LEGAL DISCRETION IN A TERRITORIAL JUSTICE SYSTEM: THE CASE OF THE TERRITORY OF GUAM

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A sociologist examines the place of customs and tradition in the definition of "legal discretion" in the Territory of Guam, a dependency of the United States, utilizing the concept of double-institutionalism as the basis for such definition in the resolution of the dialectic between custom and law. The contemporary resolutions between customary practices and constitutional law in Guam are described and evaluated using both written and interview material. The findings suggest the internal politics of a state is the synthesis of this dialectic between custom and law. The absence of constitutional bases in law in any political state necessarily deformalizes the synthesis of the primacy of law for settling disputes.

Previous research into the relationship between custom and law has tended to split the two into separate conceptual entities, custom more the subject of anthropological examinations and law of legal and sociological studies. Either custom or law, of course, may still be doubly-institutionalized into social or political activity as legal administration (Bohannon 1965), by formalization of customary practices under law (Nonet and Selznick 1978) or by self-definition. Either way, somehow the law is differentiated from custom in some concrete and definable way: "Whereas custom continues to adhere in, and only in, these institutions which it governs (and which in turn govern it), law is specifically recreated, by agents of society, in a narrower and recognizable context—that is, in the context of the institutions that are legal in character and, to some degree at least, discrete from all the others" (Bohannon 1965:34)

However, a criticism of this very double-institutionalism of the law states

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that "[n]o contemporary institution functions with the kind of autonomy that permits us to postulate a significant dialectic between law and custom" (Diamond, in Black and Mileski 1973:320). As will be illustrated below, the microstates of Micronesia may indeed provide that very dialectic between custom and law in the construction, practice, and application of their own traditions and laws to which both of these views, traditional and legal, might be evaluated.

Micronesia is home to five political entities: two republics, a federation of island states, a commonwealth, and an unincorporated territory under control of the United States. These microstates are home to micropolitics (De Smith 1970) and they share a similar imperialistic or colonial history (Kaplan and Pease 1993; Farrell 1991; Smith 1991; Ridgell 1988; Alkire 1977; Hass 1940) as well as legal history, at least for the most part (Tamanaha 1993; Kluge 1991; Ghai 1988; Sack 1982; Nufer 1978). They are likewise similar in the level of formalization expressed in their legal systems, laws, and judicial procedures for social control (Ntumy 1993; Nader 1978; Nonet and Selznick 1978; Black 1976; Schwartz and Miller 1964).

This research looks at the microstate and micropolitics of the Territory of Guam, a dependency of the United States, seeking to define the "dialectic between law and custom" that presumably does not exist by either custom or law alone.

The Relationship between Custom and Law

The relationship between custom and law is generally considered dichotomously. This conceptual split between custom and law is not absolute, for both can be seen on a continuum for defining moral and conventional behavior from the least to most formal and from more to less repressive. Constitutionalism, stipulating itself as a supreme formal construction of the law, suggests a possibility of also formalizing custom in a legal or formal way: "The uniformity of custom, of outlook, that he sees spread about him seems convincing enough, and conceals him from the fact that it is after all a historical accident. He accepts without more ado the equivalence of human nature and his own cultural standards" (Benedict 1934:6). This equivalence is equivocal, however. What is found in custom is not always translated into law. In the United States, for instance, the common law is based more in precedence over statute. Constitutionally, the *explicit* allowance for tradition and custom (or the common law), often relating to issues of property, creates the constitutional issue: "The customary and the legal orders are historically, not logically related. They touch coincidentally; one does not imply the other. Custom, as most anthropologists agree, is characteristic of primitive society.

. . . In the words of Jeremy Bentham, 'Property and law are born together and die together' " (Diamond, in Black and Mileski 1973:320–321, 322).

Consequently it is the relations of economics and politics as expressed in law, first in the constitution of a given state and then elsewhere in its legal codes, that are important to define. The character of a traditional or customary culture may in fact be explicitly formalized in its constitution and laws.

Such a contention is nothing new to sociologists, of course. As Weber proposed, "Law, convention, and custom belong to the same continuum with imperceptible transitions leading from one to another" (1978:319). Such imperceptible transitions may be socially definable, however. Durkheim took note of the transition from mechanical to organic law (or from repressive culture to enlightened law) in the social organization responsible for the enforcement of the law itself. He says that "the functioning of repressive justice tends to remain more or less diffuse. In very different social systems, it does not function through the means of a social magistracy, but the whole society participates in a rather large measure" (Durkheim 1933:76). This functional view of defining the law is mirrored as well by Sorokin, who notes that "moral phenomena can be divided into two main classes: *the moral or ethical* in the narrow sense of the term, and the *juridical (or legal)*" (1937:481; emphasis in original).

In making the transition from a study of the law to more of a study of who enforces the law (or how it can be enforced), such functionalism creates something of an "action" theory of the law and how it is used within a social context. For instance, both Roman and Anglo-Saxon law

> require a specific, not generally widespread, specialist study for their realisation in daily use and further development, and this is not only in the sense of knowing the current norms in respect of their content, but beyond that also in respect of experience and capacity for judgment as to the operative potential of the concepts, the behavioral and argumentation possibilities in legal dispute and the practical chances of achieving certain legal effects, in short: a control of precisely the open, alternative producing, aspects of a normative structure which are not also stabilised in the validity of law [custom]. (Luhmann 1972:140)

The action theory that functionalism suggests essentially equates law enforcement with legal reasoning, at least at the level being discussed here. As Unger notes, "Legal reasoning . . . is purposive when the decision about how to apply a rule depends on a judgment of how most effectively to achieve the purposes ascribed to the rule" (1976:194). That decision must be culturally,

socially, economically, and politically supportable as well, which suggests that each constitution for each state has something of a unique history and, finally, interpretation:

> The legal order emerged with modern European liberal society. The distinction between politics or administration, on one side, and adjudication, on the other, became the cornerstone of constitutionalism and a guiding principle of political thought. In the liberal state, there is a separate body of legal norms, a system of specialized legal institutions, a well-defined tradition of legal doctrine, and a legal profession with its own relatively unique outlook, interests, and ideals. It is important to understand that a legal order operates against a backdrop of customary and bureaucratic law and that differences among the types of law always remain fluid. (Unger 1976:54)

Thus, the same law may not be interpreted or enforced in quite the same way by different individuals, agencies, or states. "It is sometimes said that the question is not whether it is morally justifiable to enforce morality as such, but only *which* morality may be enforced," suggests Hart (1963:20; emphasis in original). This diversity again raises the issue of the status of legal reasoning in the attempt to define and ultimately enforce the law itself: "The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion" (Dworkin, in Dworkin 1977:45).

A constitution, being the first guiding and organizing principle of a state, is thus both a cause as well as a product of the legal behavior found in that state. A constitution is a dialectical document (doubly-institutionalized or not) that provides guidance by existence as well as by establishing precedence: "When is a constitution a statute? The important logical difference here is when a rule which exists in its own right (constituted by assumptions of its own bindingness) and a rule which exists because it is valid under a higher rule" (Detmold 1984:226). For the Territory of Guam, what I wish to focus on is the dialectic between culture and laws and how each might be expressed by the other. Three elements are considered crucial to this analysis: (1) social behavior, (2) the law, and (3) the legal discretion found in the territory. In the areas of social behavior, law, policing, and judicial discretion and reasoning, it is my intent to provide the foundations for understanding territorial legal behavior in Guam as culturally manifested and vice versa.

Descriptive Strategies

Certain descriptive strategies will govern my presentation of the evidence. Although not testable hypotheses, these descriptive guidelines are as follows:

1. What is the relationship between culture and law on Guam in reference to the definition of, reasoning behind (or precedence), and application of law? This hypothesis can be negated (as is dialectically required) as: What is the relationship between culture and law on Guam in reference to the definition of, reasoning behind, and application of traditional law? This suggests another way of addressing this relationship dialectically, which is:
2. Can law, formally constructed under the law itself and legal reasoning, support and organize politically traditional custom and practices? Again, this presumes its negation: Can politically manifested customs and traditions both support and organize a formally constructed body of law, again under the law itself and legal reasoning?

