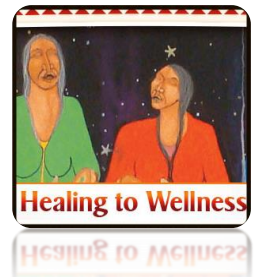




# Indigenous Precedent Handouts



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# Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law

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## Christine Zuni Cruz<sup>2</sup>

*... [T]here are few spheres in which social reality so insistently takes precedence over legal dictate as the tenacity with which people adhere to their way of life as forged in the crucible of everyday living; and so, whatever the declared legal situation, cognizance must always be given to the “living law” of the community. This is indeed true of any community, and becomes all the more pertinent when that community, by whatever name known, has some sort of consciousness of its separate identity.<sup>3</sup>*

### I. Introduction

At some point in my legal career, I recall becoming increasingly uncomfortable with the inconsistencies between the values in the written law of various indigenous nations and the values I knew were embedded in indigenous societies themselves. The two are not entirely in harmony, and in fact, in some instances are absolutely in opposition.<sup>4</sup> I realize that in some circumstances the problem stems from the original source of the written law itself, because many indigenous nations who organized themselves under the Indian Reorganization Act (IRA)<sup>5</sup> adopted the law drafted by the Department of Interior<sup>6</sup> for the Courts of Indian Offenses or Code of Federal Regulations (CFR) courts.<sup>7</sup> Yet, even recently enacted law continues to look very much like the western law of states.<sup>8</sup> Many reasons for this exist. How indigenous nations create laws, as well as, who creates the law and the type of “law” being created influence what enacted law looks like.

It was my experience as a tribal court judge that made me increasingly aware and uncomfortable with this inconsistency.<sup>9</sup> Perhaps this is because a judge is required to apply the law to the people appearing before her, an act that is no longer abstract and an act in which “the People”<sup>10</sup> are no longer nameless and faceless. One experience that stands out in my mind involved an elder man who was before the court on a traffic citation. The inverse relationship the situation created was the first thing that struck me. In the courtroom, I (a younger, non-tribal member, female) was the authority figure and the person before me (my elder, a tribal member, male) was subjected to my authority as judge. The situation made such an impression on me because we were both aware of the reversal of our roles under the typical conventions of social norms operating in Pueblo societies. While the ‘role reversal’ itself was separate and apart from the legal system we were participants in, the experience made a lasting impact on my consideration of how the tribal court system affects our tribal societies, including how the law that is actually applied to the people by the courts impacts our societies.

To some extent the gap between the written law and the societal norms of “the People” can be bridged by the judge, something at which tribal court judges who are tribal members and fluent in the tribal language can be particularly effective.<sup>11</sup> Nevertheless, the need for the written law, which judges are charged to apply, to be consistent with and based on underlying norms of the indigenous societies themselves, much of which is embedded in traditional law, is necessary.<sup>12</sup>

Often, it is said in support of the adoption by indigenous nations of law similar to state law, that whatever law an indigenous nation adopts is an act of its sovereignty. Undoubtedly, this is true. Yet, in my estimation, not every sovereign act undertaken by an indigenous nation necessarily promotes sovereignty of the people.<sup>13</sup> Law can be adopted by an indigenous nation which has values inconsistent with the value system, (i.e. law which would allow anyone, including non-Indian couples, to adopt a tribal child) or which encompasses law unknown to traditional indigenous societies (i.e. law providing for the creation of corporate entities), by which traditional law is changed, as in the former example or by which new law, not covered by traditional law is added, as in the latter example. The change of, or addition to, traditional law is clearly within the sovereign authority of an indigenous nation. However, where the end result of such change and addition is that an indigenous nation’s law is no different in substance or language from state law, indigenous nations participate in their own assimilation into the mainstream of American law.<sup>14</sup> Adoption of western law can create a gap between the adopted law and the people to whom it is applied. Such law can be ineffective if the People do not recognize it as emanating from their own value system and resist it-passively and actively. In this respect, an Indian nation’s government can participate in the alienation of its own people.

The premise of this article is that ultimately, an indigenous nation's sovereignty is strengthened if its law is based upon its own internalized values and norms. In the development of enacted law, consideration must be given to what the underlying values and norms of tribal society are, how they differ or coincide with the values and norms of enacted law and when they differ, what internal (traditional) law will be displaced by the enacted law and why. Where enacted law is imported law from outside the tribe, even where internal and imported law coincide, those responsible for creating the law should state the foundation of the internal law upon which the imported law is laid. This provides tribal court judges guidance, provides tribal and non-tribal members with notice as to what tribal norms govern their behavior, and how they are different or similar to non-tribal norms. Further, it reinforces the need for a separate system of justice for the separate peoples of indigenous nations.

This article begins, in Part I, with a discussion of traditional law generally and what it means, in an attempt to seek an understanding of the issues that must be addressed as each tribe develops a working definition for themselves. Though a general definition of traditional law can be generally articulated I suggest tribe-specific definitions are more important. Part II then examines the general process by which tribal law is created and more specifically the incorporation of traditional law into tribal codes, ordinances and resolutions. This requires consideration of the legislative process as it is generally embodied in the law of tribal governance, as well as, the practical considerations and difficulties of incorporating traditional law into written law. Part III looks at an approach used by the Saddle Lake First Nations peoples in Canada. The article concludes with a discussion of the continuing struggle to maintain cultural integrity represented by the promotion of traditional law and the relationship between traditional law and self-determination.

This article explores the idea of enacting law of indigenous nations that reflects traditional legal concepts and values. It considers the current situation that exists in many U.S. indigenous communities in which much of the enacted law is the same as the law of states and suggests that an alternative to the adoption of western law is necessary to make enacted tribal law relevant to the indigenous peoples it serves. More importantly, it begins to question the impact the enacted "western" law of tribal communities plays in shaping the lives of the people, the culture and the future of indigenous communities. In this article, I begin an initial attempt to bring in international, cross-cultural, and multi-disciplinary perspectives and voices to explore both the traditional and the created law of indigenous communities in the United States. Unfortunately, the literature is not replete with the voices of the indigenous peoples themselves, and in fact that voice is often excluded or is silent, which is especially ironic in discussions regarding traditional law. Through the use of footnotes, I allow the voices from different texts to speak directly to the reader and so,



in this manner the footnotes operate as voice, text, and subtext and not necessarily solely as silent technical citation and support, as is their function in conventional law scholarship.<sup>15</sup> Lastly, my position in this area is a developing one, but it emerges from the viewpoint that any law a tribe adopts is read and should be read as reflecting its values. In this period of self-determination, the adoption of law or the legislative function of indigenous nations takes on tremendous meaning for indigenous peoples who have long struggled to maintain their separate and distinct identity in the face of assimilationist policies of the federal government. Collective resistance, through the development of our own law, means that indigenous nations must critically assess written law and infuse enacted law with indigenous values as well as strengthen oral law.

## II. Traditional Law

What is traditional law? What do we mean when we say traditional law? This is where we must begin any discussion that addresses the use of traditional law. A critical beginning point is to consider the term in the native language. In Tiwa,<sup>16</sup> for example, there are words for law and custom derived from the Spanish words for both,<sup>17</sup> there is also a word referring to white man's law or the law of the courts,<sup>18</sup> demonstrating the introduction of outside law from two separate sources, but also the distinction such law has from traditional law. The word that comes closest to "law"> in Tiwa is the word for tradition — *keynaithue-wa-ee*, which translates "this is our way of living"<sup>19</sup> That way of life is elaborated upon in prayer.<sup>20</sup>

Chief Justice Robert Yazzie of the Navajo Nation Supreme Court also considers the Navajo word for law — *beehaz-aani*. Yazzie states:

The Navajo word for 'law' is *beehaz'aanii*. It means something fundamental, and something that is absolute and exists from the beginning of time. Navajos believe that the Holy People 'put it there for us from the beginning' for better thinking, planning and guidance. It is the source of a healthy, meaningful life, and thus 'life comes from it.' Navajos say that 'life comes from *beehaz'aani*,' because it is the essence of life. The precepts of *beehaz'aani* are stated in prayers and ceremonies that tell us of *hozho* — 'the perfect state.' Through these prayers and ceremonies we are taught what ought to be and what ought not to be.<sup>21</sup>

In clarifying what we are referring to in the use of the term traditional law, we must also recognize first, the variety of terms utilized by scholars and lay people alike in referring to traditional law and second, the meanings encoded in these English terms.<sup>22</sup> Customary law<sup>23</sup>, common law<sup>24</sup>, indigenous law<sup>25</sup>, tribal law<sup>26</sup>, tradition<sup>27</sup>, custom<sup>28</sup>, norms<sup>29</sup> and primitive law<sup>30</sup> have all been used to refer to the law of indigenous peoples. Some of these same terms, such as, customary law, common law,

tradition, norms and custom are also used generally by religions, in commerce, and are recognized terms in the western legal system and the international community.<sup>31</sup> As such, these terms have established legal meanings, some of which are utilized by indigenous peoples in the adoption of these English terms and some of which are expanded or borrowed or changed completely.<sup>32</sup> Clarity in what a particular indigenous nation seeks to recognize as traditional law accompanied with adapted definitions of recognized terminology can help indigenous peoples control the particular meanings in English legal terms like custom, tradition, customary law, norms and common law.<sup>33</sup>

The traditional law of any given tribal community is not entirely and unequivocally accessible in the same manner as is written law. Traditional law is internal to a particular community, oral, and for the most part, dynamic and not static in nature. There are some who feel that traditional law, such as that contained in creation narratives, for example, can never change. Both these positions can be reconciled. “For new rules to be accepted by the members of an affected group, they generally must build upon, and indeed, extend existing rules. That is, the fundamental principles of customary law... do not change. They are simply extended to cover new situations.”<sup>34</sup> For many of these reasons, the use of traditional law has caused and continues to raise various issues regarding its use by both those within the tribe and without the tribe.<sup>35</sup> Some tribal members may feel traditional law is subject to manipulation or has fallen into disuse and is no longer in existence or applicable; outsiders are uncomfortable with its lack of accessibility related to its internal and oral nature.<sup>36</sup>

In addition, it is important to recognize the passage of time and the impact of external forces that can give rise to changes in traditional law or which may obscure traditional law. For example, what was traditional at one point may have changed in the shift from a settled agricultural society to a mobile society brought about by the encroachment of tribal lands by the advancing settler population.<sup>37</sup> This can mean that what some consider traditional today can be the result of what colonialism has wrought.

If today’s Indian political leaders mean maintaining the traditions and culture inherited from the very brief period of Indian history during which external forces led to centralization and increasing emphasis on communal rights, then for the most part, they are really speaking of a culture which was already tremendously influenced by the coming of the white man.<sup>38</sup>

The unique history of each indigenous nation is important to consider because of the impact that history has on tradition.<sup>39</sup> A very general sketch of the history of Pueblo government in New Mexico demonstrates the impact the Spanish and Americans had

on the “original” traditional law of governance. In the words of Pueblo historian Joe S. Sando, “[t]radition was history, history was tradition.”<sup>40</sup> Originally,

[t]he Spirit warned the people to respect and obey the laws of nature, and the orders of their leaders: the chief, the war captains, and the cacique.<sup>41</sup> The cacique was to guide them spiritually. In him was vested the power of authority to legislate laws. The Spirit cautioned that this was the only way for them to live together in peace and to be protected. The Pueblo people had confidence that the cacique and the other leaders had power and wisdom because they were guided by the One above. Under this government the people made religion a part of their daily lives.<sup>42</sup>

Beginning in 1539, the Pueblos of New Mexico were impacted by three successive waves of colonial governments: the Spanish, the Mexican and the American. As a result of Spanish colonialism, the Pueblos were required to introduce Spanish-type civil officials into their government structure in 1620.<sup>43</sup> The office of pueblo governor was designed for Spanish domination, but “was converted by the Pueblos into an effective bulwark against intrusion by foreigners. The governor, in effect, protected the spiritual leaders. Thus were their human values preserved. The governor is responsible, under the cacique, for all tribal business of the modern world.”<sup>44</sup> In the majority of Pueblos, these officials are selected annually by the cacique and his staff.<sup>45</sup> Under American domination, a few of the Pueblos introduced another element to the structure of government by “reorganizing” under the Indian Reorganization Act of 1934<sup>46</sup>, which provided for the institution of constitutional elective governments<sup>47</sup>, whereby leaders are elected rather than selected by the cacique.<sup>48</sup> While the Spanish imposition of offices introduced new authority, the Pueblos responded by tying appointment to these positions to the traditional authorities, thus minimizing disruption of traditional authority.<sup>49</sup> The American introduction of constitutional elective governments removed the appointment authority of the traditional leadership over the introduced offices, separating the religious leadership from the secular government.<sup>50</sup>

In defining traditional law, fundamental questions arise. Have the introduction and incorporation of external influences resulted in a “new” or “evolved” tradition? Or is the tradition as it was prior to external influence? It depends on one’s definition of traditional law. What is considered and accepted as traditional is, of course, very much in the hearts and minds of today’s indigenous peoples, but also very much in the hands of both traditional and non-traditional “Indian political leaders” including elected tribal council members and members of the judiciary. From my experience in working with other tribes and with my own tribe, seeking to utilize traditional law is hard work that takes perseverance and patience. The requisite knowledge and skill to do this work do not come from without the tribe; they come from within. The [re]incorporation of traditional law into “tribal” law is an undertaking that must be

approached with great thought. First, what does reincorporating traditional law into tribal law mean? Second, what is the traditional law of a tribe? How do traditional law and custom transcend into the present day lives of Indian peoples living in a vastly different time and, in some cases “place”, than the ancestors from whom traditional law is drawn? Traditional law and custom do transcend, because traditional law and custom contain the values, beliefs and worldview of a peoples<sup>51</sup>, though it must be recognized native peoples’ conception of law is different from the western idea of law.<sup>52</sup> It must also be recognized that all tribes are in different places in relation to one another both in terms of articulating traditional law and incorporating it into tribal law.

Indigenous groups must define for themselves what traditional law is, because others cannot adequately define it for them<sup>53</sup> and because it is unique to each group. I suggest that it is this very act that will take indigenous peoples in an entirely different direction with their law than is possible when law is first approached from the western legal perspective.

### III. Incorporating Traditional Law

Addressing the re-incorporation of traditional law into tribal law — codes, and ordinances — implies that codes and ordinances do not contain traditional law. In the majority of tribes, this is true for at least a couple of reasons. One, traditional law is transmitted orally in the native language. Secondly, written “tribal law” adopted under the Indian Reorganization Act was not intended to reflect traditional law and in fact, supplanted it with Anglo-American legal concepts. In the end, however, the way to determine the extent to which traditional law is incorporated in tribal written law is to first examine a particular tribe’s written law. Traditional law, for the most part, will not leap out of these documents.

Reference to traditional law can also be found in tribal constitutions, where its use and application can be provided for. An example is the Constitution of the Pueblo of Laguna. The Laguna Constitution provides for the application of traditional law to members, persons residing on the lands of the Pueblo, and all persons entering the lands of the Pueblo.<sup>54</sup> The Constitution also refers to the traditional governing authority vested in officers of the Pueblo<sup>55</sup> and provides the “sovereign powers of the Pueblo of Laguna shall be vested in the Pueblo Council<sup>56</sup>” and exercised in accordance with the “Constitution, the ordinances, customs and traditions of the Pueblo, and the laws of the United States applicable to the Pueblo of Laguna.”<sup>57</sup> In addition, the Constitution states that disputes “which cannot be settled by the parties affected may first be brought before the Village Officers who shall try to have the parties settle the matter by giving their advice”<sup>58</sup>, a traditional method of resolving

disputes. If the parties cannot settle the matter with the advice of the Village Officers, the matter can be submitted to the Pueblo Courts.<sup>59</sup>

Similarly, the Hopi Constitution makes reference to traditional law or “custom” without specifying what is the custom. Pursuant to constitutional authority, “[v]illages are to decide... matters according to the established village custom, according to the procedures that a traditional village determines under the leadership of the village chief or “Kikmongwi”, or pursuant to a village’s constitution.”<sup>60</sup> This reserve of power under the Hopi Constitution “often requir[es] the finding and application of village law (often customary law) in both the tribal and village forums.”<sup>61</sup>

Likewise, some tribal legal codes provide for the application of traditional law without specifically incorporating the law into the document itself, therefore leaving the application of traditional law to the tribal judiciary.<sup>62</sup> An example is the Pueblo of Isleta’s Legal Code, Section 1-1-17(a) which states: “In all civil cases, the Pueblo of Isleta Judiciary shall apply applicable Pueblo of Isleta Ordinances or *customs*, unless prohibited by the laws of the United States, in which case such laws shall apply.”<sup>63</sup> The civil law contained in the Isleta Legal Code is very limited, in theory leaving civil law entirely within customary law.<sup>64</sup>

Nevertheless, it is important to assess the formal and informal use of traditional law in an existing tribal system, if one is working toward greater incorporation of traditional law into the tribal legal system. It is important to determine if traditional law is given place, and if so, the extent to which its use is actually employed by those responsible for applying it. An assessment that finds an unacceptable displacement of or insufficient accommodation, reinforcement or use of traditional law in the tribal justice system presumably drives a decision to “incorporate” more traditional law into codes and ordinances and can also inform what this incorporation should look like.

What do we mean when we speak of incorporating “traditional law” into written law? Do we envision incorporating the traditional law itself, or do we envision making place for it as in the above examples of Pueblo law? If we are speaking of incorporating the law itself, we must consider the difficulties of incorporating “traditional law” into written law (code, ordinances and resolutions). Do we mean to take traditional law, write it down in English for western style tribal courts to enforce? Does traditional law lend itself to this? Do we change its character in the very process of doing this? Of course, tribes can do whatever they think is right to incorporate their traditional law. But, what’s practical? The very idea of “writing” the traditional law down was recently rejected by a conservative traditional Pueblo community. Indeed, it is important to consider that when a tribe works its Indian tradition into any non-traditional system, the outcome represents a mixture, not pure tradition.

The history of the creation of existing tribal law as well as the present practice regarding the creation of tribal law informs the character of the law of tribes. Generally speaking, the responsibility for creating law or legislating lies in the Tribal Council of most tribes. Yet the process for creating law undoubtedly differs greatly from tribe to tribe. In my experience, I am aware of the following range of actors responsible for the actual language in the recently legislated law of tribes — council members, attorneys (including non-Indian attorneys, non-member Indian attorneys and member attorneys, generally in that order), council-appointed committees comprised entirely of members, council-appointed committees composed of a mixture of member and non-members, and “citizen” committees comprised of both members and non-members. Undoubtedly these actors, their goals and any “models” they consult have great influence on the structure and content of the law. Generally, the tribal council has final authority to adopt law, but this authority may be subject to Department of Interior approval.<sup>65</sup> In the end, however, it is the legislating body which has responsibility for the law adopted for the tribe. Therefore, it is appropriate to focus attention on the tribal council’s attitude and position on traditional law.

How councils create law and how they accommodate traditional law has a tremendous impact on the development of the written law of a tribe. It is not unusual for tribes, through whatever method they use to draft law, to consult outside law when developing law. Many “model”<sup>66</sup> and “uniform”<sup>67</sup> laws exist, as do “model codes” drafted specifically with tribes in mind.<sup>68</sup> In addition, tribes look at and adopt in entirety the law of states.<sup>69</sup> The reasons for this vary and are largely practical and understandable. Why should tribes create from scratch law regarding such things as traffic, taxation, environment, when perfectly acceptable law on such matters already exist? Shouldn’t tribes be concerned about the recognition factor of their laws by external actors, such as states, and outside business entities? Nevertheless, the impact of this practice on the creation of a unique body of law reflective of internal tribal values and beliefs is obvious. The extent to which tribes adopt external law as their own law directly impacts the influence of the norms and values contained in external law on tribal members and tribal society, in general. Obviously, this phenomenon has been in existence since at least 1934, the year the Indian Reorganization Act was enacted, for many tribes, and earlier for other tribes, such as the Pueblos of New Mexico [70] and the Cherokee Nation of Oklahoma<sup>71</sup>. It must be recognized that “[p]resumably . . . values are embodied in the law, in substantive rules as well as in the guiding procedural principles<sup>72</sup>” and that as a result of adopting external law we import these values as well. To the extent we mix or blend traditional and western law, or even if we introduce external law and keep it separate from traditional law we are either creating new law, that is not entirely traditional or maintaining two separate but co-existing (and inevitably competing) value systems.



The assumption that is made throughout this article is that a tribe desires to incorporate traditional law into its existing law, that the membership is supportive, that the traditional law is accessible and that the governing body of the tribe is in agreement. Of course, this may all depend on the traditional law that is being incorporated. Not all segments of tribal society may be in agreement with all or certain aspects of traditional law. For instance, in the area of governance, elected tribal councils may be the antithesis of traditional governance, and the issue may or may not have been resolved within a tribe.<sup>73</sup> The tribal council may also serve the function of an appellate court, as in some Pueblos. In this capacity, the council as appellate court is in a position to solidify principles of traditional law or set overarching rules regarding traditional law in the courts below, if it chooses not to do so in its legislative capacity. Other tribal appellate courts have taken an active role in this regard.<sup>74</sup>

To the extent that tribal councils have legislative authority, they are largely responsible for the presence of traditional law, whatever the form, in tribal enacted law. The next section of this article discusses an approach to promote traditional law that differs from the existing approaches presently found in tribal law discussed above.

#### IV. The Saddle Lake Approach

The Saddle Lake<sup>75</sup> approach is an approach that requires an understanding and articulation of a tribe's traditional law.<sup>76</sup> The approach suggests the reduction of the traditional law itself to codification.<sup>77</sup> This part of the approach is not for every tribe; in fact, I do not agree that traditional law itself should be codified. The critical part of the approach, for purposes of this article, is its concept of using traditional law as the foundation for law.<sup>78</sup> It is using traditional precepts, principles and values as the basis for the enacted law of the tribe, upon which I focus. *See Appendix B*. It is important to stress that it is an approach - it is not a model code or uniform law. In fact, the approach insures that the tribal law developed is uniquely tribal because it is based on the values of a particular tribe derived from its own traditional law. Although the approach is documented, it was not implemented by the Saddle Lake First Nation and thus remains an "approach" and not an existing example of the approach.<sup>79</sup> Its promise, however, remains. The approach is not as easy as adopting a model code or uniform law. Yet, if we learn anything from United States government policy, it is that no singular legal model exists for five hundred plus different tribes. In fact, the very promise of the Saddle Lake approach is that it is premised on traditional law — which is unique to each tribe.

The core of the Saddle Lake approach that lends itself to use by others is its premise of developing tribal law on the precepts and values of traditional law, essentially using

traditional law as the foundation for the development of all other law. The Saddle Lake Justice Manual cites the Minister of Indian Affairs, as stating:

Justice is a basic need in the life of every person. It has confronted, challenged and concerned every society which ever joined together for mutual benefit... The law belongs not to governments, not to bureaucrats, not to lawyers, but to the people... The many alternative means of resolving disputes suggested now-mediation, arbitration, restitution, reconciliation, to name a few-are the very methods which are part of customary law... Native peoples have been deprived of their own traditional laws, concepts of justice and legal procedures. We realize that the native peoples of Canada expect a system of justice that reflects their own cultural heritage...<sup>80</sup>

The expectation that justice reflect our own cultural heritage is what drives the discussion on “reincorporating” traditional law. The Saddle Lake approach was used by the Saddle Lake

First Nation to devise their entire justice system. It is an approach with various components, any of which can be adapted by those utilizing the approach.<sup>81</sup> The following components are those utilized by the Saddle Lake First Nation and relevant to the re-incorporation of traditional law into tribal codes: 1.) Meetings and interviews with elders;<sup>82</sup> 2.) Development of (a.) basic principles of traditional law derived from the elders;<sup>83</sup> and (b.) jurisprudential statement;<sup>84</sup> and 3.) Development of law<sup>85</sup> or legal system.<sup>86</sup> The approach envisions the incorporation of traditional law into the development of ethics<sup>87</sup>, and both substantive and procedural law<sup>88</sup>.

What I draw from the approach and advocate is the process of utilizing meetings and interviews with elders to determine traditional law, the use of the information to then articulate basic, foundational principles and precepts of traditional law and the use of these foundational precepts to build the law and, for the more ambitious, the legal system. The foundational precepts of traditional law are what lawmakers should keep in mind as they create the laws regarding everything from domestic relations to child protection to criminal law. This does not necessarily mean that the traditional law itself is written down, though some nations, such as the Saddle Lake Nation, might choose to do so, but that the law is based on fundamental principles of traditional law. The very process of developing law on the basic value and belief system of a particular group’s foundational principles of relationship, social values and beliefs would not allow for the wholesale adoption of external law without consideration of how or whether that law is in accord with the underlying norms of the society. This instills culture and tradition in the public law of the nation.

In practice, the approach is harder than it sounds. At each step, there are considerations to be taken into account and decisions to be made. For instance, what traditional law are we talking about? The traditional law that has survived and is alive



today? The tradition of the tribe before first contact? How is traditional law organized?<sup>89</sup> Are there some aspects of traditional law that are inappropriate for discussion?<sup>90</sup> How should elders be selected? Who is an elder? In what manner should meetings and interviews be conducted? Who should be involved in the work and who should make decisions regarding the interpretation of the materials gathered? Can the meaning of the law survive the translation from the native language to written English? Should it be translated or kept in the native language? Should traditional law be kept entirely separate and apart from any blend with non-traditional law or process? How should the information gathered then be distilled to arrive at basic precepts? How is this “foundational” law then used to develop larger bodies of law? Who holds the law? Who is to say what traditional law applies or translates to this modern time? What custom no longer applies due to disuse or due to conflict with federal or other internal and external overrides? Some of these questions can have general answers, but the majority are questions that can only be answered in context of a particular indigenous community. Furthermore, depending on the size of the community, the questions may become more difficult to answer or other questions or factors may arise. Implementing the approach, however, is not easy and, in fact, is difficult. It requires hard work, dedication and perseverance. The type of work required by the approach must be undertaken by those internal to the tribe; in fact, it cannot succeed without the support of those internal to the tribe.<sup>91</sup> What makes it difficult is what makes traditional law difficult. Tribes have different histories, not only do their experiences in interacting with colonizing forces differ but which colonizing force they dealt with at what point in time differs. Tribes differ in the extent to which their members have intermarried, and retained their languages, their traditional lands and their traditional ways. All of these factors impact traditional law. First, it is important to know and understand ourselves as well as recognize that our histories are crucial.<sup>92</sup> Secondly, we must know and truthfully analyze our own law. A series of questions can be helpful in examining tribal law, both the formal and written law and the formal and informal unwritten law. What part of the law is governed by tradition? Does our written law address areas covered by traditional law? If so, do they reflect that law? If not, do they conflict with that law or only partially reflect it? What is the relationship between codified law and traditional law, i.e. does one override the other? In short, an assessment of the law is essential.

The approach contained in the Saddle Lake Tribal Justice Manual is innovative. It contains the seed for incorporating traditional law into the justice system. It is an approach that is variable, in that tribes using the approach will not necessarily arrive at the same place in the end. More importantly, the Saddle Lake approach represents a serious respect for traditional law and its place not only in resolving specific disputes on a case-by-case basis, but in serving as a foundation for all law of the tribe, including law of governance, ethics, and substantive and procedural law.

## V. Of Cultural Integrity and Self-Determination

What I advocate is the critical development of written law that is based on the principals and precepts of traditional law, thus requiring an inquiry into how any proposed written law relates to principles of traditional law, and whether it is consistent or inconsistent. This process requires thought be given to whether traditional law is reinforced, displaced, or discarded. From such an approach, it is my belief that law that is based on internal tribal values and beliefs will emerge, law that is different from western law - law that is currently stifled under the present-day approach of wholesale adoption of developed state law. As a matter of cultural integrity and self-determination, public law and documents must reflect the culture of indigenous nations.

It is important to consider the warnings of the “dangers”<sup>93</sup> of codifying traditional law, which I take to mean writing down the specific traditions and customs of the tribe as laws. If the concern is in the direct codifying of traditions and customs as law, though I believe the concern is broader than that<sup>94</sup>, this is not the aspect of the Saddle Lake approach that I advocate for creating law. The apparent fear, or danger, of freezing traditional law or of getting it wrong assumes written law will never be amended, not be drafted by those knowledgeable of the living nature of law, or that it will be impossible to create written law that accurately reflects tribal values and beliefs. I acknowledge that it will take tremendous creative ability but expect that it will not be done without principled study of the traditional law and careful deliberation about the drafting of law based on traditional legal precepts. I also do not anticipate that such work will be done by outsiders to indigenous communities, nor be done exclusively by lawyers, without the necessary input of the traditional authorities of law. What it does require is an understanding and, perhaps more difficult, an agreement, of what values and principles are contained in traditional law and basing enacted law on those principles. It requires that those responsible for enacting tribal law understand these values. It also requires that legislators be responsible for articulating the rationale and assuming full responsibility when enacting law that differs from those values. Despite such challenges, I fail to see how adopting western written law is preferable.

Law is a dynamic force. Western written law contains western values, beliefs, and precepts that dictate thinking, behavior and approach to justice. Once law is adopted, it begins its work.<sup>95</sup> If any law must be written, and applied to us, why shouldn't it be law we fashion and create based on our own understanding of law, with knowledge of the importance of the relationships critical to our communities as well as based on what we know motivates and influences our social structure, that is — with an understanding of our social reality and our separate consciousness as indigenous peoples.

The challenge of incorporating traditional law lies in doing so in modern tribal societies, where colonialism and imperialism have been internalized and have affected tribal institutions and thought. The challenge lies in negotiating that clash between values and principles imbedded in traditional law and those imbedded in western law. De-colonization is not easily accomplished, whether one is struggling to build a nation-state or exercising self-determination within a nation. There are fears and risks to confront and through it all, the responsibility for mistakes is our own. Perhaps the greatest price to pay however, is failing to take a risk to break out of colonial patterns because the familiar paths of oppression have made the paths of self-determination and liberation unfamiliar.

Of course there are real issues at stake—jurisdiction, economic development opportunities, federal funding, but these things are not necessarily assured even if tribes mirror external law. The idea of creating law that is uniquely our own, based on our values should encourage dialogue, ignite debate, and be tested and explored in practice. I believe the threat to our cultural survival as distinct indigenous people is real, and we have survived in the face of this threat, but we must do what we can when we see the opportunity to reinforce our way of life. Significant encroachment in the area of internal tribal law has occurred, but it has not garnered the same type of attention that other encroachments have and perhaps more significantly, indigenous nations have themselves facilitated this encroachment, both through their own actions and failure to act.<sup>96</sup> Law is of great cultural significance and not to be so easily acquired and borrowed. What written law we have should be influenced by our way of thinking.

## VI. Conclusion

We have a history of colonization and oppression. That is why I address “re” incorporating traditional law and custom into our “tribal” law. But colonization and oppression have also left a legacy, in many forms, for example, alcohol and substance abuse, violence and suicide in our communities which affect our men, our women and our children. Do western legal approaches help in these areas of self-destruction and people on people violence? Do our written laws even make room to help our people resolve the underlying problems in a way that restores their self-dignity and self-worth so that the individual is reminded of their connection to the greater community? I am not suggesting that traditional law or customary law is a magical wand that once applied will take away these problems. What I do know is that relying on our own ways, our own philosophies, our own law restores our own method of supporting individuals for the strengthening of the larger community, thereby tearing away at the legacies of colonialism and oppression and reaffirming our wisdom which has helped us to continue on as “the People.” Western law is based on the values and norms of western society. Traditional law embodies the values and norms of our own

indigenous societies. If we can adopt any law we choose, including western law, why not choose the law that reinforces our own values and norms?

The link between traditional law, self-determination and sovereignty is clear. The creation of laws by us based on our philosophies and approaches is fundamental self-determination. Self-determination demands that we articulate our own law. For me, self-determination means Indigenous peoples have to do everything for themselves, according to what is right for them. It means Indigenous peoples have to be in control of the development of their law. To give our written law over entirely to western influence is a mistake. Our traditional law sets forth who we are as “the People.” Those who say that it is an act of self-determination to adopt any law we please are wrong, if that law undermines who we are as “the People.” The issue of how we incorporate traditional law into existing structures altered by colonialism is an issue worldwide. Nation-states in Africa and in the western hemisphere, such as Papua New Guinea are grappling with this very issue. It is important for tribal peoples to communicate on this and other issues concerning traditional law or internal law.<sup>97</sup> It is through the sharing of experiences and ideas concerning traditional law, its use, and its strengths that many will benefit.

## VII. Appendix A

### **Traditional Law**

## VIII. Appendix B

### **Written Law Built on the Foundation of Traditional Law**

<sup>1</sup> The term “tribal law” is used in this article to differentiate the law of United States Indigenous nations from federal Indian Law. Tribal law includes both the traditional law of the People as well as western law, whether imposed or adopted, which has become a part of modern tribal law. The title of this article refers to the incorporation of traditional values and precepts into the written law of tribes, which has come to overwhelmingly reflect western law. Though I prefer the term indigenous law to tribal law, I use the latter term because of its familiarity.

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Annual Federal Bar Association Indian Law Conference in April 2000 and before the Navajo Nation Council at the Navajo Common Law Symposium in Window Rock, Arizona in September 2000. Special thanks to the organizers of both conferences, especially Faith Roessel; Edward Dee, Special Assistant to the Speaker, and Edward T. Begay, Speaker of the Navajo Nation Council. Thanks also to UNM School of Law for a summer research grant and to the participants in the Law and Society Association's Eighth Summer Institute on Race and the Law: Critical Discourses Exploring Law and Society, Methods and Traditions, in particular Professors Kenneth (Kip) Bobroff (UNM School of Law), Alfonso Morales (UTEP Sociology Department) and Tayyub Mahmud (Cleveland Marshall College of Law) and the Summer Institute Planning Committee Chair, Professor Margaret Montoya (UNM School of Law) for the opportunity to present and discuss this article at the inspiring Institute. I also wish to thank James Zion for sharing his knowledge with me, as well as his points of agreement and disagreement, and Faye Hadley, UNM School of Law Research Librarian, for her research assistance.

<sup>3</sup> LEON SHELEFF, *THE FUTURE OF TRADITION*, Customary Law, Common Law and Legal Pluralism 121 (1999).

<sup>4</sup> See generally, Christine Zuni, *Strengthening What Remains*, 7 KAN. J. L. & PUB. POL'Y 17, 28 app. A (1997) (Appendix A contrasts the Anglo-American adversarial system of justice with indigenous concepts of justice.). This is the follow-up article to *Strengthening What Remains*, an essay that addressed the role of the tribal judiciary in strengthening the place of traditional law in tribal jurisprudence highlighting the difficulty given (1) the colonialistic history of tribal courts in indigenous communities and (2) existing tensions between Anglo-American legal concepts and indigenous approaches to settling disputes. This article expands on the concept of using traditional law as the foundation for enacted, written tribal law. *Id.* at 27.

