea of atomized economic man can be attributed to a more vividly specific image than a general reference to the breakdown of feudal relations. The idea of economic man was formed in the crucible of the enclosing of the commons in seventeenth and eighteenth century England. The enclosing of the commons is credited by some observers with setting the stage for industrial capitalism in England by forming a pool of dependent wage labor out of formerly independent country people who had been able to work for wages or not, with some degree of choice, since they could subsist at least partially on the commons, perhaps in combination with an arable field share (Polanyi 1944; Neeson 1993; for a discussion of a sequence of opposing views and subsequent revisions see Turner 1984). This recipe for making industrial capitalism was taken up by proponents of modernization, of "the normal evolution of society," by people such as Swynnerton. (My intent is not to resolve debates over what exactly occurred as a consequence of enclosing the commons, but rather to point out intellectual associations arising from the enclosure.) How did enclosing the commons give birth to the idea of economic man?

Common rights in England overlapped, were concurrent with, the ownership, rental or use of land by others. Commoners had the right to share in the produce of the land, to pasture on it, to cut peat or turf for fuel, to gather fuelwood and repair wood, and to participate in a broad set of other rights such as gleaning and herb and berry gathering (Neeson 1993). Common rights were not based on membership in a family, as frequently in Africa, but on local residence. Alternatively, common rights were attached to ownership or rental of land or a cottage. Residents had common

rights and obligations; outsiders could be excluded from commons. The use and regulation of commons brought together rich and poor of rural towns in a web of mutual obligation and communication. Local juries and customary courts established detailed bylaws for the use of commons, and towns employed people, called “pindars” by the poet John Clare, (Neeson 1993: 142), to police the commons:

> And pindar too is peeping round
> To find a tennant for his pound
> Heedless of rest or parsons prayers
> He seldom to the church repairs
> But thinks religion hath its due
> In paying yearly for his pew.

The common rights of community members, and the discourse around the use of these rights and their regulation was integral to the idea of community, and of people within community, before enclosure abolished that idea of community by abolishing common rights:

> What is common in community is not shared values or common understanding so much as the fact that members of a community are engaged in the same argument, the same *raisonnement*, the same *Rede*, the same discourse, in which alternative strategies, misunderstandings, conflicting goals and values are threshed out. (Neeson 1993, quoting David Sabean: 154)

The discourse regarding common rights sat all members of the community at the same table, as it were, though some were rich lords:

> That good old fame the farmers earnd of yore
> That made as equals not as slaves the poor
> That good old fame did in two sparks expire
> A shooting coxcomb and a hunting Squire
> And their old mansions that was dignified
> With things far better than the pomp of pride...
> Where master son and serving man and clown
> Without distinction daily sat them down...
> These have all vanished like a dream of good...
> (Neeson 1993, quoting Clare: 290)

Enclosure, in its final thorough stages, destroyed the community that the commons made possible and suppressed the discourse of common rights. (I am not saying that this community was ever an ideal place of equals.) In the 1600s, the Anti-Enclosure laws were abolished, and commons suffered a steady attrition of private enclosure over the next one hundred years. However, the commons discourse always survived, as commoners negotiated with enclosers and gave up this but kept that.

> In some parishes the workings of the land market, or the ability of landlords to consolidate holdings, reduced the number of small peasants to nothing long before enclosure. In others,

> large owners and substantial tenants may have been more eager than small commoners to innovate and to consolidate land. In still others they may have tried to overstock the commons. The point is that they did not deny common pasture to small occupiers and cottagers. Landlords did not annul leases and raise rents two or three times over in the space of a year; nor did they drive land sales up to record levels. It took a parliamentary enclosure to do all this. Before enclosure the large owners could (and did) alter the terms of landholding relations in this or that respect, *but they could not tear up the contract*. This limit to agrarian capitalism favoured the small and middling occupiers most. They took from it vitally important pasture, some risk sharing, a sense of common purpose with richer men—however tenuous—and a tradition of mutual aid. The *social* efficiency of this common-field collectivism is overlooked by historians who consider enclosure's efficiency in narrowly economic terms—measuring only what Keith Snell has called 'growthmanship'. (Neeson 1993: 320-1; emphasis on reference to contract is mine)

Neeson uses the word "contract," referring perhaps to some idea of unbreakable social contract, but it prompts an underlying question in this paper: what is a contract, how is it conceived, what does it do in society?

A story illustrates the final break with the commons discourse. The Marquis of Anglesey responded to a letter accusing him of taking from the poor what they desperately needed to survive while in doing so adding little to his ample wealth (Neeson 1993). How could he so defy morality, the rights of common property and hurt the needy of his community for a paltry gain? The Marquis replied:

> Excepting as to the mere fact of the Inclosure, the forming of which no one has a right to contest, All your statements are without foundation & as your language is studiously Offensive I must decline any further communication with you (Neeson 1993: 327).

Men like the Marquis set the pattern for the economists' conception of the autonomous, self-interest maximizing economic man. That conception was born out of, from the perspective of the old community, the socially monstrous act of enclosure, in which neighbors dispossessed neighbors. The process of parliamentary enclosure has been described as follows:

> Men known as commissioners were employed to divide the communal interests of the parish, township, etc., among the claimants of those interests, and to lay out the courses of new roads, footpaths, bridlepaths and tracks. These men were nominated by the major interests in the parish, by the church in its position as major owner of the tithes, by the lord of the manor as the owner of the rights of the soil, and by the majority in value of the freeholders....The parliamentary proceedings and subsequent administration of enclosure...were complicated to the extent that enclosure could be privately and locally sponsored, and publicly and locally applied, or generally applied....In the cases of the first two methods active application was made to Parliament...(Turner 1984: 12)

A key aspect of the successful imposition of enclosure was the denial of compensation to many of those who lost their common property rights—the expropriation by individuals of common property. (See, e.g., Neeson's discussion of the refusal by English courts to recognize gleaning

rights as property rights: Neeson 1993. Neeson also offers case studies of inadequate compensation to commoners in the aftermath of enclosure.) If common property rights had been fairly acknowledged and subject to due compensation, enclosure might have been prohibitively expensive and certainly slowed. To quickly move a society from common to individual private property rights seems, from a practical point of view, to require a violation of the logic of property rights that is being promoted. Inseparable from the idea of property rights is the principle that one may not be deprived of one's property without due compensation. If one cannot in practice calculate and pay due compensation to all those losers of common property rights, then a program that concentrates ownership rights in individuals can only proceed not only through the perpetration of a great injustice, but also through the *illegal*, in terms of the very property law being promoted, expropriation of people's common property rights. (The process in England was helped by the fact that those most affected did not have the right to vote (Macpherson 1962)).

This is precisely the issue that Guinea now faces if it seriously attempts to promote individual titling of land as saleable, private property as apparently envisaged in its new land code (Tabachnick 1994; some Guineans argue that title under the new code could be given to family groups—others reject that idea). This historical account of the idea of economic man also helps us understand why some of those trained in neoclassical economics would keep coming to Africa with the same desire to convert common property to individually-held, saleable private property, though the justifications change. Western economists who bring with them their idea of economic man but have forgotten its history, its birth out of the suppression of the English common rights may find, not surprisingly, that their economic theories keep telling them that something is not right with African holding of land in common (they may be ignorant of the variety of actual individual use rights and forms of group regulation). They may feel that the discourse around the commons in Africa must be suppressed, not communicated with but rather replaced just as was done in England.

Guinea has not only adopted, in 1992, a land code that assumes land is held by private individuals and is saleable, Guinea also has a Civil Code, adopted in 1983, based on the French Civil Code, that contains conventional rules for making contracts, rules with some similarity to those of the United States. I have discussed some of the questions that arise should one attempt to contract for the preservation of natural resources in a rural area in Guinea due to conflicting local and state legal conceptions of real property; the different local and state legal notions of real property lead to different notions of what is a "contract." The Guinean state legal notion of contract can be loosely illustrated through a description of the idea of contract law, contrasted with that of property law, in the United States.

Contract law developed later than property law in the Anglo-American history of law (Teeven 1990). In medieval times, one could not bring suit to enforce a promise. One brought suit to show that someone wrongfully possessed property to which the plaintiff had title and ownership. Thus, if you promised to pay me for a bushel of wheat and then refused to pay me when I brought you your bushel, I still had title to the wheat (as I had not delivered the wheat into your possession) and so no grounds for a suit. Durkheim has an interesting explanation of how the idea of contract in the form of mutual consent to a promise between individuals required the development of the idea of autonomous individuals who owned individual property separate from their social groups (Durkheim 1983). From this bit of history, one can appreciate the initial distinction between a

contract and a property right: one arises from a promise, the other from ownership. (A promise can become property which one may sell or assign to another, who then owns the contract.)

One can think of contract in terms of ideal abstractions (Frankel 1993). The contract ideal supposes a relationship between contracting parties that the law enforces. According to the Restatement (Second) of Contracts sec. 1 (1979), a contract is "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some recognizes as a duty." The contract ideal assumes fairly equal bargaining power between independent, capable parties in face-to-face negotiations. The contract ideal assumes the autonomous, independent rational economic actor of economic theory.

Underlying classical contract law is the idea that the state should support and protect a sphere in which free, equal, independent and capable individuals can exercise their free will and contract with mutually consenting private parties (Frankel 1993). Contracting by individuals should take place free of coercion and from government interference. The government's role is limited to enforcing the bargains made by the parties, and bargains are to be enforced according to the freely-entered-into terms of the bargains. The focus is on a promise made at a discrete moment in time, rather than on a relationship evolving over time with changing circumstances (Nassar 1995).

Underlying United States property law is the idea that the state should support the property owner's dominion over her property, her power to use her property and exclude others from using it (Frankel 1993). "[T]raditional liberal notions...place individual interests above the collective social interest." (Frankel 1993, quoting Gerald Bowden, "Protecting Our Environment Through Legislation: Approaching a New Concept of Property, 4 Real Est. L.J. 165, 174 (1975)). Laws that limit the property owner's rights and protect third parties from harm, such as environmental laws and zoning laws, limit the prior paramount individual interest in property. Additionally, the owner's power to control use of her property is limited in order to promote efficient markets and thus productive use of property through laws which promote liquidity of property. The owner's freedom to make contracts regarding her property are limited, for example, by the rule against perpetuities limiting the ability of the owner to restrict alienation of her property. On the one hand, property law protects the owner's power to act without the consent of other private individuals, in contradistinction to the central importance of consent to the contract relationship. On the other hand, the state intervenes to limit the owner's authority over property.

The state is interested in promoting efficient markets and low transaction costs, and so the state encourages certainty, clarity of terms, and predictability in both contract and property transactions. However, contract law permits greater freedom on the part of parties to custom design contracts. Under contract law, the basic rule is that the parties' agreement governs and courts should not remake the contract but should enforce the contract according to its terms at the time of making. This basic rule is in fact limited by a variety of legislated and common law rules designed to promote efficient markets and protect parties in a real world divergent from the classical contract ideal of free, equal, face-to-face private parties. Thus, for example, under the policy of efficient breach, parties suffering breach can recover compensation damages, including their expected profit and even consequential damages, but they may not recover punitive penalties (damages greater than compensation damages), even if contracted for in the form of liquidated damages. Under anti-trust policies, parties may not make agreements in restraint of trade. Under

labor law policy, parties must bargain in good faith. Under landlord-tenant policies, tenants are not permitted to waive certain rights, for example to a minimally habitable dwelling.

Property law, by comparison, requires standard forms for legally enforceable property transactions which the parties may not vary by private agreement. Property law deliberately standardizes property transactions and substantive property rights (e.g. freehold estates, non-freehold estates, concurrent estates, and future interests) to promote efficient markets by reducing unexpected and conflicting property claims. Leases, though, can provide a way out of standard property law categories into the customized freedom of contract law in which parties can agree on non-standard rights. "[C]ourts...are coming more and more to emphasize the contractual nature of leases, with important consequences." (Frankel 1993, quoting Jesse Dukeminier & James E. Krier, Property 386-87 (2d ed. 1988)).