Each of these two dialectic and descriptive strategies frames the analysis of the evidence evaluated here. Earlier literature suggests these strategies: "No contemporary institution functions with the kind of autonomy that permits us to postulate a significant dialectic between law and custom" (Diamond, in Black and Mileski 1973:320). The microstate of Guam provides the evidence of this significant dialectic between law and custom in the construction, practice, and application of its own culture in traditionally supported laws and legal administration.

Data Collection and Methodology

The data collection and methodology used in this research focus on three separate elements: (1) establishing a behavioral component of social behavior on Guam, at least as regards the formal reporting of criminal activity that may require legal sanction; (2) the legal foundations for the government and legal administration of the territory, a detailed analysis of legal precedents found; and (3) evidence to suggest the use of police and legal discretion practiced in the territory, provided by informal interviews that "flesh out" the synthesis between social control behavior and legal administration.

Official Views of Social Behavior

It is the intent of this research to analyze reported crime and clearances, that is, crimes for which an arrest is made, by the Guam Police Department during the years 1970 to 1995. These reports and clearances will then be compared to the subsequent activity of the Superior Court of Guam, evaluating the link between crimes reported and prosecutions engaged in to provide a general measure of how prosecutors and the courts appear to support and legitimate these arrests. Finally, administrative attempts to control discretion will be assessed for the police, prosecutors, and courts using the three criteria noted previously.

The Uniform Crime Reports for Guam—compiled and published by Sablan and Shewman (1977), the Department of Public Safety (1980–1983), and the Guam Police Department (1984–1995)—provide a primary data source for the analysis central to this research. Comparisons with mainland jurisdictions using the Uniform Crime Reports published by the FBI (Federal Bureau of Investigation 1994–1996) were obtained from Lennon (1997). When comparisons are made, clearance rates are drawn from the FBI's Group II, composed of 136 cities with populations between 100,000 to 249,000 (Federal Bureau of Investigation 1995:199).

Prosecution numbers and rates are provided through the Superior Court of Guam (1979–1981, 1983–1985), whose activities are also documented elsewhere, at least as to level if not offense (Economic Research Center 1991–1994). The figures will be used to assess the link between arrests and prosecutions on Guam from 1989 to 1995.

Analysis of Law and Legal Foundations for the Territory

The second foundation for this research lies in the laws and legal codes of the Territory of Guam. This foundation is then supported by the few existing abstracts or manuals that attempt to explain their import (i.e., Ntumy 1993). The legal analysis is further supported by commentary provided in articles found in law reviews and other secondary sources. The Micronesian Area Research Center at the University of Guam was an invaluable asset in gathering much of this documentary material. Additional documentary collections important for this research were found at the Bureau of Planning, Ricardo J. Bordallo Governor's Complex, and at the Territorial Law Library, both in Hagatna.

What we hope to discover are similarities and differences between the sources for precedent in legal administration in Guam. Such an analysis may shed light on the formal and legal nature the government of Guam attempts

to support, with the additional benefit of illustrating social and institutional "traditions" in such precedent.

Interview Material

The third foundation for this research rests on 290 selected interviews conducted on an informal basis during the period 1994–1997. These interviews were selected from a total pool of over 900 interviews from 600 individuals covering more than 600 hours of material collected from 1993 to 2000.[1] About 16 percent of the interviews were recorded; in the remainder only field notes were made. Individuals interviewed were selected through a snowball technique where one interviewee would suggest another. Guam's population is not large, so finding interviewees with direct experience or control concerning the questions raised in this research was not difficult. It is this narrative material around which the findings concerning the ideas of tradition and legal discretion have likewise been built, especially in reference to traditional (or customary) practices within Guam's legal system.

For the sake of space, the interview material is not quoted here extensively. The interviews did, however, guide the selection of published materials cited and quoted. Much appreciation is due to these sources, who found missing books and publications as well as providing a sound basis upon which the selection was made. In many cases, initial disagreement between sources was resolvable by seeking out the appropriate written record.

The synthesis of custom and law is illustrated in each of the definitions of social behavior, law, and discretion in any political state, micro or otherwise. What does this synthesis, elaborated by the multiple-method approach suggested here, tell us about the synthesis between custom and law in the Territory of Guam?

Findings: Defining Island Crime

There is no reason to suspect that crime in the Territory of Guam fails either to fulfill a solidarity-producing function (Durkheim 1938) or to become routinized over time in reporting or clearance behaviors (Erikson 1966; Becker 1970; Brown 1988; Davis 1979; Farmer 1984). Likewise, crime definition in the territory is based on U.S. law (McCormick, in Ntumy 1993:518–539), so Guam is likely to follow U.S. patterns for reporting and legally responding to crime generally in the official record (see Figure 1).

The official response by the police to reported crime in the territory is also likely to be the result of both law and discretion (Barker and Carter 1986; Walker 1993; Williams 1984; Wilson 1978). Response will also be influenced

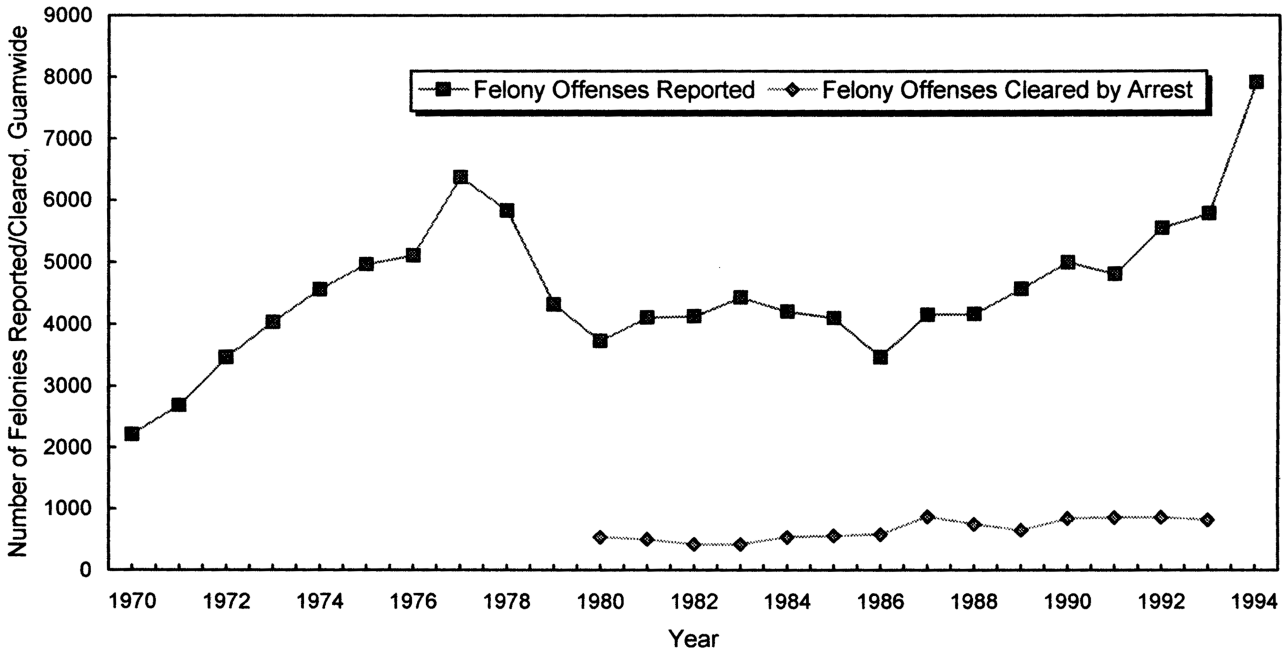

FIGURE 1. **Felony offenses on Guam reported and cleared by arrest, 1970–1993.** (Compiled by author from information in Department of Public Safety 1980–1983 and Guam Police Department 1984–1988, 1994–1995)

by factors such as the number of uniformed police personnel, police training, matériel and staff support, and visibility issues as well (Wilson 1978).