<sup>5</sup> Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-94 (1983).

<sup>6</sup> The Department of Interior's Commissioner of Indian Affairs Hiram Price compiled regulations and Secretary H. M. Teller adopted these in 1883 for Courts of Indian Offenses. They were circulated among agents for all Indians except the Five Civilized Tribes, Indians of New York, the Osage, the Pueblos, and the Eastern Cherokees. See WILLIAM T. HAGAN, *INDIAN POLICE AND JUDGES EXPERIMENTS* in ACCULTURATION AND CONTROL 109-110 (1966).

These regulations were aimed specifically at changing undesirable behavior of the indigenous peoples subject to the regulations and included provisions against dances, multiple marriages, medicine men, and destruction of property upon death of its' owner. Over time these regulations were amended, but in effect they introduced both the western notions of "law", specific types of "laws" and judicial systems into indigenous communities, initially overtly outlawing certain traditional practices and custom and introducing western legal systems to control behavior and weaken traditional authority. The regulations for C.F.R. courts are presently codified at



25 C.F.R. §§ 11.100, et seq. (2000). See COURTS OF INDIAN OFFENSES, Extract from the Annual Report of the Secretary of the Interior (Nov. 1, 1883), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY, at 160 (Francis Paul Prucha 2nd ed. 1990). See also RULES FOR INDIAN COURTS (Aug. 27, 1892), *supra* at 186.

<sup>7</sup> Russel Lawrence Barsh & J. Youngblood Henderson, *Tribal Courts, The Model Code, and the Police Idea in American Indian Policy* in AMERICAN INDIANS AND THE LAW 25 (Lawrence Rosen, ed., 1976)(footnote omitted)(“[Courts of Indian Offenses], originally established under the auspices of the Bureau of Indian Affairs, have been replaced on virtually all reservations by ‘tribal courts,’ which are free from Bureau control. However, tribal courts usually follow procedural codes derived from, if not identical to, those governing Courts of Indian Offenses because the latter are readily available without development costs and are assured of the requisite approval of the Secretary of the Interior.”) *Id.* This still holds true today for some tribal courts, for example, the general ordinances of the Pueblo of Isleta and the Pueblo of Laguna (both with constitutions adopted pursuant to the IRA) are similar to the C.F.R. code. The Isleta code was adopted in 1976, SHARON O’BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 177 (1989) Laguna’s was adopted in 1908. Laguna’s criminal code was recently amended in 1999. See *Kim Coco Iwamoto, Pueblo of Laguna Tribal Government Profile*, 1 TRIBAL L.J. (forthcoming Jan. 2001). There is a difference, however, between C.F.R. codes imposed on indigenous nations and C.F.R. codes adopted by indigenous nations. “A manual of Indian Offenses published by the U.S. Interior Department and enforced by Bureau of Indian Affairs (BIA) police or by federal troops is an element of [federal] Indian law, but probably not of tribal law. It is, however, a fact of tribal life, and wholly or in part, the manual may well become assimilated into tribal law. A code drafted by BIA representatives in consultation with tribal members, ratified by popular plebiscite, enforced by tribal police, and interpreted by judges who are members of the tribe, is presumably an element of tribal law, however inconsistent it may be with other elements. This does not mean that the new code has become the totality of tribal law, or even the preeminent form. Within some communities, undoubtedly, there are laws of which outsiders do not even dream.” Bruce B. MacLachlan, *Indian Law and Puebloan Tribal Law*, in NORTH AMERICAN INDIAN ANTHROPOLOGY, Essays on Society and Culture 340, 343 (Raymond J. DeMallie & Alfonso Ortiz eds., 1994).

<sup>8</sup> Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN’S L. REV. 69, 129, app. B (1995)(examination of the internal law of several U.S. indigenous nations on domestic violence).

<sup>9</sup> My first experience as a tribal trial court judge was as Chief Judge for the Pueblo of Laguna in 1983. I continued as Judge Pro Tempore and as an Associate Judge from 1985 to 1991. I also served as Judge Pro Tempore for the Pueblo of Santa Clara in

1993. From 1989-91, I served as a Judge for the Pueblo of Taos in the “modern” court, an arm of the traditional Governor’s Court. My tribal court appellate experience includes work with the Southwest Intertribal Court of Appeals, where I served as Administrator for the Court in 1993. I also served as an Appellate Judge for the Southwest Intertribal Court of Appeals from 1991 to 1995. In 1992, I was appointed to the Isleta Court of Tax Appeals and currently serve as an Associate Judge with the Isleta Appellate Court. The Isleta Appellate Court is an appeals court for land and property disputes created in 1999, which determines disputes according to traditional law. The Court is comprised of six judges; three are lawyers, including myself and three elders familiar with traditional law, all members of the Pueblo. The Court conducts itself primarily in Tiwa, the tribal language. Although, I am not fluent, all five judges are fluent Tiwa speakers.

<sup>10</sup> “This feeling of oneness and distinctiveness from other groups is illustrated by the widespread custom of Indian tribes naming themselves with a word or words meaning ‘the People.’” O’BRIEN, *supra* note 5, at 14.

<sup>11</sup> Some tribes require that judges serving on the bench are enrolled members of the nation and fluent in the indigenous language. *See* 7 NNC § 354 (a) and (e) (requiring applicant for judicial appointment be an enrolled member and able to speak both Navajo and English).

<sup>12</sup> “[W]illiam Sumner, in his classic work, *Folkways*, explains how law emerges out of the mores; in fact, ‘Legislation, to be strong, must be consistent with the *mores*.’” SHELEFF, *supra* note 1, at 81 (footnote omitted). *The same principal is recognized by African Law scholars in respect to African customary law. “[I]t is important to keep faith with customary law not as an exclusive body of laws but in terms of its fundamental values and precepts, because: in every society there are basic cultural values; much are of vital importance to the maintenance of social cohesion... Customary law thus becomes important not because of its rules but because of its underlying values.”* *See* Akin Ibidapo-Obe, *The Dilemma of African Criminal Law: Tradition Versus Modernity*, 19 S.U.L. REV. 327, 333 (1992)(footnote omitted).

<sup>13</sup> “First a general comment—sovereignty is no value in itself. It’s only a value insofar as it relates to freedom and rights, either enhancing them or diminishing them. I want to take for granted something that may seem obvious, but it is actually controversial—namely that, in speaking of freedom and rights, we have in mind human beings; that is, persons of flesh and blood, not abstract political and legal constructions like corporations, or states, or capital. If these entities have any rights at all, which is questionable, they should be derivative from the rights of people. That’s the core classic liberal doctrine. It’s also the guiding principle for popular struggles for centuries, but it’s very strong opposed.” Noam Chomsky Lecture, February 26, 2000 (updated June 5, 2000) . *See also* SHELEFF, *supra* note 1, at 56—57 (“There are varying definitions of sovereignty, but the two dominant ones refer, on the one hand, to the source of authority stemming from the state as such, focused on its central

organs of government, and, on the other hand, of an attribution of sovereignty to the people who make up the state, who are considered to be the font of whatever power and authority is granted to those in temporary charge of its daily running and its fortunes.”).

<sup>14</sup> As nations existing within a nation, the rationale for either adopting or retaining western law by indigenous nations in the United States can be complex. Many Indigenous nation-states who possess independence and authority to create law retain colonial law. Ibidapo-Obe comments: “Despite flag independence for virtually all African states, the reality is that they are still in a stupor of neo-colonialism as reflected in their inability to shake off their colonial mentality. Consequently, many of the colonial criminal laws remain on the statute books wearing the toga of national legislation.” Ibidapo-Obe, *supra* note 10, at 328. Colonial mentality, however, is not unique to post-colonial indigenous nation states, it is part of the colonial legacy with which indigenous peoples of the United States struggle as well.

<sup>15</sup> In traditional scholarship, footnotes are used in order to support a proposition in the text. I am using footnotes in a slightly different way. I am using footnotes in order to share the specific voices and texts, to raise tangential issues and to broaden and deepen the discussion as well as to provide specificity. (I also use footnotes in the traditional way.) I seek in my text simply to address the incorporation of custom and tradition into written law or legislation. For the most part, I keep the text in my voice for purposes of maintaining continuity of the theme of the article and to avoid obscuring its purpose. I address the many and significant tangential points which arise in footnotes. I attempt as much as possible to make the text accessible to others not necessarily interested in the scholarly or theoretical details and discourse. However, I see the interdisciplinary complexity of addressing traditional law in any context. In fact, I see the discussion of traditional law as layered; one is practical, another is theoretical. I try as much as possible to leave the text in an accessible form and to leave the theoretical and tangential ideas and issues in the footnotes. I understand this is stretching the purpose of footnotes and that is my intent. I also understand I may have not been entirely successful in this endeavor.

<sup>16</sup> The Tiwa words and translations used here are from a discussion and interview between Isleta Pueblo member and Tiwa language instructor, Doris Lucero, with the author (October 14-15, 2000).

<sup>17</sup> *Na-ley* translates to “law.” *Ley* is the Spanish word for law. *Na-costumbre* is custom. *Costumbre* is the Spanish word for custom. *Id.*

<sup>18</sup> *Na-shachee* translates to white man’s law or laws of the court. *Id.*

<sup>19</sup> *Id.* As Doris Lucero elaborates “Our way of life is good. There was honor among the people. That’s why we survived. We helped each other. We cared. We loved each other. That’s the way it should be.” *Id.*

<sup>20</sup> *Id.* *Key-wah-wai-ee* or “This is the way of life” is connected. Detail of that way of life is provided through prayers. *Id.*



<sup>21</sup> Hon. Robert Yazzie, “*Life Comes From It*”: *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994)(footnotes omitted).

<sup>22</sup> This is further complicated by the fact that multiple terms are used interchangeably in reference to traditional law. *See Zuni*, *supra* note 2, at 22-23.

<sup>23</sup> Customary law is the term used in papers discussing African traditional law. *See* Derek Asiedu-Akrofi, *Judicial Recognition and Adoption of Customary Law in Nigeria*, 37 AM. J. COMP. L. 571 (1989); T.W. Bennett and T. Vermeulen, *Codification of Customary Law*, 24 J.A.L. 206 (1980); David M. Bigge and Amelie von Briesen, *Conflict in the Zimbabwean Courts: Women’s Rights and Indigenous Self-Determination in Magaya v. Magaya*, 13 HAR. HUM. RTS. J. 289 (2000); Akin Ibidapo-Obe, *The Dilemma of African Criminal Law: Tradition Versus Modernity* 19 S.U.L.REV.327 (1992). Canadian and Australian authors also use the term customary law. *See* Bruce L. Benson, *An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary Indian Law*, 5 REV. AUSTL. ECON. 41 (1991); Roger F. McDonnell, *Contextualizing the Investigation of Customary Law in Contemporary Native Communities*, 1992 CAN. J. CRIMINOLOGY 299.

<sup>24</sup> Common law is the term used by the Navajo Nation. It is also used by the Hopi Nation. *See* Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & POL’Y 761 (2000). Sekaquaptewa restricts the meaning of common law to the written opinion of judges, and does not use the term to apply generally to traditional law outside written opinions. In this restricted sense, “common law” would refer only to that traditional law addressed in written court opinions. *See also*, Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287 (1998); Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 AM. J. COMP. L. 509 (1998).

<sup>25</sup> Indigenous law is the term I chose to use because, like the term indigenous peoples, it broadens the frame of reference world-wide, breaking down the divisions among the millions of indigenous peoples and decreasing our sense of isolation. “Indigenous and/or tribal peoples, whom I shall jointly call indigenous and identify for the moment as peoples relatively unassimilated into the global economy who exhibit strong cultural ties to territories now included in states controlled by ethnically alien peoples number more than 250 million persons, or about 4% of the world’s population. They constitute some 5,000 distinctive peoples inhabiting approximately 70 different states. Spread across every region of the globe, indigenous cultures survived best when most inaccessible to dominant and alien centers of power.” MAIVÂN CLECH LÂM, *AT THE EDGE OF THE STATE: Indigenous Peoples and self-determination* XX (2000)(footnotes omitted). Numbers are tricky. “The numbers of Fourth World peoples are estimated at about 50 million throughout the world—but of course there

can be no certainty in this regard, either as to what groups to count, or as to an accurate estimate of their numbers.” SHELEFF, *supra* note 1, at 75 n.4.

<sup>26</sup> Tribal law is the term used in Bruce B. MacLachlan’s chapter on Indian Law and Puebloan Tribal Law. MacLachlan uses the term to include both “autochthonous elements... and elements of Euro-American law... incorporated through imposition, mechanical diffusion, or stimulus diffusion.” MacLachlan, *supra* note 5, at 343.

<sup>27</sup> Tradition is used by Sheleff. *See* SHELEFF, *supra* note 1.

<sup>28</sup> Custom is used in tribal code provisions to refer to traditional law. *See e.g.*, Pueblo of Isleta Legal Code, § 1-1-17(b) (“Where any doubt arises as to the customs and usages of the Tribe, the Judiciary may request the advice of counsellors familiar with these customs and usages.”).

<sup>29</sup> The term “norms” is used in defining custom by Sekaquaptewa. Sekaquaptewa, *supra* note 22.

<sup>30</sup> Karl N. Llewellyn and E. Adamson Hoebel used the term primitive law to contrast Cheyenne law or law-ways with modern law. *See* KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941). Benson also uses the term. Benson, *supra* note 21, at 41-65. Use of the term primitive law is problematic. In the words of Professor Akin Ibidapo-Obe, “Human Society is composed of individuals of disparate disposition, character, needs, whims and caprices. It is the function of law in any given society to attempt to regulate the foibles of its members in a manner that would lead to the achievement of a balance between these diverse tendencies and maintenance of social cohesion and equilibrium... It follows from this premise that no society or community of persons, however ‘primitive,’ ‘undeveloped’ or ‘backward,’ is lacking in such rules or regulations targeted at maintaining order and preventing its destabilization by deviant elements within it. Elementary and basic as this proposition is, spirited attempts have been made by all manner of social, legal, political philosophers and theorists to posit that law... is an exclusive preserve of certain cultures, geographical areas, or, (to adopt their hackneyed phraseology) ‘civilizations’ of the world.” Ibidapo-Obe, *supra* note 10, at 327. Likewise, MacLachlan states, “[a] number of significantly different interpretations of law are productively used in anthropology. Some imply that law ‘in the strict sense’ is an institution of developed societies that has evolved from human situations in which at best there existed only prelaw, protolaw, or primitive law. This definition implies that the law of developed societies, of nation-states, is the culmination of a series of developments of lesser values. It begs a multitude of questions that are worth raising. My interest is in the conception of law that is characteristic of all human societies. Law is a brooding omnipresence in human relations.” MacLachlan, *supra* note 5, at 342. *But see* SHELEFF, *supra* note 1, at 39—40 (footnotes omitted) (“[T]he truth of the matter is that there is a vigorous, ongoing debate in the social sciences, particularly in anthropology, as to the essential nature and meaning of primitivity. Stanley Diamond has argued very forcefully that the very idea of primitive should be

seen in positive terms, and that the characteristics associated with it have significance both for understanding social reality and for clarification in the social sciences... Diamond concludes that in certain 'basic and essential respects... primitive societies illuminate, by contrast, the dark side of a world civilization which is in chronic crisis'... Ashley Montagu pinpoints the key issue with direct relevance to the term tribe. He writes: There is perfectly sound sense in which the term 'primitive' and the concept for which it stands may be used, but not until we have disembarrassed ourselves of the unsound ways in which the word is employed shall we usefully be able to employ it at all.”).

<sup>31</sup> See for example, Alan Watson, *An Approach to Customary Law*, 1984

U. ILL. L. REV. 561(1984) discussing the dominant theory of how custom in Western private law is transformed into law- *opinio necessitatis*, the thrust of which is that individuals purposely follow a certain rule because they believe it to be law, and analysis of an alternative theory that custom becomes law only when it is the subject of statute or judicial decision. The author notes the “areas” of custom his paper does not address, and the different theories of custom illustrates how “custom” is approached differently in each “area.” See also *Id.* at 561 n.1(“In view of the theoretical difficulties encountered in determining when a society has law, the nature of custom in modern ‘tribal societies’ is not discussed here. For the development of a theory of custom in Roman law, insofar as there is one, see Nörr, *Zur Entstehung der Gewohnheits-rechtlichen Theorie*, in Festschrift für W. Felgentraeger 353 (1969). For a very different view of the formation of customary rules, particularly in international law, see J. Finnis, *NATURAL LAW and NATURAL RIGHTS* 238 (1980). This paper also does not discuss custom as a source of international law.”).

<sup>32</sup> “Legal elements can belong to more than one distinct system, but diffusion of an element from one legal system to another must be analyzed carefully.” MacLachlan *supra* note 5, at 343.

<sup>33</sup> Because legal elements related to the development of traditional law, such as tradition, custom, customary law, and common law are used by both American and indigenous legal systems, it is important for tribes to provide their own definitions of such terms because American legal definitions may not in fact contain the sense, in scope or in meaning, which indigenous societies understand such words to convey in their use of the words.

<sup>34</sup> See Benson, *supra* \_note 21, at 46-47 (footnote omitted). Benson examines the social contract underlying customary law systems based on economic theory to develop generalized characterizations of such systems. He then examines these characterizations by looking specifically at the Yurok and Cheyenne customary law systems. He looks both at property right formation and the legal institutions formed for enforcement. Interestingly, he argues private property rights and the rights of individuals “are likely to constitute the most important primary rules of conduct in

such legal systems” *Id.* at 44. He also examines customary law as unwritten constitution. *See id.* at 45-50.

<sup>35</sup> Consider, for example, the language in *Duro v. Reina*, 110 S.Ct. 2053 (1990), in which Justice Kennedy states: “While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of tribes they serve. Tribal courts are often ‘subordinate of the political branches of tribal governments,’ and their legal methods may depend on ‘unspoken practices and norms.’” *Id.* at 2064(citation omitted). The Court in *Duro* held that the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership. *See also* Paul Spruhan, *Means v. District Court of the Chinle Judicial District and the Hadane Doctrine in Navajo Criminal Law*, 1 TRIBAL L.J. (forthcoming Jan. 2001)(analyzing this and other language in *Duro* *in relation to the application of Navajo traditional law to find criminal jurisdiction in the Navajo Nation to prosecute a non-member Indian in* *Means v. District Court*, 26 ILR 6083 (1999)).

<sup>36</sup> “Even if Acoma law appropriately does apply to this case, it should apply only to the extent it is preexisting, articulated, and accessible... Additionally, law that is not preexisting, articulated, and accessible does not comport with the plain meaning of ‘law’ under the FTCA’s ‘law of the place’ language. In the absence of preexisting, articulated, and accessible Acoma law, it is incumbent upon the Court to look to the law of New Mexico.” Trial Brief On The Issue Of Applying Acoma Law To This Case at 2, *Cheromiah v. United States*, 55 F. Supp. 2d 1295 (D.N.M. 1999)(*Civ. No. 97-1418 MV/RLP*). *See Cheromiah*, 55 F. Supp. 2d 1295 (D.N.M. 1999)(holding that under the Federal Tort Claims Act (FTCA), the “law of the place” to be applied to a medical malpractice claim occurring on tribal lands, was tribal law). *See* Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law under the Federal Tort Claims Act*, 32 ARIZ. ST. L. J. 695 (2000) for an analysis of the *Cheromiah* decision.

<sup>37</sup> Benson, *supra* note 21, at 61(“Resulting changes [from European settlement] set the stage for amendments to implicit social contracts within some tribes, even before the American government subjugated them, suppressed their law, and put them on reservations. For example, some tribes began to organize and centralize authority, primarily for warfare, and this centralization frequently had legal ramifications.”). Benson considers the Yurok, Comanche and Cheyenne in this paper.

<sup>38</sup> *See id.* at 63.

<sup>39</sup> *See Robert B. Porter, Building a New Longhouse: The Case for Government Reform Within The Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805 (1998)(examining the impact of colonialism on the traditional government institution of the Haudenosaunee.).

<sup>40</sup> JOE S. SANDO, PUEBLO NATIONS: Eight Centuries of Pueblo Indian History 21 (1992).

<sup>41</sup> “Traditionally, each Pueblo was governed by one or more priests (if two, then each ruled for half the year)... Among the Hopi Pueblos the leader was called the *kikmongwi*; at Jemez, the *whivela*; and at Isleta the *taikabede*. The Spanish referred to Pueblo leaders as the ‘cacique’ (Taken from a Caribbean Indian world meaning ‘leader’, *cacique* is the term used by outsiders today when speaking of a Pueblo religious leader.)” O’BRIEN, *supra* note 5, at 29.

<sup>42</sup> SANDO, *supra* note 38, at 24.

<sup>43</sup> *Id.* at 249.

<sup>44</sup> *Id.* at 14.

<sup>45</sup> *Id.* at 15.

<sup>46</sup> *Id.*

<sup>47</sup> These include the Pueblo of Santa Clara, Pueblo of Zuni, Pueblo of Isleta and the Pueblo of Laguna.

<sup>48</sup> SANDO, *supra* note 38, at 14. *Two other Pueblos elect rather than appoint leaders: Pojoaque and San Ildelfonso.* *Id.* at 15.

<sup>49</sup> MacLachlan, *supra* note 5, at 344.

<sup>50</sup> For a brief discussion of the events giving rise to introduction of constitutions and the separation of religious and secular affairs in two Pueblos. *See id.* at 345-6 (discussion on Santa Clara Pueblo). *See also* O’BRIEN, *supra* note 5, at 173—174 (discussion on Isleta Pueblo).

<sup>51</sup> “Custom, then, far from being a problematic aspect of tribal life in the context of the modern world, becomes an integral aspect of a legal system, not an artificial addition reluctantly conceded, but an essential component of a meaningful law that is willingly accepted by the citizenry, because it is deeply embedded in their consciousness as a living part of their culture.” SHELEFF, *supra* note 1, at 87.

<sup>52</sup> RENNARD STRICKLAND, FIRE AND THE SPIRITS, Cherokee Law from Clan to Court 10-11 (1975). “In truth, the Cherokee conception of law was simply different from the more traditional Western idea of law. To the Cherokees law was the earthly representation of a divine spirit order. They did not think of law as a set of civil or secular rules limiting or requiring actions on their part. Public consensus and harmony rather than confrontation and dispute, as essential elements of the Cherokee world view, were reflected in the ancient concepts of the law. The ongoing social process could not, in the Cherokee way, be manipulated by law to achieve policy goals. There was no question of man being able to create law because to the Cherokee the norms of behavior were a sovereign command from the Spirit World. Man might apply the divinely ordained rules, but no earthly authority was empowered to formulate rules of tribal conduct.” *Id.* \_ “[I]t would be a waste of time and a misdirection of intellectual effort to seek to establish a single, universally applicable connotation for [law] ... ”



*\_See P.H. Gulliver, Case Studies in Non-Western Societies in* LAW IN CULTURE AND SOCIETY 11, 12 (Laura Nader, ed. 1969).

<sup>53</sup> Take, for example, the following excerpt which illustrates to me the difficulty outsiders have in trying to understand themselves, let alone articulate, what customary law is: “Colin Bourke and Helen Cox, among others, have observed that Indigenous customary law is ‘difficult to define in non-Indigenous terms because it covers the rules for living and is backed by religious sanctions. It also prescribes daily behaviour.’ Kenneth Maddock observes that ‘Actions as diverse as the making of fire... the mating of bandicoots... and the avoiding of mothers-in-law are subsumed under *djugarura* [*an established and morally-right order of behaviour*].’ *As with all systems of culture and law, it has evolved with circumstances and continues to do so; and in many ways is comparable to Talmudic Law or Koranic Law, in this it relies on both religious and temporal sanctions for its force, and purports to organize daily existence in compliance with divine guidance. Robert Tonkinson’s anthropological definition, for example, is specific to the Mardudjara he has studied, but his suggestion that customary law ‘connotes a body of jural rules and moral evaluations of customary and socially sanctioned behaviour patterns’ is of wider application. Perhaps the best definition, however, is one as to content rather than description, and to this end Ronald Berndt offers an acceptable amalgam. Indigenous customary law, he writes, is the sum of three sets of relationships—people and land, people and deities, and people and people—and of three highly interdependent factors which act upon these relationships—religion, natural environment, and social organization/kinship.*” Rob McLaughlin, *\_Some Problems and Issues in the Recognition of Indigenous Customary Law* (visited Dec. 30, 2000) .

<sup>54</sup> CONSTITUTION of the PUEBLO of LAGUNA, art. I, §§ 2, 3 (1984).

<sup>55</sup> *Id.*, art. III, §2.

<sup>56</sup> *Id.*, art. IV, §1.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*, art.V, §5.

<sup>59</sup> *Id.*

<sup>60</sup> Pat Sekaquaptewa, *Evolving the Hopi Common Law\_ (1999) (pre-publication draft on file with the \_Tribal Law Journal)*[hereinafter, Sekaquaptewa Pre-Publication Draft](footnote omitted). The Hopi Constitution, Article III, Section 2 provides:

<sup>61</sup> Sekaquaptewa, Pre-Publication Draft, *supra* note 58, at 1.

<sup>62</sup> Therefore, in addition to looking at the law contained in the legal documents of the tribe, one must also look at the practice of the judiciary, in order to determine the extent to which customary law is applied under existing law, or to what many refer to as tribal “common law,” but the focus of this paper is on the incorporation of traditional law into tribal codes, ordinances and resolutions, the legislated law of the tribe.

<sup>63</sup> See Pueblo of Isleta Legal Code, §1-1-17(emphasis added). The provision reads in its entirety:

<sup>64</sup> The only substantive provisions of the Isleta Legal Code governing civil actions are those governing determination of paternity and support (ILC § 1-1-20), determination of heirs (ILC § 1-1-21) and approval of wills (ILC § 1-1-22).

<sup>65</sup> PUEBLO OF ISLETA TRIBAL CONSTITUTION, art. V, section 2(e) (Revised 1991).

<sup>66</sup> See e.g., MODEL PENAL CODE (1985).

<sup>67</sup> See e.g., UNIF. COM. CODE (1999).

<sup>68</sup> See e.g., MODEL CHILDRENS CODE (2nd ed.) AND CHILDREN’S COURT RULES (American Indian Law Ctr. 1981).

<sup>69</sup> See e.g., Pueblo of Acoma Res. No. TC-DEC-1-99-2, Adoption of Title 2, Chapters 1 and 2, General Civil Matters (Resolution adopting by reference the New Mexico Medical Malpractice Act); Pueblo of Isleta Res. No. 87-35, Adoption of the New Mexico Motor Vehicle Laws (Sept. 14, 1987).

<sup>70</sup> \_Supra \_text accompanying note 39.

<sup>71</sup> Professor Strickland refers to the post-contact period of 1786 to 1828 as “White Ascendancy,” the “period the Cherokees addressed themselves to the question of how the white legal system could be adapted to Cherokee needs and which elements would best serve Cherokee tribal goals.” STRICKLAND, *supra* note 50, at 5.

<sup>72</sup> Vilhelm Aubert, *Case Studies of Law in Western Societies*, in LAW IN CULTURE AND SOCIETY 273, 277 (Laura Nader ed. 1969).

<sup>73</sup> “The first major change the United States brought about in Indian tribal governments came during the treaty-making era. Through its efforts to simplify and speed treaty negotiations, the United States often pressured tribes to centralize their governments. Traditional tribal governments incorporated guards against concentration of power to preserve values of freedom, respect, and harmony. Decisions generally required the approval of leaders of several bands, each of whom needed the consensus of all band members. This democratic nature inconvenienced and exasperated the U.S. government, which urged tribes to select a principal chief with authority to make decisions on behalf of the tribe.

<sup>74</sup> See generally, *Daniel L. Lowery, Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969- 1992*, 18 AM. IND. L. REV. 379 (1993); Sekaquaptewa, *supra* note 22.

<sup>75</sup> Saddle Lake First Nation is located approximately 120 miles northeast of Edmonton, Alberta in Canada. It covers 70,500 acres. By 1985 figures, its population of approximately 3,000 citizens lived on the territory of Saddle Lake and nearly 1000 lived off of the territory. See SADDLE LAKE TRIBAL JUSTICE MANUAL 2 (1985).

<sup>76</sup> *Id.* In 1983, Saddle Lake prepared a funding proposal to the Alberta Law Foundation to research and develop a model or plan for a tribal justice system.

Funding was approved and the Tribal Justice Centre was created and mandated to develop a proposed model justice system. *Id* at 21.

<sup>77</sup> “All Tribal customs and laws applicable in the Tribal Justice System and upon the territory of the Tribe should be made evident and codified (written) where possible in order to give notice to all persons subject to them and all institutions of government whose authority and power flow from them... 2. Customs and traditional laws of the Tribe should be collected or codified for use in the justice system and by non-Indian courts which apply them in proper cases.” *Id.* at 42.

<sup>78</sup> “1. Customs and traditional laws shall be recognized and entrenched in tribal codes and justice procedures to the full extent possible and where appropriate as determined by the Tribe.” *Id.* at 42. It is this first point that influences the notion of basing written law on fundamental principles and precepts of traditional law.

<sup>79</sup> Interview with James Zion, Solicitor, Navajo Nation Supreme Court, in Albuquerque, N.M. (September 1, 2000)(Former Mentor to the Tribal Justice Centre).

<sup>80</sup> SADDLE LAKE TRIBAL JUSTICE MANUAL, *supra* note 73, at 21.

<sup>81</sup> Because of the autonomy of each indigenous nation, I do not seek to set forth this approach as “the” approach to follow. Rather, it is the idea and the process of assessing traditional law, extracting principles or precepts from that law, then basing the written law an indigenous nation finds necessary to adopt on these principles and precepts that is important. Therefore, I describe in the text of this paper only the most general approach used, and footnote the specifics.

<sup>82</sup> These included involvement and participation in various Elders meetings, band meetings, general discussion with band members and personal interviews with Elders of the community, either by appointment or Elders coming forward requesting an interview. *See* SADDLE LAKE TRIBAL JUSTICE MANUAL, *supra* note 73, at 29.

<sup>83</sup> Tribal customs for Band elections, customary law for Chief and Council, childcare, domestic relations, property, disputes/resolution of conflicts, land, and “reservation living” were set forth in statements. *Id.* at 29-36.

<sup>84</sup> Saddle Lake’s “Jurisprudential Considerations” were set out in five propositions. These propositions generally addressed justice, common values, and institutional requirements. *Id.* at 23-27. The most significant, for purposes of addressing traditional law, is the final proposition:

**PROPOSITION:** The realms of custom and law may be differently defined and each plays different roles in a community/society, yet one must be based upon and complementary to the other.

Customs are norms or rules about the ways in which people must behave if social institutions are to perform their task and society is to endure.

Law, on the other hand, is defined as a body of binding obligations regarded as right by one party and acknowledged as the duty to the other.

Seen in this light, some customs are re-institutionalized for the more precise purposes of legal institutions.



Law, therefore, may be regarded as a custom that is restated in order to make it amendable to the activities of the legal institutions. In this sense, it is one of the most characteristic attributes of legal institutions that some of the laws are about the legal institutions themselves, although most are about the other institutions of a community/society such as the family, political, economic, ritual or whatever. Thus, law is a body of binding obligations regarded as right by one party and acknowledged as the duty to the other which has been reinstitutionalized within the legal institution so that a community or society can continue to function in a orderly manner on the basis of the rules (customs) so maintained.” *Id.* at 26-27.

<sup>85</sup> The Recommendation following the Proposition for Tribal Law and Customs provides: “That tribal customs and traditional laws of the Tribe be applied in the justice system where applicable and appropriate and that where no customs or laws exist, that Chief and Council pass and have codified, where appropriate laws, statutes and regulations applicable before the tribal justice system and further, that all customs, traditional laws and statutes and by-laws be published to the extent possible for the information and notice of all persons on or off reserve where and to who such laws apply.” *Id.* at 43.

<sup>86</sup> The Tribal Mechanisms of Justice Proposition recommended a two level system for the administration of justice. *Id.* at 46. The first was a Peacemaker system and the second, a Tribal Tribunal of Jurors. *Id.* “The Tribunal shall be of the administrative model, non-adversarial, but carrying the powers to mediate, conciliate, negotiate and arbitrate disputes filed and brought before it.” *Id.* at 45. It also recommended passage of a statute creating the system and appropriate rules and regulations for the system. *Id.* at 46.

<sup>87</sup> “Ethical standards should reflect the traditions, laws, and customs of the Tribe.” *Id.* at 48.

<sup>88</sup> See *SADDLE LAKE TRIBAL JUSTICE MANUAL*, *supra* note 73, at 42-44 (Proposition 4 states procedures should reflect tribal traditional laws and customs. Proposition 5 states traditional methods of resolving disputes should be incorporated in the tribal justice system where applicable).

<sup>89</sup> For example, the Saddle Lake materials indicate that the Higher Indian (Cree) law can be divided as follows:

- Affirmation of the Whole-Continuity
- Affirmation of the Creator-World
- Affirmation of the Community-Nationhood
- Law of Harmony
- Law of Relationships
- Law of Discourse-Oral tradition and “Good Talk”
- Law of Truth
- Law of Personal Responsibility
- Law of Pity (civil)

Law of Consequences  
Law of Consensus  
Law of Fairness and Equity  
Law of Duty  
Law of History

TRIBAL JUSTICE CENTRE, PROPOSED DRAFT LEARNING MANUAL AND SYLLABUS FOR THE TRIBAL JUSTICE SYSTEM 1 (November 1985).

<sup>90</sup> “It should be made clear, however, that the Hopi have persisting traditional institutions and authorities that decide matters within their subject matter or personal jurisdiction sphere according to village and clan customary law. These mechanisms include religious societies and the presiding priests of a kiva at a given time of year. This also includes clans and clan leaders, and the Kikmongwi and other village leaders who are undertaking their traditional village responsibilities. The details of what these authorities do and how they do it comprises the body of Hopi religious law, much of which cannot be shared with the uninitiated.” Sekaquaptewa, *supra* note 22, at 776-77.

<sup>91</sup> The Saddle Lake First Nation did not implement the system. Band Leadership changed and the proposed justice system was shelved. See *Interview with James Zion*, *supra* note 77.

<sup>92</sup> “[T]o put it in the language of cultural adaptation theory, the survival of any society depends on its ability to creatively interact, out of *its* received store of experience or culture, with the unique vicissitudes of *its* particular geography and history, and not someone else’s. Geography remaining diverse still, and history having not quite ended, either the creative diversifying process continues or survival itself ends.” L&Acirc;M, *supra* note 23, at 210.