Duties to provide information to contracting parties and to third parties differ under contract and property law (Frankel 1993). Generally, contract law places on each party the responsibility and cost of gathering information needed to decide whether to contract. While the seller must answer truthfully questions posed by the buyer, the seller is not required to volunteer information. Third parties need not be informed by the contracting parties—the contract can be private. Under property law, transactions must be made public to third parties. This publicity reduces buyers' market costs by making known property rights and market prices. Sellers may have a greater duty under property law to disclose information about the property that would affect a buyer's decision. Property law allows parties less privacy than contract law. Contract law, based on the idea of interpersonal relations, may not allow transfer of contracts to third parties without consent of both parties, while property law promotes transferability of property rights.

The classical common law idea of contract, under which courts strictly limit their inquiry to express bargains at time of making and apply "buyer beware" doctrines, has come under attack in modern times (Teeven 1990; Nassar 1995). Contemporary corporate relations between individuals and great corporate entities may look a lot more like the ideal typical pre-modern world of relationship based on status and long-term relationship rather than a classical contract world of atomized individuals exercising free will. People actually behave in ways that diverge from the ideal world assumed by classical contract law. Contemporary contract law has lost some of the old rigidity and has become a less predictable set of conflicting principles or is narrowed by protective legislative statutes that aid and hinder competing interests; e.g. continuing battles over the degree to which labor law strengthens employers or workers. Businesses may opt out of contract law and use contract as a flexible governing framework mediated by negotiation or arbitration outside of courts (Williamson 1985; Nassar 1995).

Since U.S. contract law is ideally designed to be used by autonomous, independent individuals, U.S. contract law may be ignored or marginalized in U.S. business relationships that involve real people in social groups acting under real social constraints. Stewart Macauley, a professor of contract law, tells a fascinating story (Macauley 1994; see also Macauley 1963). His father-in-law was chief financial officer of Johnson Wax and got into a conversation with Macauley about what he taught at law school. On hearing Macauley's description of contract law, his father-in-law exclaimed that only a scoundrel would stand on the terms of a contract. His father-in-law told how Johnson Wax built up long-term, carefully nurtured relationships with suppliers. In the 1930s

depression, suppliers were on the edge of bankruptcy. Johnson Wax could have pit one supplier against another to get the lowest cost supplies, or stood on contracts and when contracts were breached Johnson Wax could have driven suppliers into bankruptcy. Instead, Johnson Wax carefully rationed its supply contracts between suppliers to keep them solvent and did not insist on its legal rights in the event of breach. Johnson Wax's "charity" bore fruit in the 1940s, as in war time cans, necessary to the marketing of Johnson Wax products, were in short supply, and suppliers could have held Johnson Wax up for ransom or simply not made cans available. Instead, Johnson Wax never had difficulty getting the cans it needed. Contract law, with its emphasis on terms bargained for at a discrete moment in time, as the Johnson Wax story illustrates, does not help parties engaged in long-term, repetitive *social* as well as business relationships. Parties in such long-term relationships have to manage changes in circumstances in a way that preserves the relationship. Just as one does not sue one's wife or husband for breach of agreement if one wants to continue to stay married, businesses in the U.S. that want to continue their business "marriage" may have to work out problems outside conventional commercial contract law. "The pressures to sustain ongoing relations 'have led to the spinoff of many subject areas from the classical, and late neoclassical, contract law system, e.g., much of corporate law and collective bargaining'" (Williamson 1985, quoting Macneil: 79).

In Guinea, access to land usually involves social and political issues of long-term relationships between real people which are reflected in the local refusal to individually title land, to make a liquid private market in land sales between private individuals. Conventional Western contract law is not useful or culturally legitimate in this particular world of repetitive, long-term social and political relationships. Western contract law may not be used by Westerners in such conditions, and so the refusal of Guineans to use it is not surprising. Thus when LTC goes into rural areas in Guinea and promotes the making of contracts around natural resources, it cannot fall back on the ideal type of classical Western contract law as a way of making agreements that are considered legitimate and enduring. Similarly, Western property law, which is even less concerned with interpersonal relations than Western contract law, may also be rejected.

The World Bank, in its rhetoric, equates Western law with economic growth, not realizing, perhaps, that not only may some forms of such law be rejected by Guineans, such law has limited utility even in the West. The World Bank's General Counsel Shihata argues for a "government of laws and not of men" as the foundation for economic growth:

> Concern for rules and institutions is particularly relevant to a financial institution which at present does not only finance projects but is also deeply involved in the process of economic reform carried out by many of its borrowing members. Reform policies cannot be effective in the absence of a system which translates them into workable rules and makes sure they are complied with. Such a system assumes that: a) there is a set of rules which are known in advance, b) such rules are actually in force, c) mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures, d) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial or arbitral body and e) there are known procedures for amending the rules when they no longer serve their purpose. (Upham 1994 citing Shihata: 234)

On paper this account of rules and institutions may sound reasonable and reassuring, but does economic growth really wait for such forms?

Jane Kaufman Winn argues that formal, Western style law is largely useless and marginalized in the Taiwanese engine of economic growth that is found in the informal business sector:

> The development of a modern formal legal system may belie the social realities in Taiwan....The very commitment of many legal practitioners and government officials to the maintenance of a modern legal system based on foreign models seems to contribute to the marginalization of modern formal ROC legal institutions....[T]he formalism of Taiwan's transplanted version of the Western legal tradition seems to limit the law's flexibility in adapting to contemporary Taiwanese social practices, thereby increasing the dependence of businesses on relational practices outside the law....[P]articipation in relationships remains the primary factor both in determining the sense of self and in constituting the social order in the contemporary Taiwanese world view....Social organizations and institutions with well-defined structures, such as the formal legal system, are relegated to a subordinate position...(Kaufman Winn 1994: 195, 200)

Rural Guinea is similarly a place where informal relationships ordered in informal institutions such as the family, the council of elders, the Islamic League, are paramount. (See, e.g. Fischer 1993, Karen Schoonmaker Freudenberger 1994, Mark Schoonmaker Freudenberger 1994) Jane Kaufman Winn coins the term "relational capital" to signify the importance to individuals of their positions within relationships. Sara Berry has similarly insisted upon the importance to African individuals of their position in social networks for, among other things, securing their land rights (Berry 1993). Weber pointed out:

> From the purely theoretical point of view, legal guaranty *by the state* is not indispensable to any basic economic phenomenon. The protection of property, for example, can be provided by the mutual aid system of kinship groups (Weber 1978: 336; emphasis his).

Weber went on to argue that in a modern market society, private interests increasingly rely on contractual obligations; a state legal order becomes necessary as customary rules and local group protection disintegrate under market pressures. However, in contemporary Africa, the greatest source for unpredictable interference with economic/social relationships may come not from the breakdown of a local, informal world of relationship networks, but externally from the state:

> The preliminary results of a four-count[r]y study of tenure reforms conducted by the Land Tenure Center, University of Wisconsin, suggest that farmer demand for individual title comes less from a desire to change agricultural practices and increase production than from their sense that a title conferred by the state may be the best way to defend against reallocation of land by the state and its local representatives, whom they see as the major threat to their security of tenure. (Bruce 1993: 51; see also Bruce and Migot-Adholla 1994)

Nonetheless, one should keep in mind that such general statements must be modified for different cultures and for evolving conditions over time (Tiffen 1995). Where land becomes increasingly

scarce, valuable, and individually held, and subject to sale, registration of title may appeal to users as a way to resolve disputes between relatives.

Mark Schoonmaker Freudenberger has discussed the need to convert destructive state interference into constructive co-management of common property by local people aided by state enforcement of local rules particularly against outsiders (Mark Schoonmaker Freudenberger 1993). Similarly, in the case of Somalia, village authorities continued to think and act locally in terms of common property rights, despite a hostile state legal environment, but needed state assistance, rather than hindrance, in enforcing common rights. Historically, land in Somalia had been divided into private farmland, communal clan or village land, and remote open access land (Shepherd 1989: 54). The state recognized rights to private farmland but abolished communal clan land rights, characterizing communally controlled land as open access State Land (Shepherd 1989: 55). The state refused to recognize communal clan land rights in order to promote "modernization" (clan power was to be replaced by state power). This change in legal status of communal land allowed outsiders serving urban charcoal markets to appropriate local resources.:

> Where, as in the past, rule-breakers are local people, pressure on them to conform and practice the required self-restraint can be brought to bear because of the multitude of ties which bind them to the resource group they have offended. But Bay Region villagers find it impossible to deal with [outsider] charcoal burners in this way, and need recourse to a state body such as the police or the National Range Agency *which will support them when they impose sanctions on offenders* (Shepherd 1989: 61; emphasis hers).

Villagers needed to be able to police outsiders because weak (or urban-biased) state authorities failed to enforce regulations. In addition to threats from outsiders, opportunistic insiders may seek to appropriate common property to themselves as their individual private property—a possibility illustrated by the example from Madagascar, discussed above (Leisz 1994). The insecurity may result from an alliance of a less powerful local group with the external state. In Mali, for example, Tuareg herders tried to ignore local property rights of another ethnic group by calling on local state officials for support (Moorehead 1991: 213). State rules in Mali vested all land in the state and did not recognize the local property rights thus creating, from the point of view of the state, open access to local common property.

In Guinea, in the town of Balandou, state officials have expropriated farmland and banana plantations, despite Guinea's laws on the books prohibiting state taking of private land without due compensation (Karen Schoonmaker Freudenberger 1994). State officials, with the support of some relatively land poor members of Balandou, convinced Balandou leaders to formally request a "lotissement" of land in which, ostensibly, people living in the center of town in the way of needed road and public works construction would be moved out onto some land on the outskirts of town designated for reallotment. Once Balandou leaders requested state help (they expected state subsidies to rebuild homes), government officials claimed state control over a large area of farms and plantations. Government officials said they had total power to allocate this land away from its users to whoever they wished, without compensation to those asserting customary land rights and without subsidizing rebuilding. Government officials planned to allocate much of this land to residents of a nearby city rather than to people of Balandou.

In answering the question, how does one promote contracts to preserve natural resources in Guinea, and elsewhere in Africa, one is drawn into competing discourses and political and economic interests at local and state and international levels. One might like to keep the focus narrow and practical, but how? The simplest way to think about the problem seems to be this: at the local level, contracting involving land and its natural resources requires that parties be players in local networks of relations, of long-term social and political concerns. One cannot contract with respect to land in the form of a discrete, commercial transaction between autonomous, independent individuals backed up by a state court in the event of dispute. One could contract relationally, (however one defines relational), backed up by a court if the court were a local customary court such as customary courts in Sierra Leone or The Gambia (Mark Schoonmaker Freudenberger 1993a; Tabachnick 1974). These courts are made up of local elders and chiefs and are embedded in local social networks. Generally, one must think of a land contract not as a one-time, discrete transaction, but as a symbol of a long-term local relationship. LTC, as a promoter of contracts in rural Guinea, is a kind of marriage broker.

Perhaps a contract, in these relational circumstances, may be conceptually compared to a regulation. Successful regulation of common property has been described as most likely to occur where there exists: 1) a stable, visible, small set of actual and potential users so monitoring costs are low 2) low gains from cheating, and potential appropriators have a high investment in reputation as they are repeat players in local relations 3) homogeneity of interests among individual users (Eggertson 1993; see also: Ostrom 1990; Lawry 1990; Mark Schoonmaker Freudenberger and Mathieu 1993). In the African rural context, one can frequently add that successful regulation of land as common property derives from enduring cultural, religious and ecological notions about land as an inalienable good of the family group and subject to group restrictions. While I hesitate to characterize people in a local African world as possessing a homogeneity of interests, they may be relatively stable, visible, of small number, and repeat players with high investments in reputation (and subject to great social pressure from other community members).