The "nuts and bolts" of crime definition and reporting needs to be further described and explained to establish that the territorial response to crime is comparable to that of other U.S. jurisdictions. If crime in a U.S. territory is defined differently than in other U.S. jurisdictions, it is unlikely that any comparisons should be attempted in the first place.

The Guam Police Department follows standard operating procedures for counting reported crimes (Guam Police Department 1993–1995). Promulgated by the FBI under the Uniform Crime Reporting Program (UCR) (Federal Bureau of Investigation 1994–1996), these standard reporting procedures permit comparison among differing state and territorial jurisdictions and are crime- versus person-based. In other words, a "crime" is being counted and not criminals; one person may indeed be responsible for a number of reported crimes.

The Territory of Guam, along with the Territory of the U.S. Virgin Islands, remains (and has always been) classified by the Federal Bureau of Investigation in the category "Rural Counties, 25,000 and Over in Population" (Federal Bureau of Investigation 1996:180). Reviewing the social, geographic, and economic elements of these two U.S. possessions, this classification would seem appropriate. Aside from the fact of isolation, however, it is altogether possible that these two territories may be misidentified as rural in character. Both have large urban concentrations, significant tourist or visitor populations, and all of the criminal behavior these two factors suggest. Both territories are also home to purportedly large drug-transhipment operations.

While rural counties tend to be more self-sufficient (or isolated) than their suburban counterparts and may have similar criminal reporting behavior borne of such isolation and self-sufficiency (Erickson and Empey 1963; Gove, Hughes, and Geerken 1985; Osgood et al. 1989), isolation alone cannot be proposed as the sole factor for the classification of these two U.S. dependencies. These two territories may exhibit criminal-reporting behaviors more similar to those of small but isolated urban areas; indications from this review are that this is possible if not equally likely.

In the Uniform Crime Report for 1990, the Guam Police Department (1990) performed a comparison of crimes reported on Guam to those reported in certain mainland cities, primarily suburban or, indeed, urban in definition. These cities included Reno, Nevada; Ontario, California; Pomona, California; New Haven, Connecticut; Scottsdale, Arizona; Lansing, Michigan; Paterson, New Jersey; Fort Lauderdale, Florida; Irving, Texas; and Honolulu, Hawai'i. The reported crime of these cities and Guam appears comparable. But was the comparison itself worthwhile?

As noted in the previous section on data collection, I selected twenty-seven cities to serve as comparisons for criminal-reporting behavior in the territories of Guam and the U.S. Virgin Islands. In Table 1, these crime statistics are illustrated as summarized and rank-ordered relationships across several crime categories. Both Guam and the U.S. Virgin Islands compare more closely with these jurisdictions than with those with which they are usually compared.

This is not to say that police authorities in the territories understand their own crime-reporting patterns, however. It is interesting to note that of the twenty-seven cities selected for comparison in Table 1, not one is repeated from the 1990 Guam Police Department comparison (or the FBI's). Such misidentification is more likely to occur in jurisdictions where interaction with other police authorities is minimal and sporadic in character. It is suggested here, although the data are lacking for any true support, that police authorities in the U.S. Virgin Islands are equally likely to misidentify their own crime-reporting pattern.

The findings here suggest that crime-reporting behavior in the territories of Guam and the U.S. Virgin Islands is far more similar to that of relatively isolated (if small) cities than with rural, suburban, or urban areas. It is altogether possible, when we also consider Maui, Hawai'i, that these jurisdictions present a "special case" that needs further consideration in FBI computations and comparisons.

Island crime reporting, especially on small islands with varied populations, economics, and politics, is thus a special experience not well-suited for classification as urban, suburban, or rural. Of course, any such island jurisdiction must reach a certain minimum population (perhaps 100,000) for crime-reporting statistics to be meaningful, but nevertheless above this population density these statistics do become meaningful. Likewise, relative isolation is a factor. Staten Island in New York is an island of over 100,000 population but it is intimately connected to a large population nearby by bridges, proximity, and perhaps personal as well as spatial ties.

Though Guam and the U.S. Virgin Islands are territories and the jurisdiction of Maui County, Hawai'i, is not, each is relatively small in area, has substantial populations of both local and visitor inhabitants, and has politics and an economy that are ultimately tourist-based. These three island-based police, judicial, population, and spatial jurisdictions provide "special cases" of crime reporting not found elsewhere on the American crime-reporting scene and should be separately identified in any crime-reporting scheme.

Island crime is a "different" thing. It is first of all local and second, isolated from everyone else at both the offender and police levels. All comparisons start and end pretty much "locally," that is, in the local jurisdiction in

TABLE 1. **Rank Order Comparison by General Crime Categories, 1995**

Rank Order	Population	Violent Crime	Property Crime	Per 1000 Violent Crime	Per 1000 Non-Violent Crime
1	Tallahassee, FL	U.S. Virgin Islands	Tallahassee, FL	U.S. Virgin Islands	Myrtle Beach, SC
2	Myrtle Beach, SC	Tallahassee, FL	Myrtle Beach, SC	Lima, OH	Tallahassee, FL
3	Huntsville, AL	Lima, OH	Huntsville, AL	Myrtle Beach, SC	Monroe, LA
4	Springfield, MO	Myrtle Beach, SC	Springfield, MO	Tallahassee, FL	Savannah, GA
5	Savannah, GA	Sioux Falls, SD	Savannah, GA	Monroe, LA	Athens, GA
6	Syracuse, NY	Syracuse, NY	Syracuse, NY	Savannah, GA	Tyler, TX
7	Monroe, LA	Savannah, GA	Tyler, TX	Laredo, TX	Laredo, TX
8	Tyler, TX	Monroe, LA	Monroe, LA	Athens, GA	Panama City, FL
9	Laredo, TX	Huntsville, AL	Laredo, TX	Tyler, TX	Burlington, VT
10	Sioux Falls, SD	Laredo, TX	Boise, ID	Panama City, FL	Bellingham, WA
11	Athens, GA	Tyler, TX	Athens, GA	Redding, CA	Territory of Guam
12	Panama City, FL	Redding, CA	Panama City, FL	Huntsville, AL	U.S. Virgin Islands
13	Boise, ID	Athens, GA	Bellingham, WA	Jackson, MI	Redding, CA
14	Redding, CA	Panama City, FL	Burlington, VT	Sioux Falls, SD	Boise, ID
15	Bellingham, WA	Springfield, MO	Territory of Guam	Boise, ID	Huntsville, AL
16	U.S. Virgin Islands	Jackson, MI	Sioux Falls, SD	Joplin, MO	Springfield, MO
17	Territory of Guam	Boise, ID	Redding, CA	Bellingham, WA	Joplin, MO
18	Burlington, VT	Joplin, MO	U.S. Virgin Islands	Territory of Guam	Sioux Falls, SD
19	Lima, OH	Bellingham, WA	Lima, OH	Springfield, MO	Jacksonville, NC
20	Jackson, MI	Territory of Guam	Fargo-Moorhead, ND	Syracuse, NY	Lima, OH
21	Joplin, MO	Jacksonville, NC	Jacksonville, NC	Jamestown, NY	Jackson, MI
22	Jacksonville, NC	Jamestown, NY	Joplin, MO	Jacksonville, NC	Fargo-Moorhead, ND
23	Fargo-Moorhead, ND	St. Cloud, MN	Jackson, MI	St. Cloud, MN	Jamestown, NY
24	St. Cloud, MN	Burlington, VT	St. Cloud, MN	Burlington, VT	Eau Claire, WI
25	Jamestown, NY	Eau Claire, WI	Jamestown, NY	Eau Claire,WI	Syracuse, NY
26	Eau Claire,WI	Fargo-Moorhead, ND	Eau Claire, WI	Fargo-Moorhead, ND	St. Cloud, MN
27	Wausau, WI	Wausau, WI	Wausau, WI	Wausau, WI	Wausau, WI

Source: Lennon 1997, compiled by the author from information in Federal Bureau of Investigation 1994, 1995, 1996.

which the crime occurs. It is identified locally, cleared locally, adjudicated locally, and the convicted imprisoned locally. No other U.S. jurisdictions are so localized in character. The problem is that the issues suggested in crime reporting for an island "locally" (in Guam, the U.S. Virgin Islands, or Maui) are not compared with other such "locally's" (these three are, in fact, unique to U.S. experience). As a result, comparing island criminal-behavior reports with other, "normal" U.S. reporting areas denies the uniqueness of island living and may obscure criminal-reporting relationships in both local and comparative contexts. Such comparisons do not reflect the local and isolated character of island criminal behavior.