<sup>93</sup> See James W. Zion, *Don’t Magic Power Out Of The Hands Of The People!: An Essay on Indian Common Law Statutory Process*, *(unpublished manuscript, on file with the Tribal Law Journal)*. See also Hon. Robert Yazzie, *Navajo Common Law Development*, in NAVAJO COMMON LAW SYMPOSIUM 2000, *Diné Bi Beehaz’áanii Symposium Materials* 1,3 (2000)(“I think we are all agreed that we must use the process of making law to protect, promote, and preserve Navajo values in the Navajo common law. One of the biggest dangers in doing that is that we will distort or ‘get it wrong,’ or we will freeze it. It is very dangerous to put certain customs in writing.”).

<sup>94</sup> See *Bennett & Vermeulen*, *supra* note 20, for a critique of both codification and common law development of customary law based on the difference between western law and customary law. I submit that there are differences, however, between a nation-state seeking to codify customary law for diverse indigenous populations, and a single indigenous group seeking to develop written law grounded in its own oral traditional law. There is also a difference between indigenous groups that operate entirely within an oral and traditional law system and most U.S. indigenous groups

that operate with the trappings of the western legal system, including western-style courts, legislatures, written laws and judicial opinions. The existence of these western trappings in indigenous communities raises challenges in terms of their relationship to oral traditional law.

<sup>95</sup> “Law is an adjunct of society. When the latter changes, the former must also adjust.” L&Acirc;M, *supra* note 23, at 202.

<sup>96</sup> As UNM Legal Writing Professor and Pueblo of Isleta Tribal Court Associate Judge Raquel Montoya-Lewis points out, the basis of this facilitation can be internalized oppression. It can also arise from the lack of vision regarding traditional law that legal advisors to indigenous communities bring. In this respect, many legal institutions who teach “Indian” law are implicated in their failure to treat the traditional law of indigenous peoples with the respect it deserves, with their focus on federal Indian law to the exclusion of tribal law. That said, it is also important to point out that the primary sources of traditional law are in indigenous communities, not in the legal institutions.

<sup>97</sup> In recognition of this, the Tribal Law Journal (TLJ) dedicated to the internal law of indigenous peoples was launched at the University of New Mexico School of Law. The TLJ is intended to be used as a vehicle to promote the development of tribal law based on indigenous concepts. The web address for the Journal is <http://tlj.unm.edu> . The email address for the Journal is [tlj@law.unm.edu](mailto:tlj@law.unm.edu)



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**“Whatever Tribal Precedent There May Be”: The  
(Un)Availability of Tribal Law**

**Bonnie Shucha**

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## “Whatever Tribal Precedent There May Be”: The (Un)availability of Tribal Law\*

Bonnie Shucha\*\*

*This article explores the costs and benefits of publishing tribal law. It begins by discussing the importance of tribal law and analyzing why tribal law is not widely disseminated. Next it discusses the benefits of making tribal law more accessible, and then it describes publication options for tribes. An appendix lists tribal law collections.*

¶1 “Today, in the United States, we have three types of sovereign entities,” explains U.S. Supreme Court Justice Sandra Day O’Connor, “the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country.”<sup>1</sup> Yet despite its importance, tribal law, unlike federal and state law, can be very difficult, if not impossible, to locate.<sup>2</sup> For a majority of the 566 federally recognized tribes in the United States today, no law has been published.<sup>3</sup> Where it is available, tribal law is scattered across web sites, databases, and print publications.<sup>4</sup>

¶2 The lack of access to tribal law raises numerous difficulties for both Indians and non-Indians. It is particularly problematic when tribes have concurrent jurisdiction with other sovereign entities. When tribal law is not known, state and federal courts have no choice but to disregard it, along with the tribal norms and values that it represents. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, decided by the U.S. Supreme Court in 2008, illustrates this point.<sup>5</sup> In oral argument, Chief Justice Roberts points out that in addition to applicable federal and state law, the court should also consider “whatever tribal precedent there may be.” Counsel replies, “That’s correct although we have not been able to find precedent.”

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1. Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997).

2. Tribal law comprises the law developed by tribes or Indian nations that applies to their territories and to their members. David Selden, *Basic Indian Law Research Tips—Tribal Law*, at 1 (2012), available at [http://www.narf.org/nill/resources/tribal\\_law\\_research\\_2012.pdf](http://www.narf.org/nill/resources/tribal_law_research_2012.pdf).

3. U.S. Dep’t of the Interior, Bureau of Indian Affairs, *Frequently Asked Questions*, <http://www.bia.gov/FAQs/index.htm> (last visited Apr. 28, 2014); Michele Knapp, Tribal Law Publication in Light of the Tribal Law and Order Act of 2010, at 12 (May 29, 2012) (unpublished thesis, University of Washington Information School), available at <http://lib.law.washington.edu/lawlibrarianship/CILLPapers/Knapp2012.pdf>.

4. See the appendix for collections of tribal law. Note that no two sources are alike in format and content.

5. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008).

Roberts responds, “Well, . . . neither could anybody, right? . . . It’s because it’s not published anywhere, right?”<sup>6</sup>

¶3 The unavailability of tribal law is also problematic when tribes have sole jurisdiction over non-Indians. In *Montana v. United States*, the Supreme Court recognized two circumstances in which non-Indians may be subject to tribal law. First, a tribe may “exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>7</sup> This issue is of growing concern as tribal casinos attract increasing numbers of patrons to Indian country.

¶4 Second, “a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”<sup>8</sup> Although such regulation may be very attractive to tribes, business partners may be justifiably wary of subjecting themselves to unknown tribal laws. One Wisconsin attorney expressed frustration over the lack of access to tribal law. After encouraging a client to do business with a tribe, he was disheartened to find that he was unable to get a copy of the applicable tribal law.<sup>9</sup> This unfamiliarity with tribal law and the tribal judicial system has historically led outsiders to insist that disputes be heard in federal or state court.<sup>10</sup>

¶5 Tribes that do not make their law available are also barred from participation in two recent federal programs that would otherwise grant them increased jurisdiction over crimes occurring in Indian country. The Tribal Law and Order Act of 2010 expands sentencing authority for tribal courts in criminal cases, but the law requires that prior to charging a defendant, the tribal court must first “make publicly available the criminal laws, rules of evidence, and rules of criminal procedure of the tribal government.”<sup>11</sup> The Violence Against Women Reauthorization Act of 2013, which strengthens tribal jurisdiction over non-Indian perpetrators of domestic violence in Indian country, also conditions participation on making tribal criminal laws and procedures publicly available.<sup>12</sup>

6. Transcript of Oral Argument at 31–32, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008) (No. 07-411), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-411.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-411.pdf).

7. *Montana v. United States*, 450 U.S. 544, 566 (1981).

8. *Id.* at 565.

9. Brian L. Pierson, Address at the Law Librarians Association of Wisconsin 2nd Quarterly Business Meeting (Nov. 12, 2013) (on file with author).

10. Brian L. Pierson, *Doing Business in Indian Country: An Indian Law Primer* 4 (2013) (unpublished manuscript) (on file with author).

11. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234(c)(4), 124 Stat. 2261, 2280.

12. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 204(d), 127 Stat. 54, 122; U.S. DEP’T OF JUSTICE, *VAWA 2013 AND TRIBAL JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE* (June 14, 2013), available at <http://www.justice.gov/tribal/docs/vawa-2013-tribal-jurisdiction-overnon-indian-perpetrators-domesticviolence.pdf>; Robert Anderson, Basic Principles of Federal Indian Law Governing Criminal Jurisdiction, presentation at the American Association of Law Libraries 106th Annual Meeting, Seattle, Washington (July 15, 2013); U.S. DEP’T OF JUSTICE, *Violence Against Women Act (VAWA) Reauthorization Act 2013*, <http://www.justice.gov/tribal/vawa-tribal.html> (last visited Mar. 3, 2014).

¶6 Finally, on a more general level, the lack of knowledge about tribal law can perpetuate misunderstandings and stereotypes about Native Americans. Without access to the law of the tribe, media coverage about native issues may be uninformed and one-sided: “Such a lack of public understanding means that headline Indian law news often confounds and sometimes outrages non-Indians, especially when the political status of tribes is not understood and outcomes appear to reflect unfair racial preferences.”<sup>13</sup>

¶7 Each of the difficulties described above would be mitigated by making tribal law more widely accessible.

### Why Tribal Law Is Not More Widely Available

¶8 Unlike federal and state governments, most tribes have no mandate to publish their laws. There are some notable exceptions, including the Havasupai and the Cheyenne and Arapaho. The Havasupai Tribal Council believes that their people “have a fundamental right to be able to know the laws, to be able to find the law, and to be able to have access to the laws.” To advance this right, they passed a resolution requiring that all current and future legislation be compiled into a code, then published and made available to tribal members.<sup>14</sup> The Cheyenne and Arapaho Tribes have established a constitutional requirement that both the legislature and the court must publish their legal documents.<sup>15</sup> But even when publication is mandatory, tribes have no obligation to widely distribute their laws outside of the tribe.<sup>16</sup>

¶9 Without such a mandate, many tribes have chosen not to make their laws publicly available. There are several possible reasons for this. First, and most often cited, is inadequate funding of tribal legal systems.<sup>17</sup> When asked what one of the biggest obstacles facing tribal courts was, Leech Lake Band of Ojibwe Tribal Court Judge Korey Wahwassuck replied, “Money. I think that’s a huge problem.”<sup>18</sup> Congress has also recognized that “tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation.”<sup>19</sup>

¶10 The distribution of laws requires funds for both creation and maintenance of the publication medium (whether print or electronic) as well as the personnel to organize, review, and post the content. Without such funding, tribes may find it difficult to distribute their laws, even if they have the desire to do so. Fortunately, several outside organizations, as described later in this article, have offered to publish legal

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13. Nancy Carol Carter, *American Indians and Law Libraries: Acknowledging the Third Sovereign*, 94 LAW LIBR. J. 7, 7, 2002 LAW LIBR. J. 1, ¶ 2.

14. Resolution of the Governing Body of the Havasupai Tribe of the Havasupai Reservation Supai, pmbl. (n.d.).

15. CONST. OF THE CHEYENNE AND ARAPAHO TRIBES, art. VI, § 7, art. VIII, § 6 (2006).

16. Carter, *supra* note 13, at 17, ¶ 32.

17. JERRY GARDNER, IMPROVING THE RELATIONSHIP BETWEEN INDIAN NATIONS, THE FEDERAL GOVERNMENT, AND STATE GOVERNMENTS (2003), available at <http://www.tribal-institute.org/articles/mou.htm>.

18. Aaron Arnold, *Interview, Korey Wahwassuck, Associate Judge, Leech Lake Band of Ojibwe Tribal Court, Cass Lake, Minnesota*, 2 J. CT. INNOVATION 405, 408 (2009).

19. Indian Tribal Justice Act, Pub. L. No. 103-176, § 2, 107 Stat. 2004, 2004 (1993).



content on behalf of tribes. But even with this assistance, tribes must still pay staff to organize, review, and distribute content to those organizations.

¶11 Aside from monetary issues, some tribes have affirmatively decided to keep their laws private. There are several possible reasons for this desire for privacy: concern that making law available will subject the tribe to criticism and challenge;<sup>20</sup> worry that opening up tribal culture, especially legal information, to the public will threaten its sacred nature;<sup>21</sup> tribal politics, including concern over causing public embarrassment for tribal members who have been the subject of legal action within the tribe;<sup>22</sup> and belief, although untrue, that publishing in written form will not allow the tribe to change the law in the future.<sup>23</sup> Although these privacy issues are harder to counter than the monetary concerns, tribes should consider the many benefits of publishing their laws before deciding whether to do so.

### How Making Tribal Law More Accessible Benefits Tribes and Others

¶12 Making tribal law publicly available offers numerous advantages: state and federal judges could consider tribal law in issues of concurrent jurisdiction, tribes could gain increased criminal jurisdiction, non-Indians subject to tribal law would know what exactly they are being held to, and members of the public could better understand a tribe's rights and perspectives in controversial issues. As Judge Wahwassuck points out, "[t]he misperception that we have 'no written laws' or that [Indian country is] a 'lawless place' can be corrected through communication and letting people see the process and educating people."<sup>24</sup>

¶13 Broader distribution of tribal law also facilitates idea sharing, both among tribes and between tribal and state governments. Tribal leaders can benefit by studying how other tribes have addressed thorny legal issues through their constitutions, legislation, regulations, and legal opinions. Tribal courts, which have been more open to sharing than tribal legislatures,<sup>25</sup> have already begun to exchange ideas with one another. In her study of tribal law opinions, Professor Nell Jessup Newton of American University Washington College of Law found that tribal judges increasingly refer to the decisions of other tribal courts when seeking

20. Some tribes choose not to share their laws, notes Stockbridge-Munsee Judge David Raasch, because they fear that "someone is going to say, 'You can't do that because it violates some statute or some mandatory sentencing rule.'" Aaron Arnold, *Interview, David Raasch, Judge, Stockbridge-Munsee Tribal Court, Bowler, Wisconsin*, 2 J. CT. INNOVATION 381, 387–88 (2009).

21. Knapp, *supra* note 3, at 24; Sherri Nicole Thomas, *American Indian Law: Access and Collections*, presentation at the American Association of Law Libraries 106th Annual Meeting, Seattle, Washington (July 15, 2013) (notes on file with author).

22. Knapp, *supra* note 3, at 24; Telephone Interview with Joseph Kubes, Dir. of Strategic Alliances, Thomson Reuters (Dec. 21, 2012).

23. Some tribes falsely believe that their laws will be set in stone if published, according to Richard Monette, University of Wisconsin Law School Professor and faculty advisor for the Great Lakes Indian Law Center. "Law of Indian Tribes" class lecture (Fall 2012) (notes on file with author).

24. AARON ARNOLD ET AL., *STATE AND TRIBAL COURTS: STRATEGIES FOR BRIDGING THE DIVIDE* 9 (2011), available at <http://www.courtinnovation.org/sites/default/files/documents/StateAndTribalCourts.pdf>.

25. Joseph Kubes observes that tribal courts are usually more willing to share their documents than tribal legislatures. Telephone interview with Joseph Kubes, *supra* note 22.



persuasive authority in a case of first impression.<sup>26</sup> Chief Judge P.J. Herne of the St. Regis Mohawk Tribal Court agrees that the wider availability of tribal materials online makes it easier for judges to look at models from other tribal justice systems.<sup>27</sup>

¶14 Collaboration between state and tribal governments is also increasing. “Tribes are becoming steadily more accepted as members of the American family of governments. . . . [S]tate governments recognize the important role that tribal government plays in public affairs, from fish and wildlife management to environmental protection,” observed an experienced tribal law attorney.<sup>28</sup> The sharing of tribal law can help facilitate these relationships by “dispelling ignorance” between states and tribes.<sup>29</sup>

¶15 Courts are leading the way with the creation of forums that bring together leaders from both court systems to discuss common challenges.<sup>30</sup> According to Stockbridge-Munsee Tribal Court Judge David Raasch, many Wisconsin state judges with whom he has collaborated have shown interest in and have drawn upon tribal law and legal practices, particularly those that relate to problem solving, peacemaking (mediation), and restorative justice.<sup>31</sup> In 2006, leaders from the Minnesota state court and the Leech Lake Band of Ojibwe tribal court partnered to create the country’s first joint-jurisdiction court, the Leech Lake–Cass County Wellness Court.<sup>32</sup> A second joint-jurisdiction court, the Leech Lake–Itasca County Wellness Court, soon followed.<sup>33</sup>

¶16 Collaborations between tribes and other branches of state government have also developed. These government-to-government agreements, which have multiplied since the 1990s, regulate state land use and rights-of-way on tribal land, the environment, quality-of-life and cultural issues, and civil jurisdiction.<sup>34</sup> For example, in Wisconsin, a joint agreement signed in 2000 by the Lac Courte Oreilles tribe, the state Department of Natural Resources, and the U.S. Forest Service regulates management of the Chippewa Flowage, one of the state’s largest lakes.<sup>35</sup> In 2004, Wisconsin governor Jim Doyle approved an executive order requiring state agencies to consider tribal needs and consult with tribal governments about state actions affecting tribes.<sup>36</sup>

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26. Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 314 (1997).

27. Aaron Arnold & Robert V. Wolf, *Interview, P.J. Herne, Chief Judge, St. Regis Mohawk Tribal Court, Akwesasne, New York*, 2 J. CT. INNOVATION 359, 364 (2009).

28. ALVIN J. ZIONTZ, A LAWYER IN INDIAN COUNTRY: A MEMOIR 268 (2009).

29. ARNOLD ET AL., *supra* note 24, at 12.

30. *Id.* at 11–12. As of 2011, at least seventeen states have created tribal-state court forums.

31. Arnold, *supra* note 20, at 385–86, 389. Judge Raasch also indicated that he would be open to learning from state courts as well. “If they have an idea that works, I’m certainly open to trying anything that works, conventional or unconventional.” *Id.* at 389.

32. ARNOLD ET AL., *supra* note 24, at 13.

33. *Id.* at 14.

34. *Id.* at 15.

35. *Id.*

36. Wis. Exec. Order No. 39, Relating to an Affirmation of the Government-to-Government Relationship Between the State of Wisconsin and Indian Tribal Governments Located Within the State of Wisconsin (Feb. 27, 2004).

¶17 These types of initiatives and agreements require close communication and collaboration between state and tribal governments. The exchange of needed information, including applicable tribal law, will be essential to their success. The more tribal courts and legislatures that are willing to make their legal documents available, the more effective these partnerships can become.

### How Tribes Can Make Their Law Available

¶18 There are two ways that tribes can distribute their laws: self-publishing or contributing content for publication by another organization. Traditionally, tribes that publish legal materials themselves have had to do so in print. Print publication offers a number of advantages, including complete control over the content and quality of the publication and the creation of a document that can be stored for archival purposes.<sup>37</sup> But print publication is very expensive in terms of printing and distribution costs and investment of time; as a result, tribes may not update the materials very often, and they may quickly become outdated. Some publication expenses may be passed on to subscribers, but doing so may mean that only large or specialized law libraries can subscribe. This will limit the accessibility of the law.

¶19 The advent of the Internet has made it much easier for tribes to publish their legal content. Many tribes already have a web site that can serve as an inexpensive, freely available publication platform for opinions, legislation, constitutions, and any other legal documents. The electronic format enables easy updating for the tribe and keyword searching of the content for the researcher. And tribes can still retain complete control over the content and quality of the publication.

¶20 Publishing on the Internet also has some disadvantages. While the electronic format allows tribes to more easily update content, this can also discourage the retention of older materials for archival purposes. A tribe could choose to preserve the original document intact and then post a second updated document when updates occur, but it is much easier to simply overwrite the old content with the new. Also, while publishing law to a freely available web site certainly makes content more accessible, it does not necessarily make it more findable. Researchers who rarely venture farther than their favorite database, such as Westlaw or LexisNexis, may not realize that they need to go the tribe's web site to find their laws. Finally, publication on the Internet still incurs some expense. Although there are no printing costs, tribes will need to devote staff time to organizing and posting content.

¶21 The other way that tribes can share their law is by contributing it to an outside organization for inclusion in a tribal law collection. This method saves the cost of printing and distribution and of maintaining content on a web site. Some organizations even offer additional incentives to tribes that are willing to share their content.<sup>38</sup> Also, when a tribe makes its law available as part of a large collection, the researcher can search the law of multiple tribes in one location rather than

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37. Tribal law is a rich source of history. Therefore, it is important that older copies of opinions and superseded constitutions and legislation are maintained as the law changes and evolves. Print publication provides a lasting view of the law that cannot be overwritten.

38. For example, in exchange for their opinions, VersusLaw gives tribal courts a free VersusLaw subscription. See the appendix for more information.

having to look for each tribe's laws individually. This will save the researcher time and makes the law more findable.

¶22 There are also some downsides to contributing content for outside publication. By offering content to others, tribes give up control over it, although most organizations will likely work with the tribe to ensure that the presentation is satisfactory and will accept changes and remove content at the tribe's request. In addition, tribes will still incur costs for staff time to organize and send content to the publishing organizations.

¶23 As the appendix illustrates, tribal law collections are published by various organizations, nonprofit and otherwise, each with a slightly different focus. Nonprofits, such as the Native American Rights Fund and the Tribal Law and Policy Institute, offer their collections free on the Internet. This makes the law accessible to all, but perhaps not as findable to those researchers accustomed to using subscription databases like Westlaw and LexisNexis.

¶24 Contributing content to subscription databases has the opposite effect. Researchers who use such databases will be able to easily find and access a tribe's law. Editorial enhancements, such as Westlaw's headnotes and key numbering, make the law even easier to locate for the experienced legal researcher. But for those who lack access to these databases, the law is not accessible at all.

¶25 Tribes that wish to make their law publicly available should evaluate each method to determine which is best suited to their needs and budgets. If resources are available, multiple methods could be used to increase control and accessibility.

## Conclusion

¶26 As a sovereign entity, a tribe has the authority to establish a constitution, to enact and enforce laws, to adjudicate disputes, and to promulgate rules and regulations. In exercising these powers of self-government to establish law, a tribe reinforces its cultural norms and values and protects its sovereign rights. But laws cannot be understood, followed, and applied unless they are made known.

¶27 Making tribal law publicly available benefits both Indians and non-Indians by allowing for greater understanding of and respect for the law of tribes.<sup>39</sup> Such access enables and encourages others—whether state or federal courts or agencies, legal parties and attorneys, or members of the community—to understand, follow, and apply tribal law.

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39. Knapp, *supra* note 3, at 2.

## Appendix

### Tribal Law Collections

1. *American Indian Constitutions and Legal Materials*
  - a. Publisher: Law Library of Congress
  - b. Contents: Links to American Indian legal materials, spanning both nineteenth-century items and constitutions and charters drafted after the 1934 Indian Reorganization Act
  - c. Format: Online
  - d. Cost: Free
  - e. Access: <http://www.loc.gov/law/help/american-indian-const/alaska.php>
  
2. *HeinOnline American Indian Law Collection*
  - a. Publisher: HeinOnline
  - b. Contents: Select tribal constitutions, codes, and charters, 1800s–1980s
  - c. Format: Online
  - d. Cost: \$995 initial subscription, \$575 annually thereafter
  - e. Access: by subscription at <http://www.heinonline.org>
  
3. *Indian Affairs: Laws and Treaties*
  - a. Publisher: Oklahoma State University Library
  - b. Contents: Treaties with U.S. government, and federal statutes and executive orders relating to Indians, 1788–1971. Compiled by Charles J. Kappler
  - c. Format: Online
  - d. Cost: Free
  - e. Access: <http://digital.library.okstate.edu/kappler/>
  
4. *Indian Law Reporter*
  - a. Publisher: American Indian Lawyer Training Program
  - b. Contents: Select tribal opinions (and federal and state opinions on Indian law), 1974–present. A cumulative index of tribal court opinions for all volumes of the ILR is available at <http://www.narf.org/nill/ilr/index.html>
  - c. Format: Currently only available in print, but an online version for subscribers is in the works
  - d. Cost: \$600 annually (print)
  - e. Access: For availability at local libraries, see <http://tinyurl.com/curtzql>
  
5. *Indian Tribal Codes*
  - a. Publisher: Marian Gould Gallagher Law Library
  - b. Contents: Select tribal codes, charters, and constitutions, 1940s–1988
  - c. Format: Microfiche
  - d. Cost: unknown
  - e. Access: For availability at local libraries, see <http://tinyurl.com/cwk36k6>

6. *LexisNexis Native American Law*
  - a. Publisher: LexisNexis
  - b. Contents: Very select tribal opinions, constitutions, and codes
  - c. Format: Online
  - d. Cost: depends on subscription plan
  - e. Access: by subscription; to see available content, go to <http://w3.nexis.com/sources> and select “Indigenous Law” from the list of legal topics
  
7. *LLMC Native American Collection*
  - a. Publisher: LLMC (Law Library Microform Consortium)
  - b. Contents: Select tribal constitutions, charters, codes, treaties with state and federal government, U.S. legislation, treatises, and more, 1800s–1970. See [http://www.llmc.com/Historical\\_NatAmer.asp](http://www.llmc.com/Historical_NatAmer.asp)
  - c. Format: Microform (full collection) and online (partial collection has select tribal constitutions and codes, 1808–1970)
  - d. Cost: unknown
  - e. Access:
    - i. Microform: for availability at local libraries see <http://tinyurl.com/curyl9v>
    - ii. Online: by subscription at <http://www.llmc.com>
  
8. *Municode Library: Tribes and Tribal Nations*
  - a. Publisher: Municipal Code Corporation
  - b. Contents: A few tribal codes, current
  - c. Format: Online and print
  - d. Cost: Free for online; print available for purchase
  - e. Access: [http://www.municode.com/Library/Tribes\\_and\\_Tribal\\_Nations](http://www.municode.com/Library/Tribes_and_Tribal_Nations)
  
9. *National Indian Law Library*
  - a. Publisher: Native American Rights Fund
  - b. Contents:
    - i. Tribal Law Gateway offers access to more than 170 tribal constitutions and codes, historical and more recent, and links to tribal opinions on other web sites. Copies of constitutions and codes not available on the web site may be obtained by contacting the NILL
    - ii. Indian Law Reporter: Tribal Court Cases Index presents a cumulative index of tribal court opinions for all volumes of the ILR
  - c. Format: Online
  - d. Cost: Free
  - e. Access:
    - i. Tribal Law Gateway, <http://www.narf.org/nill/triballaw/index.htm>
    - ii. Indian Law Reporter: Tribal Court Cases Index, <http://www.narf.org/nill/ilr/index.html>

10. *Native American Constitution and Law Digitization Project*
  - a. Publisher: University of Oklahoma Law Center
  - b. Contents: Select tribal constitutions and charters, 1930s–1960s and more recent
  - c. Format: Online
  - d. Cost: Free
  - e. Access: <http://thorpe.ou.edu/>
  
11. *Tribal Court Clearinghouse*
  - a. Publisher: Tribal Law and Policy Institute
  - b. Contents: Court opinions from twenty-four tribes, 1990s–present, with search engine; links to tribal constitutions and codes on other web sites; full text opinions made available through a cooperative agreement with VersusLaw
  - c. Format: Online
  - d. Cost: Free
  - e. Access: [http://www.tribal-institute.org/lists/tribal\\_law.htm](http://www.tribal-institute.org/lists/tribal_law.htm)
  
12. *VersusLaw Tribal Court Database*
  - a. Publisher: VersusLaw
  - b. Contents: Court opinions from twenty-four tribes, 1990s–present
  - c. Format: Online
  - d. Cost:
    - i. VersusLaw subscription is \$39.95 per month per person; free for law schools and participating tribal courts
      1. In exchange for their opinions, VersusLaw gives tribal courts a free VersusLaw subscription so that judges can access other tribes' opinions besides their own, in addition to U.S. state and federal court opinions
      2. Tribal opinions in VersusLaw database are available through the *Tribal Court Clearinghouse* web site (content is almost identical)
  - e. Access: by subscription at <http://www.versuslaw.com/help/library/LibCatProfessional.aspx#tribal>
  
13. *West's American Tribal Law Reporter*
  - a. Publisher: Thomson West
  - b. Contents: Select tribal opinions (as well as federal and state opinions on Indian law), 1997–present
  - c. Format: Print and online via Westlaw
  - d. Cost: print is \$247 per volume, \$2223 for nine-volume set; online is part of Westlaw subscription plan
  - e. Access: For availability at local libraries, see <http://tinyurl.com/czzgcf8>



14. *Westlaw Native American Law*

- a. Publisher: Westlaw
- b. Contents: Court opinions from twenty-three tribes (including those from *West's American Tribal Law Reporter*) and codes from twenty-four tribes, 1990s–present
- c. Format: Online
- d. Cost: depends on subscription plan
- e. Access: by subscription; in WestlawNext, enter “Native American Law” into the main search box

## 15. Self-Publication by Tribes

- a. Some tribes make their opinions, constitutions, codes, and charters available on the Internet. For a list of tribal web sites, see <http://www.tribal-institute.org/lists/justice.htm>
- b. A small number of tribes publish opinions, constitutions, codes, and charters in print. Consult your local law library to see if it subscribes to these publications

1-1-2006

# Toward a Theory of Intertribal and Intratribal Common Law

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# ARTICLE

## TOWARD A THEORY OF INTERTRIBAL AND INTRATRIBAL COMMON LAW

*Matthew L.M. Fletcher\**

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## I. INTRODUCTION

Imagine a woman driving along a highway in North Dakota. A man, a resident of South Dakota, driving a truck crashes into the woman's vehicle. The woman suffers massive injuries and spends twenty-four days in the hospital. Her family retains an attorney and sues the other driver in a North Dakota county where the accident occurred. The defendant files a motion to dismiss on the theory that a North Dakota county court has no jurisdiction over him. The court denies the motion, and that decision is affirmed on appeal. The case moves to trial.

Now imagine a woman driving along the same highway, except it is within the exterior boundaries of a reservation of the Mandan, Hidatsa, and Arikara Nation, located in North Dakota. A man, a resident of South Dakota, driving a truck crashes into the woman's vehicle. She suffers massive injuries and spends twenty-four days in the hospital. Her family retains an attorney and sues the other driver in the reservation's tribal court. The defendant files a motion to dismiss on the theory that the tribal court has no jurisdiction over him. The court denies the motion, and that decision is affirmed on appeal. The case does not move to trial because the defendant brings a claim in federal district court seeking an injunction against the tribal court on the theory that the tribal court has no jurisdiction over him. This time, the defendant's motion is granted.

Why?

The second fact pattern is a simplified and modified version of the facts that the Supreme Court reviewed in *Strate v. A-1 Contractors*.<sup>1</sup> Automobile accidents are common in every jurisdiction within the United States.<sup>2</sup> Indian Country is no

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1. *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 442–44 (1997). The Court in *Strate* concluded that the tribal court could not have jurisdiction over the lawsuit because the accident occurred on non-Indian land—a state-maintained highway. *See id.* at 455–56.

2. *Cf.* Car-Accidents.com, 2000 Car Accident Statistics: Fatalities by State, [http://www.car-accidents.com/pages/stats/2000\\_by\\_state.html](http://www.car-accidents.com/pages/stats/2000_by_state.html) (last visited Sept. 21, 2006) (providing car accident fatalities statistics by state).

exception.<sup>3</sup> In the first fact pattern, the denial of the motion to dismiss on jurisdictional grounds is an easy and noncontroversial question. In the Indian Country fact pattern, the question of jurisdiction is the most important question in the case. It appears that the question of tribal court civil adjudicatory jurisdiction is one of the most important and controversial questions in American Indian law.<sup>4</sup> The reason Indian Country is different is the Supreme Court's fear that tribal courts will apply a common law that prejudices nonmembers.<sup>5</sup>

American common law originates in a common law that evolved over centuries in Britain, moved across the ocean to the United States, and survived the Revolution.<sup>6</sup> This Anglo-American common law developed in accordance with the mores of English and American culture and was marked with a powerful dose of formalism.<sup>7</sup> For example, at common law, the essentials to an enforceable contract were "the use of parchment or paper, sealing by the obligor, and delivery as a deed, normally witnessed and attested."<sup>8</sup> One purpose of these formalities was to make

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3. See, e.g., C. Matthew Snipp, *The Size and Distribution of the American Indian Population: Fertility, Morality, Migration, and Residence*, 16 POPULATION RES. & POL'Y REV. 61, 76 (1997) (recognizing automobile accidents to be the primary cause of death among young American Indians).

4. American "Indian Law" is defined by Ninth Circuit Senior Judge William Canby as "that body of law dealing with the status of the Indian tribes and their special relationship to the federal government, with all the attendant consequences for the tribes and their members, the states and their citizens, and the federal government." WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 1 (4th ed. 2004). "In this application, 'Indian Law' might better be termed 'Federal Law About Indians.'" *Id.* "Tribal law" is defined as the law of the various and individual federally recognized Indian tribes in the United States. See *id.* at 3 (including "the internal law that each tribe applies to its own affairs and members" and ranging "from oral tradition to entire codes borrowed nearly intact from non-Indian sources").

5. Federal Indian law classifies people in three ways: first, "members," or people who are enrolled members or citizens of a federally recognized Indian tribe; second, "nonmembers," or people who are not "members;" and third, "nonmember Indians," a term used in the criminal jurisdiction context to refer to Indians within the jurisdiction of a tribe not their own. See, e.g., *United States v. Lara*, 541 U.S. 193, 210 (2004) (addressing the congressionally granted authority of a tribe to prosecute a "nonmember Indian" for criminal misdemeanor); *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (distinguishing between a tribal court's jurisdiction over "members" and "nonmembers").

6. See generally LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 15 (1973) ("The basic substratum of American law . . . is English."); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 291-305 (Inst. of Early Am. History and Culture ed., 1998) (discussing the development of a distinctly American system of law and politics in the context of the American Revolution).

7. See A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 5 (1975) ("The medieval common law was a formulary system, whose content and basic structure were determined, to a very considerable extent, by the catalogue of original writs in the Register.").

8. *Id.* at 90 (citation omitted).

clearer “any signs of monkey business.”<sup>9</sup> The common law of contract, for example, has since moved away from the formal requirement of a seal for a somewhat less formal requirement of consideration.<sup>10</sup>

In contrast, tribal common law evolved from a much different source of culture and attendant policy considerations. While it is impossible to generalize, we can be sure that many Indian communities held inviolate an oral promise without any formalities at all, for example.<sup>11</sup> Contracts between Indians came in contexts of “long-run relationships with trading partnerships . . . [that] build trust and reliance among the parties.”<sup>12</sup> Tribal communities did engage in a type of formalism that could mark a contract, although the underlying exchange often was of “gifts,” not merchandise.<sup>13</sup> Unlike Anglo-American common law that derived from “status,”<sup>14</sup> tribal common law derived from “[p]ublic consensus and harmony.”<sup>15</sup> It should be easy to observe from this comparison that American common law and tribal common law derive from different cultures and traditions on a fundamental level.

Federal and state courts apply Anglo-American common law as they always have,<sup>16</sup> but tribal courts have unusual difficulty identifying and applying tribal common law.<sup>17</sup> For a variety of

9. *Id.*

10. See CHARLES FRIED, *CONTRACT AS PROMISE* 28 (1981) (explicating the Anglo-American doctrine of consideration).

11. See, e.g., Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts* (Part II), 46 AM. J. COMP. L. 509, 548 (1998) (“[C]ontracts are valid traditionally by mutual consent. Neither writing, nor consideration, nor witnesses is required.”).