> The above description of effective local level contracting requires that the state be kept at bay and be required to respect and even enforce local authority and decision-making and customary property rights. Thus state rules need to be enacted which protect the local sphere of relational contracting from destructive interference (as opposed to constructive enforcement) by the state.

Omar Razzaz uses the idea of relational contract in discussing the informal legal world of an urban area in Jordan called Yajouz (Razzaz 1994). The Bani Hasan had held the land in tribal tenure (Razzaz does not describe tribal tenure and I assume that Bani Hasan did not have the same fundamental objections to sale of land that one frequently finds in rural Africa; in any case such objections may disappear under dense urban conditions). The Bani Hasan did not register their title to land (perhaps to avoid taxes, or perhaps because the 1930s policy granted ownership to the cultivator, and the Bani Hasan did not cultivate) and so allowed the land to be designated as state land, although with the understanding that they could register their title at any time. They finally tried to register their title when the land became valuable as an urban residential site. They wanted to be able to sell plots of land. To their surprise, the government refused to acknowledge Bani Hasan ownership and declared that ownership remained with the state and building was

prohibited. Nonetheless, an ostensibly illegal town has been built on the land, despite ongoing tensions between state and local people. Since formal, legal contracts are ostensibly prohibited, the Bani Hasan have resorted to a "traditional" contract with buyers called "hujja." "A tribal member explained:

> We do not think of a hujja as a regular sales contract. It is more like a *marriage contract*, binding both buyer and seller for good. I am expected to intervene whenever there is any dispute over the ownership of any piece of land that I had sold...In some cases I am called upon to reestablish the boundaries, in other I am called upon to identify the person who bought the land and paid me for it...If I stop performing this role, I would be reneging my commitment in the hujja, and people will have no trust in me, I wouldn't be able to sell (Razzaz: 24; emphasis mine).

Razzaz continues:

> Thus the tribal seller is a lifetime guarantor of the buyers' possession of the land. This is almost always explicitly mentioned in hujjas: "the seller is responsible for the protection of the buyer against the intrusion of tribal members and adjacent neighbors." Modifications of this provision, however, started appearing after 1977: "with the exception of the state" was added to the provision, absolving the seller from protecting the buyer against demolition or appropriation of land by the state (Razzaz: 24).

Razzaz' study illustrates how local people will construct a relational legal process of their own within an ostensibly hostile state legal environment. Razzaz further discusses accommodations between state and local people, and the resort of local people (particularly buyers) to external state authority in local bargaining and dispute resolution despite the state's apparent hostility. Life, Razzaz, points out, goes on, and even the negative can be turned to the advantage of players. Nonetheless, he tells the sobering story of a soldier who sold all his and his wife's possessions to build a home, state authorities demolished it, and a neighbor recounts: "'The poor soul had no money to rebuild; he left the site and I've never seen him since'" (Razzaz: 31).

How should the Guinean "hujja" (a perhaps unfair characterization) be made? A contract should make sense in terms of who holds property rights in the land and in terms of interested social networks. The Western contract ideal assumes an individual holds title and can contract on that basis. Let us assume, in Guinea, that the individual has use rights subject to family power over sale of land and subject to other overlapping use rights such as women's gathering rights of fruits of trees. (In practice, some rural Guineans, particularly some members of the "noble" caste of the Fulbe, claim individual ownership of land; such claims by "nobles" are influenced by Moslem ideas of ownership by right of conquest (Fischer 1994). Everyone whose property rights may be affected, including women whose gathering rights, for example, may be affected, should ideally agree to the contract. Where the contract is not for purchase of land but for long-term rental or long-term agreement to restrict tree cutting by the user, then perhaps family agreement is not necessary as long as the family does not have the power to intervene and allocate the land to another person from the present user during the contract period. The contract should be written and signed in order to comply with the Civil Code (rural rentals require written agreements, Art. 917). In addition to the signatures of the parties to the contract, witnesses should also sign who

represent local authority and the state, such as a state notary (greffier). As I discussed above, the idea of "parties" to the contract is deceptive in a relational context, where the individual stands for or is connected to a larger social group. Some procedure is needed to ensure that the larger group, if involved, does agree to the act of the representative individual. Equally important, some procedure is needed to ensure that the state legally recognizes the power of the local representative of the family group to bind the group. (The Guinea Civil Code requires that representatives of others in contracts be designated by undefined "special" powers: Art 657). The use of local and state witnesses, including a state notary, may help solve that problem. The contract could set out what penalties or reimbursements are required if the contract is breached or not fulfilled, although a relational contract may best be viewed as a flexible framework governing relationships, rather than a rigid document of clauses that exist to be violated (due to unforeseen contingencies as well as deliberate opportunism) (Williamson 1985). The contract should describe what authority will resolve any disputes that arise over interpretation or performance under the contract—a local, informal settler of disputes may be designated (a low cost, informal, local dispute settlement process is preferable). Such a contract might be considered valid under the Civil Code.

A publication of the Projet National d'Infrastructures Rurales, Direction Nationale du Genie Rurale, Ministere de l'Agriculture et des Ressources Animales, "Guide pour les Amenagements de Bas-Fonds," describes how to gather the information about land rights needed to make a contract between a groupement d'exploitements agricoles (a democratic farmers group) and an "owner" or user of land, and the Guide also describes the format of contracts (Republique de Guinee 1992). The Guide suggests that one ask actual users how long they have used the land, where did they get their parcels, do they give gifts to the owner, can they cut trees, can they plant trees, can they loan for a season to other farmers, can they loan for longer periods, can they rent out their land? The format proposed for a lease contract has the contracting parties (lessor and groupement) sign the contract; the object of the contract is stated: the location of the land is described, the purpose for leasing the land is stated, the parties explicitly agree that the contract is not a property title; duration of the lease is stated, with condition of renewal; obligations of the lessor are listed, including an agreement by the lessor to not intervene in the management and allocation of the land, nor in the functioning of the groupement; the obligations of the groupement are listed, including agreeing to manage the land as "good father of the family" and using proper techniques, and also including agreeing to not plant any tree or bush on the land, to not build on the land, to not sublet, and to pay a rent of 10% of harvest, and to not ask for any reimbursement of expenses incurred in leaving at end of lease; penalties in event of breach of contract are listed; six months prior notice is required if a party does not desire to renew; a dispute resolution provision requires that any disputes over the contract will be submitted to the village council of elders who can also seek the opinion of the administration; those signing the contract are: the lessor, the lessee, three witnesses—the village chief, a member of the family of the lessee, and a member of the CRD (communauté rurale de developpement, a local elected authority created by state law).

The approach to contracting described in the Guide makes sense in the relational and legally confusing conditions in Guinea. The first step is an inquiry into who holds what land rights in the land at issue, an inquiry that in the U.S. could be verified through a title check. The contract is signed by two individual contracting parties. This is the most troubling aspect of the form used by the Guide, as one wants to know whether the family group asserting rights in the land consents to

the contract—one must assume, on the face of the contract, that the lessor's ability to make the contract is not contested. The initial land right inquiry hopefully made credible this assumption. The familiar, and likely inappropriate use of the Western contracting stereotype, is modified by the use of witnesses who also sign the contract. The witnesses serve conventionally to make the transaction in land public and known, so future interested persons can find out past contracts in the land. The witnesses, particularly the village chief and elder family members, unconventionally, may also serve to ensure that the transaction is credible and legitimate in terms of local social networks and various claimants to property rights in the land. The witness on behalf of the CRD, as a member of the state legal order, unconventionally serves to legitimate the contract from the perspective of the state, hopefully preventing the state from denying the legality of the contract. A state notary should also sign, as a notary's signature certifies that the notary found the form of the contract to be legally proper (Guinea Civil Code Art: 806). LTC obtains the signature of the state notary to land contracts the LTC promotes (Fischer 1994/95). (Of course a court could disagree with the notary's finding of valid form and substance.) In addition, these witnesses (members of state and non-state local authority) lend a regulatory aspect to the contract, perhaps making the contract good against people inside and outside the community who were not parties to the contract. If a dispute between contracting parties arises, or a dispute between non-contracting local people and the contracting parties, the dispute should go first to the local council of elders, particularly in the former case, thus keeping decision-making within the community, which is where such decision-making mostly resides at present. The relevant discourse at the council of elders will be that of local notions of land rights and of procedures for a valid agreement, as well as, perhaps, notions of state contract law, but state law will not replace local discourse around rules.

In the event of appeal out of the local level of dispute resolution into state courts or to the offices of state officials, state courts or officials should apply local rules to maintain state respect for local property rights and community discourse. Such a policy will also encourage local, low cost dispute resolution as external courts and officials will be consistent in using local legal and social concepts. In Sierra Leone, for example, a consistent field of reasoning over land rights in cases appealed to higher courts is maintained by having a local expert sit with the court. (Tabachnick 1974: 15) In Sierra Leone, a land dispute might travel the following hierarchy of appeal (this description dates to 1974 and Sierra Leone may have modified aspects since then): 1) local chiefdom court is the first stage. The chiefdom court is headed by a court president who has a salaried permanent position and is assisted in examinations and decisions by four 'courtiers'—members of the Tribal Authority (heads of local extended families) who sit on the court in rotation for a small fee. 2) An appeal from the chiefdom court goes to Group Local Appeal Court, consisting of the Paramount Chiefs from neighboring chiefdoms, and excluding the chief from whose chiefdom the case originated. 3) Appeal from Group Local Appeal Court goes to Magistrates Court. 4) Final appeal may be made to a division of the High Court. Magistrates and the division of High Courts are the only courts with judges trained in law derived from English law. The other court judges are chiefdom members familiar with local customary law. Therefore Assessor Chiefs sit with the judges at the Magistrates and High Courts levels to advise on local rules.

When I was a student at the University of Sierra Leone, I had a professor of economics who liked to refer to "the crusted cake of tradition." However, African land tenure customs are relatively

flexible compared to state laws and the economic and social doctrines behind those laws. Mary Tiffen discovered an example of that flexibility in Gombe, Nigeria (Tiffen 1995, 1976: 117-118; the following discussion of Gombe and Machakos is summarized from comments made by Mary Tiffen; see also Tiffen, Mortimore and Gichuki 1994; Tiffen 1976). Tenure customs are likely to change with changes in population density. For example, in Gombe, in 1960, the local rule was that a man could sell land if he had cleared the land himself, but he could not sell land received from another, or uncleared bush, or land that had reverted to bush. In 1970, with increased land scarcity, the *Alkali* (Chief Judge) told Mary Tiffen that land could be sold if it had been cleared, bought or inherited. The Machakos district of Kenya represents another example where land customs evolved with increased scarcity of land (Tiffen 1995). When land was less scarce, older sons established their own farms and abandoned their claims to their mothers' lands to younger brothers. As land became scarce, disputes arose as the children of older brothers fought with the children of younger brothers over claims to the mothers' lands. Elders ruled that where evidence showed that the older brother had not taken up his claim on his mother's land and also that the younger brother had looked after the mother, then the children of the younger brother obtained rights to the land. Presently, in Machakos, every son makes sure that he gets an equal share of the mother's land. Machakos got its first land office, used for titling land, in 1968, relatively late compared to Kikuyu areas. The Akamba, who lived in the Machakos district, had refused to have a land office. They were not interested in Swynnerton's land titling plan. The Akamba intentionally had many scattered plots in order to have access to different ecological zones. Swynnerton originally proposed land consolidation as a condition of land registration. This requirement of consolidation was enforced on Kikuyu land as part of a policy of Mau Mau policing. However, the Akamba, who were in the police force policing the Kikuyu, refused to register their land while land consolidation was a condition. Since 1968, land registration in Machakos has gone forward through a slow process in which land is surveyed and demarcated, and all disputes are consensually settled. Land registration is still not complete in many areas in Machakos. Under conditions of land scarcity, where people may inherit small plots of poor land, the sale of such inherited land is a way to raise funds to move elsewhere. Local customs may evolve to permit such sales, and state laws that permit but do not force land registration then become useful to local people. Customs affecting grazing land in Machakos also evolved with changes in land scarcity. Originally, access to grazing land was open and free to all. With increasing land scarcity, the custom developed that people had to ask permission to take animals to graze on someone's land. Eventually, landowners asked for crop residues, which had commercial value, from those asking for permission to use grazing land. The example of Machakos shows the need to allow for the flexibility of custom (Tiffen 1995).