Island crime (at least when the total population, both inhabitant and tourist, is under 250,000) must be considered a special case outside rural, suburban, or urban classifications. It must be addressed differently than it is today. It is not solely rural, suburban, or urban in character, but of the three it "patterns" more as isolated urban areas do. Island crime is more urban than rural in its reporting characteristics or pattern. The "state" jurisdiction of Maui, Hawai'i, is misidentified even as the territorial experience is also misidentified thereby.

Each of these three jurisdictions would be better placed as urban areas for both reporting and comparison purposes. Rather than have the isolation of island societies be the sole defining factor, the population density and economic realities of these island communities require urban comparison. Isolated urban areas act urban in their crime-reporting characteristics. They do not act rural. These three jurisdictions should be reclassified to permit more appropriate definition and comparison of island crime. Consequently, the comparison suggested here in Table 1 is more appropriate than that that the FBI, territorial police departments, or others have suggested. Island crime is something unique to the American criminal-reporting experience, but it is not foreign.

Findings: Law and Legal Organization in the Territory of Guam

When describing or defining legal behavior in most U.S. jurisdictions, some issues are immediately presumed—for instance, applicability of the U.S. Constitution, trial by jury, grand jury indictments. But such matters cannot be presumed for the Territory of Guam. Each of these elements, along with search and seizure or evidentiary requirements in court, and even the general applicability of federal law (DeBenedittis 1993), has had to be politically and legally determined in the territory: "Section 22 of the Organic Act initiated the creation of a civil legal system on Guam [in 1950]. . . . The Organic Act omitted mention of trials by jury and rights to grand jury indictment,

which did not exist under the navy. It took a few years to establish jury trials and grand jury indictments in both federal and local courts on Guam" (Rogers 1995:228–229). Presumptions of immediate integration of territorial law with other U.S. legal systems should thus be avoided with either the federal or state systems. While present in many facets, one cannot presume the existence of some of the most basic legal precedents or protections, or further to presume their applicability, in the territory. The Organic Act of 1950 is a complicated and incomplete document, but it must be seen as the ultimate legal precedent for any legal behavior found on-island (see Table 2). The U.S. Constitution is only advisory; it does not provide the foundation for legal activity or serve as an immediate precedent to the application of law. Any such constitutional advisement tends to be created, constructed and politically hard-won.

As already suggested, the U.S. Constitution does not entirely apply to U.S. territories (Office of the Solicitor, U.S. Department of Interior 1993; McCormick, in Ntumy 1993:518–539). Federal protections along with U.S. citizenship for the 150,000 people on Guam is granted only through sections contained within the Organic Act of 1950 (United States Congress 1950). Both the history of the island and Guam's laws in and of themselves have created a distinctive legal structure fairly unique in American jurisprudence. Local construction of precedence differs from that established from the federal government, for instance. The assumption of the applicability of federal law and precedent that other states share is not an assumption that should be made in a territory (Liebowitz 1975, 1979, 1986, 1989).

The law in the Territory of Guam has numerous military holdovers from its prewar and postwar naval administrations (Edwards 1957). Its prewar and postwar law is also based upon California precedent (Robinson 1933a, 1933b; Government of Guam 1947a-e) with, however, a strong military law element remaining evident. Even after passage of the Organic Act in 1950, Guam law is an amalgam of federal, military, state (primarily California), and local legislation (Bohn 1951–1952, 1953a, 1953b). Further expansion and definition of the law has occurred sporadically, first in 1970 (Bohn 1970a, 1970b, 1970d) and again during the commonwealth debates held in the territory during the late 1980s.

Each of these changes in law required modifications to regulation and, ultimately, policy. Such modifications are evident in the revisions to regulatory statutes made in the early 1950s (Bohn 1952), 1960s (Bohn 1960; Government of Guam 1960), 1970s (Bohn 1970c), 1980s (Aguon 1983; Bohn 1981–1982; University of Guam 1984–1996), and on to the 1990s (Office of the Attorney General 1991). An important facet of this regulatory support for the law to keep in mind, especially when I attempt to define discretion in

TABLE 2. **Ranking of Precedence for Sources of Law for Micronesian States**

Rank	Republic of the Marshall Islands	Republic of Palau	Federated States of Micronesia	Commonwealth of the Northern Marianas	Guam	
					U.S. View	Guam Code Annotated
1st	RMI Constitution	RP Constitution	FSM Constitution	Covenant with U.S.	Organic Act of 1950	Organic Act of 1950
2d	Legislation	Republic of Palau National Code	State Constitutions	U.S. Constitution	Treaty of Paris (1898)	Treaty of Paris (1898)
3d	Treaties and compacts	Initiative	National legislation	Treaties and laws of U.S.	U.S. Constitution	U.S. Constitution
4th	Custom	Custom	State and local legislation	Constitution of the CNMI	U.S. laws	Guam laws
5th	Common law (restatements)	Common law (restatements)	Treaties	Pre-Commonwealth laws (Trust Territory, CNMI Code)	Guam laws	Executive Orders of governor
6th			Customary law	Legislation	Custom (unrecognized)	U.S. Supreme Court decisions applicable to Guam
7th			Trust Territory law	Custom (unrecognized)	Common law (no common law)	Guam Supreme Court, decisions of other courts
8th			Common law (restatements)	Common law (restatements)		Superior Court (Guam) decisions

Source: Compiled from Zorn, McCormick, and Ottley, in Ntumy 1993.

the territorial justice system, below, is that these modifications usually did not rescind previous statutes. Previous regulations remained in force and the modifications were merely added to existing law and statute.

The debates that examined the territorial relationship with the federal government throughout the 1980s likewise focused on the character, or source, of the rule of law applied in the territory. At this time the applicability of federal law was publicly debated, but now in opposition to self-governance issues (Alvarez-Cristobal 1990; Zafren 1986; Guam Law Revision Commission 1979; Eichner 1978; Rogers 1988, 1995). The conclusion of these political debates remains unclear even today. Although political status issues were voted on at least twice in popular and special elections, in 1982 and 1987, none of the options gathered the required majority to permit the continuance of negotiations with the federal government (Guam Commission on Self-Determination 1989). As a political fact, however, after these elections a commonwealth relationship is the only one being pursued by territorial political leaders.

This confusion regarding territorial law and political status is no less evident on the federal side of the coin. The Territory of Guam has never been an important federal concern, legally or otherwise, and hearings before the U.S. Congress have illustrated more a common ignorance than anything else (House Committee on Interior and Insular Affairs 1975; Senate Committee on Interior and Insular Affairs 1976; Senate Committee on Energy and Natural Resources 1978; Venture Development Management Resources 1980). The ignorance of federal officials, either executive or legislative, regarding the local situation of Guam is nearly total, which makes any application of federal jurisdiction under law or by the judiciary difficult.

Where the applicability of law and political self-governance issues agree, there is no problem. Where they do not agree, local concerns are usually determined to be more important to uphold. The problem illustrated here is that federal and local concerns are not so easily identifiable as separate entities. Local law is based on federal and state constructions just as federal law is enforced primarily through local political actors and institutions. Each federal or territorial law is somehow supported by the other at the structural or procedural level. The problem is that neither holds precedence.

A look at the establishment of the Guam Supreme Court illustrates this interdependence of policy, law, and political institutions. In 1996, the legislature and governor created the Supreme Court of Guam under local law. Almost immediately, justices of the new Supreme Court and existing Superior Court judges started fighting over administrative and judicial primacy and precedence. The newness of the Supreme Court of Guam is not its only weakness. It will hear appeals based not on constitutional law but on that of

the Organic Act of 1950, and the Organic Act changes far more often than the constitution owing to administrative and judicial law decisions. The Supreme Court is unlikely to have a lasting impact on the justice behavior already found on-island. Supreme courts do best when there is a "supreme" law (Becker 1970), but their impact is indeterminate when there isn't. Openness in such a new situation is impossible to define.