12. *Id.* at 547.

13. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* 228 (1941) (“[N]o price was set beforehand for services to be rendered, so that the compensation was phrased, and in good part felt, as a gift given in appreciation for a helpful act.”).

14. Cf. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 553 (1933) (“One of the most influential of modern saws is Maine’s famous dictum that the progress of the law has been from status to contract”).

15. RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* 11 (1975). See generally JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* 56–76 (2002) (discussing Aninishaabe and Canadian Aboriginal common law as applied in Canadian courts).

16. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890–96 (1986) (defining “federal common law” and examining its application). While “[c]onsiderations of federalism and separation of powers combine to make us skeptical about courts formulating very broad federal common law,” federal courts continue to make law both through pronouncements of law and through interpretation. *Id.* at 890–96, 931; see also Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 927–31 (2004) (contrasting the state and federal courts’ abilities to create common law).

17. See Alex Tallchief Skibine, *Troublesome Aspects of Western Influences on Tribal*



reasons relating to the history of federal Indian policy,<sup>18</sup> tribal courts rely upon Anglo-American common law to decide many, if not most, of the cases before them.<sup>19</sup> Tribal courts have made a strong effort to restore tribal, rather than Anglo-American, custom and tradition to their adjudicatory decisionmaking,<sup>20</sup> but the process is slow.

Members of the Supreme Court appear to have assumed that tribal courts apply a tribal common law that is so far from Anglo-American common law as to be unrecognizable to non-Indians.<sup>21</sup> This assumption arises in the context of a tribal court exercising civil jurisdiction over nonmembers. In 2001, the Supreme Court decided *Nevada v. Hicks*, an unremarkable case holding that tribal members may not sue in tribal court for the on-reservation tortious conduct and civil rights violations of state officials investigating off-reservation breaches of state law.<sup>22</sup> To be sure, scholars and tribal leaders criticized the decision more for its reasoning than its holding,<sup>23</sup> which is very narrow. The Court left

*Justice Systems and Laws*, 1 TRIBAL L.J. (2000), [http://tlj.unm.edu/articles/volume\\_1/skibine/index.php](http://tlj.unm.edu/articles/volume_1/skibine/index.php) (identifying several efforts by the federal government to influence tribal common law and discussing “some of the problems associated with efforts to ‘integrate’ tribal justice systems into the United States political system”).

18. See *id.* (reviewing the federal government’s attempted imposition of Western norms on the tribal judiciary, influence on Indian culture, and integration of Indian tribes).

19. E.g., *Kalantari v. Spirit Mountain Gaming, Inc.*, 32 Indian L. Rep. 6079, 6080 (Grand Ronde Tribal App. Ct. May 16, 2005) (on file with the Houston Law Review) (basing decision on U.S. law).

20. E.g., *Navajo Nation v. Crockett*, 7 Navajo Rptr 237, 240 (Navajo Sup. Ct. 1996), available at <http://www.tribal-institute.org/opinions/1996.NANN.0000006.htm> (deciding a free speech claim on the basis of tribal custom and tradition, saying “Navajo common law is the law of preference in the courts of the Navajo Nation”).

21. See *infra* note 58 (explaining Justice Rehnquist’s use of precedent to arrive at the conclusion that Indian courts will not treat non-Indians appropriately).

22. *Nevada v. Hicks*, 533 U.S. 353, 374–75 (2001).

23. See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 457–59 (2005) (criticizing the Court for its growing tendency to shrink tribal authority proactively while ignoring foundational Indian law); David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 278–79 (2001) (observing that the Court’s recent jurisprudence rebukes traditional deference to Congress and turns a blind eye to precedent); Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1607 (2004) (criticizing recent Supreme Court jurisprudence as “devastating,” noting that decisions over “the last three decades . . . have seriously eroded . . . inherent tribal judicial authority”); Joseph William Singer, *Canons of Conquest: The Supreme Court’s Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 647–48 (2003) (speculating that in *Hicks*, the Court constricted tribal authority, permitting regulation of consenting parties only); Alex Tallchief Skibine, *Making Sense Out of Nevada v. Hicks: A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 349 (2001) (“[O]ne of the fundamental problems with the Court’s analysis stems from its failure to adequately conceptualize the . . . tribal ‘right to exclude.’”); cf. Ronald Eagle Eye Johnny, Special Feature, *Nevada v. Hicks: No Threat to Most Nevada Tribes*, 25 AM. INDIAN L.

open very important and fundamental questions regarding the civil jurisdiction of tribal courts to adjudicate the rights of nonmembers.<sup>24</sup> As Justice Scalia wrote for the majority, “We leave open the question of tribal-court jurisdiction over nonmember defendants in general.”<sup>25</sup> While the question of tribal court civil jurisdiction over nonmembers rages in the federal courts, the Court has not yet decided the issue.<sup>26</sup> The Court’s most recent statement came in dicta in 1997, where the Court “assumed that ‘where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts,’ without distinguishing between nonmember plaintiffs and nonmember defendants.”<sup>27</sup>

The real concern amongst tribal advocates in the aftermath of *Hicks* was the surprising concurrence by Justice Souter, who wrote what amounts to an opening attack on the future application of tribal law to nonmembers.<sup>28</sup> Though the application of tribal law to nonmembers was not squarely before the Court in *Hicks*,<sup>29</sup> Justice Souter took the time to lay the framework for a broad holding in future cases that tribal law should *never* apply to nonmembers.<sup>30</sup> Despite the fact that several years have passed

REV. 381, 381 (2002) (arguing that Nevada tribal courts tend to require express nonmember consent before taking jurisdiction over the nonmembers); Edwin Kneedler, *Indian Law in the Last Thirty Years: How Cases Get to the Supreme Court and How They Are Briefed*, 28 AM. INDIAN L. REV. 274, 277 (2003) (identifying the *Hicks* decision as unsurprising because the case involved state law enforcement officers defending their official conduct). See generally Gloria Valencia-Weber, *The Supreme Court’s Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 411 (2003) (searching for the constitutional foundation of the holding in *Hicks*).

24. *Hicks*, 533 U.S. at 358 n.2.

25. *Id.*

26. *E.g.*, *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1128–29 (9th Cir. 2006) (en banc) (“[A] non-Indian plaintiff consents to the civil jurisdiction of a tribal court by filing claims against an Indian defendant arising out of activities within the reservation where the defendant is located.”), *cert. denied*, 126 S. Ct. 2893; *Wilson v. Marchington*, 127 F.3d 805, 813–14 (9th Cir. 1997) (affirming that absent an authorizing statute or treaty, tribal courts lack subject matter jurisdiction over claims against nonmembers arising out of their conduct on state highways); *MacArthur v. San Juan*, 391 F. Supp. 2d 895, 934 (D. Utah 2005) (“The full extent of implicit divestiture has yet to be determined, resulting in no small amount of uncertainty and confusion as to the scope of tribes’ inherent civil authority over non-indians . . .” (citations omitted)).

27. *Hicks*, 533 U.S. at 358 n.2 (quoting *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 453 (1997)).

28. See *id.* at 375–85 (Souter, J., concurring).

29. See *id.* at 356–57 (majority opinion).

30. See *id.* at 381 (Souter, J., concurring) (“[I]t is undeniable that a tribe’s remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the

since Justice Souter characterized tribal law in this fashion, no scholar has responded in a direct manner to this description. This Article argues that Justice Souter's characterization of the "substantive law" that tribal courts apply is an oversimplification of the on-the-ground realities of tribal law.

This Article attempts to create a simple and reasonable framework by which judges, lawyers, and scholars can classify tribal law. "Tribal law" as applied by tribal courts is not monolithic.<sup>31</sup> This Article divides tribal law or "tribal common law" into two broad categories—"intertribal common law" and "intratribal common law." As a general matter, intertribal common law is the common law applied by tribal courts to cases arising out of an Anglo-American legal construct, such as an employment contract.<sup>32</sup> Intertribal common law tends to mirror federal and state common law, with some differences. Intratribal common law, by contrast, is the common law applied by tribal courts and other tribal dispute resolution venues to disputes arising out of a tribal legal construct, such as the inheritance rights to on-reservation hunting territories.<sup>33</sup> Intratribal common law often is the unwritten and unique customary and traditional law deriving from Indian culture and languages. It is the law of the Indigenous communities from time immemorial. This Article will show that intratribal common law will not, except in extraordinary circumstances, apply to cases where nonmembers are a party in interest. Distinguishing in an intelligent manner between intertribal and intratribal common law should allay fears from the Justices that "outsiders" will be disadvantaged by tribal courts.

Part II of this Article describes the open question before the Court—whether tribal courts have civil jurisdiction over

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individual over whom jurisdiction is claimed, not on the title to the soil on which he acted.").

31. See NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.05[3] (Nell Jessup Newton et al. eds., Matthew Bender 2005) (1941) ("[I]t may be a mistake to equate tribal tradition and custom with tribal common law, because tribal common law may be a broader category . . .").

32. See, e.g., Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. MICH. J.L. REFORM 273, 290–315 (2005) (noting the need for improvements in the law of tribal employment separation that give credence to Tribal communities' unique needs).

33. See generally Russel Lawrence Barsh, *Coast Salish Property Law: An Alternative Paradigm for Environmental Relationships*, 12 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1 (2005) (examining the Puget Sound's and Gulf of Georgia's indigenous peoples' prevailing paradigm of environmental controls); Frank G. Speck, *The Family Hunting Band as a Basis of Algonkian Social Organization*, 17 AM. ANTHROPOLOGIST 289, 290 (1915) (surveying kinship groups from various tribes and their respective laws, including property and social rules).

nonmembers in general. Part II will describe *Nevada v. Hicks* and the recent cases that identify “fairness to outsiders” as a possible serious problem in tribal court adjudication of nonmember rights, examining in detail Justice Souter’s *Hicks* concurrence. Part III provides a theory of differentiating between intertribal common law and intratribal common law, providing examples in several subject areas of tribal court adjudication of how the theory of differentiation could work in the real world. Part IV concludes the Article with a call for the federal courts to recognize the difference between intertribal and intratribal common law, with a concomitant recognition that nonmembers are not prejudiced by the application of tribal law by tribal courts. Part IV also offers a preliminary response to the concerns and questions that may be raised by the application of this theory. This Article concludes that the recognition of different kinds of tribal common law by federal courts will meet the twin goals of preserving and advancing tribal sovereignty and protecting the rights of nonmembers.

## II. SUPREME COURT JURISPRUDENCE REGARDING TRIBAL COURT CIVIL JURISDICTION OVER NONMEMBERS

Tribal governments have long exercised civil regulatory jurisdiction over nonmembers.<sup>34</sup> Indian treaties recognized in an implicit manner the authority of tribes to control and regulate the conduct of non-Indians passing through reservation lands.<sup>35</sup> Federal courts have long held that an Indian tribe’s right to tax nonmembers conducting business in Indian Country is “inherent.”<sup>36</sup> Indian tribes have the power to exclude nonmembers from their territories<sup>37</sup> and to place conditions on their continued presence.<sup>38</sup> As a corollary, tribal courts also have

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34. According to the Supreme Court, Indian tribes do not have criminal jurisdiction over non-Indians. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

35. *E.g.*, Treaty with the Sioux Indians art. 16, U.S.-Tribes of Sioux Indians, Apr. 29, 1868, 15 Stat. 635, 640 (prohibiting any “white person” from settling upon, occupying, or passing through Sioux Indian land without their consent).

36. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 134–41 (1982) (“inherent”); *Montana v. United States*, 450 U.S. 544, 565 (1981) (“A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”).

37. See *NEWTON ET AL.*, *supra* note 31, § 4.01[2][e] (“A tribe needs no grant of authority from the federal government to exercise the inherent power of exclusion from tribal territory, either as a government or as a landowner.”).

38. *Id.* § 4.01[2][f] (explaining tribal authority over reservation land to include a regulatory power over nonmember entrants).

the authority to adjudicate the rights of nonmembers in civil cases.<sup>39</sup>

But in recent decades, the Supreme Court has placed severe limitations on the authority of Indian tribes and tribal courts to exercise jurisdiction over nonmembers.<sup>40</sup> American Indian law scholars have long objected to the Court's results and approach.<sup>41</sup> Professor Phil Frickey describes the Court's approach as a form of "ruthless pragmatism" when it comes to tribal sovereignty.<sup>42</sup> This Part identifies the relevant cases and discusses the possible underlying reasons for the Court's approach.

### A. *The Montana Rule and Justice Souter's "Difficulty"*

In 1959, the Supreme Court opened what Professor Charles Wilkinson called the beginning of the "modern era of

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39. *E.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("Civil jurisdiction over [nonmember, on-reservation conduct] presumptively lies in the tribal courts unless affirmatively limited [by treaty or statute]."); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 854–55 (1985) (concluding that Congress's divesting tribal courts of jurisdiction over criminal matters only, shows a clear intent to leave tribal courts jurisdiction over civil matters); *Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt., Inc.*, 32 Indian L. Rep. 6148, 6150 (Confederated Tribes of the Grand Ronde Community of Or. Tribal Ct. Aug. 5, 2005) (noting that the tribal court's jurisdiction over civil actions extends to the limits of the Constitution and laws of the Tribe and the United States); *Bank of Hoven v. Long Family Land & Cattle Co.*, 32 Indian L. Rep. 6001, 6003 (Cheyenne River Sioux Tribal App. Ct. 2004) (affirming the lower court's exercise of jurisdiction over a nonmember based on the nonmember's consensual agreement with a tribal member).

40. *E.g.*, *Nevada v. Hicks*, 533 U.S. 353, 374 (2001) (holding that tribal courts do not have jurisdiction over civil suits brought against state officers acting in their official capacity); *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 459 (1997) (concluding that tribal courts do not have jurisdiction over civil suits brought against nonmembers where the underlying incident took place on a state-controlled right-of-way inside of Indian Country); *Montana*, 450 U.S. at 565–66 (adopting a presumptive rule that tribes do not have civil jurisdiction over nonmembers, absent two exceptions); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (finding that tribes do not have criminal jurisdiction over non-Indians). See generally NEWTON ET AL., *supra* note 31, § 4.02[3] (pulling together case law and scholarly works to chronicle judicial limitations placed on tribal sovereignty in the civil and criminal contexts).

41. See Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 57 (1999) ("On their own terms, the [Court's] opinions congeal into an incoherent muddle."); Getches, *supra* note 23, at 278–79 (characterizing the Court's approach to Indian law as improper subjectivism); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1620–30 (1996) (same); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1, 6–10 (2003) (blaming the antitribal decisions on the Court's failure to integrate its general federalism jurisprudence into Indian law).

42. Frickey, *supra* note 23, at 436.

federal Indian law<sup>43</sup> in *Williams v. Lee*.<sup>44</sup> *Williams* served to legitimate the existence of tribal courts by denying state court jurisdiction over a small claims suit brought against a Navajo Nation member by a nonmember business operator doing business within the Navajo reservation.<sup>45</sup> The Court's holding meant that nonmembers suing the tribe or tribal members must seek judicial relief in the tribe's courts, a critical decision in favor of tribal sovereignty, and a decision that guaranteed the future of tribal courts.<sup>46</sup> But in that case, a tribal member was the defendant in tribal court.<sup>47</sup> It was a different question for the Court when a nonmember was the defendant or otherwise subject to a tribe's police powers.<sup>48</sup>

In 1981, the Court articulated a general rule that Indian tribes have no civil jurisdiction over nonmembers—with two exceptions—in *Montana v. United States*.<sup>49</sup> There the Court held that the authority of Indian tribes over the “*relations between an Indian tribe and nonmembers of the tribe*” has been implicitly divested as a function of a tribe's “*dependent status*.”<sup>50</sup> In the criminal context, that implicit divestiture of tribal authority is absolute,<sup>51</sup> but in the civil context, there are two exceptions. First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”<sup>52</sup> Second, “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>53</sup>

The *Montana* Court gave no underlying federal common law or public policy reasoning or justification for the general rule. The Court relied upon its decision in *Oliphant v. Suquamish*

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43. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 1 (1987).

44. *Williams v. Lee*, 358 U.S. 217 (1959).

45. *Id.* at 223.

46. *See id.* at 218, 223.

47. *Id.* at 217–18.

48. *See Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 442 (1997) (establishing that tribal courts have no jurisdiction over claims against nonmembers arising out of accidents on state highways located within tribal territory).

49. *Montana v. United States*, 450 U.S. 544, 564–66 (1981).

50. *See id.* at 564 (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978)).

51. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (finding tribal courts to possess no inherent jurisdiction in criminal suits against nonmembers).

52. *Montana*, 450 U.S. at 565.

53. *Id.* at 566.



*Indian Tribe*—a case adopting a bright line rule that tribes may not exercise criminal jurisdiction over nonmembers<sup>54</sup>—for the general principle that Indian tribes have no civil jurisdiction over nonmembers either.<sup>55</sup> *Oliphant* is one of the more notorious Supreme Court decisions in terms of its near-complete lack of plausible legal authority to support the Court’s conclusion that Indian tribes had no criminal jurisdiction over nonmembers.<sup>56</sup> The *Oliphant* Court, in contrast to more recent Supreme Court cases discussing tribal sovereignty, gave little or no pragmatic or public policy reasoning for its decision.<sup>57</sup> Instead, as Professor Charles Wilkinson suggested, the Justices voted on their “own visceral reaction” to the case.<sup>58</sup> Professor Wilkinson did presage a pragmatic reason for the Court’s reluctance to extend tribal

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54. *Oliphant*, 435 U.S. at 212. The *Oliphant* Court seemed to hold that tribes could not exercise criminal jurisdiction over any nonmembers—a conclusion confirmed by the Court in *Duro v. Reina*, 495 U.S. 676, 688 (1990)—but the state of law now, after Congressional tinkering, is that tribes may exercise criminal jurisdiction over members and nonmember Indians. See *United States v. Lara*, 541 U.S. 193, 197–98 (2004) (“[S]oon after this Court decided *Duro*, Congress enacted new legislation specifically authorizing a tribe to prosecute Indian members of a different tribe.”).

55. See *Montana*, 450 U.S. at 565. The Court also cited Justice Johnson’s concurrence in *Fletcher v. Peck* for the proposition that Indian tribes have no jurisdiction over nonmembers, but a careful review of the *Fletcher* opinion makes it clear that Justice Johnson said no such thing. See *Fletcher v. Peck*, 10 U.S. 87, 143–48 (1810) (Johnson, J., concurring).

56. The list of distinguished commentators that have criticized Justice Rehnquist’s opinion on this ground includes, without limitation: T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY* 106–08 (2002) (calling the central reasoning behind *Oliphant* a “muddle” and “none-too-clear”); DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT* 187–215 (1997) (“[I]t was the disingenuous methodology, the questionable historical arguments, and the unclear rationale used by Rehnquist to justify this opinion that were especially disquieting.”); ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 97–113 (2005) (“*Oliphant*, as written by Rehnquist, cites, quotes, and relies upon racist nineteenth-century beliefs and stereotypes . . . .”); Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609, 616–35 (1979) (describing *Oliphant* as a “failure of judicial craftsmanship”); Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1, 11–16 (1995) (citing *Oliphant*’s significant impact despite its “flawed reasoning and unsubstantiated assertions”).

57. Compare *Oliphant*, 435 U.S. at 211–12 (finding no inherent power for tribal courts to prosecute and punish non-Indians), with *Lara*, 541 U.S. at 210 (recognizing an inherent power to prosecute nonmember Indians).

58. WILKINSON, *supra* note 43, at 43. Quoting language out of context from a case called *Ex parte Crow Dog*, Justice Rehnquist implied that tribal courts would “[tr]y nonmembers], not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . .” *Oliphant*, 435 U.S. at 210–11 (quoting *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883)). Professor Rob Williams identified the missing language in the ellipses as referring to, among other things, Indians’ “savage life” and “the red man’s revenge by the maxims of the white man’s morality.” WILLIAMS, JR., *supra* note 56, at 109.

criminal jurisdiction over nonmembers—“civil liberties of United States citizens”<sup>59</sup>—although the Court had rejected similar arguments before the *Oliphant* decision.<sup>60</sup>

This reason for rejecting tribal jurisdiction over nonmembers has been labeled the “democratic deficit” by Dean T. Alexander Aleinikoff.<sup>61</sup> Dean Aleinikoff suggests that the Court’s concern goes further—nonmembers “cannot readily become voting members,” in contrast to citizens who move from state to state.<sup>62</sup> This class of citizens is “permanently excluded from political participation.”<sup>63</sup> These persons would not be in a position to participate in local politics, without the concomitant potential to seek a change in the law. There are three elements to the “democratic deficit”—Indian tribes, in general, do not allow nonmembers to “vote in tribal elections, run for tribal office, or serve on tribal juries.”<sup>64</sup> But these elements are an illusion.<sup>65</sup>

To borrow an old analogy, a resident and citizen of Colorado who defaults on a loan in Utah may be subject to the legal processes of Utah, even though she is not a citizen there. The Court focuses on the possibility that she has legal status sufficient to some day acquire citizenship in Utah, in contrast to a non-Indian who might not [have legal status to attain tribal membership]. But at the time the Colorado citizen’s loan is adjudicated, *she is not a citizen of Utah*. Moreover, should the Colorado citizen move to Utah and become a citizen of Utah, her changed status could not alter the result the Utah courts’ adjudication of her loan.<sup>66</sup>

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59. WILKINSON, *supra* note 43, at 43.

60. See Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 519 (1979) (citing *United States v. Mazurie*, 419 U.S. 544, 557–58 (1975) (holding that respondents’ non-Indian status did not preclude them from Tribal Counsel’s authority to regulate the sale of liquor), and *Williams v. Lee*, 358 U.S. 217, 223 (1959) (“The cases in this Court have consistently guarded the authority of Indian governments over their reservations.”)).

61. See ALEINIKOFF, *supra* note 56, at 115.

62. *Id.* at 116.

63. *Id.*

64. *Id.* at 115.

65. See Matthew L.M. Fletcher, *The Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. [hereinafter *Legal Culture War*] (forthcoming 2006) (manuscript at 9–11), available at <http://ssrn.com/abstract=882831> (characterizing the “so-called democratic deficit problem” as “an illusion”); Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, FED. LAW., Mar-Apr. 2006, at 38, 40 (same); see also Frickey, *supra* note 23, at 466 (criticizing Justice Kennedy’s approach as “question-begging.”).

66. *Legal Culture War*, *supra* note 65, at 11. Thanks to Kristen Carpenter for

The Colorado citizen is in the same position she would be in if she were a non-Indian subject to the legal processes of a tribe. Her status as a nonmember, like her status as a nonresident of a state, makes no difference.

In addition, the Court's worry about serving on juries is more than a little specious for two reasons. First, as Professor Kevin Washburn showed, federal prosecutors prosecute large numbers of reservation Indians in large cities, far from their "peers" on the reservation and in spite of the unfamiliar proceedings of federal courts.<sup>67</sup> Second, the Court's jurisprudence on tribal civil jurisdiction renders impotent tribal court attempts to compel nonmembers to respond to tribal jury summonses.<sup>68</sup> Assuming more tribes sought to expand nonmember rights to political participation as a means of showing the courts that there is no "democratic deficit," their ability to do so is hamstrung by the very doctrine to which they are attempting to respond.

The Court, instead, seems to assume a particular view of tribal law—that tribal substantive law is not fair to nonmembers.<sup>69</sup> Justice Kennedy's majority opinion in *Duro v. Reina*, a case where the Court held that Indian tribes had no criminal jurisdiction over nonmember Indians,<sup>70</sup> states that the underlying reason for rejecting tribal court jurisdiction over nonmembers is that tribal courts "are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often 'subordinate to the political branches of tribal governments,' and their legal methods may depend on 'unspoken practices and norms.'"<sup>71</sup> The Court believes that tribal law is

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suggesting this analogy.

67. See Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 710–11 (2006) (discussing, among other things, the almost-foreign setting of such a proceeding); see also *United States v. Nakai*, 413 F.3d 1019, 1022 (9th Cir. 2005) (concluding that a venue transfer which may have reduced the number of Native Americans attending jury duty, "deprive[ing the defendant] of a fair representation of the community," did not violate the Sixth Amendment), *cert. denied*, 126 S. Ct. 593 (2005).

68. Cf. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647–48 (2001) (holding that tribes may not tax nonmembers conducting business on non-Indian owned fee land within the Navajo Reservation).

69. *Duro v. Reina*, 495 U.S. 676, 693–94 (1990) (examining basic differences between tribal and federal courts, and finding the former to deny certain constitutional protections).

70. See *id.* at 688. Congress amended the Indian Civil Rights Act in a successful attempt to overturn the result in *Duro*. See *United States v. Lara*, 541 U.S. 193, 197–98 (2004) (citing 25 U.S.C. § 1301(2) (1994)).

71. *Duro*, 495 U.S. at 693 (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 334, 335 (1982)).

unfair to nonmembers.<sup>72</sup> It is this line of reasoning, not the amorphous notion of the social contract, which drives the Court.

Justice Souter's concurrence in *Hicks*, the first comprehensive attack on tribal law as applied to nonmembers, lays out the major thrust of the argument why substantive tribal law should not apply to nonmembers. He quotes two respected commentators on tribal common law for the proposition that the substantive law applied by tribal courts "would be unusually difficult for an outsider to sort out."<sup>73</sup> The first commentator, Dean Nell Jessup Newton, conducted one of the first empirical studies of tribal court common law decisionmaking.<sup>74</sup> Justice Souter chose to highlight her observation that tribal courts "ha[ve] leeway in interpreting' the [Indian Civil Rights Act's (ICRA)] due process and equal protection clauses and 'need not follow the U.S. Supreme Court precedents' jot-for-jot."<sup>75</sup> The second commentator, Ada Pecos Melton, had participated in one of the first serious and mainstream symposia regarding the importance of tribal courts in the federal system.<sup>76</sup> Justice Souter quoted Ms. Melton for the proposition that "tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.'"<sup>77</sup> Justice Souter then collapsed all forms and categories of tribal law into this summation: "The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' . . . which would be unusually difficult for an outsider to sort out."<sup>78</sup>

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72. *Id.* ("The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts.").

73. *Nevada v. Hicks*, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring).

74. Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 290–91 (1998) (digesting eighty-five tribal court opinions, surveying their legal bases in the broader context of tribal and other jurisprudence).

75. *Hicks*, 533 U.S. at 384 (Souter, J., concurring) (quoting Newton, *supra* note 74, at 344 & n.238).

76. Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126 (1995). Other participants and commentators included Yale law professor Judith Resnik, the then-United States Attorney General Janet Reno, the then-Chief Judge of the Ninth Circuit J. Clifford Wallace, and the then-Chief Justice of the Arizona Supreme Court Stanley G. Feldman. See Symposium, *Indian Tribal Courts and Justice*, 79 JUDICATURE 110 (1995).

77. *Hicks*, 533 U.S. at 384 (Souter, J., concurring) (quoting Melton, *supra* note 76, at 130–31).

78. *Id.* at 384–85 (citation omitted) (quoting NAT'L AM. INDIAN COURT JUDGES ASS'N, *INDIAN COURTS AND THE FUTURE* 43 (1978)).

Justice Souter erred when he combined all forms of “tribal law” into this “complex mix.” As this Article will show, tribal law is not monolithic in the manner that Justice Souter suggests. A careful review of the article by Dean Newton shows that tribal courts decide their cases using Anglo-American common law more often than not.<sup>79</sup> Perhaps more critical is that a careful review of Ms. Melton’s article shows that her subject matter—tribal customary and traditional law—applies *only to members* except where a nonmember expresses his or her consent to the proceedings (and also where the members consent to the presence of the nonmember).<sup>80</sup> Justice Souter implied that the consequence of all this “difficult” tribal law is that nonmembers, or “outsider[s]” as he terms them, will suffer prejudice in their ability to adjudicate before tribal courts in accordance with tribal law.<sup>81</sup>

Justice Souter’s error is endemic to much on-the-ground tribal court practice involving nonmembers and their nonmember counsel. Few take the time to learn the law of Indian tribes. And, while it may be true that tribal common law is not as simple to discover as state or federal common law, “much of the information is acquired in the same way other legal education is acquired.”<sup>82</sup> Tribal common law often is available online and in

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79. See Newton, *supra* note 74, at 305 (commenting that of the cases surveyed, only a few were not decided based on state or federal common law).

80. Perhaps the classic example of this arrangement is under the so-called “Duro fix,” where Congress affirmed the inherent authority of Indian tribes to prosecute nonmember Indians in accordance with intertribal common law. See *United States v. Lara*, 541 U.S. 193, 197–98 (2004). Tribes could prosecute these consenting nonmember Indians in accordance with intratribal common law, although few if any have done so, because, in typical cases—if not the vast, vast majority of cases—the nonmember Indian has moved onto the reservation community through intermarriage or employment or other social arrangement. See Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 *LAW & SOC’Y REV.* 1123, 1143–44 (1994) (discussing how such nonmembers have become part of the Indian community in a way that non-Indians cannot).

81. *Hicks*, 533 U.S. at 384–85.

82. *BORROWS*, *supra* note 15, at 25. Moreover, Justice Steven’s opinion in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, the case creating the tribal court exhaustion doctrine, stated that one benefit to requiring tribal court exhaustion before a federal court can review whether a tribal court has civil jurisdiction over nonmembers is that it “will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of [tribal court] expertise in such matters in the event of further judicial review.” See *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856–57 (1985); see also FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 95 (1995) (“The Court, without articulating and perhaps without even realizing it, appears to be gradually identifying the contours of the relationship of tribal courts to the federal system.”).

published reporters.<sup>83</sup> But, as any tribal court judge can attest, lawyers appearing in tribal courts every working day often *refuse* to learn tribal court rules or to seek out substantive tribal court decisions and tribal statutes.<sup>84</sup> Justice Souter's opinion gives lazy attorneys an excuse to not prepare before appearing in (and thereby disrespecting) tribal courts.

Moreover, Justice Souter's opinion assumes without discussion that tribal courts will always apply tribal law.<sup>85</sup> Practice in tribal courts suggests that tribal courts would, if asked, adopt a choice of law doctrine similar to the one followed by federal courts where they would apply nontribal law to decide questions involving nonmember rights.<sup>86</sup> In other words, tribal courts would apply the substantive law of the jurisdiction with the most significant relationship to the underlying dispute.<sup>87</sup> But tribal law, as should be expected, will be the choice of law in on-reservation disputes.

### B. *The Open Question Following Hicks*

Justice Souter's concurrence in *Hicks* is directed at a future case to be decided by the Court, addressing the question left open in *Hicks* and the case preceding it, *Strate v. A-1 Contractors*—"We leave open the question of tribal-court jurisdiction over nonmember defendants in general."<sup>88</sup> This open question may be one of the more fundamental questions for Indian tribes in the 21st century. It is well-settled that Indian tribes have both criminal and civil jurisdiction over their own members.<sup>89</sup> But, as

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83. See Tribal Court Clearinghouse, [http://www.tribal-institute.org/lists/tribal\\_law.htm](http://www.tribal-institute.org/lists/tribal_law.htm) (last visited Sept. 21, 2006) (providing, among other things, links to tribal courts, constitutions, laws, codes, and court decisions).

84. See, e.g., J. Edythe Chenois, et al., *Just Like a "Real" Court*, WASH. ST. BAR ASS'N NEWS, Nov. 2002, <http://www.wsba.org/media/publications/barnews/archives/2002/nov-02-real.htm> (familiarizing attorneys with the modern tribal court and noting that "many attorneys do not have the opportunity to learn about how tribal courts work until they find themselves there").

85. *Hicks*, 533 U.S. at 383–85 (Souter, J., concurring).

86. Newton, *supra* note 74, at 300 & n.52.

87. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971) (listing the applicable policies of interested states and the degree of interest of those states among several factors relevant to a court's choice of law decision); see also Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 731–32 (1990) ("If more than one state has a real interest in the case, the courts should apply the law of the state that has the most significant relationship to the parties and the transaction or occurrence . . .").

88. *Hicks*, 533 U.S. at 358 n.2.

89. E.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63–64 (1978) (citing the Indian Civil Rights Act of 1968 (ICRA) for its mandate that states may not have civil or criminal jurisdiction in Indian Country without tribal consent); *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("[I]f the crime was by or against an Indian, tribal jurisdiction or that



Professor Wenona Singel noted, nonmembers pervade Indian Country:

In reality, non-members participate in nearly all aspects of tribal life. They work as employees in both tribal business enterprises and tribal government. They live in tribal housing with their enrolled spouses, parents, or children. They participate in tribal commerce, stay as guests in tribal hotels, and travel through tribal lands. In addition, in many tribes, non-members participate in tribal government by serving as members of tribal boards, commissions, and judiciaries.<sup>90</sup>

A tribe's authority to regulate on-reservation nonmember conduct and a tribal court's authority to adjudicate the rights of nonmembers is fundamental to meaningful tribal self-governance.

The Members of the Roberts Court recognize that the *Oliphant* decision contained little or no pragmatic or public policy reasoning for why Indian tribes should not have criminal jurisdiction over nonmembers.<sup>91</sup> Justice Kennedy attempted to provide a pragmatic public policy justification for protecting nonmembers from tribal court criminal jurisdiction<sup>92</sup>—the presumed unfairness of tribal substantive law—and Justice Souter's *Hicks* concurrence is an attempt to extend that logic to civil jurisdiction.<sup>93</sup> While Justice Souter's argument has had a half-decade or more to settle, the Court awaits the next challenge to tribal court civil jurisdiction from a nonmember. A Supreme Court decision guided by the mistaken view of a monolithic tribal common law could be a disaster for Indian Country. Tribal sovereignty, a critical bulwark against the disintegration of tribal culture and traditions, would erode further. Tribal members would be forced to leave the reservation and their homes to seek civil relief against nonmembers, including tortfeasors, deadbeat dads, and every other nonmember liable to them. Tribal members, many of whom cannot afford legal representation in

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expressly conferred on other courts by Congress has remained exclusive.”).

90. Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 714–15 (2004) (citations omitted).

91. See, e.g., *United States v. Lara*, 541 U.S. 193, 205 (2004) (indicating that Congress has power to “modify or adjust” status of tribes exercising authority over nonmembers); *id.* at 215 (Thomas, J., concurring) (arguing that plenary authority of Congress over Indian tribes is inconsistent with notions of tribal sovereignty).

92. *Id.* at 211–12 (Kennedy, J., concurring).