At the same time imperial European powers were exploring the darkness of their hearts in Africa, the United States was engaged in a philanthropic and mercenary program of confining surviving American Indians to reservations and eradicating American Indian culture and self-government. Congress embarked on a massive program of rapid conversion of Indian-held community property to individual property in part as a way of replacing American Indian culture and government with assimilation. In 1887, Congress passed the General Allotment Act (Dawes Act) which provided that "[W]henever in [the President's] opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes [the President is authorized] to allot the lands in said reservation in severalty to any Indian located thereon..." (Sec. 1). The General Allotment Act came about through an alliance of missionaries and reformers, white settlers and

other interests (Meyer 1994: 52; Kelly 1990: 71-75). The Act provided for the allotment of land per American Indian (generally from 40 to 160 acres depending on age and social status) and anticipated that any excess lands "adapted to agriculture" and not allotted could be purchased by the federal government and made available to non-Indian settlers (Sec. 5). The issuance of allotments to American Indians made them U.S. citizens subject to state and federal law, including tax laws (Sec. 6). Since American Indians could not afford to pay taxes on allotted land and generally might be easily victimized by non-Indian speculators, the allotments would be held in trust by the federal government for 25 years (Sec. 5; Kelly 1990: 71). During this 25 year period, allotted lands could not be sold or taxed. The breakup of American Indian communal lands into individual allotments was considered crucial to the eradication of separate American Indian cultures (cultures described as anti-culture: barbaric) and the assimilation of American Indians into a notion of universal American civilization. According to the 1887 Annual Report of the Commissioner of Indian Affairs:

> I think it may safely be predicted that when the [allotment] system is thoroughly in operation, there will be fewer cases reported of Indians having been driven from their homes through ignorance of their rights....
>
> I fail to comprehend the full import of the allotment act if it was not the purpose of the Congress which passed it and of the Executive whose signature made it law ultimately to dissolve all tribal relations and to place each adult Indian upon the broad platform of American citizenship. Under this act it will be noticed that whenever a tribe of Indians or any member of a tribe accepts lands in severalty the allottee at once, *ipso facto*, becomes a citizen of the United States....This should be a pleasing and encouraging prospect to all Indians who by experience or education have risen to a plane above that of absolute barbarism (p. 8).
>
> That hitherto, under tribal relations, the progress of the Indian toward civilization has been disappointingly slow is not to be wondered at. So long as tribal relations are maintained so long will individual responsibility and welfare be swallowed up in that of the whole, and the weaker, less aspiring, and more ignorant of the tribe will be the victims of the more designing, shrewd, selfish, and ambitious head-men. Any people, of whatever race or color, would differ little from our Indians under like conditions (p. 9).

American Indians lost two thirds of the land they had held between 1887, when allotment was enacted, and 1934, when allotment was ended under the Indian Reorganization Act (Clinton 1993: 123). Land held dropped from 138 million to 48 million acres. Many American Indian groups and individuals objected to allotment, but the federal government ignored their lack of consent or created a fiction of consent (Clinton 1993: 101; Kelly 1990: 74-75). The United States allotment policy illustrates the point made earlier in the context of the enclosure of the English commons: one cannot move a society quickly from common to individual private property rights without violating the logic, and law, of private property, because such a rapid movement is only possible through the unjust, nonconsensual, and uncompensated expropriation of common property rights. As in the case of enclosure of the English commons, although to a greater degree in the American Indian case, those people adversely affected by allotment did not have the right to vote and had no real voice in the government that imposed conversion of common to individual

property rights. Even where consent of some American Indians was obtained, one must question the validity of this apparent consent. Many American Indians did not speak English. To what degree were they fully informed about what they "consented" to? To what degree was consent coerced? Why would American Indians consent to the loss of unallotted land, to the policy of "dissolving tribal relations," to the ending of Indian self-government and the eradication of Indian culture outlined by the Commissioner of Indian Affairs? Why would not American Indians, like Africans, like English commoners, resist the breakup of common property rights where that breakup is associated with the destruction of particular social organizations and culture?

The tragic history of allotment and related policies, their effect on American Indian self-government and resource management, can be illustrated through a comparison of the experiences of the White Earth Reservation in northern Minnesota and the Menominee Reservation in northeastern Wisconsin.

The White Earth Reservation got its start as a home for a variety of immigrant Anishinaabe (Chippewa) bands and also attracted "mixed-blood" settlers after a treaty in 1864 (Meyer 1994: 42-49). "Mixed-bloods" is a term originally used to describe people related to "full-blood" Anishinaabeg but who made up a distinct cultural group that generally acted as traders and mediators between the U.S. government and businessmen and "full-blood" Anishinaabeg who might not speak English or have much contact with non-Indian culture. Tensions between "full-bloods" and "mixed-bloods" existed from the first days of the Reservation (Meyer 1994: 42-49). The White Earth Reservation was divided between woods and lakes and plains suitable for farming. This ecological division became integral to cultural divisions on the Reservation, as the U.S. government planned to use the farmland to assimilate the Anishinaabeg into an individualistic, yeoman, idea of American civilization. However, more conservative Anishinaabeg who continued a subsistence way of life tended to settle in the wooded eastern half of the reservation. White Earth had its own allotment plan that predated the Dawes Act. An 1867 Treaty established an allotment procedure that granted individuals up to 160 acres depending on the amount of land an Anishinaabe individual cultivated (Meyer 1994: 45). These allotted lands were exempt from taxation and attachment for debt. They could be sold to another Anishinaabe only with permission of the Secretary of the Interior (Meyer 1994: 43). The U.S. government agreed to provide money and tools needed to establish farms.

American settlers and lumber interests coveted access to White Earth farmland and timber and argued that White Earth land was not used by the Anishinaabeg and so should be taken away from them. American allies of the Anishinaabeg, such as Episcopal Bishop Henry S. Whipple, hoped to save White Earth from American encroachment by concentrating Minnesota Anishinaabeg at White Earth, in the process allocating all open land to Anishinaabe individuals. However, Minnesota bands were not eager to relocate (Meyer 1994: 50-51), among other reasons placing no faith, from bitter experience, in U.S. promises of aid to immigrants.

The combination of pressures to open White Earth to non-Indians and to relocate Minnesota Anishinaabeg at White Earth led to the 1889 Nelson Act. The Nelson Act applied the Dawes Act to White Earth: agricultural land was allocated to Anishinaabe individuals with any surplus farmland to be sold to non-Indian settlers. Allotted land would be held in trust for twenty-five years. The Nelson Act differed from the Dawes Act in that it permitted any Minnesota

Anishinaabe individual to relocate to White Earth and receive an allotment, thus promoting the policy of concentrating Minnesota Anishinaabeg at White Earth. The Nelson Act also provided for selling off White Earth pine lands, thus acquiescing to the timber interests, while justifying the sale as a means of raising money to pay for relocation and aid to immigrants. Money from sale of land and timber would go into a "Chippewa in Minnesota Fund." All Minnesota Anishinaabeg had a shared right to this fund, unintentionally creating the foundation for a pan-reservation Anishinaabe identity (Meyer 1994: 52-53). The United States unilaterally decided that the provisions of the Nelson Act would be activated and "cession and relinquishment shall be deemed sufficient as to each of said several reservations" once two thirds of the male Anishinaabe adults agreed in writing (Nelson Act, Sec. 1). A U.S. Chippewa Commission formed and took a census of all Minnesota Anishinaabeg. The Commission negotiated with and obtained the agreement of two thirds or more adult males of every Minnesota Anishinaabe band, including the agreement of between 88% and 95% of adult males of the various bands on White Earth itself (Meyer 1994: 55). How did the Commission obtain agreement?

> Gus Beaulieu, son of [a mixed-blood] trader...heatedly argued that "there should not be a single solitary foot" disposed of by sale, but was reminded of the ultimate "authority" of the United States. The commissioners rebuked Beaulieu with paternalistic rhetoric and demanded that the Indians acquiesce in a cession "for your own safety and protection." Eventually the commissioners persuaded Wabonaquod, the most respected White Earth *ogimaa*, that selling the timberlands would provide the capital necessary to develop their resources. Although he felt too old to benefit much from the act himself, he believed that if "he was a young man" he would "overflow with joy and...profit by the opportunities now offered." With this rationale, he urged his tribespeople to take advantage of the Nelson Act, especially its educational and economic benefits (Meyer 1994: 54).

Wabonaquod apparently was also persuaded that sale of timber lands would protect the Anishinaabeg from its theft or loss from fire (Meyer 1994: 138). Individual Anishinaabeg agreed out of deference to leaders such as Wabonaquod, out of interest in the provisions for allotment combined with agricultural assistance, or out of a desire to obtain land titles as a protection from loss of land (Meyer 1994: 55). However, many Anishinaabeg only agreed on condition that they could take their allotments on their home reservations, thus nullifying the intent to extinguish title of the Anishinaabeg to other reservations through their relocation to White Earth (Meyer 1994: 56). When allotment at White Earth was completed, no surplus farmlands were available for sale to non-Indians (Meyer 1994: 137).

By 1920, thirty-one years after the 1889 Nelson Act, most of the land at White Earth had passed from Anishinaabe to non-Indian ownership. In 1867, the Anishinaabeg had controlled 837,000 acres of land at White Earth; presently, only 7% remains in Anishinaabe control (Meyer 1994: 229). Gus Beaulieu, of mixed-blood ancestry, who had argued against sale of a single foot of White Earth land, became an important agent of land transfers away from the Anishinaabeg, both mixed-blood and full-blood, in the years before 1920 (Meyer 1994: 156). How did this disaster happen?

An appreciation of the internal politics of mixed- and full-bloods at White Earth is useful in understanding how land was lost. "Mixed-blood" and "full-blood," from the Anishinaabe point of

view, were terms that characterized more cultural than racial or genetic notions. Mixed-blood Anishinaabeg dressed in clothes like those of non-Indians, lived in houses rather than wigwams, spoke English and accepted the economic and social ethics of individualistic accumulation of wealth through participation in a commercial market world. Full-bloods maintained a life built around the seasonal round of subsistence as well as market activities such as selling wild rice, maple sugar, berries, ginseng, fish, game etc.: they were "poor" (Meyer 1994: 80, 118-122). The giving away of possessions was an important aspect of full-blood socializing. Mixed-bloods tended to follow the Catholic religion, while full-bloods tended to follow the Episcopal or native religions (Meyer 1994: 107). Mixed-blood and full-blood Anishinaabeg usually socialized separately and lived in different parts of the Reservation (Meyer 1994: 128-130). Council meetings at White Earth were controlled by a clique of mixed-blood traders until 1910, when their control was challenged in the aftermath of the clique's involvement in fraudulent and unfair land transfers (Meyer 1994: 106).

The loss of most Reservation land from Anishinaabe control took place relatively quickly in a series of steps. Timber interests formed a powerful political and collusive economic force that initially acted to fraudulently depress prices of pine lands sold pursuant to the Nelson Act and then pushed for legislation that would open allotted lands to timber interests (Meyer 1994: 138-142). The 1902 Inherited Allotment Act ended the twenty-five year trust restriction on inherited lands and permitted Anishinaabe heirs to sell inherited lands with approval of the Secretary of the Interior (Meyer 1994: 141, 152). The sale of these inherited lands provided the base for the formation of non-Indian settler towns along a rail line running through the Reservation (Meyer 1994: 141). The sale of inherited land undermined Anishinaabe ownership of Reservation land; the 1904 Clapp Rider, the 1904 Steenerson Act and the 1906 Clapp Rider along with its 1907 amendment devastated Anishinaabe ownership and control.