Other forms of precedence are administrative, in Circuit Court decisions made applicable to the territory. The federal Department of the Interior's decisions often have more of an impact than the Circuit Court's. On average only one case from Guam is decided by the Ninth Circuit Court of Appeals every three years. This does not presuppose importance, but a nonlocal case is unlikely to have the same impact as a local one.

So appellate applicability of any Circuit Court case to local concerns is not as simple there as in a state jurisdiction. The U.S. view of Guam precedent is ranked or stratified differently than the view illustrated under territorial law (see McCormick, in Ntumy 1993; and Table 2). Many appellate findings are expressly inapplicable to the Territory of Guam, but no one knows which ones until the local courts decide. In essence, "Appeals are always heard twice, both on the way up and back on the way down" (interview, 97/1/5, A49). In stateside jurisdictions, appeals generally only need the way up.

Added to this uncertainty, the new Supreme Court must contend with an active territorial legislature that changes local law more often than other jurisdictions do (Victor 1969). Such changes are continual and often substantive. In many ways, these legislative changes to local law have served as the appellate system from 1950 to 1996, a role the legislature is unlikely to relinquish. Judicial appeals will play out on a political field where there are far more experienced players at work. Changes in a law under appeal will often be made before the appeal is completed, making the whole appellate process somewhat questionable in effect.

Such a lack of applicable findings, newness of the territorial appellate court, and uncertain openness of any procedures found there do not suggest a legitimating function for the court, at least not for some years. Until such time that there is a "supreme law" for the territory, it is not altogether certain what the role of a supreme court will be. Since constitutional issues are not immediately applicable, checks and balances between the executive and judicial branches are not immediately assumed nor even necessary. The Organic Act of 1950 does not presuppose interaction between branches.

Although the constitutional bases for behavior differ, the organizational structures of both law enforcement and the courts of the territory follow, with some local quirks, those of most other U.S. jurisdictions. There is a

Guam Police Department and a Superior Court of Guam, which serves as the initial venue for all judicial actions, civil and criminal (Superior Court of Guam 1985; Sanchez 1991). While the territorial Supreme Court is a new addition to this simple organization (with the organizational politics of precedence and administrative power now being debated), this addition simply completes the enforcement-to-court picture. In this picture, however, we must realize that changes in both personnel and structure are continually underway. Some organizational and political participants were important once but are no longer important, yet may be important again tomorrow as territorial politics requires.

To define discretion in a legal system as appropriate or inappropriate requires a standard set of rules. Appropriateness is determined, finally, by the legitimacy of the system's supports. If, as in the Territory of Guam, the law practiced is undefined, and thus perhaps uncontrollable, the foundations for legitimacy of the whole territorial justice system must be considered suspect.

Findings: Territorial Discretion

The definition of discretion at any level—police, prosecutorial, judicial, and certainly when considered interdependently—provides an important measure of the legitimacy of the whole justice system. For the purposes of this research discretion will be defined for each of the institutional players of the territorial justice system and then comprehensively for the system as a whole. It is important to note here that I am constructing a procedural model of discretion over these institutional actors. My attention is focused on the transfer points between justice professionals within the executive and judicial branches, from initial report to arrest to possible prosecution and finally to possible conviction. Sablan and Shewman (1977) suggest that the transfer from police to prosecution to courts failed far later in the process on Guam than elsewhere, at the prosecution level rather than before it. In short, prosecutions occurred on Guam that normally would have been dealt with informally at the police level in other jurisdictions (Wilson 1978). This model was developed to "tease" out this relationship.

For my purposes, discretion needs to be defined at the transfer points between public-police, police-prosecutor, and prosecutor-judge. Elements of structural discretion at the police-police, prosecutor-prosecutor, and judge-judge steps are assumed present and active but not concentrated on here, except as these actors define and explain the behavior of their professional and structural allies. Instead I will focus on how these structural and institutional actors exercise their discretion in the transfer of the accused from one

institutional actor to another. It is within this transfer that the legitimating aspects of these justice professionals may be evaluated.

No one denies the importance of defining police discretion at the street level, especially in the decision to arrest (Barker and Carter 1986; Walker 1993; Williams 1984; Wilson 1978). The personal nature of justice between police officer and alleged perpetrator is assumed. What is more important for my purposes is how such personal application of power, at least through statute and regulation, is presumably controlled: "The fact that so many arrests are made, and that they are made as much as possible on the basis of a fixed, not variable standard of behavior, is primarily the result of departmental policies. It is the administrators who devise these policies, manipulate the rewards and sanctions that get them carried out, and reflect on their justification. The patrolmen are primarily 'doing their job' "(Wilson 1978: 179). The issue for defining the control of police discretion in Guam, then, becomes the existence of a "fixed" police code of conduct supported by an administrative structure empowered to uphold and enforce it.

Defining the next stage of purely executive discretion, at the prosecutorial level, two kinds of discretion factor into the decision-making process: charging and procedural. In other U.S. jurisdictions, charging discretion has been found most important for determining modifications to prosecutorial charges and subsequent judicial activity in the courts: "Consequently, according to David Neubauer, the most frequent form of concession granted involves the charging decision" (Dow 1981:129). But procedural discretion is no less important, if harder to discern as a measurable issue.

> Prosecutors often aid police by giving advice concerning preparation and issuance of arrest and search warrants. After the arrest, the prosecutor has the burden of establishing at the preliminary hearing or grand jury investigation that the accused is likely to have committed the crime charged. Prior to the trial, detailed preparation of the evidence, making the decision as to what crime(s) to levy against the accused, and consultation with police, witnesses, and defense counsel are indispensable. . . . Finally, although judges have the constitutional or statutory authority to establish the amount of bail, in many jurisdictions the "recommendation" of the prosecutor is usually followed. (Dow 1981:85)

There is a method by which such procedural discretion may be measured, however, and that is in the number of "dismissals" found in any particular system. Such dismissals can be defined as the prosecutorial attempt to modify police behavior (especially with the procedural discretion mentioned previ-

ously): "A variety of procedures exists whereby prosecutors can control police behavior. Prosecutors may simply refuse to litigate particular cases. Dismissing cases sends a signal to the police that questionable arrest tactics and evidence gathering will not be tolerated" (Dow 1981:129). This is no less true of the judiciary. Judges as well as prosecutors can dismiss cases over real or imagined procedural irregularities by police or prosecutors before or after their filing in court. Again, my emphasis remains on the appropriate application of such discretionary judicial power. The rules for such applications should be clear and explicit: "It is clear enough . . . that judges from all three cultures [Hawai'i, Hong Kong, and the Philippines] *expect* that the existence of clear, directly relevant precedent *should at least be stated to be an important, influential factor in judicial decision-making*" (Becker 1970:48; emphasis in original). If such precedent is not present, the appropriateness of any decision to dismiss a case is unclear.

In this brief discussion of the literature, discretion is dealt with first by a supervisory attempt at control, for "possibly the most important check of discretionary action is simply the normal supervision of subordinates by superiors" (Davis 1979:143). This supervision must be further supported by regulatory and bureaucratic delineation of responsibility, of course. The rules for supervision must be clear and explicit for the police officer and police administration, prosecutor and prosecutorial administration, judges and administrative structure of the court concerned. Supervision without explicit rules is apparently no supervision at all.