93. *Hicks*, 533 U.S. at 375 (Souter, J., concurring).

state and federal courts, often would be left without effective legal remedies.<sup>94</sup>

### III. A THEORY OF “INTERTRIBAL COMMON LAW” AND “INTRATRIBAL COMMON LAW”

Tribal courts are not organic or Indigenous,<sup>95</sup> but Indian tribes have made great strides in taking cultural and legal ownership of them. Indian tribes in the modern era of self-determination and self-governance have adapted tribal courts, once tools of assimilating, “civiliz[ing],” and “educat[ing]” reservation Indians,<sup>96</sup> to suit their own purposes and needs—and the purposes and needs of nonmembers. Tribal courts are now tools of adaptation, not assimilation. More than 250 Indian tribes have adopted tribal courts, and the rest have adopted one or more mechanisms of dispute resolution.<sup>97</sup> And many tribal court systems include more than one type of court.<sup>98</sup> Some courts mirror state and federal courts,<sup>99</sup> while more traditional courts are more informal and rely upon traditional and customary procedure and practice.<sup>100</sup> Some of these traditional courts operate under a system that rejects much of the adversarial system of adjudicating disputes.<sup>101</sup>

Though much has been written about the subject of tribal courts and tribal law, little is known. Scholars and commentators writing about tribal courts can differentiate without difficulty the procedures and infrastructure of tribal courts that mirror federal and state courts and those tribal courts that are based on

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94. See Gabriel S. Galanda, *BAR NONE! The Social Impact of Testing Federal Indian Law on State Bar Exams*, FED. LAW., Mar.-Apr. 2006, at 30, 32 (citing an American Bar Association study published in 1994 which estimated that “only 20 percent of Indian peoples’ legal needs are met”).

95. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 113–20 (1983) (attributing the rise of Courts of Indian Offenses to necessity).

96. *United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888).

97. See generally BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT’ OF JUSTICE, EXECUTIVE SUMMARY, *PATHWAYS TO JUSTICE: BUILDING AND SUSTAINING TRIBAL JUSTICE SYSTEMS IN CONTEMPORARY AMERICA* 5–6 (2005).

98. See Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 139–41 (1995) (describing “five general categories” of developing tribal courts).

99. E.g., Michael D. Petoskey, *Tribal Courts*, 67 MICH. B.J. 366, 367 (1988) (“These modern tribal courts have developed from adaptations of state and federal court systems.”).

100. E.g., Vicenti, *supra* note 98, at 141 (“Several Pueblos adjudicate transgressions and solve problems in accordance with age-old practices.”).

101. See Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229, 264–66 (2000) (discussing the “marked difference[s]” in Anglo-American and tribal courts).

customary and traditional methods of dispute resolution.<sup>102</sup> But in the area of tribal law, scholars and commentators either ignore or do not differentiate between the substantive common law applied by the different courts. Discussion of the differences between these two categories of tribal common law, in fact, is necessary to preserve tribal cultures.

This Article provides a rough theoretical framework for distinguishing between two very different categories of substantive tribal law as applied by tribal courts. Such work is necessary for the preservation of tribal law and culture. As Anishinaabe and Canadian legal scholar John Borrows wrote:

[Tribal] legal traditions are strong and dynamic and can be interpreted flexibly to deal with the real issues in contemporary . . . law concerning [Indian] communities. Tradition dies without such transmission and reception. Laying claim to a tradition requires work and imagination, as particular individuals interpret it, integrate it into their own experiences, and make it their own. In fact, tradition is altered by the very fact of trying to understand it. It is time that this effort to learn and communicate tradition be facilitated, both within [Indian tribes] and between [Indian tribes] and [other] courts.<sup>103</sup>

Borrows's statement serves as a template for the broader argument in favor of tribal sovereignty. Tribal sovereignty is not a claim to power and authority for their own sake, but a tool to preserve the culture and traditions of Indian people.<sup>104</sup> Tribal sovereignty shields Indian people and Indian tribes from the assimilative effects of non-Indian society imposed through non-Indian governmental control.<sup>105</sup> It follows that tribal law, as the manifestation of internal tribal sovereignty, should operate to reflect and preserve tribal culture and traditions.

But tribal law serves more than one purpose. Tribal law also must allow Indian tribes to interact and survive in a political and legal world dominated by the United States and the various individual states. Tribal law can reduce the distance between the

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102. Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17, 28 (1997) (comparing and contrasting various aspects of Anglo-American and tribal courts).

103. BORROWS, *supra* note 15, at 27 (footnote omitted).

104. DELORIA & LYTLE, *supra* note 95, at 105–08 (discussing the challenges of modern efforts to reinvigorate tribal sovereignty while preserving customs and traditions).

105. Cf. Whitney Kerr, *Giving up the "I": How the National Museum of the American Indian Appropriated Tribal Voices*, 29 AM. INDIAN L. REV. 421, 423–25 (2004) ("In the hands of the federal government, tribes have lost their claims to individuality. In between attempts at obliteration, the federal government has shown a tendency to homogenize tribal culture.").

American economic, legal, and political arena. Substantive tribal common law reflects those two interests.

A. *Intertribal Common Law*

1. *The Theory.* “Intertribal common law” is the substantive common law applied by tribal courts in cases arising out of an Anglo-American legal construct. It is this Author’s sense that the vast majority of tribal court cases arise out of an Anglo-American legal construct. Intertribal common law includes the common law decisions of other tribal courts and may include a tribal court’s importation of federal and state court common law. Tribal courts create intertribal common law, for example, when litigants ask the court to interpret a statute such as the ICRA<sup>106</sup> or a tribal secured transactions code.<sup>107</sup> Tribal courts create intertribal common law when they adopt a common law rule of another tribal court or a federal or state court, such as the doctrine of sovereign immunity.<sup>108</sup>

An “Anglo-American legal construct” is any legal construct or relationship that has been imported into Indian Country, modeled upon a non-Indigenous legal construct.<sup>109</sup> Tribal courts modeled on state and federal courts are Anglo-American legal constructs. Tribal constitutions modeled upon the “Model [Indian Reorganization Act (IRA)] constitution”<sup>110</sup> are Anglo-American legal constructs. Tribal housing leases, tribal employment contracts, tribal casino financing deals, tribal sovereign immunity, and common law tort, contract, and property law causes of action and defenses are all Anglo-American legal constructs. Indian tribes imported some of these constructs by choice, but outsiders imposed many others.<sup>111</sup> As a function of

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106. 25 U.S.C. §§ 1301–41 (2000).

107. *E.g.*, National Tribal Justice Resource Center, Secured Transactions Ordinance of the Bay Mills Indian Community, available at <http://www.tribalresourcecenter.org/ccfolder/bmseured.htm> (last visited Sept. 21, 2006).

108. *E.g.*, One Hundred Eight Employees of the Crow Tribe of Indians v. Crow Tribe of Indians, No. 89-320, at paras. 47–52 (Crow App. Ct. Nov. 21, 2001), available at <http://www.tribal-institute.org/opinions/2001.NACT.0000001.htm>. (citing federal principles of sovereign immunity).

109. For purposes of this Article, a “legal construct” is a legal concept or model. It may include, without limitation, a statute, a doctrine of common law, and legal or political infrastructure, such as a court, a governing body, and an executive agency.

110. See Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 GONZ. L. REV. 81, 92–93 (1993) (describing often enacted model constitutions as “largely ‘boilerplate’” documents that frequently did not reflect tribal values).

111. See *id.* at 82 (“In the 1880s, . . . the United States shifted from dealing with

coexisting within non-Indian American society, some Indian tribes have taken these non-Indigenous constructs and made them, as much as possible, more consistent with tribal culture, while other communities have adopted them in haste or without detailed consideration as need arises.<sup>112</sup> At this point in history, where Indian tribes have begun to see success in their long struggle to preserve their cultures, economies, and even lives using the legal constructs available to them,<sup>113</sup> it is not possible or even desirable to expel all Anglo-American legal constructs from Indian Country.<sup>114</sup>

2. *The Practice.* Despite the dearth of theorization behind the use of intertribal common law, the wide majority of tribal courts apply intertribal common law in almost every decision involving nonmembers.<sup>115</sup> As the theory of intertribal common law suggests, tribal courts apply intertribal common law in a wide variety of tribal court cases, including drug-related civil forfeiture cases, contracts with nonmember businesses, and tort claims.<sup>116</sup> In *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three Dollars and 14/100*, for example, the Muscogee (Creek) Nation Supreme Court upheld the authority of the tribal government to “regulate public safety through civil laws that restrict the possession, use or distribution of illegal drugs.”<sup>117</sup> The statutes applied to the matter—the tribal legislature’s codification of laws that prohibit the possession and use of certain drugs and the confiscation of property related to the possession and use of illegal drugs<sup>118</sup>—were Anglo-American legal constructs. The federal common law that established the tribal government’s exclusive jurisdiction over the casino parking lot where the tribal police found the drugs; the federal common law that established the Nation’s authority to regulate the

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Indian nations as governments to dealing *within* Indian nations, . . . [seeking] to destroy tribal governments through the forced assimilation of Indian people.”)

112. *Id.* at 93–94 (critiquing the widespread adoption of boilerplate constitutions and noting an increased desire among tribes to amend these constitutions to better reflect tribal values).

113. *See generally* CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 271–72, 330–38 (2005) (discussing legal and policy frameworks of modern Indian tribes, including tribal sovereignty and self-rule, and focusing particularly on tribes’ efforts to establish casinos by using Anglo-American legal constructs such as litigation and congressional lobbying).

114. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–21 (2000), the single most intrusive legal construct relating to tribal economic development, is also the most indispensable. *See generally* Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. (forthcoming 2007), available at <http://ssrn.com/abstract=895900> (examining federal interests in protecting Indian gaming rights and advancing a legal structure that will best apportion the resulting stream of revenue).

nonmembers' on-reservation actions; and the federal treaty reserving to the tribal government certain rights as against state and federal intrusion are all Anglo-American legal constructs.<sup>119</sup> Even the tribal police's actions were modeled upon American law enforcement tactics.<sup>120</sup> There's nothing wrong with the Nation's choices in this case—the drug (“crystal meth”) came from outside the community, brought by nonmembers to the tribal casino, and so it is reasonable for the Nation to employ an outside legal construct in response.<sup>121</sup> Most tribal court cases—and almost all tribal cases that involve nonmembers in significant ways—do the same thing.

When an Indian tribe engages in commercial business operations both on and off the reservation, the tribal courts resolving the disputes that arise out of these transactions employ intertribal common law to resolve them. *Confederated Tribes of Grand Ronde v. Strategic Wealth Management, Inc.* is a good example of a circumstance where tribal law adopted Anglo-American legal constructs as a means of adaptation to modern transactional and business needs.<sup>122</sup> There, the Tribes brought suit in tribal court to vacate an arbitration panel's award of

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115. See, e.g., *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three Dollars and 14/100*, 32 Indian L. Rep. 6133, 6134 (Muscogee (Creek) Nation Sup. Ct. Apr. 29, 2005) (electing not to apply Title 14 of the Muscogee (Creek) Nation's code because the appellant was a non-Indian).

116. See *id.* at 6133 (adjudicating a drug-related civil forfeiture case); see also *Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt., Inc.*, 32 Indian L. Rep. 6148 (Confederated Tribes of the Grand Ronde Community of Or. Tribal Ct. Aug. 5, 2005) (examining agreements with nonmember businesses under federal and state law); *Sullivan v. Mashantucket Pequot Gaming Enter.*, 32 Indian L. Rep. 6128 (Mashantucket Pequot Tribal Ct. May 31, 2005) (reviewing a tort claims case under state common law standards).

117. See *Muscogee (Creek) Nation*, 32 Indian L. Rep. at 6133, 6135.

118. See *id.* at 6133–34 (citing 14 MUSCOGEE (CREEK) NATION CODE ANN. § 2-101(I) and 22 MUSCOGEE (CREEK) NATION CODE ANN. § 2-101(9)).

119. See *id.* (citing, among other authorities, 27 MUSCOGEE (CREEK) NATION CODE ANN. § 1-102(A) (defining territorial jurisdiction limits), 27 MUSCOGEE (CREEK) NATION CODE ANN. § 1-102(B) (defining civil jurisdiction limits), *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (noting tribes' broad range of civil jurisdiction over non-Indians on reservations), and *Indian Country v. Oklahoma*, 829 F.2d 967, 971 (10th Cir. 1987) (holding as a matter of federal law that the same tract of land and gaming facility where the criminal acts addressed in *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three Dollars and 14/100* took place are part of the original treaty lands held by the Nation and subject to the civil authority of the Muscogee (Creek) Nation)).

120. See *id.* at 6133.

121. *Id.* at 6133.

122. *Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt., Inc.*, 32 Indian L. Rep. 6148 (Confederated Tribes of the Grand Ronde Community of Or. Tribal Ct. Aug. 5, 2005).

attorney fees and costs to the Tribes' former business partners, Strategic Wealth Management (SWM) and Paradigm Financial Services, Inc. (Paradigm), nonmember-owned businesses.<sup>123</sup> The tribal court granted the relief because the Tribe "did not waive its sovereign immunity in any of the agreements it entered into with [SWM]."<sup>124</sup> The underlying contract (a contract relating to financial and investment services) and the arbitration clause, coupled with its incorporation of tribal sovereign immunity, were all Anglo-American legal constructs utilized by the Tribes.<sup>125</sup> The tribal code provisions establishing subject matter jurisdiction mirrored federal rules in significant ways.<sup>126</sup> The federal common law allowing for tribal court jurisdiction over the nonmembers and the defenses raised by SWM were all Anglo-American legal constructs.<sup>127</sup> The tribal court relied upon its own authority for the background policy relating to tribal sovereign immunity<sup>128</sup> and many federal court cases for much of the remainder of the issues. All of this was intertribal common law.

*Strategic Wealth Management* is the perfect example of how tribal law is fair. Patrick Sizemore, president of SWM, and Mark Sizemore, president of Paradigm, were brothers who worked for years in Indian Country, tailoring their businesses to tribal clients.<sup>129</sup> They represented themselves and their businesses as being able to bridge the gap between on-reservation tribal capital and off-reservation business investment opportunities—experts in both finance and investment, *and* in relevant federal Indian law.<sup>130</sup> The question of tribal sovereign immunity should not have been a surprise when they negotiated their contract with the Tribes.

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123. *Id.* at 6148.

124. *Id.* at 6155.

125. *See id.* at 6148–49 (citing the contract and arbitration clauses and describing the arbitration proceedings); *id.* at 6152 (citing, among other authorities, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) and *Guardipee v. Confederated Tribes of Grand Ronde*, 19 Indian L. Rep 6111, 6111 (Confederated Tribes of the Grand Ronde Community of Or. Tribal Ct. June 11, 1992), for the proposition that the Tribes retained immunity from suit).

126. *See id.* at 6148–51 (citing TRIBAL COURT ORDINANCE § 310(d)(1)(A)).

127. *See id.* at 6150–51 (citing, among other authorities, *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438 (1997), *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Montana v. United States*, 450 U.S. 544 (1981)); *see also id.* at 6154–55 (examining the applicability of the Anglo-American waiver, *res judicata*, and justiciability defenses).

128. *See id.* at 6152 (citing *Guardipee*, 19 Indian L. Rep at 6111).

129. The Author became familiar with SWM during his experience as in-house counsel for the Pascua Yaqui Tribe of Arizona in 1998 and 1999.

130. *See Strategic Wealth Mgmt., Inc.*, 32 Indian L. Rep. at 6148.



Tribal courts also decide tort and contract claims brought against Indian tribes, tribal government officials, and tribal entities using intertribal common law. Many student commentators, and even the Supreme Court,<sup>131</sup> have criticized tribal sovereign immunity as a tool whereby tribal defendants avoid liability,<sup>132</sup> but the on-the-ground reality defies conventional wisdom. Tribal defendants often waive their immunity.<sup>133</sup>

Moreover, they are insured, either in accordance with tribal or federal law.<sup>134</sup> Modern tribal court cases adjudicating tort claims often do so with nonmember-owned insurance companies as parties. *Lee v. Little Lodge Headstart*<sup>135</sup> and *Sullivan v. Mashantucket Pequot Gaming Enterprise*<sup>136</sup> are instructive. *Lee* exemplifies the reality of a tribal government's tort liability when operating governmental services funded in part by federal funds.<sup>137</sup> Federal law mandates that the tribal government and its entities acquire adequate insurance and further mandates that the insurance carrier not invoke tribal sovereign immunity.<sup>138</sup> The *Lee* Court held that the tribal defendant was entitled to a dismissal of the claims brought against it on the basis that it retained immunity from suit but declined to dismiss the tribal entity's insurance carrier.<sup>139</sup>

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131. See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998).

132. E.g., Brian C. Lake, Note, *The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone*, 1996 COLUM. BUS. L. REV. 87, 88 (1996) (citing unawareness and involuntary assumption of the risk as two fundamental problems of extending unlimited sovereign immunity to off-reservation tribal businesses).

133. See R. Spencer Clift, III, *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 177, 180 (2003) (“[A]s a practical matter and business decision [tribes will oftentimes] . . . waive sovereign immunity in certain legal fora in order to garner valuable . . . commercial interaction with the private and public sectors.”).

134. Thomas P. Schlosser, *Sovereign Immunity: Should the Sovereign Control the Purse?*, 24 AM. INDIAN L. REV. 309, 336, 340–41 (2000).

135. *Lee v. Little Lodge Headstart Program*, No. 02C-0366 (Three Affiliated Tribes of the Fort Berthold Reservation Dist. Ct. Nov. 1, 2004) (on file with Author).

136. *Sullivan v. Mashantucket Pequot Gaming Enter.*, 32 Indian L. Rep. 6128 (Mashantucket Pequot Tribal Ct. May 31, 2005).

137. See *Lee*, No. 02C-0366, at 8.

138. 25 U.S.C. § 450f(c) (2000).

139. See *Lee*, No. 02C-0366, at 7–12. The Court relied upon the common law of federal and state courts, as well as other tribal courts, to conclude that the Little Lodge Headstart Program was entitled to raise sovereign immunity. See *id.* at 5 (citing, among other authorities, *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Gavle v. Little Six, Inc.*, 534 N.W.2d 280 (Minn. Ct. App. 1995); *Clement v. LeCompte*, 22 Indian L. Rep. 6111 (Cheyenne River Tribal Ct. App. Jan. 12, 1994); *Davis v. Mille Lacs Band*, No. 96 CV 701 (Mille Lacs Band of Chippewa Indians Tribal Ct.

The *Sullivan* case demonstrates how tribal sovereign immunity operates when the tribal defendant is a tribal business enterprise.<sup>140</sup> The Mashantucket Pequot Tribal Nation waived its immunity from suit arising out of claims made by its gaming and resort enterprise patrons.<sup>141</sup> The Nation waived its immunity for damage awards not exceeding “actual damages” and for pain and suffering not exceeding “100% of the actual damages sustained.”<sup>142</sup> *Sullivan* is an uncomplicated case whereby the court took evidence and heard testimony regarding an accident that occurred at the Foxwoods casino.<sup>143</sup> Both *Lee* and *Sullivan* involved nonmembers and were resolved by a tribal court applying intertribal common law. Likely for business reasons, the tribal court applied Anglo-American versions of tort law to the claims of nonmembers.

All four of these cases—and there are many, many more with similar patterns—involved nonmembers and the application by tribal courts of intertribal common law to resolve these disputes.<sup>144</sup> Tribal courts will resolve tort claims involving nonmembers as an Anglo-American legal construct using intertribal common law.<sup>145</sup> The same is true for sovereign immunity and the analysis undertaken by the *Sullivan* court for determining the tort claimant’s “actual damages.”<sup>146</sup>

The *Sullivan* opinion demonstrates how tribal courts have developed in the last three decades. The tribal court relied upon its own precedent in most instances, citing to Connecticut law or American legal treatises where its own common law was silent.<sup>147</sup>

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Sept. 30, 1996)).

140. *Sullivan*, 32 Indian L. Rep. at 6128.

141. See David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 194–95 & n.101 (2004) (citing Mashantucket Pequot Tribal Nation, TRIBAL LAWS AND RULES OF COURT tit. IV (2001), available at <http://www.tribalresourcecenter.org/ccfolder/mpequot1.htm#title4> (last visited Sept. 21, 2006)).

142. *Sullivan*, 32 Indian L. Rep. at 6130 (quoting Mashantucket Pequot Tribal Nation, TRIBAL LAWS AND RULES OF COURT tit. IV, ch. 1, § 4(a), (d) (2001)).

143. See *id.* at 6129–32 (applying state common law to resolve a tort claim).

144. *Id.* at 6128, 6130–31; *Lee*, No. 02C-0366, at 1–2 (Three Affiliated Tribes of the Fort Berthold Reservation Dist. Ct. Nov. 1, 2004) (on file with Author); Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three Dollars and 14/100, 32 Indian L. Rep. 6133, 6134 (Muscogee (Creek) Nation Sup. Ct. Apr. 29, 2005); Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt., Inc., 32 Indian L. Rep. 6148, 6150 (Confederated Tribes of the Grand Ronde Community. of Or. Tribal Ct. Aug. 5, 2005).

145. See Cooter & Fikentscher, *supra* note 11, at 552 (“One Pueblo told us that . . . pain and suffering are not compensated in tribal law[—]‘You live with it . . . .’”).

146. See *Sullivan*, 32 Indian L. Rep. at 6129–32.

147. *Id.*

As tribal courts hear more and more cases, they will be more capable of relying upon their own precedents, rather than importing federal, state, and other tribal court decisions. This exemplifies the ongoing process of tribal courts adapting Anglo-American common law in cases involving nonmembers. The oldest tribal courts of record adopted and imported Anglo-American precedents for use in cases involving nonmembers.<sup>148</sup> The next generation does the same, but also relies upon the precedents of older generations of tribal courts.<sup>149</sup> The process suggests that importation and adaptation of Anglo-American common law is useful for tribal courts when resolving disputes involving nonmembers—and that this process will continue.

Intertribal common law is a mixture of tribal common law, as well as the common law decisions of other tribal courts, federal courts, and state courts. While there is a definite mixture of authorities, there is no instance where a tribal court has chosen to depart in an unusual manner from the established common law of other jurisdictions once adopted. In short, it is unusual to find a tribal court decision involving nonmembers that would depart in a radical manner from the way a state or federal court would decide the case. If the Supreme Court is concerned about the unfairness of tribal substantive law as it applies to nonmembers, it need not worry.

Take “due process,” for example, the area of law Justice Souter pounced on.<sup>150</sup> Dean Newton stated that tribal courts do not follow state and federal precedent “jot-for-jot,” but that sounds much worse than it is. Dean Newton would agree that tribal courts’ interpretations are well within the parameters of the due process that state and federal courts apply.<sup>151</sup> Due process is one of the more subjective legal doctrines in the law.<sup>152</sup> State and federal courts tend to apply a balancing test,<sup>153</sup> reaching results that differ from other

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148. *Id.* at 6129–30.

149. Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts* (Part I), 46 AM. J. COMP. L. 287, 327 (1998) (indicating the importance of institutional memory among tribal judges).

150. *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring).

151. *Cf. Newton, supra* note 74, at 297 (“[S]tudents and scholars approaching tribal court opinions with respect for the tribal context would not automatically criticize deviations from state or federal law, but would understand that difference does not always mean inferiority.”).

152. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (calling the “guideposts” for substantive due process decisionmaking “scarce and openended” (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992))).

153. *See Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (creating a test for due process cases that balances three factors: (1) private interest affected; (2) risk of erroneous deprivation; and (3) government interests).

courts in often dramatic ways. A California resident and citizen, where the notion of “substantive due process” is incorporated into the state’s constitutional law,<sup>154</sup> might be subject to a U.S. Supreme Court still cringing from its own substantive due process jurisprudence.<sup>155</sup> Due process as envisioned by the framers of the Constitution might be nothing like the due process the Court now applies.<sup>156</sup> Why should Justice Souter hold Indian tribes to a “jot-for-jot” standard when the Court does not (and cannot) hold state and federal courts to the same standard?<sup>157</sup> While the Rosebud Sioux tribal court might not apply due process the same way as the Little River Band of Ottawa Indians tribal court, they might apply the doctrine the same as Idaho, South Dakota, or Michigan courts.<sup>158</sup> In fact, the Court’s own due process jurisprudence has built-in expectations of variation.<sup>159</sup>

As tribal courts decide more cases, they will have more opportunity to rethink these common law choices, just as federal and state courts rethink their own common law choices. Every Indian tribe is a laboratory for innovation.<sup>160</sup> Every court may live by Justice Holmes’s dictum:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>161</sup>

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154. CAL. CONST. art. I, § 7.

155. *E.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690–91 (1999) (finding the expanding due process approach a distasteful tool for achieving legislative flexibility); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861–64 (1992) (justifying a malleable view of due process based on changing understandings of facts over time).

156. *See generally* STEPHEN BREYER, *ACTIVE LIBERTY* 15–38 (2005) (describing the Constitution as a “continuing instrument” of government that will apply to changing subject matter).

157. *Compare* *Sheppard v. Sheppard*, 655 P.2d 895, 901 (Idaho 1982) (advancing full faith and credit to tribal court orders and judgments), *with In re Marriage of Red Fox*, 542 P.2d 918, 920 (Or. Ct. App. 1975) (applying rules of comity, not full faith and credit, to tribal court orders and judgments).

158. *See, e.g.*, *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80–81 (1930) (holding that states may adopt differing types of appeals processes without violating the due process clause).

159. *See* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

160. *Cf.* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

161. OLIVER WENDELL HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167, 187 (1920).

Over time, tribal courts may incorporate the necessary custom and tradition—and stories—of the tribal community into its own common law. This incorporation must be gradual, but it is a must if the tribal common law is to have value for the community.

### *B. Intratribal Common Law*

1. *The Theory.* “Intratribal common law” is the common law applied by tribal courts in cases arising out of an Indigenous legal construct.<sup>162</sup> Intratribal common law, in a normative sense, should be the law that a tribal court would apply, a law that relies on tribal custom and traditional law and norms. Intratribal common law also may be the “law” that traditional or nonadversarial tribal courts, such as peacemaker courts, use to resolve disputes.<sup>163</sup> In a practical sense, however, many tribes have not yet recovered their customs and traditions in a manner that is useful in this regard. Regardless, cases resolved using intratribal common law tend to involve tribal members to the exclusion of all others, with the exception of nonmember Indians and nonmembers who consent to the application of intratribal common law.

An “Indigenous legal construct,” in contrast to an “Anglo-American legal construct,” is a legal construct that originates within the tribal community. The form of government that a tribal community chooses may be indigenous in origin, such as the so-called “theocratic” government of many of the Pueblos in the desert southwest.<sup>164</sup> The canoe ownership traditions of the Pacific Northwest tribes, handed down from generation to generation, originated from within the community.<sup>165</sup> The inheritance rules of a community, whether they are matrilineal, patrilineal, or neither, tend to originate from within the community.<sup>166</sup> Any legal construct not imposed or imported from the non-Indian political communities should be classified as an Indigenous legal construct.

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162. See, e.g., Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 229–30 (1989) (examining applicable law in Navajo tribal courts and characterizing the law as Navajo “customary,” or common, law).

163. *Id.* at 230.

164. See JOHN R. WUNDER, “RETAINED BY THE PEOPLE”: A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 10–11 (1994); Angela R. Riley, *Sovereignty and Illiberalism*, 95 CAL. L. REV. (forthcoming 2007) (manuscript at 15, on file with Author).

165. See VINE DELORIA, JR., *INDIANS OF THE PACIFIC NORTHWEST* 32–33 (1977).

166. See Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL’Y 97, 97–98 (2004) (describing the origins of various traditions of Pueblos).

Applying intratribal common law—in cases involving members and the tribe—to the exclusion of the laws of nonmember communities should be the goal of all tribal courts, but it may be a goal that is slow in coming. Discovering the tribe's customs and traditions—and the tribe's stories—may take time. Learning how these customs and traditions apply to the decisionmaking analyses of tribal courts may take even longer. But it is a worthy and necessary goal. As it stands right now in many tribal jurisdictions, tribal courts decide disputes between members with reference to federal and state law more often than not.<sup>167</sup> Professor Kevin Washburn wrote that, in the area of criminal law, for example, imported federal and state criminal laws and law and order codes do not match with tribal cultures.<sup>168</sup> Professor Washburn argues that a tribal community “defines what it values and what it abhors” in enacting criminal laws.<sup>169</sup> Tribal communities that import state and federal criminal laws into Indian Country do so at a great risk to the preservation of community norms and culture.

Intratribal common law is the heart of the intersection of tribal law and culture. As noted by Professor Christine Zuni Cruz, tribal courts that do not apply custom and tradition in this context, relying instead on federal and state law, “participate . . . in their own ethnocide.”<sup>170</sup> Here is where Indian tribes and Indian people reach back into the past to relearn the old stories, to learn what it means to be Indian, and to learn how Indian people resolve these kinds of internal disputes.<sup>171</sup> For example, although federal Indian law and policy has depleted much of Indian Country, a great deal remains undisturbed.<sup>172</sup> Intratribal common law is strongest in these places. Here is where Indian people, Indian tribes, and tribal courts take what they can from custom and tradition and apply it to the disputes of today, to the extent that they differ from the disputes of the past. Here, then, is the other part of tribal common law, a part

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167. See Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL'Y 74, 94–95 (1999) (analyzing sources of law relied upon by tribal courts in 359 cases published in the Indian Law Reporter).

168. See Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 836–37 (2006) (stating that the Major Crimes Act, enacted by Congress in 1885, has led to a situation in which “a community alien and external to the tribal communities” has defined criminal offenses for the tribes).

169. *Id.* at 834.

170. Zuni, *supra* note 102, at 24.

171. See *id.* at 26 (“The sources of common law are the members of tribal society who were raised traditionally.”).

172. See *id.* at 27 (“Individual tribes face the challenge to develop an indigenous system[;] . . . in the face of imposed mandates . . . the spirit of resistance is alive.”).

that exists parallel to intertribal common law and that tribal courts apply in specific and relevant contexts—contexts not including nonmembers.

2. *The Practice.* The classic example of the use of intratribal common law is where a dispute arises between two members (or the tribe) involving tribal lands with “spiritual significance to the group.”<sup>173</sup> In some Indian communities, the location of the land may not be disclosed, nor may the law that would decide the dispute.<sup>174</sup> These disputes touch members to the exclusion of all nonmembers by definition. But most disputes arising out of Indigenous legal constructs may be discussed in some manner, although published tribal court opinions relating to the disputes may be difficult to locate.

Part of the theory of intratribal common law is discovering the relevant customs and traditions of an Indian community. While many scholars have located and published the customs and traditions of several tribal communities,<sup>175</sup> most tribes have not had the benefit of this kind of scholarship. The relevant stories are yet to be discovered.<sup>176</sup> But there are a few tribal court cases that exemplify the application of intratribal common law.

Tribal courts decide family law cases involving members (and even nonmembers who consent) using intratribal common law. *Polingyouma v. Laban* is a case that recites customary and traditional law before applying that law to modern Hopi life.<sup>177</sup>

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173. Newton, *supra* note 74, at 306 n.71.

174. See *id.* at 306 & n.71 (noting a property claim on land with spiritual significance and within a tribe’s ancient land).

175. E.g., GEORGE COPWAY, *THE TRADITIONAL HISTORY AND CHARACTERISTIC SKETCHES OF THE OJIBWAY NATION* v, ix–x (1850) (providing “a sketch of [Ojibway] [N]ation’s history, describing its home, its country, and its peculiarities”); LLEWELLYN & HOEBEL, *supra* note 13, at vii–viii (explaining that the authors have “aimed at the development of a social science instrument for the recording and interpretation of lawways among . . . the Cheyennes”); MARY SHEPARDSON, *NAVAJO WAYS IN GOVERNMENT* 3–4 (1963) (advancing a “functional analysis of Navajo politics against a background of the main historical events . . . and a sketch of Navajo economy and traditional Navajo social structure”); STRICKLAND, *supra* note 15, at xi–xii (studying the Cherokees who were moved from Georgia to Oklahoma in 1838 and 1839); Steven M. Karr, *Now We Have Forgotten the Old Indian Law: Choctaw Culture and the Evolution of Corporal Punishment*, 23 AM. INDIAN L. REV. 409, 409, 410 n.2 (1999) (discussing the Choctaw, Cherokee, Chickasaw, Creek, and Seminole cultures); Robert Yazzie, “*Life Comes From It*”: *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 175–76 (1994) (reviewing the character of “Navajo justice” and comparing it to Anglo law).

176. See BORROWS, *supra* note 15, at 25–26 (“[M]uch of the information is acquired . . . through years of study and hard work.”).

177. *Polingyouma v. Laban*, 25 Indian L. Rep. 6227, 6228 (Hopi Tribe App. Ct. Mar. 28, 1997).



The case involved an appeal of a child custody decision reached at the trial court level whereby the trial court decided to award equal periods of physical custody to both parents.<sup>178</sup> The appellate court took judicial notice of “three aspects of Hopi custom concerning children. Under traditional Hopi practice, a child is born into her mother’s clan, lives with the mother’s household and receives ceremonial training from the mother’s household.”<sup>179</sup> The court then “tested” the custom “for relevancy . . . in the context of modern Hopi life.”<sup>180</sup> Hopi custom seemed to imply that the mother should have retained full custody. To uphold the trial court’s order, however, the court relied upon the fact that the parents wanted the child to remain in Hopi Day School at Hopi and the representation by the father that he would relocate to Hopi to avoid disrupting the child’s education.<sup>181</sup> Anglo-American courts would not have considered custom and tradition at all, let alone this particular Hopi custom. *Polingyouma* was a case involving members engaged in a family dispute. The tribal court should and did apply intratribal common law to resolve the dispute.

Disputes between members over rights to tribal lands are another type of case best decided in accordance with intratribal common law. *Ross v. Sulu*<sup>182</sup> was a case arising out of a dispute over claims to land within the Hopi reservation by different clans at the First Mesa.<sup>183</sup> The Hopi Constitution provided that the local village there, the Village of First Mesa, had “the power to assign farming land.”<sup>184</sup> The Hopi intratribal common law provided that each village had the discretion to adopt modern, or Anglo-American-style, governmental structures, but unless they did so, “they [were] considered as being under the traditional Hopi organization.”<sup>185</sup> “The Village of First Mesa [had] not adopted a village constitution . . . [and] therefore, remain[ed] under the traditional[, intratribal, law] . . .”<sup>186</sup> The Hopi appellate court ruled that the lower court could not have

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178. *See id.*

179. *Id.*

180. *Id.*

181. *See id.*

182. *Ross v. Sulu*, No. CIV-023-88 (Hopi Tribe App. Ct. July 5, 1991), available at <http://www.nativelegalnet.org/Data/DocumentLibrary/Documents/1041966042.59/Patsy%20Ross%20%26%20Burke%20Adams%20vs%20Tom%20Sulu%2C%20as%20Tewa%20Kachina%20Clan%20L.pdf>.