The immediate architects of the loss of Anishinaabe land were two Minnesota politicians: Senator Moses Clapp and Congressman Halvor Steenerson (Meyer 1994: 142). They served the interests of the companies controlling the timber industry on the Reservation and non-Indian settlers. The immediate agents of land transfers were frequently the clique of Anishinaabe mixed-blood traders (Meyer 1994: 155-156). The 1904 Clapp Rider allowed the Anishinaabeg to sell the timber on their allotments (Meyer 1994: 142). However, under the Nelson Act and Dawes Act, little timber land had been allotted to individual Anishinaabeg. The Steenerson Act, which became law one week after the 1904 Clapp Rider, permitted extra allotments of land up to 160 acres to all Anishinaabeg residing on or relocating to White Earth. The practical effect of the Steenerson Act was to open all White Earth land to allotment, including unallotted pine lands that had not been sold. The Steenerson Act provided for pro rata allotments should there be insufficient land (a provision not followed in practice). The 1904 Clapp Rider, in combination with the Steenerson Act, made available for sale all timber on the Reservation through contracting with individual Anishinaabeg. Timber interests originally had the right to buy pine lands under the Nelson Act, but sales of a portion of pine lands had been slowed by the Office of Indian Affairs due to allegations of fraud in the sale process (Meyer 1994: 137-140). The Clapp Rider and Steenerson Act allowed timber interests to buy the timber throughout the Reservation without buying the land. However, under the 1904 Clapp Rider, Anishinaabeg still had to get permission from the Indian Office to contract for the sale of their timber because the twenty-five year trust restrictions still applied to Anishinaabe allotments (Meyer 1994: 151).

At this point, while individual Anishinaabeg could sell their timber, they could not sell their land, unless it was classified as inherited land, and even then permission of the Secretary of the Interior was required. Nationwide, both Indian and non-Indian interests pushed for relaxation of trust restrictions (Meyer 1994: 152). Some Indians, such as the mixed-blood Anishinaabe traders, wanted full control over their individual private property. Some non-Indians viewed Indians as racially incapable of managing their resources and saw the loss of Indian control of their resources as inevitable and something to be promoted (Meyer 1994: 152). Timber interests and settlers wanted ownership of Indian land. The Burke Act, enacted in May of 1906, allowed the Secretary of the Interior to terminate the twenty-five year trust restrictions and issue unrestricted title to allottees nationwide who were found economically competent (Meyer 1994: 152). In June of 1906, a second Clapp Rider was enacted, aimed specifically at White Earth, that ended all trust restrictions on sale or taxation of allotted land held by "adult mixed-bloods" and also "full-bloods," if the Secretary of the Interior declared the "full-bloods" to be competent (Meyer 1994: 153). The terms "mixed-blood" and "full-blood" were not legally defined in the 1906 Clapp Rider and had not appeared in the Burke Act. The 1906 Clapp Rider shifted attention from notions of economic competency, in the Burke Act, to notions of racial characteristics (Meyer 1994: 153-154) as the basis for lifting restrictions on land sales. Fraudulent land sales boomed.

> Members of the Graham Commission collected evidence between 1911 and 1912 that revealed how the Clapp Riders and Steenerson Act had actually operated. Participants and observers testified that fraud and corruption had characterized every stage of the management and sale of Anishinaabe land and timber. Irrefutable evidence indicted certain key individuals of mixed descent at White Earth....
>
> ....These illegal transfers became the basis of complex land fraud claims at White Earth that are still pending in the courts today (Meyer 1994: 156-157).

Both mixed- and full-blood allottees claimed that they had been defrauded of their land. For example, allottees said that brokers of land sales such as Gus Beaulieu misrepresented or did not inform allottees of what they were signing; brokers promised large payments that were never made; brokers defrauded minors of their allotments (Meyer 1994: 156-157). It is ironic that so many land sales violated the law, when so much effort had gone into rewriting the law to make legal land sales possible. However, allottees or their parents at times cooperated with the fraudulent activities of the land brokers out of financial self-interest (Meyer 1994: 156). Allottees, at times, reasonably had little reason to preserve ownership of allotments that they did not personally use (Meyer 1994: 155-156). Allottees who did not value their allotments had likely been victims of a fraudulent and unfair process in allocating allotments (Meyer 1994: 155).

The process of allocating additional allotments after passage of the Steenerson Act, like the later brokering of their sale, was presided over by the same mixed-blood clique in the same dishonest way (Meyer 1994: 143-150). Allottees not only lost their land by outright land sales, but also through agreeing to mortgages that were foreclosed: "My people don't realize what a mortgage is and the white people easily persuade them to give one for a small bit of money for they know they are sure to get the land then on a foreclosure" (Meyer 1994: 181-182, quoting Mezhucegeshig). Allottees who avoided losing their land through fraud or mortgage foreclosure frequently lost

their land through tax forfeiture (Meyer 1994: 210). County government officials, including at least one mixed-blood land broker and county auditor, levied high taxes on mixed-blood allottee lands, seized lands through tax forfeitures, and sold lands to private land dealers (sometimes themselves) at low prices (Meyer 1994: 210). Claims arising out of these sales of land led to later court rulings that suggested that much of the allotted land, characterized as out of trust status and thus subject to sale and taxation, was in fact wrongly characterized and illegally sold and taxed (Youngbear-Tibbetts 1991; *State v. Zay Zah*, 259 N.W.2d 580 (Minn. 1977)). The Department of the Interior, in 1979, went so far as to send letters to past and current holders of 110,000 acres of land pointing out possible defects of title.

The allotment and related policies and subsequent loss of land, not surprisingly, led to loss of Anishinaabe control over natural resources on the Reservation. Non-Indian lumber companies controlled logging and logged for short term gain through clear cutting, rather than selective cutting appropriate to a policy of sustainable yield (Meyer 1994: 211-212; cf. Ourada 1979: 173). Loggers did not concern themselves with the impact of their activities on other resources and thus built dams, for example, that destroyed wild rice (Meyer 1994: 217). U.S. government policy focussed on making the Anishinaabeg into individual property-owning farmers, and government officials wrote off those Anishinaabeg engaged in the seasonal round of subsistence activities as not productive; therefore, U.S. policymakers did not value the resources the Anishinaabeg used in their subsistence activities (Meyer 1994: 212, 217). Non-Indian buyers of allotted lands fenced and placed land off limits to the Anishinaabeg (Meyer 1994: 219). Health conditions deteriorated and emigration increased (Meyer 1994: 220-223).

> By 1916, Inspector W. H. Gibbs actually celebrated the process of dispossession that had unfolded at White Earth. To him, the impoverishment of the Anishinaabeg was but an unfortunate by-product of "the metamorphosis of an Indian reservation into a civilized, cultivated country." "Individual cases of hardship, suffering and wrong" were simply concomitants of the fulfillment of a "higher human destiny" (Meyer 1994: 224).

Inspector Gibbs echoes proponents of "modernization" and "improvement" of the commons in England and Africa. The breakup of common property into saleable allotments aided the dispossession not just of Anishinaabe landowners but also of Anishinaabe community control of Reservation resources. "Contract" ceased to be a relational problem that had to be worked out among larger Anishinaabe groups; contracts became tools for the defrauding of Anishinaabe individuals. In the years after Anishinaabe loss of Reservation land, illegal contracts became a focus of court claims. However, little land has been recovered. The White Earth Land Settlement Act of 1985 quieted title to much of the land subject to dispute while transferring monetary compensation and only ten thousand acres to the White Earth Band (Youngbear-Tibbetts 1991).

The battle at White Earth for control over management of natural resources continues under terms set in part by the history of land loss; however, recent court decisions have recognized Anishinaabe treaty rights to use natural resources on the Reservation, even where the land is owned by the county, state or federal government (Bruce, Nabokov and Tabachnick 1995; *State v. Clark*, 282 N.W.2d 902 (Minn. 1979)). Members of the White Earth Land Recovery Project, a White Earth Anishinaabe activist organization, are of the opinion that members of the White Earth Band may legally exercise hunting, fishing and gathering rights on land owned by non-Indian

private individuals within the Reservation boundaries—this issue has not yet been decided in the courts: *State v. Clark*, 282 N.W.2d 902, 910 (Minn. 1979). The wheel of history thus has turned towards a problem reminiscent of the English commons, that of common property rights concurrent with private, as well as county, state and federal land ownership at White Earth.

After the conference presentation of this paper in 1995, the Eighth Circuit upheld a lower court decision in a case opposing a number of Minnesota and Wisconsin Chippewa Bands to the state of Minnesota and several private landowners. The Eighth Circuit held with respect to *off-reservation* non-exclusive hunting, fishing and gathering rights that "[b]and members may exercise their rights only on public lands and private lands open to public hunting, fishing and gathering." Mille Lacs Band of Chippewa v. Minnesota, 124 F.3d 904 (8th Cir. 1997), rehearing en banc denied, cert. granted U.S. S. Ct., June 8, 1998. Band members may hunt and gather only on private lands that, under Minnesota law, do not require owner consent for access by the public. The court thus has acknowledged that Indian treaty rights overlap private rights of non-Indian landowners on off-reservation lands, but the court has blocked access by Indians to private land where owner consent is an issue rather than leave the matter to local negotiation or discretion. By comparison, concerning lands *within* the borders of White Earth Reservation, and in accord with *State v. Clark*, supra, county government on the White Earth Reservation has changed its past practice and currently assumes that Indians are "stakeholders" and use of county land must be negotiated between all stakeholders, Indian and non-Indian (Bruce, Nabokov and Tabachnick 1995).

The Menominee, in contrast to the Anishinaabeg at White Earth, avoided allotment and have held most of their land in common since the Menominee Reservation was established in 1857. The cultural leaders of the Menominee always insisted on sustainable cutting of the forest that would permit the trees, and thus the Menominee themselves, to "last forever" (Nesper and Pecore: 28).

> Tribal lands hold a sacred position in Menominee cultural values. The earth is deemed to be the Mother from which all living things emerge. Its ecological preservation is nothing less than a religious obligation (Preloznik and Felsenthal 1974, from statement by Shirley Daley: 68).

The Menominee now possess a shining example of a sustainably managed forest:

> When it was established by treaty with the U.S. government in the mid-nineteenth century, the reservation held an estimated 1.2 billion feet of timber, predominantly northern hardwoods. After 125 years of logging, it has produced 2 billion feet of timber, yet 1.5 billion feet are standing now and the quality of the trees and diversity of species is improving (Nesper and Pecore: 1993: 28).

How did the Menominee avoid allotment, large-scale loss of land and maintain their cultural vision and community control over Reservation resources?

The Menominee in Wisconsin faced a non-Indian lumber industry, similar to the lumber interests in Minnesota, that was eager to gain use and ownership of valuable Menominee timber (Keesing 1987: 170). The Menominee experienced social divisions between mixed- and full-bloods,

between followers of Catholic and native religions, but despite periodic attempts by lumber interests to coopt mixed-blood or other Menominee factions (Ourada 1979: 177), the Menominee councils were not dominated by an acquisitive mixed-blood clique comparable to the one at White Earth in the early 1900s. Menominee chiefs, in 1868, objected to federal authorities about the illegal cutting and fraudulent activities of a lumbering association that had obtained permission to clear "dead and down" timber on the Reservation (Ourada 1979: 144). At the urging of the timber interests, Congress passed a law in 1871 authorizing the sale of some Menominee land with consent of the Menominee governing council (Keesing 1987: 170). The Menominee council unanimously rejected selling any land. Again at the urging of the timber interests, Congress prohibited the Menominee, during 1880 to 1882, from cutting and selling timber, live or dead (Ourada 1979: 153). Wisconsin lumbering interests hoped to force the Menominee into selling off their pine (Keesing 1987: 183). The Menominee responded by pressuring the government for permission to sell their pine themselves, and in 1882 the Menominee received permission to cut "dead and down" timber (Keesing 1987: 183).