> Because supervision is so clearly desirable, somewhat surprising is the complete absence of supervisory power over some of the most vital discretionary power in our legal system, such as the power to prosecute or not to prosecute. The American system . . . usually leaves the city and county prosecutors largely unsupervised, with the result that the enormous power to prosecute or not to prosecute is typically (1) unchecked by higher authorities, (2) secretly exercised, (3) often influenced by political or other considerations extraneous to justice, and (4) without findings, without reasoned opinions, and without a system of open precedents. (Davis 1979:144)

In defining these checks to discretionary behavior (or lack of) on the part of the police, Attorney General's Office, and the Superior Court of Guam, I will identify the factors important in determining (1) unsupervised discretion, (2) secrecy in behavior, and (3) political influence in decision-making. The importance of this operational foundation permits the definition of the relative legitimacy or illegitimacy of the territorial justice system. The pres-

ence of a strong supervisory administration, open and public discussions of discretion at any justice level, and lack of political manipulation of the legal system are each and all measures of the relative legitimacy of any given justice system. The relative formality of any of these factors is seen as promoting judicial legitimacy. These elements will be used to frame the evidence for interpreting the official record. Exactly what does the model for procedural discretion for Guam suggest?

Unsupervised Discretion

The lack of clear and established precedent makes the definition of legal behavior in the territory a difficult task (see Table 2). Statutes are rarely rescinded even when superseded by new law. Precedent under local law is a different constructive process than that assumed under federal law, making the application of either a political event. Consequently, while the rule of law is supposedly removed from political debate after legislation is passed, the opposite effect is found under territorial institutions, where it is in the application of law that political debate begins.

Comparing routine police behavior found on the mainland United States with that in a territorial jurisdiction that does not support such routines may be misleading at best. If the numbers of reports, prosecutions, and convictions do not mean the same thing their comparison is troublesome. Data for the Territory of Guam appear, at least initially, to be comparable with those of mainland jurisdictions through the clearance level. At the prosecutorial, dismissal, and conviction levels, all comparisons should cease. The territorial routine is not the mainland one after an arrest is made, primarily differing because of three factors: regulatory nonexistence as governmental entities, an internal bureaucratic structure that can be legally avoided, and a lack of concrete standards to define discretion.

As a regulatory, bureaucratic, and legal entity, the Guam Police Department is intimately concerned in local politics. There is no separate professional code of ethics, extended training outside the department, or mandated bureaucratic isolation from political leaders. But then again, neither the Attorney General's Office nor the Superior Court of Guam exists outside of these political parameters either. They are executive and judicial creatures of the Organic Act of 1950 without the firm constitutional foundation provided to other U.S. jurisdictions (United States Congress 1950; McCormick, in Ntumy 1993:518–539; Rogers 1988, 1995). Checks and balances between the executive (police and prosecutors) and the judiciary (judges) are therefore incomplete, nonsupervisory in character, and often nonexistent. Such nonsupervision between the branches of government promotes cor-

ruption (Barker and Roebuck 1973; Barker and Thomas 1986; Guthertz and Singh 1986).

Each of these governmental agencies is governed by an internal set of regulations, often quite elaborate and lengthy. Not one of these manuals, however, even suggests oversight by other than immediate supervisors. Internal affairs units (for the police) or ethics boards (for prosecutors and judges) are easily and legally evaded in the Territory of Guam, if they exist at all. Such localized supervision and control is thus left to the personalities of the persons involved rather than supported by (institutionalized and depersonalized) bureaucratic offices. In short, what is political is legal and legal is political, a situation to which I will return presently.

Consequently, discretion is for the most part undefined and undefinable in the Territory of Guam under current operating procedures. If discretion cannot be defined apart from nondiscretionary behavior, the situation suggests a lack of the standards through which the administration of any justice entity could conceivably control its members (Henderson 1994). Without such standards there can be no control, and the exercise of discretion may exceed any limits generally understood as appropriate.

Secrecy in Behavior

A quick perusal of the Uniform Crime Reports published by the Guam Police Department provides an interesting evolutionary pattern. From the fairly complete and critical analyses of the 1970s (Sablan and Shewman 1977), to the less critical but still relatively complete versions published between 1980 and 1987 (ethnic, village, sex, and age categories in the reports are relatively complete and presented in detail), we end up with the sanitized versions of the post-1987 era. Ethnic and village distinctions are missing entirely ("The mayors didn't like it"; interview, 95/11/16, P4). Age and sex characteristics are presented only as summed across other categories, and other material on victims and offenders is abstracted or missing entirely.[2]

Additionally, in 1995 a police chief announced that police officers may not talk to the press except through official channels. Likewise, other officials informed their employees not to talk to the press, including the territory's attorney general, the chief justice of the Superior Court, the president of the local university, the chief administrator of the local hospital, and other agency heads. The personnel of all these agencies have been informed that "unapproved" releases of information are grounds for immediate dismissal. While not entirely successful in stopping the flow of information, the gag orders have added a sense of conspiracy to conversation on Guam.

Prosecutions are difficult to determine in number, type, or seriousness. The Attorney General's Office and the Superior Court of Guam do not keep careful records; in fact, the *Annual Report of the Superior Court* ceased publication in 1985. Although not written to make data collection or analysis simple (many of the categories are cross-listed, added and illustrated), the reports can still be mined for information as has been done here for 1984. After 1985, only the number of filings has been released. The number of dispositions, dismissals, or convictions is absent and apparently unattainable or no longer collected.

Conspiracy theorists might intimate from this state of affairs a deliberate attempt to misinform the public regarding justice activities. But these changes have occurred regardless of the numerous political changes in party and administration, heads of agency, and supervisory control evident for the territory over this period. A better, and more supportable, contention is that the silence is structural in character rather than deliberately motivated. If one of these institutional actors is embarrassed or releases information, all would suffer public scrutiny. This is not to say that these little "releases" are unknown, only that they appear few and far between.

For instance, in 1977 the Territorial Crime Commission noted the following relationship between felony arrests and subsequent prosecution in the local courts.

> Another important factor in judging the performance of the Attorney General's Office would be the percent dismissals. For all defendants disposed of in the U.S. District Courts in FY 1974, except in the case where civil rights were removed in the state court, approximately 14% of the defendants were dismissed. On Guam, limiting it to only Part I [felony] offenses, 75% of the defendants were dismissed. Forty percent of the defendants whose prosecution was begun were dismissed. Again, even adjusting for the difference in years and the difference in type of court, it would still seem likely that such large differences could be accounted for. (Sablan and Shewman 1977:114)

In 1996, these problems of nonprosecution were again important, and an embarrassment, for the courts. Of 189 arrests made in March of 1991, only 61 cases reached the court at all, and of those, only 10 defendants were convicted and received any prison time whatsoever (Sterne 1996c:1). As Sterne notes: "Thirty-four people . . . were arrested in connection with burglary and theft. Of those, five people went to court, and two people served a total of 19 days in prison" (Sterne 1996c:1). Evidence from the interviews recorded

for this research support this pattern as well. "What, you think because they're arrested that means anything?" noted one commentator (interview, 95/6/6, P77).

It is clear that a breakdown of communication between the Guam Police Department, the Attorney General's Office, and the Superior Court of Guam is chronic and fairly complete (Superior Court of Guam 1985, 1984). Arrests in the territory do not presume, and in fact do not even suggest, subsequent prosecution. The silence and secrecy surrounding this judicial collapse only further fuel the discontent local inhabitants feel toward their justice system. As one noted, "If they're doing such a good job, why doesn't anybody know about it? I don't even know, and I should if we were doing so good" (interview, 96/11/21, P107). Secrets on a small island are hard to keep.

Political Influence in Decision Making

Two committees oversee and attempt to influence legal behavior on Guam. A committee of legislative, executive, and judicial members called the Judicial Council generally oversees all justice activity in the territory, from the police to the appellate court. Another committee, the Civil Service Commission, covers directly or indirectly all personnel concerned with "justice work" (which has led to some fascinating reinstatements).

The chief of police is a governor-appointed position (with legislative approval required, however), and this individual then chooses his or her senior staff. Political influence and interference is immediate, constant, and chronic in the organization as well as the behavior of the police (Guthertz and Singh 1986), leading to repeated serious charges of police corruption (Sterne 1996a). The three hundred officers and staff of the Guam Police Department (the average for the study period) are neither afforded the organizational distance necessary to foster professionalism nor granted the training necessary to legitimize their use of discretion of power in arrest. The police officer of the Guam Police Department, by default, is required to apply personal elements of power without organizational support or its control (Barker and Carter 1986; Barker and Roebuck 1973; Brown 1988; Farmer 1984; Walker 1993; Williams 1984).