183. *See id.* at 1.

184. *Id.* at 4–5 (citing HOPI CONST., available at [http://www.ntjrc.org/ccfolder/hopi\\_const.htm](http://www.ntjrc.org/ccfolder/hopi_const.htm) (last visited Sept. 21, 2006)).

185. *Id.* at 5–6.

186. *See id.* at 6.

exercised jurisdiction in the dispute at issue in *Sulu*.<sup>187</sup> Hopi law allows for traditional villages to resolve certain disputes over land exclusive of tribal court jurisdiction.<sup>188</sup> *Sulu* exemplifies a case involving disputes between tribal members to the exclusion of all others. Under Hopi law, it was appropriate to resolve the dispute utilizing intratribal law. In that instance, the relevant intratribal law even precluded the tribal court from exercising jurisdiction over the matter.

Tribal government disputes and constitutional law questions are another area where tribal courts can and should apply intratribal common law. Here, tribal courts are confronted with tribal governments that are Anglo-American legal constructs; that is, the federal government more often than not imposed a form of government on the tribe based on outside models such as municipal governments or the federal government structure.<sup>189</sup> The form a tribal government takes is a decision that originates from within, in theory, but most tribal governments mirror Anglo-American governmental structures in important respects. In these cases, tribal courts *adapt* intertribal common law and apply the modified laws as intratribal common law.<sup>190</sup> Again, because these cases are wholly tribal, nonmember rights are not implicated. *Certified Question II: Navajo Nation v. MacDonald* exemplifies this adaptation of intertribal common law in a tribal governmental dispute.<sup>191</sup> The relevant question presented was whether the Navajo Tribal Council had authority to place the

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187. See *id.* (explaining that the tribal court lacked jurisdiction over an “intravillage dispute between clans over a matter reserved for village decision”).

188. See *id.* at 6–7.

189. See NEWTON ET AL, *supra* note 31, § 4.06[2][a] (identifying that under the Indian Reorganization Act (IRA), Congress authorized the Secretary of the Interior’s involvement in tribal governmental matters, including elections and constitutional amendments). In many cases, the Secretary of Interior’s authority to disapprove new tribal constitutions impeded the discretion of tribes to form an organic tribal government structure. See Matthew L.M. Fletcher, *The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs*, 19 WASH. U. J.L. & POL’Y 273, 279 (2005) (“[T]his requirement allows the federal government to decide elemental questions of tribal law that should be decided by the tribe alone.”); Joranko & Van Norman, *supra* note 110, at 84 (“By continuing secretarial review of IRA tribal constitutions, Congress left in place a significant obstacle to true Indian self-determination.”).

190. See, e.g., *Turtle Mountain Judicial Bd. v. Turtle Mountain Band of Chippewa Indians*, No. 04-1126, at 5 (Turtle Mountain Tribal App. Ct. 2005), [http://www.turtle-mountain.cc.nd.us/pp\\_cases/2005\\_cases/Judicial%20Board%20v%20TMB%20Opinion.doc](http://www.turtle-mountain.cc.nd.us/pp_cases/2005_cases/Judicial%20Board%20v%20TMB%20Opinion.doc) (drawing upon federal and other tribes’ common law where the tribe’s common law was silent); *Snowden v. Saginaw Chippewa Indian Tribe of Mich.*, 32 Indian L. Rep. 6047, 6050 (Saginaw Chippewa Indian Tribe of Mich. App. Ct. Jan. 7, 2005) (same).

191. *Certified Question II: Navajo Nation v. MacDonald*, 16 Indian L. Rep. 6086, 6087 (Navajo Sup. Ct. Apr. 13, 1989) (stating that a Navajo statute governs when the Navajo Tribal Council may remove a probationary judge).

tribal chairman on administrative leave pending an investigation into alleged criminal activity.<sup>192</sup> The Nation has no written constitution,<sup>193</sup> so the tribal court adapted intertribal common law to resolve the dispute.<sup>194</sup> The court relied upon the fact that the chairman's authority was derived in all respects from acts and delegations of the tribal council.<sup>195</sup> The court implied from that reality that the tribal council also retained the authority to "withdraw, limit, or supervise the exercise of powers it has bestowed on the offices of Chairman."<sup>196</sup> From that holding, the Court concluded the tribal council could place the Chairman on administrative leave.<sup>197</sup> The Navajo court began its analysis with the Secretarial regulations creating the Navajo government structures, which are, of course, Anglo-American structures. But the court stayed away from blind reliance upon federal and state law common law precedents. It was, after all, an internal matter to be decided, as much as possible, by intratribal common law.

The practice of applying intratribal common law establishes that there can be a clear line delineating between the laws that may be used to resolve disputes between members and tribal entities, and those disputes whose subject matters arise out of Indigenous legal constructs. Nonmembers, unless they consent *and* the community consents, are not affected by intratribal law.

#### IV. TOWARD RECOGNITION OF TRIBAL COURT CIVIL JURISDICTION OVER NONMEMBERS

The development and theorization of intertribal and intratribal common law may assist Indian tribes and their advocates in educating the federal judiciary of the on-the-ground reality of tribal court civil jurisdiction over nonmembers. To be certain, there appears to be a great deal of apprehension emanating from the Court about the possibility of this nonconsensual exercise of jurisdiction, but a little education may go a long way.

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192. *See id.* at 6090.

193. *See* DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 429 (5th ed. 2005).

194. While the court relied upon intratribal common law, it should be noted that the chairman's office and the Tribal Council, created by regulations promulgated by the Department of Interior, were both Anglo-American legal constructs. *See MacDonald*, 16 Indian L. Rep. at 6090.

195. *See id.* at 6091.

196. *Id.*

197. *See id.* at 6092 ("The Navajo Tribal Council can place a Chairman or Vice Chairman on administrative leave with pay if they have reasonable grounds to believe that the official seriously breached his fiduciary trust to the Navajo people . . .").

### A. *Correcting the Misunderstanding*

Cases where nonmembers challenge the jurisdiction of tribal courts are consistent with a theory differentiating between intertribal and intratribal common law. The recent case, *Smith v. Salish Kootenai College*,<sup>198</sup> is a typical tribal court case involving a nonmember.<sup>199</sup> Victims of an auto accident on the Flathead Indian Reservation sued the nonmember in tribal court in a wrongful death action.<sup>200</sup> The nonmember then filed a cross-claim against his co-defendant, also in tribal court.<sup>201</sup> After losing at trial, the nonmember sought to challenge tribal court jurisdiction in federal court.<sup>202</sup>

*Smith* involved the tribal court's application of intertribal common law. Wrongful death is an Anglo-American legal construct, and the tribal court applied, as tribal statutory law required, Anglo-American common law in instructing the jury on negligence as embodied in the Restatement (Second) of Torts.<sup>203</sup> The nonmember's first argument on appeal before the tribal appellate court involved the best evidence rule, another Anglo-American legal construct.<sup>204</sup> The nonmember's final argument on appeal before the tribal appellate court was an attempt to convince the court to reject the American common law rule that evidence concerning the insurance coverage of the parties is inadmissible, as stated in Federal Rule of Evidence 411.<sup>205</sup> The tribal appellate court affirmed the tribal court's refusal to allow the nonmember to question witnesses and jurors about insurance.<sup>206</sup> Like so many other tribal court cases, this case did

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198. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127 (9th Cir. 2006) (en banc).

199. Many tribal court cases involving nonmembers as defendants, where the nonmember contests jurisdiction, are tort claims. *E.g.*, *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438 (1997) (reviewing a personal injury action); *Allstate Indem. Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999) (evaluating jurisdictional issues related to an insurance claim arising from tortious conduct).

200. *Smith*, 434 F.3d at 1129.

201. *Id.*; see also *Smith v. Salish Kootenai Coll.*, No. AP-99-227-CV, at 1-4 (Confederated Salish and Kootenai Tribes App. Ct. 2003), available at <http://www.umt.edu/lawinsider/library/tribal/cs&k/opinions/SmithSKC.pdf>.

202. See *Smith*, 434 F.3d at 1129-30.

203. See *Smith*, No. AP-99-227-CV at 10-11 (citing RESTATEMENT (SECOND) OF TORTS § 874A cmt. e (1977)); *Laws of the Confederated Salish & Kootenai Tribes* § 4-1-104 (2003), <http://www.umt.edu/lawinsider/library/tribal/cs&k/code2003/intro.pdf#search=%22%22Laws%20of%20the%20Confederated%20Salish%20and%20Kootenai%20Tribes%22%22> (instructing tribal courts to first apply intratribal law and then to apply applicable federal law).

204. See *Smith*, No. AP-99-227-CV at 5-7.

205. See *id.* at 13-14 (citing FED. R. EVID. 411).

206. See *id.* at 14.

not involve the kind of law that would tend to confuse nonmembers. If anything, in an attempt to bring evidence about insurance before the jury, the nonmember defendant attempted to exploit the fact that state and federal law is not controlling in tribal court decisions by questioning witnesses and jurors about insurance. From beginning to end, this case involved Anglo-American legal constructs and state and federal common law interpreted by a tribal court. There was no unfairness to that nonmember litigant—the tribal court decided the case the same way a state or federal court would have.

Empirical studies of tribal court decisions involving nonmembers confirm the result in *Smith*. Dean Newton characterizes *Middlemist v. Member of the Tribal Council of the Confederated Salish and Kootenai Tribes*,<sup>207</sup> a case involving the challenge to tribal regulatory jurisdiction brought by nonmember irrigation districts, as a “striking example of sensitivity to tribal traditions,”<sup>208</sup> but the result in the case mirrored the result that the nonmembers would have achieved in state or federal courts.<sup>209</sup> Dean Newton reviewed as many as thirty-seven tribal court cases involving nonmembers and concluded that nonmember litigants had been treated in a fair manner.<sup>210</sup> Professor Mark Rosen, reviewing civil rights cases brought in tribal courts, also agreed that “[m]ost of the cases are examples of responsible and good faith interpretation of [applicable law], and none of the cases involves patently outrageous reasoning or outcomes.”<sup>211</sup> All of the cases reviewed by Professor Rosen involved Anglo-American legal constructs, and the tribal courts decided all of the cases employing intertribal common law.<sup>212</sup>

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207. *Middlemist v. Member of the Tribal Council of the Confederated Salish & Kootenai Tribes*, 23 Indian L. Rep. 6141 (Confederated Salish & Kootenai Tribes App. Ct. June 29, 1996).

208. Newton, *supra* note 74, at 306.

209. *See id.* at 307. (noting that the tribal court decision in *Middlemist* required the exhaustion of tribal administrative remedies before challenging the tribe's jurisdiction).

210. *See id.* at 352 (“[T]he tribe does not always win against the individual, and the tribal member does not always defeat the non-Indian.”).

211. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 *FORDHAM L. REV.* 479, 573 (2000).

212. *See id.* at 573–75 (citing, among other authorities, *Schumacher v. Menominee Indian Tribe of Wis.*, 24 Indian L. Rep. 6084 (Menominee Tribal Sup. Ct. Jan. 30, 1997) (perfection of security interest in collateral)); *Muskogee (Creek) Nation v. Am. Tobacco Co.*, 25 Indian L. Rep. 6054 (Muskogee (Creek) Nation Okmulgee D. Ct. Feb. 12, 1998) (reviewing the rules of personal service); *Means v. Dist. Court of the Chinle Judicial Dist.*, 26 Indian L. Rep. 6083 (Navajo May 11, 1999) (reviewing a criminal misdemeanor against nonmember Indian decided on federal equal protection grounds); *Shoshone Bus. Council v. Skillings*, 21 Indian L. Rep. 6050 (Shoshone & Arapahoe Tribal Ct. App. 1994)

Professor Bethany Berger's recent article, *Justice and the Outsider*,<sup>213</sup> is perhaps the most detailed look at the empirical evidence relating to the fairness of tribal courts to outsiders. Professor Berger analyzed the decisions of the Navajo Nation's tribal courts where a nonmember is a party.<sup>214</sup> In ninety-five Navajo Nation Supreme Court opinions where a non-Navajo party opposed a Navajo party, the non-Navajo party won half of the cases.<sup>215</sup> Relying upon a theory that parties with accurate information "will settle or fail to pursue cases in which they agree that one party is significantly more likely to win,"<sup>216</sup> Berger concludes that "non-Navajo parties are at least as good at predicting their chances of success as are Navajo parties."<sup>217</sup> The result "tends to undermine the assumption that the courts are unfair to these outsiders."<sup>218</sup>

Though it is very difficult to draw comprehensive conclusions about tribal court fairness to outsiders from these small samples, it is notable that no study found evidence of the kind of unfairness that concerns the Court.

### B. *Theorizing the Presumption of Tribal Court Jurisdiction*

In the coming years, the Supreme Court may decide to review a case where a *member* sues a *nonmember* in tribal court for committing a tort *on reservation land*.<sup>219</sup> The open question of the presumption of tribal court jurisdiction over nonmembers will then be before the Court.<sup>220</sup> While tribal sovereignty will be weighed against the political rights of American citizens, the fundamental practical question is whether nonmembers will have their meaningful day in court. This Article's premise is that

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(reviewing a tribal membership issue)).

213. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005).

214. See *id.* at 1067.

215. See *id.* at 1075 (reporting that of the ninety-five cases examined, the non-Indian party won 47.4%, but noting that until a recent surge in (often unsuccessful) challenges to tribal jurisdiction the rate was 50%).

216. *Id.* at 1076 & n.161 (citing George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 51-52 (1984)).

217. *Id.* at 1077.

218. *Id.*

219. This is a different fact situation than *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 438 (1997) (involving a nonmember plaintiff and an off-reservation accident) and *Nevada v. Hicks*, 533 U.S. 353, 355 (2001) (involving a state law enforcement officer as a defendant).

220. See *Hicks*, 533 U.S. at 358 & n.2 (quoting *Strate*, 520 U.S. at 453 and citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)) ("We leave open the question of tribal-court jurisdiction over nonmember defendants in general.").

nonmembers will not be subject to “unusually difficult,” confusing, unfair, or unfamiliar substantive law. As such, the Court should rule—as it suggested in *National Farmers Union*—that tribal courts may be presumed to have civil jurisdiction over nonmembers for disputes arising in Indian Country.<sup>221</sup>

The Court’s concerns that nonmember litigants will have important or even fundamental rights limited or even erased in tribal fora is belied by the realities of federal and state court practice. Commentators have long known that litigants and attorneys remove cases from state courts to federal courts under the federal removal statute<sup>222</sup> because the defendants wish to employ *procedural* (not substantive) strategic ploys such as delay<sup>223</sup> or because the defendant’s *attorney* (not client) is unfamiliar with state or local courts.<sup>224</sup> In addition, many state courts adjudicate cases of first impression on any number of subjects of law.<sup>225</sup> Sometimes jurisdictions differ on whether to adopt a particular rule.<sup>226</sup> This is all part of Justice Brandeis’s vision of each jurisdiction serving as part of a “laboratory” of experimentation. Tribal courts may be a part of the “jurisgenesis” of tribal law and culture,<sup>227</sup> as well as part of the learning from experience that all courts can do for each other. After all, the Founders took from English common law what they wanted and left the rest.<sup>228</sup>

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221. See *supra* note 39.

222. 28 U.S.C. § 1441 (2000).

223. See Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1089 (1989) (noting that defendants remove cases hoping the delay will deplete the plaintiff’s resources).

224. See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 402–03 (1992) (reporting that 77% of defense lawyers based removal decisions on their familiarity with the federal system).

225. *E.g.*, *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co.*, 584 P.2d 15, 21, 23 (Alaska 1978) (adopting a common law doctrine of economic duress); *Seehafer v. Seehafer*, 704 N.W.2d 841, 843, 847 (N.D. 2005) (adopting rule that “[a] spouse of a deceased joint tenant cannot claim a probate homestead on her husband’s property when his interest in that property terminated on his death and she held no interest of her own in the property”); *Cincinnati Bar Ass’n v. Kathman*, 748 N.E.2d 1091, 1095, 1097 (Ohio 2001) (adopting a common law rule that licensed attorneys “aid” in unauthorized practice of law when they assist nonattorneys in marketing or selling living trusts).

226. Compare, *e.g.*, *Mills v. Wyman*, 20 Mass. 207 (1825) (adopting and applying the material benefit rule in contract cases), with *Harrington v. Taylor*, 36 S.E.2d 227, 227 (N.C. 1945) (refusing to adopt the material benefit rule).

227. See *Chamberlain v. Peters*, 27 Indian L. Rep. 6085, 6096 (Saginaw Chippewa Indian Tribe of Mich. App. Ct. Jan. 5, 2000) (quoting Robert Cover, *Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983)); POMMERSHEIM, *supra* note 82, at 101 (attributing the term to Robert Cover); WILLIAMS, JR., *supra* note 56, at 20 (same).

228. *E.g.*, *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249 (1936).

In the light of all that has now been said, it is evident that the restricted rules of



On a pragmatic level, difficult tribal common law decisions can be explained. The Court already noted a mechanism in place to alleviate the concerns about “unusually difficult” tribal substantive law.<sup>229</sup> Justice Stevens’ *National Farmers Union* opinion argued that federal courts reviewing tribal court jurisdiction can utilize the opinions generated by those tribal courts to understand tribal law.<sup>230</sup> The Court has not yet followed Justice Stevens’ lead and examined a tribal court case for the purpose of understanding intertribal common law. Both of the tribal court cases cited by Justice Stevens involved nonmembers as parties. *Crow Creek Sioux Tribe v. Buum* involved a tribal court judgment excluding a non-Indian from the Crow Creek Sioux Reservation for a period of one year and, when the nonmember violated the order, to ten days of confinement and a fine.<sup>231</sup> All of the legal questions in the *Buum* matter were Anglo-American legal constructs that the tribal appellate court resolved using intertribal common law. These Anglo-American legal constructs included the notion of a “public nuisance,”<sup>232</sup> the difference between a civil judgment and a criminal penalty,<sup>233</sup> and “due process.”<sup>234</sup> In *Buum*, the appellate court reversed the exclusion order on due process grounds, holding that the tribal court must meet several “due process” conditions in order to effectuate a civil exclusion order.<sup>235</sup> The tribal courts didn’t rely upon “unusually difficult” tribal substantive law to prejudice the nonmember and, in fact, ruled in favor of the nonmember.

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the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods.

*Id.*

229. See Barsh, *supra* note 167, at 81–82 (finding “tribal common law” often based on Anglo law and tribal courts disfavoring grounding their decisions on tradition even in internal social cases).

230. See *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) (citing *N.D. ex rel. Wefald v. Kelly*, 10 Indian L. Rep. 6059, 6060 (Standing Rock Sioux Tribal Ct. Oct. 4, 1983) (explaining the Standing Rock Sioux Tribal Code) and *Crow Creek Sioux Tribe v. Buum*, 10 Indian L. Rep. 6031, 6032 (Intertribal Ct. App. Apr. 1, 1983) (explaining the Crow Creek Sioux Tribal Code)).

231. See *Buum*, 10 Indian L. Rep. at 6031.

232. *Id.* at 6032 (citing CROW CREEK SIOUX TRIBAL CODE §§ 07-07-01 to -04).

233. See *id.* at 6033 (citing S.D. CODIFIED LAWS §§ 16-15-1 to -15 (1995) and S.D. CODIFIED LAWS § 23A-38-1 (1998)).

234. *Id.* at 6034.

235. See *id.*

The Court's apparent presumption that tribal substantive law is unfair to nonmembers has no basis in fact. Tribal courts derive the substantive law that applies to nonmembers, intertribal common law, from Anglo-American common law.<sup>236</sup> Indian tribes adopt a statutory law that tends to mirror American laws for a reason—because they must be able to function in the American political system in a seamless manner. Because federal Indian policy drove tribal law underground for a decades-long interregnum, Indian tribes and tribal courts had to start, as a pragmatic matter, by borrowing federal and state law. Once tribal legislatures and tribal court establish a baseline of tribal law, it is natural and necessary that tribal courts will work to mold the law to meet the needs and realities of the tribal communities. Just as state and federal common law changes to accommodate community norms,<sup>237</sup> tribal courts will adopt changes to the intertribal common law over time. There is nothing remarkable in changing the gradual course of the common law to reflect the community's choices.<sup>238</sup>

#### V. CONCLUSION—THE SEVENTH FIRE

The prophet of the Seventh Fire of the Ojibwe spoke of an Osh-ki-bi-ma-di-zeeg' (New People) that would emerge to retrace their steps to find what was left by the trail. There are Indian people today who believe that the New People are with us in the form of our youngest generation. This young generation is searching for their Native language. They are seeking out the few elders who have not forgotten the old ways. They are not finding meaning to their lives in the teachings of American society. . . . This younger generation is discovering the common thread that is

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236. See *supra* Part II.

237. E.g., Sarah Howard Jenkins, *Preemption & Supplementation Under Revised 1-103: The Role of Common Law & Equity in the New U.C.C.*, 54 SMU L. REV. 495, 505 (2001) ("As business ethics and values evolve and community mores change, the principles of common law and equity generally evolve to accommodate and control the innovative business practices, the novel modes of ordering and modifying commercial relationships, variations in financing mechanisms, and commercial behavior that deviates from established social norms."); Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 798 (2002) ("The common law method substantially minimized the impact of legal transitions. In contrast to modern comprehensive legislative action, changes in the path of the common law occurred through gradual and episodic accretions to the existing body of judge-made norms.").

238. See E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* 288 (Atheneum 1979) (1954) ("The evolution of law as a phase of societal evolution has been no more an undeviating lineal development than has been the evolution of life forms in the organic world.").

interwoven among the traditional teachings of all natural people.<sup>239</sup>

Eddie Benton-Banai's description of the New People is a plea for the next generation of Indian people—and the generation after that, and so on—to reach back to learn the language and culture of their ancestors. Just as American Constitutional law scholars reach back to revisit the foundations of the United States Constitution,<sup>240</sup> Indian people, lawyers, and scholars must reach back to revisit the foundations of their own laws. Traditional tribal law has all but disappeared from Indian Country, replaced with an amalgam of imposed and imported Anglo-American legal constructs.<sup>241</sup> Tribal judges and Indian law scholars have long advocated for the restoration of traditional and customary law, but that work is far from complete and, in some places in Indian Country, it hasn't even begun. Since tribal common law is infused with tribal culture, neither can survive in the long run without the other.

The irony of these developments is that the Supreme Court, taking a superficial look at tribal courts and tribal court jurisprudence, appears to be close to concluding that the restoration of tribal traditions and customs is complete.<sup>242</sup> As a result, the Court may soon rule that tribal courts may never exercise civil jurisdiction over nonmembers on the theory that tribal law is “unusually difficult for an outsider to sort out.” The Court may make this final and conclusive judgment without knowing the facts on the ground. The reality is that tribal courts do not apply “unusually difficult” substantive law to cases involving nonmembers.<sup>243</sup> As a matter of law *and* culture, “intratribal common law,” exemplified by tribal customs and traditions, does not apply to nonmembers, by definition. “Intertribal common law,” the law imposed and imported into the tribal community that mirrors state and federal common law to a significant extent, is that law that tribal courts would apply to disputes involving nonmembers. Also, tribal court judges, like state and federal judges, write legal opinions that explain the

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239. EDWARD BENTON-BANAI, *THE MISHOMIS BOOK* 111–12 (1979).

240. *E.g.*, BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 11 (2005) (seeking, through an examination of the Court's first decade, to “locate the changing role of the judiciary as a response to an even more fundamental constitutional transformation”); AKHIL REED AMAR, *AMERICA'S CONSTITUTION* xii (2005) (providing an “*opinionated* biography” of the Constitution by scrutinizing the actions and decisions of the Founders and later generations of constitutional amenders).

241. *See supra* Part II.

242. *See supra* Part I.

243. *See supra* Part II.A.

application of tribal common law to a particular case. Justice Stevens wrote in 1985 that a federal court should review these opinions as necessary for explanations of tribal law and culture.<sup>244</sup> In the end, tribal courts decide matters of intertribal common law just as state and federal courts would.

This Article delineates a proposed line between intertribal common law and intratribal common law as a means of explaining and emphasizing the difference between tribal law that applies in some circumstances to tribal members alone and tribal law that applies to members and nonmembers both. If the Court understands the distinction, its fears of subjecting nonmembers to unfair law should be allayed. Choosing to solidify the *National Farmers Union* presumption that tribal courts do have civil jurisdiction over nonmembers should not be controversial. Even a cursory review of tribal court decisions involving nonmembers shows that nonmembers are not prejudiced in tribal courts any more than a resident of Rhode Island would be prejudiced in Texas or Connecticut.<sup>245</sup>

Eddie Benton-Banai's words of hope were tempered by his concern that the bullets and bayonets of early American Indian policy have been replaced with "less visible weapons."<sup>246</sup> He believed that non-Indians sought "to absorb Indian people into the melting pot of American society. . . . The old ways, these teachings, are seen as unnecessary to the modern world."<sup>247</sup> Much of Indian Country is populated by nonmembers—people who live and work on the reservation, intermarry with tribal members and raise tribal member children, and even participate in tribal politics and traditional ceremonies. A Supreme Court decision creating a bright-line rule that tribal courts cannot have civil jurisdiction over nonmembers forces more and more Anglo-American common law into Indian Country, rendering tribal custom and tradition irrelevant and useless. Over time, this will result in the continued erosion of tribal culture and tradition. Recognizing the jurisdiction of tribal courts over nonmembers would generate benefits to tribal communities—and all other American courts—through the jurisgenerative journey that tribal courts take every day in adjudicating the rights of people in Indian Country while preserving the rights of nonmembers.

Miigwetch.

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244. See *supra* note 230 and accompanying text.

245. See *supra* notes 213–218 and accompanying text (reviewing a study of Navajo courts and finding that nonmembers win almost 50% of the time).

246. BENTON-BANAI, *supra* note 239, at 111.

247. *Id.*

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## **Legal Studies Research Paper Series**

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### **Tribal Courts, the Indian Civil Rights Act, and Customary Law: Preliminary Data**

*Matthew L.M. Fletcher*

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# **Tribal Courts, the Indian Civil Rights Act, and Customary Law: Preliminary Data**

**Matthew L.M. Fletcher\***

## **INTRODUCTION**

In 2001, the Supreme Court last reviewed the question of whether a tribal court could have civil jurisdiction to adjudicate a federal civil rights claim against a state police officer.<sup>1</sup> The Court concluded that Congress never intended the federal civil rights statute to be enforced against state officers in tribal courts, in large part because there was no mechanism for removing the claim from tribal court to federal or state courts.<sup>2</sup> Justice O'Connor's concurring opinion also demonstrated that the doctrine of state sovereign immunity may have been an independent reason for denying tribal court jurisdiction in the matter.<sup>3</sup> But Justice Scalia's majority opinion and a separate concurring opinion from Justice Souter focused on the inherent authority of an Indian tribe and its courts to assert civil jurisdiction over all nonmembers. In a particularly damning passage, Justice Souter asserted that the laws that tribal courts apply are "unusually difficult for an outsider to

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\* Assistant Professor, Michigan State University College of Law. Director, Indigenous Law & Policy Center. J.D., University of Michigan, 1997. Many, many thanks to Alicia S. Ivory, who assisted with the research involved in this project.

<sup>1</sup> *See Nevada v. Hicks*, 533 U.S. 353 (2001).

<sup>2</sup> *See id.* at 366-69.

<sup>3</sup> *See id.* at 400-01 (O'Connor, J., concurring in the judgment).



sort out.”<sup>4</sup> Justice Souter, quoting noted American Indian tribal court expert Ada Pecos Melton, suggested that the unwritten tribal customary law and traditions guide tribal court judges in their decision making, putting nonmembers in a disadvantageous litigation position.

The purpose of this short paper is provide the preliminary results of an empirical study of tribal court opinions to assess the factual validity of Justice Souter’s concerns in this area.

### METHODOLOGY

I have looked at the opinions from thirteen tribal courts that are available through VersusLaw. The courts with opinions available on VersusLaw that I studied include Chitimacha, Colville, Coquille, Coughatta, Eastern Band Cherokee, Fort McDowell Yavapai, Mohegan, Passamaquoddy, Puyallup, St. Regis Mohawk, Tunica Biloxi, Turtle Mountain Chippewa, and Wisconsin Oneida tribal courts.

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<sup>4</sup> *Id.* at 384-85 (Souter, J., concurring). The entire paragraph in which this phrase appears is worth quoting in the margin:

Although some modern tribal courts “mirror American courts” and “are guided by written codes, rules, procedures, and guidelines,” tribal law is still frequently unwritten, being based instead “on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,” and is often “handed down orally or by example from one generation to another.” [Ada Pecos] Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130-131 (1995). The resulting law applicable in tribal courts is a complex “mix of tribal codes and federal, state, and traditional law,” NATIONAL AMERICAN INDIAN COURT JUDGES ASSN., INDIAN COURTS AND THE FUTURE 43 (1978), which would be unusually difficult for an outsider to sort out.

I have also studied the Mashantucket Reporter, published by Thomson-West and available on Westlaw.

Finally, I studied cases published in the Indian Law Reporter after the Supreme Court's decision in *Nevada v. Hicks*. In this reporter, I studied the opinions from nine tribal courts: Cheyenne River Sioux Tribe, Colville Confederated Tribes, Fort Peck, Confederated Tribes of the Grand Ronde Community, Karuk Tribe, Mandan Hidatsa and Arikara Nation (Three Affiliated Tribes), Saginaw Chippewa Indian Tribe, Confederated Salish and Kootenai Tribes, and the Turtle Mountain Band of Chippewa Indians.

I carefully studied 120 opinions from these courts that applied substantive provisions of the Indian Civil Rights Act (ICRA).<sup>5</sup> I did so for the purpose of learning if tribal courts use tribal customary law or tradition to interpret the Anglo-American legal concepts included in ICRA.<sup>6</sup>

### **SUMMARY OF FINDINGS**

As Justice Souter asserted in his concurrence in *Nevada v. Hicks*, the Court may be concerned that the laws applied by tribal court judges are “unusually difficult for an outsider to sort out,”<sup>7</sup> and that “there is a ‘definite trend by tribal courts’ toward the view

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<sup>5</sup> 25 U.S.C. § 1302.

<sup>6</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (“By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.”).

<sup>7</sup> 533 U.S. 353, 385 (2001).

that they ‘ha[ve] leeway in interpreting’ the ICRA’s due process and equal protection clauses and ‘need not follow the U.S. Supreme Court precedents ‘jot-for-jot....’”<sup>8</sup>

This study is an attempt to assess the validity of my theory that tribal courts do not apply “unusually difficult” laws in cases involving nonmembers.<sup>9</sup> I theorized that in most cases (if not the vast, overwhelming majority), tribal courts apply a kind of “intertribal common law,” which consists of the application of tribal statutes that mirror federal and state statutes and the federal and state cases that interpret them.<sup>10</sup>

Conversely, only in cases involving tribal members (and even then, usually in insular tribal communities) will tribal courts be asked to apply law that an outsider might find “unusually difficult to sort out.” I labeled this category “intratribal common law.”<sup>11</sup> As my paper demonstrated, “intratribal common law” cases typically involve disputes between family members, disputes over tribal property, and occasionally tribal constitutional law questions.<sup>12</sup>

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<sup>8</sup> *Id.* at 384 (quoting Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Tribal Courts*, 22 AM. INDIAN L. REV. 285, 344 n. 238 (1998)).

<sup>9</sup> See Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUSTON L. REV. 701 (2006).

<sup>10</sup> See *id.* at 720-28 (explaining “intertribal common law”).

<sup>11</sup> *Id.* at 728-33 (explaining “intratribal common law”).

<sup>12</sup> See *id.* (discussing *Polingyouma v. Laban*, 25 Indian L. Rep. 6227 (Hopi Tribe App. Ct. 1997); *Ross v. Sulu*, No. CIV-023-88 (Hopi Tribe App. Ct. 1991)); see also *Champagne v. Little River Band of Ottawa Indians*, No. 06-178-AP (Little River Band of Ottawa Indians Court of Appeals 2007), <http://rezjudicata.files.wordpress.com/2008/01/lrb-v-champagne-final-opinion.doc> (applying tribal customary law to the prosecution of a tribal appellate court judge).

ICRA is an appropriate vehicle for assessing this theory because tribal courts have exclusive jurisdiction to hear ICRA civil cases.<sup>13</sup> Moreover, while the substantive provisions of ICRA are borrowed from American constitutional law and the Bill of Rights, tribal courts may choose to apply tribal customary law to interpret these provisions.

I anticipated that tribal judges tend to borrow state and federal case law to interpret ICRA, rather than disregard it in favor of announcing and applying tribal customary law. In a second article, I argued that tribal judges are less likely to apply tribal customary law to Anglo-American legal concepts such as those found in ICRA because of the practical difficulty in finding, announcing, and (most especially) applying unwritten tribal customary law.<sup>14</sup>

*The preliminary results of this study suggest that my hypotheses are substantially accurate. Of the 120 cases involving an ICRA issue, tribal court judges applied federal and state case law as persuasive (and often controlling law) in 114 cases (95 percent). And, of the six cases in which the tribal court explicitly refused to apply federal or state case law, either the parties involved tribal members in a domestic dispute or else the tribal court held that its interpretation of the substantive provisions of ICRA were stronger or more protective of individual rights than would otherwise be available in parallel federal or state cases.*

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<sup>13</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978).

<sup>14</sup> See Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 81-84 (2007) (reporting a “dearth” of tribal custom in tribal court decisionmaking).

## STATEMENT OF FINDINGS

Perhaps the most critical substantive provisions of the Indian Civil Rights Act are the requirements that tribal governments must provide due process and equal protection of the laws to all persons under tribal jurisdiction.<sup>15</sup> It was due process in particular that Justice Souter asserted might raise a fairness problem for “outsiders.”<sup>16</sup> And due process is an area of law that tribal courts must analyze on a regular basis.

In this study, I analyzed dozens of tribal court cases that articulate a test for guaranteeing due process to individuals confronted with tribal governmental takings of property or liberty. *In all cases involving nonmembers and members alike, the tribal court borrowed settled federal or state case law to announce the test for guaranteeing due process to individuals in accordance with the Indian Civil Rights Act.*

### 1.1 Annunciations of the Test for Guaranteeing Due Process

The tribal courts in this study, *without variation*, apply the same test for the guarantee of due process to individuals – notice and a meaningful opportunity to be heard.

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<sup>15</sup> 25 U.S.C. § 1302(8) (“No Indian tribe in exercising powers of self-government shall .. deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law....”).

<sup>16</sup> Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring).