Although the Menominee held firm against the sale of any land in the 1800s, it is not clear how firmly the Menominee rejected the idea of allotment in this period. In 1869, the local Bureau of Indian Affairs Agent promoted allotment for the usual reasons: allotment would force the Menominee into the agricultural part of the Reservation, allowing the transfer of the valuable pine lands to outside lumber interests; the Menominee who became an individual property-owning farmer through allotment "would become weaned from his tribal relations, and feel and know that he was independent of tribal authority" (Ourada 1979, quoting Agent Morgan Martin: 145). In 1868, a delegation of Menominee chiefs went to Washington to complain about Agent Martin's promotion of allotment (Ourada 1979: 145). However, in 1881, the local Agent of the Office of Indian Affairs wrote: "Their urgent request at every council, besides the sale of their pine, is the allotment of their land in severalty that they may have a home of their own" (Keesing 1987: 183). The Menominee head chief Neopit, in 1882, dictated a letter favoring allotment to the local paper, the Shawano County Advocate:

> We want to sell our timber for a fair price, and we will give the purchasers four or five years to take it away in, and then we want our lands allotted to us...But we will not consent to the sale of any more land. We want it for our children and our grandchildren (Keesing 1987: 183).

The Menominee who favored allotment may have expected that allotment would be restricted to homesites only. The General Allotment Act of 1887 was never applied to the Menominee, perhaps in part because the Menominee were adamant against the sale of lands that application of the Dawes Act, in the manner of the 1889 Nelson Act, would have required, and perhaps partly because Menominee economy and ecology obviously revolved more around the forest than agriculture, and the Dawes Act was explicitly designed to convert American Indians into independent property-owning farmers.

The Menominee lumber industry boomed after 1881 (Keesing 1987: 186-187; Ourada 1979: 153-156). The lumber industry provided jobs and revenues went into a tribal fund used to pay for social services (Ourada 1979: 156). The Menominee established a new sawmill in 1886, and after 1890 Congress authorized the Menominee to cut standing green timber as well as dead timber

(Ourada 1979: 154-155). Congress authorized the annual cutting of twenty million board feet of timber, and in doing so acknowledged the importance of the prior Menominee effort to cut in a sustainable manner (Nesper and Pecore 1992: 13). The Menominee initially were allowed to mill logs only for their own use and exported whole logs to non-Indian mills. This policy changed in 1908. At about the same time the Anishinaabeg at White Earth had to contend with the political duo of Clapp and Steenerson, the Menominee were fortunate to have Senator Robert M. La Follette on their side. Senator La Follette helped the Menominee obtain permission to establish their own commercial mill, so that they would not have to export raw logs (Ourada 1979: 170). The La Follette Act of 1908 established a tribal fund (4 Percent Fund) for all revenues from the mill and continued the annual sustained yield limit of twenty million board feet (Ourada 1979: 172). La Follette, arguing on behalf of the 1908 Act, still imagined the future in terms of allotment:

> The aim of the proposed legislation is to give to Indians on reservations in Wisconsin practical instruction and experience in the management of their own business, and thus to prepare them against the time when their land shall be allotted, their restrictions entirely removed, and they be compelled to assume the complete management of their own affairs (Ourada 1979, quoting La Follette: 171).

However, he explicitly advocated in favor of sustainable forestry:

> The care, the preservation, of these forests should be the Indian's interest and his work....the harvest of the crop of forest products should be made in such a way that the forest will perpetuate itself; that it shall remain as a rich heritage to these people from which, through their own labor, they may derive their own support, and that, too, without ruthless destruction. (Ourada 1979, quoting La Follette: 171).

The La Follette Act put the United States Forest Service in control of the Menominee timber industry. The Forest Service, in accord with the La Follette Act, adopted a policy (not necessarily followed in practice) of selective rather than clear-cutting, leaving in place trees needed to act as a windbreak and to reseed for the next cut (Ourada 1979: 172-173; 185). Despite positive aspects of Forest Service management, the lack of Menominee control over their own mill and logging operations would lead to constant tensions and complaints (Keesing 1987: 232-235).

Allotment suddenly became an issue in 1920. The Reservation Superintendent Edgar Allen, as well as some young Menominee and outside organizations such as the "Indian Rights Association" claimed that poverty and lack of "progress" on the Reservation was caused by the failure to allot land (Ourada 1979: 179; Keesing 1987: 235). The Menominee Council, in 1919, voted in favor of allotment with one dissenting vote (Ourada 1979: 179). However, other Menominee organized in opposition to allotment and obtained support from Congressman Schneider (Ourada 1979: 179). Congress let the allotment plan drop. In 1928, the Merriam Commission reported on problems in American Indian Reservations nationwide. Researchers visited the Menominee Reservation and wrote that problems of poverty on the Reservation were not caused by allotment but were problems found as well on Reservations that had suffered through allotment. The Merriam Commission recommended abandoning the idea of allotment for the Menominee Reservation and other Reservations with rich natural resources and instead urged

tribal incorporation to protect the Menominee forest (Ourada 1979: 179-180). After 1928, allotment faded as the ultimate and inevitable solution to Menominee "progress."

Since the Menominee kept alive common ownership and cultural reliance on sustained use of the forest, they had to find an appropriate legal form for the management of the forest, a legal form that differed from individual private ownership and individual contracting. In the years before 1961, management of resources was divided between a ten member elected Advisory Council and General Tribal Council and the hierarchical business operation of the mill under U.S. Forest Service control—the mill workers were mostly Menominee (Ourada 1979: 185; Nesper and Pecore 1993: 29). All adult enrolled Menominee, male and female, were entitled to attend and vote at General Council meetings (Preloznik and Felsenthal 1974: 56). The Advisory Council made decisions affecting daily business affairs. The decisions of the Advisory Council could be reversed by the General Council or the Secretary of the Interior. The Advisory Council made fish and game regulations, for example, in 1947, banning sale of fish and game by Menominee to restaurant owners (Ourada 1979: 188). The Forest Service was supposed to manage the mill and logging operations in accord with the sustainable-yield provisions of the 1908 La Follette Act and with the Menominee cultural principle that tied community survival to sustainable use of the forest. Prior to 1961, Menominee land continued to be held in trust for the Menominee by the Secretary of the Interior, thus exempting the Menominee from state and federal taxes. The Menominee used revenues from the mill and from other sources to build a hospital and clinic and pay for their own police and courts (Huff and Pecore 1995: 5). In 1954, the tribal 4 Percent Fund held over ten million dollars, due in part to successful law suits against the federal government for forest mismanagement (Huff and Pecore 1995: 5).

The Menominee success in keeping their land, maintaining sustainable use of resources, using revenues to operate services and generally in keeping alive their cultural vision was threatened by termination of their federally recognized status as a tribe possessing land protected by federal trust. In 1953, the Menominee Advisory Council was manipulated into voting in favor of termination by Congressmen who wanted to end federal obligations towards American Indian tribes (Ourada 1979: 191-192). Many Menominee feared termination, seeing it as a threat on the same order as allotment:

> The Menominee people are painfully aware of [the possibility of loss of land made private, taxable property] by looking around at the Stockbridge, Chippewa, the Potawatomi, and other tribes in our areas, all of whom had reservations but lost them after they were allotted and given fee patents (Ourada 1979, quoting Antoine Waupochick: 202).

Politicians favoring timber or recreational interests proposed buying out the property rights held in common by individual Menominee so that a state or federal forest could be established; however, the idea had to be abandoned as too expensive (Ourada 1979: 197).

With termination, the Menominee had to replace the old legal forms. The Reservation became a state county subject to state and county taxes (Ourada 1979: 193). The state took the position that Menominee hunting and fishing treaty rights had been abrogated by termination, and so state game laws applied on former Reservation land (Preloznik and Felsenthal 1974: 58-59). State Game Wardens arrested Menominee for hunting deer on the former Reservation, thus threatening

Menominee access to food. The U.S. Supreme Court, in 1968, ultimately rejected the state's arguments and upheld Menominee hunting and fishing rights (Preloznik and Felsenthal 1974: 59). The newly created county was responsible for county services except for courts and high schools (Ourada 1979: 200). The Menominee thus became subject to non-Indian schooling and policing. The most devastating change, as a consequence of termination, was the loss of Menominee decision-making control over the use and sale of Menominee land. This change, coupled with excessive tax burdens compared to revenues on the newest, and poorest county in Wisconsin, led to the first loss of land since the establishment of the Reservation (Ourada 1979: 204-207). Ironically, termination, which non-Indian politicians had expected would reduce federal obligations, led to increased federal and state aid to the Menominee while at the same time frustrating the ability of the Menominee to manage their resources and gain a subsistence living (Ourada 1979: 204-205).

Following termination, the Menominee lost decision-making control over their land through a poorly designed corporate structure that took over ownership and control of former Reservation property. Congress had intended that Menominee control over land ownership should be protected, despite termination:

> Mr. Watkins: The bill provides that [the Menominee] can write into their own agreement, in whatever organization they set up, which will probably be a corporation, a restriction on alienation, so that the property cannot be disposed of, or someone cannot take it away from them.
>
> Mr. Chavez: That is the point I wanted to make, because once in a while when we pretend to give the Indians a little freedom, all we do is open up opportunity for a land grab somewhere...
>
> Mr. Watkins: It cannot happen to these Indians, because after all is said and done, the ultimate decision will be their own...(Preloznik and Felsenthal 1974, quoting from 99 Cong. Rec. 9746 (1953): 60)

In meetings of the General Council to discuss plans for termination, no one spoke in favor of permitting land sales (Preloznik and Felsenthal: 60). However, those present at the General Council finally agreed to the sale of homesites to individual Menominee, ending common ownership of homesite land (Preloznik and Felsenthal: 60). Those planning for termination decided to form a tribal corporation, Menominee Enterprises, Inc., (MEI), under Chapter 180 of the Wisconsin Statutes relating to business corporations (Ourada 1979: 200). Other than homesites, land would continue to be held in common, with legal title and management powers vested in MEI (Preloznik and Felsenthal 1974: 57).

MEI held legal title in trust for individual Menominee as beneficiaries. A four-member committee of Menominee planners worked in concert with a committee established by the Wisconsin Legislature to design the corporate structure. These two committees decided that the Menominee as a whole were not capable of managing tribal property through MEI. They therefore created a Voting Trust made up of 7 members, 4 Menominee and 3 non-Menominee (Preloznik and Felsenthal 1974: 57). This Voting Trust became the actual controlling body of the corporation.

Each Menominee received trust certificates, not stock, which represented 100 shares of stock and which entitled the trust certificate holder to vote for the members of the Voting Trust on a staggered basis. Legally, the trustees of the Voting Trust became the actual stockholders and thus had all the powers of stockholders. The trustees in turn elected MEI's Board of Directors (Preloznik and Felsenthal 1974: 61). The trustees claimed even to have the power to sell land to non-Menominee, despite the expressed intent of Congress and the tribal members at the General Council meetings that sales of land not be permitted except by agreement of the whole tribe. The Menominee appeared to hold a bare majority control over MEI, and thus over their property, due to their 4 members. However, trust certificates issued to minors and incompetents were placed in an Assistance Trust with the First Wisconsin Trust Company (Preloznik and Felsenthal 1974: 63). These certificates amounted to 43% of all trust certificates. The Assistance Trust was effectively able to control elections for trustees of the Voting Trust, and thus also elections for the MEI Board of Directors, by voting its 43% share of trust certificates in a block. The Assistance Trust, managed by the First Wisconsin Trust Company, therefore, effectively controlled the Voting Trust, MEI and the management of tribal property, in complete contravention of Congressional and tribal intent in planning for termination.