The territory's attorney general is another position appointed by the governor with approval of the legislature. The office is subject to the same elements of political interference found in the Police Department. Attorneys in the Attorney General's Office are generally retained only for a year even if initially signed to a three-year contract. Since 1981 the office has retained more than seventy-five attorneys, with the shortest duration being six hours (the attorney got off a plane, then back on) and the longest unbroken stretch

being twenty-three months. Attorneys do not specialize within the office and they are shifted around repeatedly between criminal and civil cases as workloads dictate (Cepeda 1993; Tamanaha 1993).

These attorneys general, in negotiation with the Police Department, determine which charges are filed, at what level of offense (felony or misdemeanor), and the tactics for any subsequent prosecution. They likewise oversee parolees along with the Parole Board. The local quirk here is that it is the character of the director of each division—whether the police chief, attorney general, the presiding judge, or ultimately the governor—that defines justice in the territory. Each of these offices, and the individuals who hold them, are immediately and directly involved in the island politics that surround them.

The Police Department and the Attorney General's Office provide the executive elements to justice within the territory (the Department of Corrections, the last executive department so responsible, requires its own analysis and will not be addressed here). Both organizations are instance- or case-driven rather than outcome-directed in organization, application of legitimate power, and finally in their possible manipulation by and interference from political leaders (Sterne 1996b). The executive departments are truly executive in character; the character of the governor changes the character of justice attempted (if not fulfilled) by these two departments. Political interference remains the most important issue still to be resolved, but this is not solely an executive problem.

The Superior Court of the Territory of Guam in some ways mirrors the top-down organizational structure of the police, if with the additional (and distancing) element of limited judicial tenure. Judges must stand for election every eight years for retention, but not for selection or placement as they too are appointed by the governor and approved by the legislature. This limited tenure relatively isolates the judges from immediate, if not chronic, political interference (Sanchez 1991). The presiding judge oversees several judges (six in 1996) whose division of labor is organized on a case-by-case basis into "courts." Consequently, the criminal courts for felony and misdemeanor categories or the civil courts categorized by "divisions" (domestic, juvenile special proceedings, adoption, juvenile delinquent, small claims, special proceedings, land registration, traffic court, probate, and so on) are determined not by a specific court venue but by the judge presiding and the specific filing submitted (Superior Court of Guam 1980, 1981, 1983–1985). The case rather than the court determines its legal "division." As part of its powers the Superior Court also oversees diversionary probation programs (Sanchez 1991).

None of the personal nature of discretion outlined above occurs outside the law. Both territorial law and precedent supports, requires, and legitimates

such personal application of the law and the political manipulation suggested above (for analogues, see Davis 1979 and Table 1). For instance, the Judicial Council is mirrored by a Department of Law (another committee with similar responsibilities but a different mix of members), a Governor's Supervisory Council, and even a citizen's group or two. All have similar responsibilities and each affects the application of law within the territory. The Civil Service Commission likewise influences, modifies, or changes the personnel relationships within all of these organizations, professional or not, and is an additional political player in the process.

All of the political manipulation of justice in the Territory of Guam is legally *required* in both law and regulation. Each of these mutually responsible bureaucracies is properly fulfilling its legal mandate, even as the consequence is "deformalization" of the law (as in Muller 1991). As a result, overlapping oversight not only of the agencies involved but also of one another (each board is required to oversee the other boards, an interesting arrangement) makes the application of any legal behavior in the territory immensely complicated. Whether defined as a legacy of U.S. imperialism (Eichner 1978; Pomeroy 1969; Ridgell 1988; Rogers 1988; Smith 1991), a cultural holdover, or an interpretation of the law itself (Aguon 1983; Carano and Sanchez 1964; De Smith 1970; Rogers 1995), the fact remains that the justice applied in the Territory of Guam remains over-, not under-, politicized.

Conclusions

A constitution is merely a document that synthesizes the initial relationship between custom and law by providing a singular precedent for defining a state, micro or otherwise (Diamond, in Black and Mileski 1973:320; Bohannon 1965). Within that state and its constitution, any number of syntheses are made possible by that initial synthesis. The relationships between executive, legislative, and judicial branches are not fixed permanently in a constitution, and certainly the relationships within and between these branches of government evolve and change over time (Unger 1976). Quite possibly the only thing a constitution provides a political state is a final arena for debate, controversy, and a narrowing down of the political choices possible or available.

Unlike other Micronesian jurisdictions, the Territory of Guam has no constitution whatsoever. Instead, the Organic Act of 1950 establishes the sources of law applicable to Guam as those in force on 1 August 1950, except as amended by the Organic Act or modified or repealed by the Congress of the United States or the Legislature of Guam. These sources of law are the Treaty of Paris, the U.S. Constitution, U.S. laws, custom, and the common law (McCormick, in Ntumy 1993:519). If the law was really that clear, this

ranking would be far more important than it now appears. Referring back to Table 2, we see two sets of applicable precedent, each different from the other, and apparently unresolvable both by custom and under law (Rogers 1995, 1988; DeBenedittis 1993; Liebowitz 1975, 1986, 1989; Pomeroy 1969).

In opposition to other microstates in the region, the U.S. Territory of Guam is unique in that it supports neither an indigenous nor Westernized constitutional basis for its law or politics (Liebowitz 1986). The territory necessarily abrogates the application of the U.S. Constitution even as it provides no local substitute (Rogers 1995). What does apply—as a matter of law, procedure, and precedent—is an elaborate mixture of interlocking, conflicting, and responsible regulations. Bureaucratically the territory is a study in chaos and crisis management. Political or administrative boards and committees often have overlapping responsibilities and tasks and no applicable final construction of primacy.

The resolution between custom and law on Guam, then, is performed organizationally but without the traditions found elsewhere being imposed. We can call this situation "law without tradition," which interestingly enough has as its consequence "law without law." Without primacy established local and federal law often contradict one another, and there is no arbiter of tradition to reinforce either. Without tradition or constitution, the Territory of Guam aimlessly disputes organizational structure without examining legal or political purpose (Liebowitz 1986, 1989). By definition, there can be no legal reasoning if the law is not explicit and the "higher law" is undefinable along with the "lesser laws" that presumably enact it.

I have illustrated here the way Guam resolves the custom and law dichotomy: the double-institutionalism of custom and law is not resolved in only one fashion (Bohannon 1965). The social and political resolution or synthesis are each a current and living legal and social system actively supporting both custom and law in local venues, either under constitutionally established law or in spite of it.

Custom, like politics, reinforces legal application and power through the use of legal reasoning by the individuals who enforce the law. Oftentimes then, the politics of a state are both correctly and incorrectly defined as "holdovers" from a customary, or more primitive, time. If defining the law separately from custom is at least possible, defining politics separately from custom is not. Even in presumably strong legal states with a long history of law and constitutionalism, law remains a part of the social system and local politics. "Separated from the social and economic fabric by which it [the constitution] is, in part, conditioned and which, in turn, it helps to condition, it has no reality" (Beard [1935] 1965:12). Custom supports politics, politics support the law, and law ultimately supports both and in turn is supported by them.

The dichotomy between custom and law is a lived phenomenon in the microstates found in Micronesia, and is resolved locally in Guam in the many different ways as illustrated here. The dichotomy is likewise manifested in both custom and law in the politics practiced on Guam, as in this observation by Walzer: "Politics, moreover, establishes its own bonds of commonality. In a world of independent states, political power is a local commodity . . . that gets distributed. But it is a good that can only be distributed by taking people in, where all the senses of that latter phrase are relevant: they must be physically admitted and politically received" (1983:29). The dichotomy then is not a legal problem to be resolved but a political reality that is lived (Crocombe and Ali 1983). Establishing a singular and unitary view (Benedict 1934) of both custom and law is difficult.