Typical annunciations of due process tests include this statement from the Turtle Mountain Band of Chippewa Indians appellate court:

A fundamental requirement of due process is that the parties be given adequate or reasonable notice. ‘An elementary and fundamental requirement of due process ...is notice reasonably calculated, under all the circumstance, to apprise interested parties of the pendency of the action...The notice must be of such nature as reasonably to convey the required information...’ *Mullane v. Central Hanover Bank & Trust Co.*, 399 U.S. 306,314; 70 S.Ct. 652 (1952). Reasonable notice must be given at each new step in the proceedings. *Cash v. Cashman*, 41 Conn. App. 382, 390 (1996).<sup>17</sup>

And another from the Puyallup Tribal Court:

The United States Constitution states in pertinent part that no person shall be deprived of property without due process of law. U.S. Constitution, Fifth Amendment.

Similarly, the Indian Civil Rights Act prohibits an Indian Tribe exercising powers of self-government from depriving any person of property without due process of law. 26 U.S.C. 1302(8).

The essence of due process requires notice and an opportunity to be heard. *Washington v. Rogers*, 127 Wn.2d 270, 898 P.2d 294 (1995).

The notice should be “reasonably calculated, under all circumstances, to

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<sup>17</sup> *Monette v. Schlenvogt*, No. TMAC 04-2021, 2005.NATM.0000003, at ¶ 25 (Turtle Mountain Band of Chippewa Indians Court of Appeals 2005), available at [www.versuslaw.com](http://www.versuslaw.com).

apprise interested parties of the pendency of the action and afford them an opportunity to present their objections ....” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 214-315, 70 S.Ct. 652, 657 (1980).<sup>18</sup>

The Cheyenne River Sioux Tribe’s appellate court articulates its due process test a slightly different way, but with the same fundamental requirements of notice and a meaningful opportunity to be heard. That court recently wrote:

[T]his court recently reaffirmed the traditional Lakota values embodied in the term due process of law. Just as Lakota tradition requires the respectful listening to the position of all interested persons on any important issue, the legal requirement of due process of law requires that all persons interested in a matter receive adequate written notice of any proceeding that would implicate their personal interests....<sup>19</sup>

The import of this slightly different standard is to accord additional protections to individuals in their dealings with the tribal government. In an earlier case, the court held that an amendment to the tribal constitution limiting the time limits for challenges to referenda were unconstitutional under tribal law, though they would have been acceptable under state law. The court wrote, “[State court case law] is not constitutionally persuasive because the line of state court cases all assume a constitutional predicate that does not

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<sup>18</sup> *Delgado v. Puyallup Tribal Council*, No. 95-3604, 1996.NAPU.0000007, at ¶¶ 48-50 (Puyallup Tribal Court 1996), available at [www.versuslaw.com](http://www.versuslaw.com).

<sup>19</sup> *High Elk v. Veit*, 33 Indian Law Reporter 6033 (Cheyenne River Sioux Tribal Court of Appeals 2006).

exist on the Cheyenne River Sioux Reservation.” The court noted that notice is the critical constitutional predicate under Lakota traditions.<sup>20</sup>

## **1.2 Choice of Law Questions**

In addition, the tribal courts in this study, *again without variation*, borrow federal and state case law as persuasive authority for their annunciation of the due process test. While tribal courts may choose to employ tribal customary and traditional law to develop a test for guaranteeing due process, they rely upon federal articulations of due process as persuasive authority. Consider this statement from the St. Regis Mohawk Tribal Court:

The Indian Civil Rights Act safeguards those rights restated in entirety in the Constitution of the Saint Regis Mohawk Tribe. Under the Indian Civil Rights Act tribes are prohibited from depriving persons of rights without due process. While Federal, state, and tribal law is not binding authority upon the Saint Regis Mohawk Tribal Court such can act as persuasive authority. The fundamental requirements of due process is the ‘opportunity to be heard.’ *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing must be at a ‘meaningful time and in a meaningful manner.’ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Due process also requires notice, the right to be heard in a full and fair hearing, to call witnesses and to be heard before an impartial decision maker. The Constitution of the Saint Regis Mohawk Tribe safeguards the same rights

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<sup>20</sup> In the Matter of Tribal Council Ordinance 14, 31 Indian Law Reporter 6141 (2004).



as those stated in the Indian Civil Rights Act, that is the political, social, and civil rights of duly enrolled members of the Tribe.<sup>21</sup>

Tribal courts cognizant of their possible obligation to apply tribal customary and tradition found that federal case law interpreting the federal due process clause was the logical place to start its analysis, which concluded by adopting the foundational federal due process test articulated in *Mathews v. Eldridge*.<sup>22</sup>

While the Fifth Amendment due process clause does not apply so as to limit the power of tribal self government, we believe that the due process analysis developed over the years in federal jurisprudence is instructive and a logical place to begin an analysis of the due process protections found in the Indian Civil Rights Act.

The procedural due process provision of the Fifth Amendment to the United States Constitution that is made applicable to the States through the 14th Amendment can be traced back to ideas that first originated in the Magna Charta of England. The Fifth Amendment to the Constitution of the United States states that no person shall “be deprived of life, liberty or property, without due process of law...” In applying this simple language to real life situations the United States Supreme Court has cautioned against the setting out specific rules which apply in each and every situation. In case after case the United States Supreme Court has adapted

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<sup>21</sup> In re: Constitutional Question re: Voting, 1998.NASR.0000001, at ¶ 40 (St. Regis Mohawk Tribal Court 1998), available at [www.versuslaw.com](http://www.versuslaw.com).

<sup>22</sup> 424 U.S. 319 (1976).

the general concept of procedural due process to deal with the competing interests presented by the case at hand. The Court has specifically held:

...the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.

Moreover, courts have held that procedural due process is “...flexible and calls for such procedural protections as the particular situation demands.” Simply put: What is procedural due process under the Fifth Amendment in one case is not in another. Each case is different.

In the recent case of *Mathews v. Eldridge*, the Court set out a “balancing of interests” test to determine the “...specific dictates of due process ...” which included the following three factors: (1) The private interests at stake; (2) The government’s interests involved.; and (3) The risk that the procedure will result in error.<sup>23</sup>

The Mashantucket Pequot Tribal Court also applies federal and state law in the absence of applicable tribal customary and traditional law:

“The due process clause of the ICRA applies to all tribal proceedings: criminal, civil and administrative.” *Johnson v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 273, 276, 2 Mash.Rep. 249, 255

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<sup>23</sup> *Chitimacha Housing Authority v. Martin*, No. 93-0006, 1994.NACH.0000002, at ¶¶ 108-111 (Chitimacha Indian Tribal Court of Appeals 1994), available at [www.versuslaw.com](http://www.versuslaw.com) (citing and quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Little v. Streat*, 452 U.S. 1, 5-6 (1981); *Wolf v. McDonnell*, 418 U.S. 539, 560 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Armstrong v. Manzo*, 380 U.S.545, 552 (1965); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Cafeteria Workers V. McElroy*, 367 U.S. 886, 895 (1961)) (other footnotes omitted).

(1998), quoting *Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 104, 105, 1 Mash.Rep. 142, 145 (1995). The ICRA is to be interpreted in a manner “consistent with Tribal practice or custom.” I M.P.T.L. ch. 3, § 10(b). Here, there is no distinctively Mashantucket Pequot tribal custom or tradition or cultural norm which is offered in support of the amendment to the Board of Review policy. In the absence of a clearly demonstrated tribal custom or tradition, and because many provisions of the ICRA, including the due process clause, are in language nearly identical to the Bill of Rights and state and federal constitutions, the court will apply general federal and state principles of due process. *Johnson v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 273, 276-277, 2 Mash.Rep. 249, 255-57 (1998).<sup>24</sup>

The Cheyenne River Sioux Tribe’s appellate court, as noted above, relies far more heavily on Lakota traditions, but the court still applies the basic foundational premises of due process, which it derived in part from federal case law.<sup>25</sup>

### **1.3 Establishment of Property Rights**

Again, *without variation*, tribal courts in this study borrow federal and state case law as persuasive authority in articulating the test for whether property rights have vested in an individual for purposes of the Indian Civil Rights Act’s due process and takings clauses.

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<sup>24</sup> *Miller v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. Rep. 418, 421 (1998).

<sup>25</sup> *See Cheyenne River Housing Authority v. Howard*, 32 Indian Law Reporter 6165 (Cheyenne River Sioux Tribal Court of Appeals 2005) (citing *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950)).

In the context of tribal governmental official removal proceedings, the Turtle Mountain Band of Chippewa Indians appellate court followed the Supreme Court's decision in *Cleveland Board of Education v. Loudermill*, establishing the due process formulation in the context of public employment.<sup>26</sup>

The right to elective office is a property right that cannot be taken without due process of law. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Removal proceedings of a tribal chairman can implicate the Indian Civil Rights Act. See e.g. *Stands Over Bull v. BIA*, 442 F. Supp 360 (D. Mont. 1977) (removal proceedings against Tribal Chairman implicates due process rights under the ICRA.) The Court below and this Court have an especial obligation to ensure that both the Tribal Constitution and the Indian Civil Rights Act are honored in removal proceedings. The type of process due, however, in a removal proceeding of an elected official is not coterminous with due process rights afforded persons in tribal court. Removal proceedings of elected officials are heavily imbued with political considerations that this Court must be cautious of ignoring. It is not appropriate for a Court to substitute its opinion for that of elected officials in deciding what constitutes cause for removal of an elected official provided the process by which that decision was reached comports with due process of law and the Tribal Constitution. See *Baker v. Carr*, 369 U.S. 186 (1962) (Courts should not exercise jurisdiction over purely political disputes where the constitution

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<sup>26</sup> 470 U.S. 532 (1985).

vests another branch of government with exclusive authority to resolve an issue).<sup>27</sup>

In the more important context of tribal employment relationships,<sup>28</sup> the tribal courts in this study also follow the *Loudermill* formulation. The Mashantucket Pequot Tribal Court borrowed this test in the context of Foxwoods casino employment cases:

The Indian Civil Rights Act, 25 U.S.C. § 1302, adopted by the Mashantucket Pequot Tribe as tribal law, 1 M.P.T.L. ch. 3, § 10, provides in pertinent part that no one within the jurisdiction of an Indian tribe exercising the powers of self-government shall be deprived of property without due process of law. 25 U.S.C. § 1302(8). The right to due process conferred by the ICRA “shall apply in the Tribal Court.” 1 M.P.T.L. ch. 3, § 10(a); *Healy v. Mashantucket Pequot Gaming Enterprise*, Decision on Rehearing En Banc., 1 MPR 63, 2 Mash.App. 28 (1999), and applies to the plaintiff’s property interest in continued employment. “It is settled law that the ordinances and policies of the Mashantucket Pequot Tribe ‘manifestly accord job security protections to employees of the Gaming Enterprise. Once the property interest in employment is conferred, the employee cannot be deprived of that interest without due process safeguards.’ “ *Johnson v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 273, 277, 2 Mash.Rep. 249, ---- (1998) (*Johnson III*), citing

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<sup>27</sup> *Monette v. Lenoir*, 2002.NATM.0000005, at ¶ 12 (Turtle Mountain Band of Chippewa Indians Court of Appeals 2002), available at [www.versuslaw.com](http://www.versuslaw.com).

<sup>28</sup> See generally Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. MICH. J. L. REFORM 273 (2005).

*Johnson v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 15, 19, 1 Mash.App. 21, ---- (1996) (*Johnson II*); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).<sup>29</sup>

Tribal courts routinely adopt the *Loudermill* formulation.<sup>30</sup>

#### **1.4 The Application of Tribal Customary and Traditional Law**

There are relatively few instances where a tribal court brings to bear a tribe's customary law or traditions to decide the outcome of a dispute. The five cases in which a tribal court applied tribal customary or traditional law to a dispute exclusively involved internal domestic disputes and criminal cases. *Importantly, there are no instances whatsoever in this study in which a tribal court applied or purported to apply tribal customary or traditional law in a dispute involving a nonmember.*

In one criminal case, the Colville Confederated Tribes appellate court reviewed a claim on appeal by a criminal defendant that the tribal court's sentence for drunk driving was excessive under the Indian Civil Rights Act. The court wrote:

Where a violation of civil rights is alleged in criminal sentencing, our inquiry does not lead us to apply Washington law. Because the civil rights of a criminal defendant appearing before the Tribal Court is grounded in ICRA, and [the Colville Confederated Tribes Civil Rights Act], our frame of reference for

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<sup>29</sup> *Johnson v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. Rep. 74, 1999 WL 34828696 at \*1 (1999).

<sup>30</sup> *E.g.*, *Synowski v. Confederated Tribes of Grand Ronde Community*, 31 Indian Law Reporter 6117 (Confederated Tribes of the Grand Ronde Community Tribal Court 2003); *Thomas v. Coquille Indian Tribe*, No. 03-001, 2004.NACQ.0000001 at ¶ 78 (Coquille Indian Tribal Court 2004).

this analysis is the Constitution of the Colville Confederated Tribes, tribal statutes, Tribal Court procedure, and ICRA. [T]he origin of a defendant's federal civil rights in Tribal Court is statutory, presumably arising from the Indian Commerce Clause of the United States Constitution, Article I, Sec.8, Cl. 3. By adopting ICRA, the Congress selectively incorporated certain provisions of the Bill of Rights with knowledge that other provisions based upon tribal law would be used to define the guarantees arising under ICRA. Although some of those protections appear to be the same as those provided by the Bill of Rights, we believe ICRA must be applied against a backdrop which includes the tribal Constitution, tribal statutes, tribal court procedures, all of which are the product of a tribal system which has maintained its ties with custom and tradition.

To place ICRA in perspective for this analysis, we note that the Act was enacted to provide those appearing before tribal courts with certain protections from the Bill of Rights while fostering tribal self- government, and not to impose the full Bill of Rights on tribes. *Therefore, when applying common law principles based upon the Bill of Rights to civil rights issues arising from ICRA and tribal law, we do so with considerable care. Federal common law doctrine which interprets duties and protections flowing from the United States Constitution and the Bill of Rights did not include in its development, and is not rooted in tribal law, custom and tradition. Therefore, we will examine how the federal courts have handled similar constitutionally-based issues, but because the origins of tribal law differ, any parallels between federal common law and tribal law must be drawn with caution. Accordingly, we will narrowly adopt such common law interpretations when we are fully satisfied they are consistent with tribal law.*<sup>31</sup>

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<sup>31</sup> Sam v. Colville Confederated Tribes, No. 93-15379, 1994.NACC.0000002, at ¶¶ 24-25 (Colville Confederated Tribes Court of Appeals 1994) (emphasis added).

The tribal court did not employ tribal customary and traditional laws in order to deprive an individual of individual rights he or she would have enjoyed in federal or state courts. Instead, the tribal court used tribal customs and traditions as a “check” to ensure that any criminal penalty satisfied tribal law.

In a domestic dispute, the Mashantucket Pequot Tribal Court borrowed tribal common law from another tribal court and tested that common law to Pequot customs and traditions in adopting its rule of the case – a gender-neutral rule for purposes of determining the legal residence and domicile of a child:

Relying on *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989), Mother argues that the legal residence and domicile of the minor child is that of her mother’s, which is Virginia, where the child was born and lived until June 1997. The Court in *Holyfield* noted that, “Well-settled common law principles provide that the domicile of minors, who generally are legally incapable of forming the requisite intent to establish a domicile, is determined by that of their parents, which has traditionally meant the domicile of the mother in the case of illegitimate children.” *Id.* at 48, 109 S.Ct. 1597. In *Eberhard v. Eberhard*, 24 [Indian Law Reporter] 6059, 6061 (1997), the Cheyenne River Sioux Tribal Court of Appeals rejected “the historically gendered and sexist rules of the western common law” cited by *Holyfield*, and instead adopted a gender-neutral rule which looks to the legal residence or



domicile of the spouse who is a member of the Cheyenne River Sioux Tribe. In support of the gender-neutral rule, the Cheyenne River Sioux court noted that the approach has the additional advantages of: “(1) complying with the gender equality protections afforded by the due process and equal protection guarantees of the Indian Civil Rights Act, 25 U.S.C. § 1302(8) and (2) asserting potential tribal court jurisdiction over any children who are enrolled in the tribe or may be eligible for tribal membership by virtue of their parentage.” *Id.* at 6061. The court found that the rule “protects the sovereign interests of the Cheyenne River Sioux Tribe, recognized in other contexts by Congress in the Indian Child Welfare Act, in protecting the sovereign relationship of the tribe with ‘Indian children who are members of or are eligible for membership in an Indian tribe.’” *Id.* citing 25 U.S.C. § 1901(3).

This court finds the *Eberhard* court’s reasoning with regard to the adoption of a gender-neutral rule to be compelling, particularly with respect to situations where the tribal member child is not an infant. In *Holyfield*, the married parents of twin babies moved “promptly” for their adoption following their birth. *Holyfield* at 30, 109 S.Ct. 1597. The common law rule alluded to in *Holyfield* does not take into account that a child born to unwed parents may subsequently go to live permanently with his or her father for a variety of reasons. This is precisely the situation in

the case at hand. The better rule is to look at each parent-child relationship on a case by case basis in a gender-neutral fashion.<sup>32</sup>

### CONCLUSION

Justice Souter's presumption – based on law review articles and legal commentaries – that tribal law is unusually difficult to sort out is not well supported from the available evidence. This study, comprised of 120 tribal court opinions that applied and interpreted the substantive provisions of the Indian Civil Rights Act in cases involving both members and nonmembers concludes that tribal courts are far more likely to borrow federal and state case law as persuasive authority.

There is little or no evidence that tribal courts would decide a matter involving the Indian Civil Rights Act's due process or takings clauses different than a federal or state court would decide a similar dispute involving the Fifth and Fourteenth Amendment Due Process Clauses, except for the few cases in which the tribal courts interpret ICRA to offer *more* protections to individuals.

When tribal courts do apply tribal customary or traditional law, they do so in cases that exclusively involve tribal members, such as criminal cases and internal domestic disputes. There is no evidence in this study that tribal courts ever apply tribal customary or traditional law to nonmembers.

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<sup>32</sup> Father v. Mother, 3 Mash. Rep. 45, 1999 WL 34828488 at \*3 (1999).

There is much more research to be conducted. This study did not include the hundreds – and perhaps thousands – of tribal court opinions that are available in the Indian Law Reporter prior to 2001, the Oklahoma Tribal Court Reports, the Navajo Reporter, Mvskoko Law Reporter, the Southwester Intertribal Court of Appeals Reporter, or the Northwest Intertribal Court of Appeals Reporter. It also does not include the opinions published online by individual tribes or tribal courts, including without limitation the tribal courts of the Cherokee Nation of Oklahoma, the Confederated Tribes of the Grand Ronde Community, the Crow Nation, the Fort Peck Tribes, the Ho-Chunk Nation, the Little Traverse Bay Bands of Odawa Indians, the Nevada Intertribal Court of Appeals, the Northern Plains Intertribal Court of Appeals Reporter, the Pascua Yaqui Tribe of Arizona, and the Sac & Fox Tribe of the Mississippi in Iowa.<sup>33</sup>

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<sup>33</sup> See generally Rez Judicata blog, Tribal Courts—Research, available at <http://rezjudicata.wordpress.com/tribal/tribal-courts-online/>.

## **APPENDICES**

**Appendix 1 – Cases Available on VersusLaw**

**Appendix 1.1 – Chitimacha Tribal Courts**

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**Appendix 2 – Cases Available on Westlaw: Mashantucket Pequot Tribal Courts**

**Appendix 3 – Cases Available in the Indian Law Reporter since 2001**

## Appendix 1 – Cases Available on VersusLaw

### Appendix 1.1 Chitimacha Tribal Courts (3 cases)

#### *Chitimacha Housing Authority v. Martin*

No. CV-93-0006  
09/01/1994

**Procedural History:** Appeal from an Eviction judgment.

**Issue:** Whether the trial court's judgment of Eviction is valid.

**Decision:** Reversed.

**Held:** Housing agreement improperly terminated by the Chitimacha Housing Authority pursuant to federal and Tribal law; due process rights violation under ICRA

**Facts:** CHA administers a low-income housing program with HUD. Appellant's home was part of the CHA/HUD program. As part of the re-certification process, CHA obtained employment verification from Appellant's employer. Appellant was paid 80.00/day, but was not a full time employee. Other information from the employer indicated that Appellant's yearly income was not as high as that which CHA ultimately calculated. His projected income was overestimated by about 100%. CHA increased his monthly payment from 75 to 247. Several hearings were scheduled, some of which appellant missed altogether, and one of which he joined late and did not speak. CHA It is unclear whether appellant received any of the notifications from CHA regarding his recalculated income and rent prior to receiving his eviction notice.

**Reasoning:** The court began by looking to the Chitimacha Comprehensive Code of Justice, which says that binding effect is given by the courts to any applicable constitutional provision, treaty, law or valid regulation of the United States.; any applicable provision of the Tribal Constitution or law of the Tribe not in conflict with federal law; and any applicable custom or usage of the Tribe not in conflict with any law of the Tribe or of the US. When doubt arises as to such custom and usage, the court may request the testimony of persons more familiar.

The court reasoned that in this case, "a determination of what is 'due process' is not easy to make and is made especially complicated in the native American context because of the unique "...historical, governmental and cultural values of an Indian tribe." In other words, some consideration must be given in the due process analysis to possible differences between tribal custom and values and traditional AngloSaxon values. While the Fifth Amendment due process clause does not apply so as to limit the power of tribal self government, we believe that the due process analysis developed over the years in federal jurisprudence is instructive and a logical place to begin an analysis of the due process protections found in the Indian Civil Rights Act."

After briefly discussing the Magna Charta and the Fifth Amendment, the court discussed the three-part procedural due process balancing test decided in *Mathews v. Eldridge*: private interests, government's interests, and the risk that the procedure will result in error. The court stated that these factors are "strongly influenced and tempered by the complexity of the contractual and federal regulations involved in federal housing and the difficulty

created by the clash of indigenous Native American culture and the central and structuralized federal Anglo-American concepts of procedural due process.”

The court held that the Appellant was not given adequate notice under the due process clause of ICRA, and in terms of the three factor test, the third was most important: “There are various reasons why a family could fail to comply with the numerous and confusing rules and regulations concerning federal housing. Some will be valid and some not. In the instant case, the purpose of the due process provisions of the Indian Civil Rights Act is to construct a procedural apparatus whereby the tribal member can be provided notice of: (1) the precise nature of the problem he or she faces; (2) the seriousness of his failure to comply; (3) the consequences of his failure to comply; (4) an opportunity to present his or her side of the story; and (5) the right to have someone represent him in dealings with the housing authority.”

*Chitimacha Housing Authority v. Lightell*

No. CV-93-0005

09/01/1994

**Procedural History:** Appeal from an Eviction judgment.

**Issue:** Whether the trial court's judgment of Eviction is valid.

**Decision:** Reversed.

**Held:** Housing agreement improperly terminated by the Chitimacha Housing Authority pursuant to federal and Tribal law; due process rights violation under ICRA

**Facts:** CHA administers a low-income housing program with HUD. Appellant's home was part of the CHA/HUD program. As part of the re-certification process, Appellant's home had to have regular inspections. At one inspection, the CHA agent found several violations in the Appellant's home and told him that they had to be repaired as part of his contract with the CHA. The actual inspection report was not introduced into evidence so the nature of the violations are not known. CHA checked appellant's home several times and the problems hadn't been fixed. At one point he asked for an extension and received it. The final time that CHA visited his home, they found that he had made some of the repairs, but not enough to put him in compliance. The CHA sent Appellant a notice of termination, and the trial court ordered eviction.

**Reasoning:** (Much of the reasoning in this case is the exact same as the prior case) The court began by looking to the Chitimacha Comprehensive Code of Justice, which says that binding effect is given by the courts to any applicable constitutional provision, treaty, law or valid regulation of the United States; any applicable provision of the Tribal Constitution or law of the Tribe not in conflict with federal law; and any applicable custom or usage of the Tribe not in conflict with any law of the Tribe or of the US. When doubt arises as to such custom and usage, the court may request the testimony of persons more familiar.

The court found that the Notice of Termination did not give Appellant adequate notice in several ways—it did not explicitly indicate that the termination could be rescinded by compliance, that it would become effective after 30 days if there is no rescission, and it did not inform the Appellant that he had the right to representation at the eviction hearing. "A Tribal member, such as Mr. Lightell, is at a disadvantage when dealing with the more knowledgeable and informed housing authority. If he voluntarily chooses to proceed without the benefit of representation, he has such a right. However, due process under the Indian Civil Rights Act (as well as federal regulations and the Chitimacha Tribe's own code and contract) require that he be informed of such a right. The failure to provide Mr. Lightell with such a notice of his right to be represented is fatal to the validity of the termination of the MHO agreement."

(The following section is the exact same as the case above [Martin], because the court used the exact same language from that case in this opinion) The court reasoned that in this case, "a determination of what is 'due process' is not easy to make and is made especially complicated in the native American context because of the unique "...historical, governmental and cultural values of an Indian tribe." In other words, some consideration must be given in the due process analysis to possible differences between tribal custom and values and traditional AngloSaxon values. While the Fifth Amendment due process clause does not apply so as to limit the power of tribal self government, we believe that the due process analysis developed over the years in federal jurisprudence is instructive and a logical place to begin an analysis of the due process protections found in the Indian Civil Rights Act."

After briefly discussing the Magna Charta and the Fifth Amendment, the court discussed the three-part procedural due process balancing test decided in *Mathews v. Eldridge*: private

interests, government's interests, and the risk that the procedure will result in error. The court stated that these factors are "strongly influenced and tempered by the complexity of the contractual and federal regulations involved in federal housing and the difficulty created by the clash of indigenous Native American culture and the central and structuralized federal Anglo-American concepts of procedural due process."

The court held that the Appellant was not given adequate notice under the due process clause of ICRA, and in terms of the three factor test, the third was most important: "There are various reasons why a family could fail to comply with the numerous and confusing rules and regulations concerning federal housing. Some will be valid and some not. In the instant case, the purpose of the due process provisions of the Indian Civil Rights Act is to construct a procedural apparatus whereby the tribal member can be provided notice of: (1) the precise nature of the problem he or she faces; (2) the seriousness of his failure to comply; (3) the consequences of his failure to comply; (4) an opportunity to present his or her side of the story; and (5) the right to have someone represent him in dealings with the housing authority."



*Sanders v. Royal Associates Management, Inc.*

No. CV-95-0007

03/04/1997

**Procedural History:** Appeal from a personal injury judgment in favor of plaintiffs. Plaintiffs appeal for a new trial; Tribe appeals for reversal.

**Issue:** Whether the tribal court system is inherently biased so as to prevent a fair trial to non-members.

**Decision:** Affirmed.

**Held:** Tribal court system is no more inherently biased than federal or state court systems, which recognize no legal theory of inherent bias.

**Facts:** Plaintiff Sanders visited a casino owned by the tribe. When attempting to sit on a chair, it became detached, causing plaintiff to fall and allegedly become injured. She sued for damages associated with that injury and her husband joined as party plaintiff for loss of consortium. A jury awarded damages for the personal injury but decided in favor of the tribe on the loss of consortium claim. After the jury verdict but before the court entered judgment, plaintiffs filed motions for tax costs, new trial, and additur/judgment notwithstanding the verdict. The trial court granted the motions for tax costs and additur. Plaintiffs petition for review, claiming that the award is too low, that the jury was biased and the trial system itself was inherently biased. The tribe petitions for review, claiming that the trial court improperly granted additur and tax costs to the plaintiff.

**Reasoning:** (The court addresses plaintiffs' contention that ICRA does not provide for a jury trial) "This is so because the Seventh Amendment applies to civil jury trials in United States courts, not Tribal courts. The Indian Civil Rights Act of 1968 (25 USC § 1301-1303) was enacted to provide powers of self-government for Indian tribes, including courts, and guarantees civil rights in Indian country. Section 1302 thereof generally tracks the first ten amendments to the United States Constitution, but omits the provisions of the Second, Third and Seventh Amendments, so there is no right to a jury trial in civil cases, as there is in criminal cases, in Indian country guaranteed by either the Constitution or the Indian Civil Rights Act. Of course, neither document prohibits civil jury trials in Indian country, and the Chitimacha have seen fit to provide for same in their court in certain cases in the discretion of the trial judge. The TRIBE requested a jury trial in the instant matter, and the same was granted. We cannot find fault with the requirement that, through a fair and orderly process, the panel or venire from which the trial jury is selected comes from the entire adult enrolled membership of the Tribe, regardless of where they reside. Since the jury trial herein was conducted in accordance with established Tribal law and procedure, we must look to Federal law to finally dispose of plaintiffs' claim of inherent bias." The court then looked to the CCCJ, 5<sup>th</sup> amendment, and several U.S. cases on inherent bias. The court found no support in any of those sources for plaintiffs' claim.

## Appendix 1.2

## Colville Confederated Tribes Tribal Courts (17 cases)

### Stone v. Somday

Colville Confederated Tribes Court of Appeals

1 CCAR 9

March 6, 1984

**Procedural History:** The trial court dismissed an employment discrimination case against tribal officials partially on the grounds that sovereign immunity barred the action.

**Issue:** Is ICRA a federal law which has the effect of specifically waiving tribal and tribal official's sovereign immunity pursuant to the Colville Tribal Law and Order Code (other issues omitted)?

**Decision:** Reversed and remanded for a trial on the merits. The ICRA does not waive a tribe or tribal official's sovereign immunity under the Code, under which a Colville Tribal officer has qualified immunity.

**Facts:** Lou Stone and David Alexis filed a civil complaint in the Colville Tribal Court against three tribal officials alleging discrimination in employment practices.

**Reasoning:** The court held that the ICRA is not a federal law that waives tribes' sovereign immunity. "However, the import of this federal legislation cannot be ignored. It is the duty of tribal forums, including Tribal Court, to promote the objectives of the ICRA, i.e. strengthening the position of individual tribal members vis-à-vis the Tribe and furthering Tribal self-government. The Colville Tribal Court has long recognized the rights guaranteed in the ICRA in its criminal cases. To disregard all the other civil rights guaranteed in the ICRA would defeat its dual purposes. The "substantial and intended effect" of the ICRA on tribal courts is to change the laws we apply in assessing important personal and property rights of individual members vis-à-vis their tribe and, at the same time, furthering the Tribes' self-government. Therefore, although the ICRA does not waive the sovereign immunity of the Colville Tribal Court, it is a substantive law which the Colville Tribal Court cannot disregard in adjudicating rights of its members."

**Colville Confederated Tribes v. Davis**  
Colville Confederated Tribes Court of Appeals  
Case No. AP83-6136  
March 8, 1984

**Procedural History:** Appellee was found not guilty of a drug abuse charge. The Tribes appeal, on the grounds that the trial judge entered a judgment of not guilty despite agreeing that the defendant was probably guilty, but had been charged with the wrong offense.

**Issue:** Whether re-trying a defendant because he was initially charged with the wrong offense would constitute double jeopardy in violation of the ICRA.

**Decision:** Affirmed. The initial case was adjudicated to the acquittal stage, and the Tribes are therefore barred from re-litigating it.

**Facts:** Davis was cited for violation of the Colville Tribal Law and Order Code in that he was carrying a pipe in his pants pocket which contained marijuana residue. He testified that he did not know who the pipe belonged to, that he had never used the pipe, and that his brother sometimes wore his pants.

**Reasoning:** “Double jeopardy is a recognized concept for this Tribal Court. It is mandated that this civil right be recognized in tribal courts exercising powers of self-government through the Indian Civil Rights Act, as it is applied through the Colville Tribal Law and Order Code. Throughout the appeal hearing, the appellant argued that he did not want to retry the appellee, but only wished to have the Trial Court’s decision reversed. It is our holding that this would contradict the double jeopardy doctrine. For authority we look to Finch v. U.S., 433 U.S. 676 (1977). This Court now holds that the Tribe can appeal if (1) double jeopardy does not attach and (2) there has been no acquittal. The case *Colville Confederated Tribes vs. Markus K. Davis* was fully adjudicated to the acquittal stage; and the Tribe’s appeal is denied as barred by double jeopardy.

**Monaghan v. Colville Confederated Tribes**  
Colville Confederated Tribes Court of Appeals  
Case No. AP88-10623  
March 8, 1989

The appellant's basis for appeal, which is failure to appoint legal counsel for a person, is insufficient due to the Court's finding that it is an issue which has been widely litigated and found to be valid pursuant to the Indian Civil Rights Act; thus it was not error for failure of the trial judge to appoint counsel for the defendant.

**Thomas v. Colville Confederated Tribes**  
Colville Confederated Tribes Court of Appeals  
Case No. AP90-12425, AP90-12426,, AP90-12427, AP90-12428  
October 29, 1990

**Procedural History:** Appellant was charged with abduction, rape, attempted criminal homicide, and reckless endangerment.

**Issue:** Whether defendant was denied due process when an attorney was not appointed to represent him, when his request for a jury trial was deemed waived with no notice to him, through judicial misconduct and irregularities before and during the trial, and by finding of guilt despite having no substantial evidence in the record to prove the elements of the crimes charged beyond a reasonable doubt.

**Decision:** Appellants was denied due process in all of the issues listed above. Charge of reckless endangerment dismissed without prejudice, all others dismissed with prejudice.

**Facts & Reasoning:** Although the Colville Confederated Tribes were not in the position at the time to provide counsel for indigent defendants, the court believes that the tribal court still did not provide due process to appellant because they should have “exercised greater latitude” in giving him pre-trial and in-court advice, “in light of the defendant’s personal history and the ramifications of the alleged charges.” Appellant’s demand for a jury trial was clear to the Court. “Whether he was adequately informed of the consequences of failing to confirm his request, and whether he affirmatively acknowledged and understood the waiver of his right to a jury trial is not clear from the record.” The court notes some discrepancy between provisions in the Tribal Code (one section outlines the 10-day-rule, wherein the right to a jury trial is waived if the defendant does not confirm his demand for one within 10 days of the trial, and another section indicates that the demand for a jury trial can be made orally or in writing, and must be made at least 14 days before trial or else it is waived. The latter appears in the criminal procedure section of the code, and the former does not). “The Panel concludes that the waiver provision should also be found in the criminal procedure section of the Tribal Code, to insure that defendants, especially pro se defendants, have the opportunity to receive notice of an important waiver of rights guaranteed by the Indian Civil Rights Act. In addition, the Panel believes that in order for the waiver to be fair the defendant needs to receive some type of written notice.”