MEI ran into financial trouble in the mid 1960s, due to increased county taxes (Preloznik and Felsenthal 1974: 64). MEI decided to sell land to a developer of a large recreational housing site within the former Reservation. The developer created a large artificial lake by damming nine small natural lakes and swamplands, thus destroying particularly rich hunting and fishing grounds (Preloznik and Felsenthal 1974: 67). The developer planned to sell 2,600 lots to non-Menominee on the 5,170 acre site (Ourada 1979: 208).

The Menominee organized to take back management control of MEI, stop land sales and, ultimately, to gain restoration of the land to federal trust status as a Reservation. The Menominee formed an organization, DRUMS (Determination of Rights and Unity for Menominee Stockholders), that in 1971, after a series of battles, succeeded in gaining control of the Voting Trust. Although further land sales could be stopped, land already sold or slated for sale by the developer could not be recovered except by a slow process of purchase by the tribe (Preloznik and Felsenthal 1974: 66-67).

In 1973, the Menominee succeeded in convincing Congress to repeal termination and restore the federal relationship that recognized the Menominee as a tribe and obligated the federal government to assist the Menominee (Preloznik and Felsenthal 1974: 68). Under restoration of tribal rights, the Menominee tribal roll, which had been closed at termination, was reopened so that Menominee children could be recognized by law as American Indians (Preloznik and Felsenthal 1974: 70). However, under the restored relationship, the Menominee are no longer subject to the degree of paternalistic domination by the Bureau of Indian Affairs and the U.S. Forest Service that existed pre-termination.

The current relationship between the Menominee and the federal government is based on the 1975 Trust and Management Agreement and Indian Self-Determination Act (Huff and Pecore 1995: 25). The federal government provides funds to assist the Menominee in caring for the forest, including paying salaries of Bureau of Indian Affairs and state of Wisconsin foresters stationed at the Reservation (Huff and Pecore 1995: 7). The federal government has a forest management

contract with the Menominee; under the contract, the Menominee manage the forest according to the terms of a Forest Management Plan that is reviewed by the Secretary of the Interior; the Secretary of the Interior annually approves management of the forest as part of the government's trust responsibilities (Huff and Pecore 1995: 7). Both the Menominee and the federal government are legally obligated to manage the forest for the benefit of future generations (Huff and Pecore 1995: 7).

The Menominee Tribe has its own Constitution and Bylaws and is recognized as a sovereign nation by the United States. The Menominee have their own executive, legislative, judicial and police powers. Government is divided into the Menominee Tribal Legislature and the Menominee Tribal Judiciary (Huff and Pecore 1995: 7). Menominee Tribal Enterprises (MTE) operates the mill and logging businesses (Huff and Pecore 1995: 11). A 12-member Board of Directors sets policies for MTE; board members are elected for three-year terms and are required to be enrolled Menominee tribal members (Huff and Pecore 1995: 12). The Menominee Tribal Legislature may not interfere with the operation of MTE, although the Legislature has ultimate control over disposition of Menominee property, within the limits of the property's federal trust status. For example, no land can be sold without permission from Congress (Huff and Pecore 1995: 7).

## CONCLUSION

Problems of common property in land tenure are not easily reduced to a formula that can be carried about from place to place, although the old formula, equating conversion of common to individual private property with spiritual enlightenment and the progress of civilization, appears and reappears with the persistence of dandelions. Future generations may look back at the dramatic cures imposed by social planners over the last century in the same way we look back at the obsession of the heroic age of medicine with purges and blood-letting.

The economic, utilitarian and legal idea of the autonomous individual owner is essentially a poetic idea in which the ownership claims of the community and family members disappear and in their place arise the free individual on the one hand, and the state on the other. Ownership becomes a bundle of rights held by the individual. State regulation of property becomes a taking from this bundle of rights. In those places where legal recognition of common ownership survives, family and community members reappear in law as co-owners, but this reappearance challenges the poetry of the free individual in the stories of liberal economists and lawyers. Yin and yang, light and dark, individual and community. It is the fate of poetry to live with its contradictions, rather than resolve them.

The experience of American Indians who have fought against loss of control over land can be compared to that of Africans, such as Somali villagers fighting urban charcoal merchants for control of their forest, and compared as well to that of English commoners evicted by their wealthier neighbors from the commons. The discussion of the allotment and subsequent alienation of American Indian lands, of state non-recognition of common property rights in Africa, and of the enclosure of the commons in England suggests that one should avoid using state power to impose rapid conversion of land from common property to individual property. Such rapid conversions are destructive of social organizations, may be ecologically unwise, and they violate the legal rules that protect property rights. African states should not refuse legal recognition to

local common property rights and the power of local authorities to manage land. Actual local land rules and institutions need to be integrated into the legal and bureaucratic operation of the state. One can, as in Sierra Leone, create a system of local and higher courts that are consistent in their application of local land rules, but in a manner that does not codify in advance those rules—relying instead on the flexibility of custom. As in Sierra Leone, and in a manner reminiscent of the Menominee Reservation, one could declare all rural land inalienable, thus freezing in place the status of land as common property. Alternatively, one could adopt laws that permit registration of land as alienable individual private property, but only where local conditions have evolved to the point where such registration is consensual and fair between members of a community and family, and is ecologically sound. Local communities must have control over whether conversion of common to individual property takes place and, if it takes place, the rate at which legal recognition of such individualization occurs. The Machakos District in Kenya may be an example of such an evolution leading to consensual registration of land. Presumably people will consent to giving up their common property rights if they feel they can afford to do so, both in terms of their economic self-interest and in terms of community values and social organization. However, the case studies of the Menominee and White Earth Reservations illustrate the great vulnerability of poor rural communities to social and ecological devastation by powerful outside industrial interests, particularly where outside interests combine with acquisitive insiders. The Menominee, by comparison to the Anishinaabeg at White Earth, have had great success in preserving and improving the ecology of their forest due to their common property regime that restricts individual private tenure and alienation, and due also to a legally recognized community policy of sustainable forestry. The Menominee sustainable forestry policy is legally recognized not only by the local Menominee community (and sovereign nation), but by the United States as well in its role as federal trustee of Reservation land. Many communities in Africa would appreciate similar state guarantees of local community policies of sustainable forestry.

What is a contract, how is it conceived, what does it do in society? Legal forms of contract, property and corporate law are social constructions embedded with cultural assumptions and a history of use that may conflict with the needs of a community into which such forms are imported. Legal forms may even be of more symbolic than actual usefulness in the society that made and proudly exports them. U.S. commercial contract law assumes that contracts are made by autonomous individuals possessing individual private property; the government's role is limited to enforcing consensual bargains according to their terms recorded at a discrete moment of time. In the U.S., businesses may opt out of such a contract model because they need to focus on a maintaining a relationship with contracting parties—a relationship that changes over time. These businesses prefer to view contract as a flexible governing framework subject to mediation or arbitration outside of courts. Conventional contract law does not help parties engaged in long-term, repetitive social as well as business relationships. Rural Africa is quintessentially a world of vibrant, informal networks of relationships. Conventional U.S. contract and property law is not likely to be appropriate in such a world, any more than it is under such conditions in the U.S. Contracting involving land and its natural resources in Africa frequently requires that parties be players in local networks sensitive to long-term social and political concerns. One cannot contract with respect to land in the form of a discrete, commercial transaction between autonomous, independent individuals backed up by a state court in the event of dispute. A contract, in a relational world, whether in Africa or the U.S., becomes a symbol of a long-term local relationship. Just as U.S. businesses resort to out-of-court dispute settling forums, disputes over

rural contracts relating to land should go to local mediators and to customary courts that represent local authority and know local customs. Ultimately, what is at stake is the ability of local communities to manage their resources and protect their social organization—their particular poetry. Effective local-level contracting in Africa requires that the state act as guarantor of local authority without destructively interfering in local discourses. When disputes cannot be resolved in local forums, the state forums, whether state courts or Ministries, should maintain a field of reasoning consistent with local customs. Maintaining the same field of reasoning is not the same thing as being locked into a specific outcome, since local customs provide for flexible decisions as circumstances change.

The disastrous experience of the Menominee with the importation of a U.S. corporate legal form illustrates the dangers of such legal naivete (on the part of the U.S. as much as the Menominee). The Menominee replaced their democratic councils with a corporate form taken from the state of Wisconsin business code. They replaced forums open to the community, and that kept control over fundamental decisions concerning land-use in the community, with a corporate structure that was so closed to the community that a non-Menominee Trust Company controlled the controversial decision to sell land to a non-Menominee developer of an artificial lake and recreational lakeshore lots. The White Earth and Menominee case studies also show the need for community control over local tax policies.

U.S. communities can learn from the ability of African communities to cope with overlapping property rights and to conceive of property not purely in terms of the individual and the state but also in terms local networks of relations. Where treaty hunting, fishing and gathering rights overlap non-Indian land, American Indians and neighboring U.S. communities and landowners enter a relational world of common rights overlapping individual rights. American Indians have shown an ability to think of land and natural resources in terms of maintaining long-term community relationships, but they may be surrounded by people who feel that there is no point in owning land if they cannot fence out the rest of the world. Increasingly, landowners in the United States argue that government regulation, for example to protect wetlands or shorelines, takes from the potential development value of the landowner's real property, and so government should compensate landowners for such takings. However, if government regulatory authority were seen as an expression of community property rights overlapping individual property rights, as is the case when American Indians assert their overlapping treaty rights, then the takings argument of landowners is undermined. For example, government could point out that landowners' proposed development takes from the government property interest in conserving wetlands, and so if development occurred, government would be entitled to compensation from landowners. An example of such overlapping property rights occurs where the government has acquired conservation easements permitting a farmer to farm but not develop farmland. When government regulates owners of land by rivers to prevent these private owners from affecting the public waterway, government may do so under a public trust doctrine, as in Wisconsin, that makes the government trustee of the public property interest in the waterway and opposes that public property interest against private assertion of property rights. Non-governmental organizations that work on development projects in Africa are likely to find themselves in confusing legal environments of the sort described in Guinea. State law concerning land and natural resources may be conceptually at odds with local common property regulation. NGOs should take seriously the legal meaning of their actions and try to create ad hoc bridges between the state and local

legal systems. NGOs, for example, should make contracts concerning land and natural resources that fit within local notions of relational contracting and use local customs and authorities that regulate common property, even when, and particularly when, the state ignores local rules. Contracts that bring together representatives of local and state authority and provide for local forums of dispute settlement are one way to bridge state and local legal systems. Ultimately, such states are in need of national legal reform that creates a legal place for local relational rules; in the meantime, NGOs can help create legal precedents and legal momentum for such reform by approaching problems of contract in a way that fits with a relational world.

The reader should keep in mind that this paper focuses on issues involving the tension between common property in land and the individualization of property. Much more could be said concerning the reform of situations where ownership of land is highly concentrated, or where land truly is in a state of open access, both from the state and local point of view, and so no local authority exists to regulate the land as common property. In situations of true open access, the problem may be to create local institutions that can convert open access property to regulated common property.

## REFERENCES


Barrows, Richard L. 1974. "African Land Reform Policies: The Case of Sierra Leone." *Land Economics*, November. Madison: University of Wisconsin Press.

Berry, Sara. 1993. *No Condition Is Permanent*. Madison: The University of Wisconsin Press.

Bohannan, P. J. 1964. "Land Use, Land Tenure, and Land Reform." In *Economic Transition in Africa*. Evanston: Northwestern University Press.

Bruce, John. 1993. "Do Indigenous Tenure Systems Constrain Agricultural Development?" In *Land in African Agrarian Systems*, edited by Thomas J. Bassett and Donald E. Crummey. Madison: The University of Wisconsin Press.

Bruce, John W., Shem E. Migot-Adholla and Joan Atherton. 1994. "The Findings And Their Policy Implications: Institutional Adaptation Or Replacement." In *Searching For Land Tenure Security In Africa*, edited by John W. Bruce and Shem E. Migot-Adholla. The World Bank. International Bank for Reconstruction and Development. Dubuque: Kendall/Hunt Publishing Company.