Consequently, the dichotomy between culture and law may be an academic issue rather than a real one. Reflected with varied intensity in much of the literature (Durkheim 1933; Sorokin 1937; Luhmann 1972; Dworkin 1977), this dichotomy might serve more as a scholastic curiosity of classification (evolutionary or not; see Black 1976, 1989) far more than a reality that is lived. The dichotomy between custom and law as an ideal type (Weber 1978), rather than as a political reality, is better used to compare constitutions between states than in describing the political and legal realities within states. Law separated from politics might be an appropriate venue for study by legal scholars of whatever discipline, but law separated from custom and politics is meaningless within a local political state. Certainly this is so in Micronesia. Bohannon and Diamond illustrate two sides of the same coin even if they disagree with one another as to which side they pertain to. Custom and law are inextricably linked, and lived, within their local area of influence but can only be compared with other states as a matter of law, not custom.

So the unity of custom and law, at least internally, might be true of other states as well. The United States can build walls using constitutional tenets just as effectively as Micronesian states have in terms of citizenship requirements and naturalization restrictions, for instance. The U.S. Constitution is a lived phenomenon, just as it is in Micronesia. If we begin from the premise that constitutions establish the legal handling of disputes (Nader 1978), this should not presume that this legality is the only, or best, way of resolving such disputes. Other avenues might be equally effective and not at all primitive in application.

Constitutions allocate the power to define disputes to a legally constructed "magistracy" (Durkheim 1933) or to customary practices and practitioners. Either has the effect of including or excluding matters for concern. The disputes are ultimately handled nonetheless. So as constitutionality might pro-

vide a comparative analysis between states, it remains but a reflection of the politics entertained there. Even if doubly-institutionalized, such constitutionality does not negate the existence of political solutions performed locally for local concerns. This is no more true in the political states of Micronesia than it is for other, larger, less "primitive" venues. The synthesis of custom and law has always been, and remains, the purview of political action and power regardless of the political state examined.

If the law, regulations, and standards applied in a jurisdiction do not permit the definition of discretion, the control of discretion is impossible as well. The behavior exhibited throughout the whole of the justice system on Guam—from police officer to prosecutor to Superior Court judge, and now on to Supreme Court judge—indicates a justice system in search of itself. The extremely high number of dismissals serves only to provide a reflection of the collapse of this system. It cannot be determined if these dismissals are more a police, prosecutorial, or judicial problem. The high number of dismissals is ultimately an indication of failure for them all both separately and together. The model of procedural discretion used here not only points out difficulties in procedural justice but in structural justice as well.

The justice system of Guam is held accountable for its actions at whatever level by the local inhabitants. System personnel are universally seen as incompetent, untrained, inefficient, and politically motivated (Sterne 1996c). The system's legitimacy is perceived as low and legitimate only in the ideal rather than the real, if at all. "It should be better and maybe someday it will be, but it's also all we got right now" (interview, 96/10/5, A88). The crisis management and continual organizational collapse of the Guam Police Department and Attorney General's Office are a local reality and entirely ignored by federal authorities.

Where the justice system is not held accountable at all, apparently, is exactly by those federal authorities entrusted with its supervision. Territorial status has not promoted federal intervention, save in one or two cases (DeBenedittis 1993). Compliance with federal law is more an exception in the territory than the rule, and even extreme cases of noncompliance have not been dealt with by federal authorities. For example, the applicability of the Voting Rights Act to the territory has not generated any federal concern: "An amendment to the Organic Act in 1966 (P.L. 89–552) allowed the legislature to decide if elections were at large or by district. Elections remained at large until the 1978 and 1980 elections (Fifteenth and Sixteenth Legislatures), which were by districts, and then—to assure Chamorro political control in face of a rising Filipino population—switched back in 1982 to at large, making electoral districting a controversial issue" (Rogers 1995:228). Equal opportunity, civil rights, the right to grand jury indictment, and the right to a

jury trial have been, at different times, a problem too: "Section 22 of the Organic Act initiated the creation of a civil legal system on Guam [in 1950]. . . . The Organic Act omitted mention of trials by jury and rights to grand jury indictment, which did not exist under the navy. It took a few years to establish jury trials and grand jury indictments in both federal and local courts on Guam" (Rogers 1995:228–229). The source of problems involving discretion in the territory follow a pattern suggested by the existence of the Organic Act of 1950. Guam is a territory, governed by the Organic Act, and many of the problems with legally or politically defined justice arise from this simple fact. Territorial justice is not constitutional justice, it is organic justice.

So if, as the findings suggest, we conclude that the territorial justice system is neither customary nor legal in character, this ambiguity was created and supported by federal authorities in the construction of territorial law under the Organic Act. There is no final construction of the law other than this congressional creation. The result is a justice system steeped in political interference and inefficiency that cannot exist if only supported on-island. The federal government is just as responsible for territorial inadequacies as the territorial government it created.

What the lack of constitutional protection means for the inhabitants of Guam is the misidentification of political self-determination for the self-determination of but one ethnic group (the Chamorro, or indigenous people, of the island). Composed of only about 40 percent of the island's people—and this population is declining rapidly—the Chamorro nevertheless are the only true political actors within the territory. Everyone else has been effectively disenfranchised, disempowered, and uninvolved in territorial decision making. Lack of legal protections has immediate and meaningful political effects. The political ambiguity of the territorial government has numerous deep roots.

The policy implications for supporting an ambiguous territorial justice system should now be clear—the delegitimation of any and all governmental activity performed in the territory whether federal or territorial in character. The failure of the "hands-off" policy of the federal government has only generalized the effects of what could have remained, given active federal intervention, a local problem. It is no longer solely a local problem but one equally shared by both federal and territorial governments.

While there are numerous legal ways out of the ambiguity dilemma illustrated by the Territory of Guam, only one political method is being seriously considered, and that is the assumption of commonwealth status. But other available choices could likewise solve the dilemma and should be placed on the table for consideration. For example, Guam may declare independence

with or without U.S. assistance (the example of East Timor provides a recent example); the Organic Act of 1950 could be repealed, allowing the accession of Guam into another existing U.S. state jurisdiction (i.e., Hawai'i; see Omicinski 1997);[3] Guam could be included in the already existing Commonwealth of the Northern Marianas; or Guam could be added to the Federated States of Micronesia as its fifth state.[4] These alternatives have been evaluated locally over the past twenty years and found wanting for one reason or other, such as lack of population, national security concerns, loss of U.S. citizenship, or simple prejudice.

The chronic lack of legal finality for the territorial government must be dealt with, and any one of these choices would solve the legitimacy issues regarding justice in the territory raised here. But only a singular commonwealth, one constituted by Guam alone, is currently being considered seriously. For legitimacy issues, however, any of these choices is preferable over continuing the status quo.

Legitimacy requires a "final say" in both custom and law before this "final say" can filter down through judicial and executive departments to the people involved. Without this final construction the synthesis of territorial justice must be considered ambiguous both in definition and application. When there is no conventional standard of either custom or law, there can be no legitimacy. The Territory of Guam illustrates this point well.

NOTES

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1. Interviews included members of the Guam Police Department, Agana and Tiyan, Guam, March 1994–January 2000; staff at Sanctuary, Inc., Mangilao, Guam, February 1995–January 1996; individuals at the Archdiocese of Agana, January 1996; individuals of the Superior Court of Guam and the Office of the Attorney General, Agana, January 1995–January 2000; and staff of the Department of Public Health, Mangilao, January 1996.

2. The Guam Uniform Crime Report has been composed by the same individual and office throughout this period. The changes in reporting practices were ordered through the police chiefs in answer to concerns far removed from data integrity or replication issues. As an individual outside the department noted, "When they're in doubt, they'll rip it out or make it up" (interview, 95/8/12, A4). This situation is apparently of the "rip it out" variety.

3. This was suggested recently by U.S. Senator Slade Gorton and immediately rejected by territorial representatives in Washington (Omicinski 1997).

4. Interestingly enough, using the stated and published policy documents released by the Government of Guam, the assumption of status as a fifth state in the Federated States of

Micronesia would seem to be the best political choice. Strong prejudices are apparent, however, and such a choice is politically impossible to raise on Guam, much less fulfill. Nevertheless, it should be examined as an alternative, as joining the Federated States fulfills both local and federal mandates not only adequately, but well.

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