Bruce, John W., Peter Nabokov and David Tabachnick. 1995. "Walkabout Report, White Earth Reservation, Minnesota." Madison: Land Tenure Center.

Bromley, Daniel W. 1995. "Rousseau's Revenge: The Demise of the Freehold Estate." Lecture in the North American Land Tenure Seminar Series, Land Tenure Center, University of Wisconsin-Madison.

Bromley, Daniel W. and Michael Cernea. 1989. "The Management of Common Property Natural Resources: Some Conceptual and Operational Fallacies." World Bank Discussion Paper 57. Washington D.C.: World Bank

Clinton, Robert N. 1993. "Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law." 46 *Arkansas Law Review* 77.

Commissioner of Indian Affairs. 1887. *Annual Report Of The Commissioner Of Indian Affairs To The Secretary Of The Interior For The Year 1887*. Washington: Government Printing Office.

Defoe, Daniel. 1781. *The Life and Adventures of Robinson Crusoe*. London: Printed for Harrison and Co.

Durkheim, Emile. 1983. *Durkheim and the Law*, edited by Steven Lukes and Andrew Scull. New York: St Martin's Press.

Eggertson, Thrain. 1993. "Analyzing Institutional Successes and Failures: A Millennium of Common Mountain Pastures in Iceland." In *The Political Economy of Customs and Culture:*

*Informal Solutions to the Commons Problem*, edited by Terry L. Anderson and Randy T. Simmons. Lanham: Rowman & Littlefield Publishers Inc.

Elbow, Kent M. 1994. "Popular Participation in the Management of Natural Resources: Lessons from Baban Rafi, Niger." Madison: Land Tenure Center, University of Wisconsin-Madison.

Fischer, Julie et. al. 1993. "Preliminary Report on Natural Resource Management Practices and Tenure Constraints and Opportunities in the Diafore Watershed, Fouta Djallon, Guinea." Report prepared for USAID/Guinea. Madison: The Land Tenure Center, University of Wisconsin-Madison.

Fischer, Julie E. 1994. Personal communication.

Fischer, Julie E. 1994/95. "Tenure Opportunities and Constraints in Guinea: Resource Management Projects and Policy Dialogue." *Land Tenure Center Newsletter,* Winter. Madison: Land Tenure Center, University of Wisconsin-Madison.

Foucault, Michel. 1980. *Power/Knowledge*. New York: Pantheon Books.

Frankel, Tamar. 1993. "The Legal Infrastructure of Markets: The Role of Contract and Property Law." *Boston University Law Review* 73: 389.

Freudenberger, Karen Schoonmaker, Nfa Adama Camara, Yacouba Camara, Mamadou Saliou Diallo, Julie E. Fischer, Sidiki Kourouma, Pierre Lamah. 1994. "Le Foncier et la Gestion des Ressources Naturelles en Haute-Guinee: Une Etude de Cas du Terroir de Balandou." In Presentation des Premieres Etudes de Cas: Le Foncier et La Gestion des Ressources Naturelles en Haute-Guinee. August. Madison: The Land Tenure Center, University of Wisconsin-Madison.

Freudenberger, Mark Schoonmaker, Tor Claussen, Susan Gannon, Demba Komma. 1993a. "Institutions and Natural Resource Management in The Gambia: A Case Study of the Foni Jarrol District." Edited by Mark Schoonmaker Freudenberger. Madison: The Land Tenure Center, University of Wisconsin-Madison.

Freudenberger, Mark Schoonmaker. 1993. *Land Tenure, Local Institutions and Natural Resources in Senegal*. Synthesis. Madison: The Land Tenure Center, University of Wisconsin-Madison

Freudenberger, Mark S. and Paul Mathieu. 1993. "The Question of the Commons in the Sahel." Preliminary version. December. Madison: Land Tenure Center, University of Wisconsin-Madison.

Freudenberger, Mark Schoonmaker. 1994a. Personal communication.

Freudenberger, Mark Schoonmaker, Boubacar Thiam, Ibrahima Kalil Kourouma. 1994. "Le Foncier et la Gestion des Ressources Naturelles en Haute Guinee: Une Etude de Cas du Terroir de Norassoba (Sous-Prefecture de Norassoba, Prefecture de Siguiri)." In Presentation des

Premieres Etudes de Cas: Le Foncier et La Gestion des Ressources Naturelles en Haute-Guinee. August. Madison: The Land Tenure Center, University of Wisconsin-Madison
Funk, Ursula. 1988. "Land Tenure, Agriculture and Gender in Guinea-Bissau." In *Agriculture, Women and Land*, edited by Jean Davison. Boulder: Westview Press.

Gaudreau, Martha, Peter Gilruth, G. Edward Karch, Karen LeAnn McKay, Barton Sensenig. 1990. "Evaluation de la Gestion des Ressources Naturelles dans la Republique de Guinee." Prepared for USAID/Guinea. Prime Contractor: E/DI, Washington, D.C., and Principal Subcontractor: Development Alternatives, Inc., Washington, D.C.

General Allotment Act of Feb. 8, 1887, (Dawes Act), 24 Stat. 388, I Kappler 33.

Hardin, Garrett. 1968. "The Tragedy of the Commons." *Science* 162.

Huff, Paula Rogers and Marshall Pecore. 1995. "Case Study: Menominee Tribal Enterprises (Menominee Reservation, Wisconsin, USA)." January. Madison: Institute for Environmental Studies and the Land Tenure Center, University of Wisconsin-Madison.

Jones, Carol A.G. 1994. "Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China." *Social and Legal Studies* 3: 195-221.

Keesing, Felix M. 1971. *The Menomini Indians of Wisconsin*. New York: Johnson Reprint Corp.

Kelly, Lawrence C. 1990. *Federal Indian Policy*. New York: Chelsea House Publishers.

Lawry, Steven W. 1989. "Tenure Policy And Natural Resource Management in Sahelian West Africa." Madison: Land Tenure Center, University of Wisconsin-Madison.

Lawry, Steven W. 1990. "Tenure Policy Toward Common Property Natural Resources in Sub-Saharan Africa." *Natural Resources Journal* 30.

Leisz, Steven. 1994. Personal communication.

Macauley, Stewart. 1994. Personal communication. (He has published his research on these issues. See, for example: "Non-contractual Relations in Business: A Preliminary Study." 28 *American Sociological Review* 565, 1963.)

Macpherson, C.B. 1962. *The Political Theory of Possessive Individualism Hobbes to Locke*. London: Oxford University Press.

Marx, Karl. 1973. *Grundrisse*. Translated by Martin Nicolaus. New York: Random House.

Meyer, Melissa L. 1994. *The White Earth Tragedy*. Lincoln: University of Nebraska Press.

Moorehead, Richard. 1991. *Structural Chaos: Community and State Management of Common Property in Mali* thesis for DPhil, University of Sussex.

Moorehead, Richard. 1989. “Changes Taking Place in Common-Property Resource Management in the Inland Niger Delta of Mali.” In *Common Property Resources*, edited by Fikret Berkes. London: Belhaven Press.

Nassar, Naglar. 1995. *Sanctity of Contracts Revisited: A Study In The Theory And Practice Of Long-Term International Commercial Transactions*. London: Martinus Nijhoff Publishers.

Neeson, J.M. 1993. *Commoners: common right, enclosure and social change in England, 1700-1820*. Cambridge: Cambridge University Press.

Nelson Allotment Act of 1889, 25 Stat. 642, I Kappler 301.

Nesper, Larry and Marshall Pecore. 1993. “The Trees Will Last Forever.” *Cultural Survival Quarterly*, Spring.

Obiora, Leslye. 1994. “Law, Colonialism and Contracts.” Preliminary Working Draft. Symposium on Law, Colonialism, and Contracts in Africa. May. Joint Stanford-Berkeley Center for African Studies together with UCLA and the Stanford Humanities Center.

Ostrom, Elinor. 1990. *Governing The Commons*. Cambridge: Cambridge University Press

Ourada, Patricia. 1979. *The Menominee Indians: a History*. Norman: University of Oklahoma Press.

Painter, Thomas M. 1991. “ Approaches to Improving the Use of Natural Resources for Agriculture in Sahelian West Africa. A sociological analysis of the ‘Amenagement/Gestion des Terroirs Villageois’ Approach and its Implications for Non-Government Organizations.” Final Report. Care International.

Parsons, Talcott. 1968. *The Structure of Social Action*. Volume 1. New York: The Free Press.

Pecore, Marshall. 1992, “ Menominee Sustained Yield Management.” *Journal of Forestry*, July.

Polanyi, Karl. 1944. *The Great Transformation*. Beacon Press: Boston.

Preloznik, Joseph F. and Steven Felsenthal. 1974. “The Menominee Struggle To Maintain Their Tribal Assets And Protect Their Treaty Rights Following Termination.” *North Dakota Law Review*, 51.

Razzaz, Omar. 1994. “Contestation and Mutual Adjustment: The Process of Controlling Land in Yajouz, Jordan.” *Law and Society Review* 28.

Republique de Guinee, Ministere de l’Agriculture et de Ressources Animales, Direction Nationale du Genie Rural, Division des Amenagements Hydro-Agricoles. 1992. “Guide pour les

Amenagements de Bas-Fonds. Premiere Partie: Problemes socio-economiques et fonciers." Projet National d'Infrastructures Rurales.

Republique de Guinee. Code Civil de la Guinee. Adoptee par loi 004/APN/83 du 16 Fevrier 1983.

Republique de Guinee. Code Foncier et domanial, 0/92/019 du 30 mars 1992.

Shepherd, Gill. 1989. "The Reality of the Commons: Answering Hardin From Somalia." *Development Policy Review* 7: 51-63.

Shipton, Parker, 1992. "Debts and Trespasses: Land, Mortgages, and the Ancestors in Western Kenya." *Africa* 62.

Tabachnick, David. 1974. "Political and Social Aspects of Land Tenure in Bumpe and Kakua Chiefdoms, Sierra Leone." Unpublished Manuscript.

Tabachnick, David. 1994. " A Review of Natural Resource Laws and Implementation of the Land Code in Guinea." Prepared for USAID/Guinea. Madison: The Land Tenure Center, University of Wisconsin-Madison.

Tawney, Richard H. 1912. *The Agrarian Problem In The Sixteenth Century*. New York: Sentry Press, Inc.

Teeven, Kevin M. 1990. *A History of the Anglo-American Common Law of Contract*. New York: Greenwood Press.

Tiffen, Mary. 1976. *The Enterprising Peasant. Economic Development in Gombe Emirate North Eastern State, Nigeria, 1900-1968*. London: Her Majesty's Stationary Office.

Tiffen, Mary; Michael Mortimore; Francis Gichuki. 1994. *More People Less Erosion*. Chichester: John Wiley & Sons.

Tiffen, Mary. 1995. Personal communication.

Turner, Michael. 1984. *Enclosures In Britain 1750-1830*. London: Macmillan Press.

Upham, Frank K. 1994. "Speculations on Legal Informality: On Winn's 'Relational Practices and the Marginalization of Law.'" *Law and Society Review* 28.

Weber, Max. 1978. *Economy and Society. Volume One.* Edited by Guenther Roth and Claus Wittich. Los Angeles: University of California Berkeley Press.

White Earth Land Settlement Act of 1985, P.L. 99-264, 100 Stat. 61.

Williamson, Oliver E. 1985. *The Economic Institutions of Capitalism*. New York: The Free Press.

Winn, Jane Kaufman. 1994. “Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Businesses in Taiwan.” *Law & Society Review* 28.

Youngbear-Tibbetts, Holly. 1991. “Without Due Process: The Alienation of Individual Trust Allotments of the White Earth Anishinaabeg.” *American Indian Culture and Research Journal* 15.

Zey, Mary. 1992. *Decision making: alternatives to rational choice models*, edited by Mary Zey. Newbury Park: Sage.