The court then discusses irregularities and misconduct in and before the trial, including discouraging subpoenas of key witnesses. The court again notes that the Tribal Code is unclear in discussing costs and necessary procedures, especially in a case such as this, where a defendant representing himself has “limited education and understanding.” The various instances of misconduct denied him due process. Lastly the court discusses the fact that “[g]eneral principles of law require that if there is any reasonable doubt as to any element of an offense then the trier of fact has a duty to return a verdict of not guilty. The only evidence before the Trial Court with respect to the actions of the defendant on the night in question was the testimony of Ms. Nanpuya. The Appellate Panel found her testimony insufficient to establish each and every element of each of these offenses. In closing, the Appellate Panel was surprised that there was no record of declination to prosecute these charges under the Indian Major Crimes Act by the federal government. If the charges had been substantiated the Panel questions whether or not the penalties, which are limited by federal law, would have been severe enough to punish the offender.”

**Lacourse v. Colville Confederated Tribes**  
Colville Confederated Tribes Court of Appeals  
Case No. AP90-13206, AP90-13207, AP90-13208  
January 21, 1991

**Procedural History:** Appellant was found guilty of reckless driving, driving while intoxicated, and driving while suspended. He appeals.

**Issue:** Whether the trial court erred by failing to make specific findings regarding the defendant's ability to pay before including in the judgment and sentence a financial obligation to make restitution (other issues unrelated to the ICRA omitted).

**Decision:** Remanded. Due process requires the trial court to determine the defendant's ability to pay.

**Facts:** The incident leading to the charges occurred in the driveway of HUD house 1021 in Nespelem, Washington, adjacent and connected to a public road within the Colville Reservation.

**Reasoning:** "The Appeals Court believes that under the Indian Civil Rights Act and the Colville Tribal Civil Rights Act due process requires the Trial Court to determine the defendant's ability to pay the restitution before imposing the monetary obligation."

**Condon v. Colville Confederated Tribes**  
Colville Confederated Court of Appeals  
Case No. AP92-15313  
May 28, 1993

**Procedural History:** Condon appeals the tribal court's denial of her request to withdraw her guilty plea and the sentence that was imposed for her conviction of driving with a suspended or revoked license.

**Facts:** Appellant entered into a negotiated plea agreement with the prosecution. In exchange for pleading guilty, the prosecutor would recommend to the court a 100.00 fine. At the change of plea hearing, the judge told appellant that she did not have to accept the terms of the plea agreement, and that the appellant would not be allowed to withdraw her plea once it was entered. Appellant proceeded with her guilty plea, and due to numerous other driving violations in her record, the court sentenced her to 60 days in jail, a fine of \$600.00, and \$5.00 in court costs. In lieu of that sentence, the Court ordered that the appellant could submit one teddy bear per month for twelve months to the Court Clerk for the Police Department's Teddy Bear Program, serve 40 hours of community service, and refrain from violating any traffic laws for a period of one year.

**Decision:** Affirmed.

**Issue:** Whether the Tribal Court erred by refusing to let the appellant withdraw her guilty plea after the Court imposed its sentence, and whether the court should have followed the FRCP 11 (e)(4), which requires the court to advise criminal defendants that the terms of a negotiated plea are unacceptable and provide the defendant with an opportunity to withdraw the guilty plea before accepting it.

**Reasoning:** Although the Tribal Court has not adopted FRCP 11, it has adopted procedural standards for accepting guilty pleas resulting from plea bargains, as shown by the proceedings in this case. The trial judge in this case gave appellant ample opportunity to make a reasoned decision whether to plead guilty and accept the sentence imposed by the Court or withdraw her plea and go to trial. Because neither the Tribal Council nor the Tribal Court has adopted the FRCP 11, the Panel cannot accept Appellant's argument that she has been denied due process. The Tribal Court has developed a procedure different from federal law in providing due process to criminal defendants in accepting guilty pleas arising from plea bargains. Yet, the Panel believes the procedure adopted by the Court provides adequate constitutional safeguards to fair process within the framework of the ICRA and the CTCRA.

The appellant also makes a claim that her due process rights under the ICRA and CTCRA were violated because her sentence was excessive and amounted to cruel and unusual punishment. "The Panel fails to see how the sentence imposed by the Trial Judge was in any way excessive, cruel and unusual, or amounted to a deprivation of the appellant's liberty or property interests without due process of law. In the first instance, the sentence of 60 days in jail and a fine of \$600 imposed by the Court was well below the maximum possible sentence which could have been imposed for the offense. Secondly, the fact that the Court imposed probation with certain conditions means that the appellant could avoid the original sentence, which was set to commence one year from the date of her guilty plea. The jail sentence would be served only if the appellant failed to comply with the conditions of her probation. Although requiring as a condition of probation that the appellant donate twelve teddy bears to the Teddy Bear Program seems unusual, the Panel views this practice as constructive alternative to incarceration. For that matter, performing community service is also a constructive alternative to serving time in jail that also carries some deterrent effect."

**St. Peter v. Colville Confederated Tribes**  
Colville Confederated Tribes Court of Appeals  
2 CCAR 2  
September 28, 1993

**Procedural History:** Appellant was convicted of disorderly conduct, assault, trespass to buildings and resisting arrest, and was sentenced to maximum jail sentences, each running consecutively. He appeals.

**Issue:** Whether the sentences imposed were excessive, arbitrary and capricious, cruel and unusual punishment, and violative of appellant's rights under the ICRA.

**Holding:** Affirmed.

**Facts:** No particular facts of the incidents leading to appellant's convictions were included.

**Reasoning:** Appellant contends that in his sentencing process, his right to due process and right to be free from cruel and unusual punishment were contravened under the Indian Civil Rights Act. The court looked to tribal and federal statutes because of the nature of appellant's claim. The federal law principles for sentencing review "are not 'specifically applicable to Indian tribal courts', CTC 2.6.09, supra. They are based upon the federal constitutional standards, and not on the Tribal Constitution or the Indian Civil Rights Act. Therefore, we consider such principles to be advisory only."

"We note that the Colville Tribal Civil Rights Act closely parallels the operative language of the ICRA with regard to prohibitions against imposing excessive bail, excessive fines, or infliction of cruel and unusual punishment, and appears to contain identical language to that of the ICRA regarding due process. The Indian Civil Rights Act contains similar but not identical provisions as found in the Bill of Rights. The legislative history of the ICRA indicates congressional intent that the Act should be read consistent with the principles of tribal self-government and cultural autonomy."

Although the due process and equal protection provisions under ICRA regarding due process are similar to corresponding constitutional principles under the Bill of Rights, they differ both in substance and origin. The Panel reads ICRA to mean that equal protection and due process guarantees refer to constitutional protections provided under tribal law and not federal law. *Howlett v. Salish And Kootenai Tribes*, 529 F.2d 233, 237 (9th cir. 1976). This interpretation is consistent with view that Congress, with modification, selectively incorporated certain provisions of the Bill of Rights into a substitute bill which was enacted to protect the individual rights of Indians while fostering tribal self government and cultural identity. Moreover, Congress did so recognizing that coextensive provisions of tribal constitutions and the Bill of Rights would not be identically aligned, *Wounded Head v. Tribal Council Of Oglala Sioux Tribe*, 507 F.2d 1079, 1082 (8th cir. 1975). See also *Groundhog v. Keeler*, 442 F.2d 674 (10th cir. 1971). Thus, we interpret ICRA in light of the inherent power of tribes to create and administer a criminal justice system, *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th cir. 1975) and a well established federal policy of preserving the integrity of tribal governmental structure, including the authority of tribal courts. *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1146 (8th cir. 1973). We also note that federal courts have been careful to construe notions of due process and equal protection under ICRA with due regard for historical, governmental and cultural values of Indian tribes. *Tom v. Sutton*, 533 F.2d 1101, 1104, (9th cir. 1976).



We also take note that due process and equal protection guarantees applicable to tribal courts under ICRA flow from congressional exercise of its plenary power, which, despite the United States Supreme Court's pronouncements in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), lack the clear constitutional underpinnings of the Bill of Rights. See *Pommersheim, Tribal State Relations: Hope For The Future*, 36 S.D. L. Rev. 239, 247-48. Instead, the origins of such plenary power, if a constitutional source can be found, arise from the Indian Commerce Clause. United States Constitution, Article I, Sec. 8, Clause 3. In addition, the legislative history of ICRA clearly indicates that Congress did not intend to impose full constitutional guarantees under the Bill of Rights on litigants coming before the tribal court or to restrict the tribes beyond what was necessary to give the Act the effect Congress intended. *Tom v. Sutton*, 533 F. 2d at 1103-1104. Among the goals intended by Congress in enacting ICRA were affording constitutional protections to litigants on one hand, and supporting tribal self government and cultural autonomy on the other. We therefore apply due process principles under ICRA with flexibility and in a manner contextually adapted by the Colville Confederated Tribes.

[Appellant challenged the trial court's use of an FBI printout that allegedly contained misinformation regarding his criminal history at sentencing, and cited US Supreme court cases in support of his argument that a criminal defendant has a due process right to be sentenced on the basis of accurate information. This court looked to that case and two other SC cases to glean the general federal rule that courts can not rely on unconstitutionally invalid convictions in sentencing, in particular those in which the defendant was not represented by counsel.] "The cases cited above involve federal constitutional principles and cannot, without a review of Tribal standards, be said to represent an accurate reflection of Tribal law. Although the Panel does not adopt each principle of law set forth in *Townsend*, *Gideon*, and *Tucker*, we do hold that a criminal defendant in Tribal Court has a due process right under the Indian Civil Rights Act and the Colville Tribal Civil Rights Act not to be sentenced on the basis of prior criminal convictions where the defendant was not advised of his right to counsel or was improperly denied his right to counsel. We do not believe that the defendant is denied due process when the Trial Court considers or relies on criminal convictions in which the defendant was simply unrepresented. We believe that principles of fundamental fairness reflected in the cases cited above are consistent with the language in CTC 56.02 (h) and 25 U.S.C. Sec. 1302 (8).

Appellant also challenged his conviction based on several cases from Washington State courts. This court repeatedly emphasized that Washington law has no place in its analysis: "Because there is nothing in the Tribal Code or Tribal decisional law which precludes use of a computer printout to establish a defendant's criminal history, we find that the principle established by *In re Bush* (Washington State case), *supra* does not apply to the cases at bar."

"We now turn to the appellant's argument that the Tribal Court abused its sentencing discretion by arbitrarily and capriciously imposing punishment or violating the prohibition against cruel and unusual punishment. We have found no legal precedent under Tribal law to guide us in determining when a trial judge abuses his or her discretion in sentencing or when appellate intervention is required. Further, we have stated that Washington statutory law and case law concerning sentencing does not apply to this analysis. Although we are not bound to apply judicially created standards of appellate review of criminal sentencing practices under the United States Constitution, we turn to federal case law to see how these issues have been resolved." (The court then analyzed

several federal court cases.) “In conducting this limited review, we emphasize that the due process principles reflected in the cases cited above are federal constitutional standards which cannot be applied without great difficulty to Tribal law. Further, the question before us is whether the appellant’s due process rights under Tribal law were contravened. We believe that such a finding must precede any determination that the appellant’s due process rights were violated under the Indian Civil Rights Act, 25 U.S.C. Sec. 1302 (8). Therefore, we adopt a flexible standard of review, utilizing the above principles, to determine whether the appellant was afforded due process under Tribal law. We hold that the trial judge had sufficient information to meaningfully exercise her sentencing discretion and that she exercised her discretion by sufficiently individualizing sentencing so that the punishment fit not only the offenses, but the individual. We are not aware of any provision under Tribal law that requires a trial judge to make a finding that a defendant would derive no benefit from rehabilitation before imposing a maximum jail sentence. From our reading of the Code it is clear that the Tribal Business Council delegated broad sentencing discretion to the trial judge, and imposed no such restrictions on the Tribal Court.”

The appellant relies on *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th cir. 1988) as controlling in this case. *Randall* stands for the principle that once a tribe has adopted certain procedures, the tribal court must, as a matter of due process follow those procedures. (Roughly summarized, the *Randall* court held that when tribal court procedures differ significantly traditional non-Indian court procedures, the courts should balance individual rights of fairness against the tribal interest in using those procedures, and that when tribal court procedures and non-tribal court procedures are essentially the same, the court will not use a balancing test, and will instead “[h]ave no problem of forcing an alien culture, with strange procedures on these tribes.”)

“Thus, where the Yakima Nation had adopted certain procedures governing an appellant’s perfection of her right to appeal, and the tribal court deprived the appellant of that right by failing to comply with established court procedure, the Ninth Circuit Court of Appeals had no difficulty applying principles of federal constitutional law and finding that a litigant had been denied due process. *Id* at 901. We do not believe that *Randall* is applicable to this case for the reason that the Colville Confederated Tribes have not adopted detailed sentencing procedures such as found in the Federal Rules of Criminal Procedure, and we have not found that the Trial Court abused its discretion in sentencing. We do not find that the procedures followed by the Tribal Court parallel those found in Anglo-Saxon society. The Panel rejects the appellant’s view that by adopting procedures similar to those used by the federal or state courts, the Tribes have somehow come within the full reach of the Bill of Rights. This view, which would expand the application of *Randall* to an area where the Tribal Business Council has delegated considerable latitude to the Tribal Court, runs counter to the clearly enunciated purpose of ICRA, which affords constitutional protection to litigants while fostering tribal self government and cultural autonomy. We view the Tribal Business Council’s delegation of broad discretion to the Tribal Court as a statement of policy that the Tribal judge is aware of Tribal norms and is in a position to apply the law consistent with those values. The Panel also rejects the notion that the doctrine set out in *Randall*, with its harsh result, should apply where the Tribal Court has adopted procedures designed to provide consistency and accountability in Court proceedings. Even if the Court should follow the Federal Rules of Evidence or the Business Council should adopt specific court rules which parallel the federal criminal rules, this does not mean that the Tribal culture, tradition and autonomy has been abandoned. Nor does it mean that the Tribal Court has taken on such an Anglo-”

Saxon character that the Bill of Rights should be applied. Following this illogical rule would discourage the Tribal Business Council and the Tribal Court from adopting written, uniform procedures, including those based upon Tribal tradition and cultural standards, or other measures which could improve operation of the Court. This does not mean that we believe the reasoning in Randall should not be applied in an appropriate case in which the Panel finds that established procedural rules have been violated and the prejudice shown is of a nature where no balancing of tribal and individual interests is required. This is not the nature of the case before us. The Panel finds that neither the Colville Confederated Tribes nor the Tribal Court have adopted procedures which, under the rationale of Randall, bring the instant matter under the federal review standards of the Bill of Rights.”

The court turned to appellant’s claim of cruel and unusual punishment in violation of the Colville Tribal Civil Rights Act, CTC 56.02 (g) and the Indian Civil Rights Act. 25 U.S.C. Sec. 1302 (7). The court reviewed federal law, noting again that it is not binding on this court. The court looked to federal cases establishing the principles that sentences that are extremely disproportionate to the offenses have sometimes been held to violate the constitutional prohibition against cruel and unusual punishment. The inquiry to be made is “[w]ere the sentences were so arbitrary and shocking to the sense of justice as to constitute cruel and unusual punishment. We reiterate the principle that under federal law a sentence within the statutory maximum is only subject to review on appeal for manifest abuse of discretion. We have found that the Trial Court imposed sentences on St. Peter that were within statutory limits. Under federal law we do not believe that those sentences were “so arbitrary and shocking to a sense of justice” as to violate the prohibition against cruel and unusual punishment or that the trial judge “manifestly or grossly abused her discretion” by imposing the sentences. Similarly, we have found no support for the appellant’s argument under Tribal law.

The appellant argued that the Trial Court erred by imposing consecutive rather than concurrent jail sentences, which is required under Washington sentencing law. The court declined to apply State sentencing law with regard to concurrent sentencing practices, and noted that the appellant cited no authority under Tribal law in support of his argument that consecutive sentencing in the instant cases has violated his right to due process and his right to be free from cruel and unusual punishment under the Colville Tribal Civil Rights Act and the Indian Civil Rights Act. “The Colville Tribal Code and the Tribal Constitution are silent with regard to whether the Trial Court should impose concurrent or consecutive sentences. In addition, the Panel is not aware of any action by Congress which has divested the Tribal Court of authority to impose consecutive sentences. Accordingly, the Panel concludes that the decision to impose concurrent or consecutive jail sentences is within the discretion of the trial judge. Our review will, therefore, be based on whether the trial judge abused her discretion.”

“Because there is no Tribal common law authority to draw upon for guidance, we again examine federal sentencing law to see how the federal courts have resolved this issue. We reiterate that federal sentencing law is not binding on the Tribal Court. Absent statutory direction to impose concurrent or consecutive sentences, federal courts generally are invested with power to choose the manner in which sentences will be served. Only if a statute is ambiguous regarding whether a criminal act warrants separate sentences will the “rule of lenity” be applied, and absent such ambiguity, the trial judge may impose consecutive separate sentences for the offenses committed.”

Congress has since placed controls on sentencing inter alia by establishing guidelines for federal courts to follow in imposing consecutive or concurrent sentences. 18 U.S.C. Sec. 3584. Thus, restrictions on the court's sentencing authority involving multiple offenses is the result of a legislative act, and not court action. While there has been federal legislation enacted to limit sentencing authority of the federal courts, no similar federal sentencing restrictions have been placed on tribal courts. In that regard, the relevant limitations on tribal court sentencing appear in the Indian Civil Rights Act. The Act provides that no Indian tribe shall "subject any person for the same offense to be twice put in jeopardy." 25 U.S.C. 1302 (3), or "impose for conviction of any one offense any penalty or punishments greater than imprisonment for a term of one year or a fine of \$5,000 or both." 25 U.S.C. Sec. 1302 (8). (emphasis added). The language in 25 U.S.C. Sec. 1302 (8) does not contain any indication that Congress intended that tribes refrain from imposing concurrent sentences for multiple offenses. The Act only limits the sentence which may be imposed for any one offense. Further, no restrictions on the Court's authority to impose consecutive sentences have been enacted by the Tribal Business Council and none appear in the Tribal Constitution. From our discussion of the above authority, we find that nothing in the Tribal Code, the Tribal Constitution, ICRA, or CTCRA prohibits the Tribal Court from imposing consecutive sentences on a defendant convicted of multiple offenses. We also find that the Tribal Court practice of consecutive sentencing is consistent with pre-guidelines standards followed by the federal courts. However, the rule of lenity set forth in Gore, supra, is not binding on the Tribal Court. We believe it is significant that the offenses adjudicated by the Tribal Court are misdemeanors, and adoption of the rule of lenity would unduly interfere with the Court's discretion. Any decision to adopt that rule is a legislative function. Further, federal sentencing guidelines are not binding on the Tribal Court."

**Stensgar v. Colville Confederated Tribes**  
Colville Confederated Tribes Court of Appeals  
Case No. AP92-15068  
November 10, 1993

**Procedural History:** Appellant pleaded guilty to a DWI charge. The trial court ordered a pre-sentencing investigation, and scheduled his sentencing date and time. He signed consent forms acknowledging the date and time and agreeing to appear. The sentencing date was later rescheduled due to court congestion and administrative concerns. At the sentencing hearing, appellant's counsel objected to the fact that his sentencing had not occurred within a week, as required by CTC 2.4.04. Counsel had not objected prior to this point. The Appellate court convened through a conference call several months later and without oral argument or briefing, summarily ruled that the Tribes had lost jurisdiction over the defendant under CTC 2.4.04, and dismissed the case with prejudice. Appellee moved to vacate, and called for oral arguments pursuant to CTC 1.9.05. The Appellate Court found that it had deprived the appellant (sic? Maybe means appellee?) of the opportunity for oral argument, vacated the previous order of dismissal under 1.9.05, and scheduled oral arguments.

**Issue:** Whether the deviation from the 60-day sentencing rule denied the defendant his rights to due process and speedy trial, in violation of ICRA and CTCRA.

**Decision:** Trial court's denial of the motion to dismiss is affirmed, and the case is remanded back to the trial court for imposition of the sentence already given. The court does not approve of the trial court's failure to follow the 60 day sentencing rule, but found no prejudice to the defendant, and noted that the delay was due in part to accommodate his request to finish inpatient rehab. Therefore, the court found that his due process rights and right to speedy trial were not violated.

**Facts:** summarized within the procedural history section

**Reasoning:** Appellant argues that his due process rights were violated under the ICRA and CTCRA. He cites *Randall v. Yakima Nation Tribal Court* "for the general proposition that tribal courts must follow their own court procedures and that, when the court deviates from such procedures, a defendant's due process rights may have been violated." The court found that this case did not factually parallel the *Randall* case, and therefore the standard is not applicable. The court found that a "necessary element" in applying the *Randall* standard is that Tribal Court procedures "parallel those found in Anglo-Saxon society," and here "CTC 2.4.04 has no parallel in state or federal law in terms of a strict deadline for sentencing after the entry of a plea, at least insofar as any such parallel was made known to this Appellate Panel."

"The Tribal Code does not expressly mandate dismissal if a defendant is sentenced beyond the sixty day sentencing deadline, and there is no Tribal case law to this effect. Since this is a criminal case, then, we look to the Applicable Law section of the Colville Tribal Code Chapter entitled 'Rules of Court,' Section 4.1.11, which reads: In all cases the court shall apply, in the following order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law. Neither party cites any other 'applicable laws of the Colville Confederated Tribes, tribal case law, state common law [or] federal statutes' in support of the party's position. Therefore, we proceed to analysis of the federal common law (case law)." The court then analyzes several federal cases concerning the right to "speedy sentencing," focusing on the factors enumerated in *Barker v. Wingo*, a Supreme Court

case, and found that there was no denial of Defendant's speedy trial/sentencing rights under the Sixth Amendment, ICRA or CTCRA.

**Sam v. Colville Confederated Tribes**  
Colville Confederated Tribes Court of Appeals  
Case No: AP93-15379/80  
March 8, 1994

**Procedural History:** Appellant was convicted of driving while intoxicated, and with a suspended license.

**Issue:** Whether the sentencing procedure and sentences imposed by the Tribal Court violates the appellant's civil rights under the ICRA and CTCRA; specifically, whether the sentencing procedures deprived appellant of due process, and whether the sentences imposed are excessive and violate his right to be free from cruel and unusual punishment.

**Facts:** Appellant was convicted of driving while intoxicated, and with a suspended license. At sentencing, defense counsel objected to the validity of previous convictions showing in the pre-sentencing report, arguing that some of defendant's previous DWI convictions were constitutionally invalid because Sam was not represented by counsel. Counsel also argued that Washington law should apply to sentencing in tribal court, because the Colville Tribal Law and Order Code does not define the term "sentence," and that additionally, (also citing Washington State cases) before Sam's past convictions can be used in sentencing, the Tribes must show by a preponderance of the evidence that such convictions are valid and furnish the Court with certified copies of the judgments. Counsel was unable to provide the Court with specific authority extending these rules to the Tribal Court. The sentencing judge then found that Washington law does not apply to sentencing in the Tribal Court, denied Counsel's motion to continue, and proceeded with sentencing.

**Decision:** Affirmed. The tribal court's sentencing procedures and the sentences in the instant case are not violative of the ICRA or CTCRA. "The Principles of Construction, CTC 1.1.07(e), do not require that the Tribal Court adopt Washington sentencing law in order to give meaning to the term 'sentence.' Therefore, we hold that the Tribal Court did not err in rejecting that application of the Principles of Construction. We also hold that the Court did not err in refusing to follow the principles set forth in Ammons, which construes the rights of a criminal defendant in sentencing under Washington law."

**Reasoning:** "Where a violation of civil rights is alleged in criminal sentencing, our inquiry does not lead us to apply Washington law. Because the civil rights of a criminal defendant appearing before the Tribal Court is grounded in ICRA, and CTCRA, our frame of reference for this analysis is the Constitution of the Colville Confederated Tribes, tribal statutes, Tribal Court procedure, and ICRA. As we said in St. Peter, supra, the origin of a defendant's federal civil rights in Tribal Court is statutory, presumably arising from the Indian Commerce Clause of the United States Constitution, Article I, Sec.8, Cl. 3. By adopting ICRA, the Congress selectively incorporated certain provisions of the Bill of Rights with knowledge that other provisions based upon tribal law would be used to define the guarantees arising under ICRA. Although some of those protections appear to be the same as those provided by the Bill of Rights, we believe ICRA must be applied against a backdrop which includes the tribal Constitution, tribal statutes, tribal court procedures, all of which are the product of a tribal system which has maintained its ties with custom and tradition. To place ICRA in perspective for this analysis, we note that the Act was enacted to provide those appearing before tribal courts with certain protections from the Bill of Rights while fostering tribal self- government, and not to impose the full Bill of Rights on tribes. Therefore, when applying common law principles based upon the Bill of Rights to civil rights issues arising from ICRA and tribal law, we do so with considerable care. Federal common law doctrine which interprets duties and

protections flowing from the United States Constitution and the Bill of Rights did not include in its development, and is not rooted in tribal law, custom and tradition. Therefore, we will examine how the federal courts have handled similar constitutionally-based issues, but because the origins of tribal law differ, any parallels between federal common law and tribal law must be drawn with caution. Accordingly, we will narrowly adopt such common law interpretations when we are fully satisfied they are consistent with tribal law. We next address the appellant's argument that the sentences imposed by the Tribal Court are excessive and violate the prohibition against cruel and unusual punishment. ICRA, 25 U.S.C. Sec. 1302 (7), CTCRA, CTC 56.02 (g). Our review on this issue will focus on whether the punishment imposed by the Tribal Court was so disproportionate for the crimes involved that it is shocking to the sense of justice. St. Peter at 6115. (The court concludes that it was not.)



**Wiley v. Colville Confederated Tribes**  
Colville Confederated Tribes Court of Appeals  
2 CCAR 60  
March 27, 1995

**Procedural History:** Appellants were convicted of driving while under the influence of intoxicating liquor or drugs, pursuant to CTC 9.1.01, which incorporated by reference the Washington state DWI statute. They appeal common issues of law under the statutory due process provisions of the ICRA and the Colville Tribal Civil Rights Act (CTCRA). Appellants contend that incorporation of the state DWI statute under CTC 9.1.01 does not provide adequate notice of prohibited criminal conduct and violates their due process rights under ICRA and CTCRA.

**Issue:** Whether the incorporation of the Washington drunk driving statute and future amendments, as Tribal law, without corresponding Tribal legislation, amounts to an unlawful delegation of Business Council's legislative authority to the Washington State Legislature, and whether the adoption of prospective State DWI law deprives appellants of proper notice of what conduct is prohibited under Tribal law in violation of their right to due process under ICRA and CTCRA.

**Decision:** Affirmed. The Colville Business Council's authority to delegate is not co-extensive with that of the United States Congress, but it is, unless specifically pre-empted, no less restrictive than that of the Congress with regard to incorporating laws of other jurisdictions. CTC 9.1.01, incorporating RCW 49.61.502, is a valid exercise of Tribal legislative authority, not an unlawful delegation. The appellants were not deprived of their right to due process since they were provided with adequate notice of prohibited conduct under Tribal law.

**Facts:** All appellants were convicted of driving under the influence of drugs or alcohol.

**Reasoning:** Congress has enacted legislation limiting tribal sovereignty, but intrusions upon tribal authority to make and interpret its own laws have been minimal. Appellants cite no acts of the Congress which limit the Tribes' authority to make their own laws and be governed by them, with the exception of ICRA, and the Court found no authority considering whether Tribal authority is constrained to the extent that the Tribal legislature may not incorporate by reference laws of another jurisdiction as Tribal law. The appellants' rights have not been violated unless the ICRA or CTCRA constrains the Colville Business Council from prospectively adopting Washington law as Tribal law. The court found that they did not.

Next the court addressed the argument that since the Council has adopted state statutes as tribal law, that the Tribal Court should follow decisions of the state courts in applying those statutes. The court re-emphasized that "the power of the Confederated Tribes to govern does not derive from the Constitution of the United States or the State of Washington." Santa Clara Pueblo v. Martinez, supra. "Rather, the power of the tribal sovereign to govern arises from the inherent sovereignty of the tribe, which predates the United States Constitution and the State of Washington. Hence, the foundations of Tribal law are not shaped from legal doctrine developed by state and federal courts defining the limits of legislative power under their respective constitutions. We note that while CTC 9.1.01 incorporates certain State statutes as Tribal law, it does not direct the Tribal Court to apply Washington case law with regard to application of the incorporated statutes."

"The sovereignty of tribal governments has long been viewed as comparable to that of sovereign nations, not as states of the Union. The Panel agrees with Amicus that because of the Confederated Tribes' sovereign status, its incorporation of Washington state DWI

law by CTC 9.1.01 is analogous to the federal government's practice of adopting state law as federal law. We maintain the view that unless the Congress has expressly limited the tribal sovereign's authority to govern its internal affairs, the Tribal Business Council has at least as much authority as the Congress with regard to the exercise of its legislative authority. Thus, if the Congress may incorporate by reference contemporary and prospective state laws without violating the delegation doctrine, the Business Council may do the same."

In terms of notice, "It has consistently been held that a continuing incorporation of law from another jurisdiction provides sufficient notice for due process purposes under federal constitutional standards. Although the appellants are guaranteed statutory due process under ICRA and CTCRA, no argument has been advanced that they are entitled to greater notice than under federal constitutional standards. In our view, CTC 9.1.01, incorporating RCW 46.61.502, provides sufficient notice to those driving a motor vehicle on the Reservation that they are prohibited, by Tribal law, from driving while under the influence of alcohol to the same extent as they are while driving off the Reservation under the State statute. The Panel concludes that the statutory scheme satisfies due process guarantees under ICRA and CTCRA. Such notice provides a person of reasonable intelligence an opportunity to know the circumstances under which driving a motor vehicle on the Reservation is unlawful, just as it is throughout the State of Washington."

**Laramie v. Colville Confederated Tribes**  
Colville Confederated Tribes Court of Appeals  
Case No. AP94-017  
May 1, 1995

**Procedural History:** Appellant was denied a trial by jury on the grounds that he did not demand a jury trial in a timely manner. He appeals that denial.

**Issue:** Whether the fundamental right to a jury trial can be presumed waived by failure to confirm the demand for that jury trial ten days before trial.

**Decision:** Reversed and remanded. The right to a jury trial can not be presumed waived by failure to comport with the “ten-day rule.”

**Facts:** Appellant was arraigned on various misdemeanor charges. He pled not guilty and demanded a jury trial. The trial date was set and he was given a Notice of Court Appearances and Advisement of Rights which indicated, pursuant to the Colville Tribal Code, that he must confirm his request for a jury trial by a certain date, or the trial will be a judge trial—his right to a jury trial will be considered waived. He was also notified of this “10 day rule” orally. Appellant’s attorney filed written confirmation of the request for a jury trial in a timely manner, but learned later that he would be unavailable for trial, and the trial was re-scheduled for a month later. Eight days before the re-scheduled trial date he filed another confirmation of the request for a jury trial. The Tribes moved for an order finding that the appellant had waived his right to a jury trial by not filing his confirmation in a timely manner. The motion was granted, and he was tried and convicted before a judge.

**Reasoning:** “In considering this matter the panel looks in order of priority to the following: the Constitution and Bylaws of the Tribes, applicable laws of the Tribes, tribal case law, state common law, federal statutes, federal common law and international law. The Constitution and By-laws of the Confederated Tribes of the Colville Reservation do not address the rights of individual Tribal members, including the right to trial by jury. These rights have been established, however, in several titles of the Colville Tribal Codes.” The ICRA is applicable also; its purpose is to “secur(e) for the American Indian the broad constitutional rights afforded to other Americans, and thereby to protect individual Indians from arbitrary and unjust actions of tribal governments.” (citing Santa Clara Pueblo v. Martinez) The court turns to the proper reading of the “ten day rule,” found in the Tribal Law and Order Code, in conjunction with ICRA’s and CTCRA’s right to a trial by jury for a criminally accused. The court finds guidance in cases from Washington State, the U.S. Supreme Court, and the Confederated Salish and Kootenai Tribes.

The court concludes that the defendant is entitled to a jury trial upon request and that a request was made. The only remaining question is “whether the fundamental right to trial by jury, once demanded, can be presumed waived by failure of the defendant to confirm his demand at least ten days before trial.” The court concluded that it can not. Again the court looked to several Washington state cases that considered whether a waiver of jury trial can be presumed. The Tribes argue that “the efficient administration of justice mandate[s] the need for defendants to confirm the jury demand at least ten days before the trial date scheduled,” to which the court responds, “While we are sympathetic to the concerns of the Tribe, the fundamental right of a criminal defendant to a trial by jury cannot be diluted because of administrative difficulties.”

Lastly, the court overrules two of its earlier decisions, which held the 10-day rule applicable to criminal trials.

**Seymour v. Colville Confederated Tribes**  
Colville Confederated Tribes Court of Appeals  
Case No. AP94-004  
November 17, 1995

**Procedural History:** Seymour seeks to overturn criminal convictions for four misdemeanor offenses. The Trial Court denied his pre-trial motion for a competency hearing, and Seymour asserts that this was reversible error, because he was incompetent to be tried or sentenced.

**Issue:** Whether a criminal defendant's due process rights are violated when he asserts incompetency to stand trial, and the Tribal Court, after examining the defendant, and without further inquiry, denies a motion for a competency hearing and orders the defendant to stand trial.

**Decision:** Affirmed. the Tribal Court did not abuse its discretion in denying the appellant's motions to continue trial and order a mental health examination, or by concluding that Seymour was competent to stand trial.

**Facts:** Seymour was seen near a roadside by patrolling tribal police officers, and he jumped in front of their car as they were about to pass him by. According to the officers, he appeared highly intoxicated and agitated, tried to start a fight, kicked and spit in the patrol car, and kicked an officer in the chest. He was described as having violent mood swings during which he tried to attack the officers followed by periods of calm. Seymour was charged with Battery, Intimidation of a Public Officer, Resisting Arrest or Process, and Disorderly Conduct. He was represented by a court-appointed public defender at the pretrial hearing, who made no pretrial motions related to Seymour's competence to stand trial. He was held in jail pending trial. The day before trial, defense counsel asked to continue the trial because "defendant is unable to participate or assist in his own defense." Seymour's attorney stated that he visited him in jail twice, and although at the first visit, he was able to talk about the circumstances of the case, on the second visit he "did not appropriately respond to any of my questions and so we were unable to discuss any issues." Counsel also stated that Seymour was not taking his medication. On the day of trial, he was examined by counsel for both sides, and questioned by the judge. During this questioning, it appeared that Seymour knew the charges against him and how he came to be in court, and was able to answer questions about the night he was arrested, but also that at times his answers were muffled, he seemed distracted, and that he gave inappropriate answers to some questions and none to others. The court found him competent to stand trial, and denied counsel's motion for a pre-trial competency hearing. He was subsequently tried and convicted, and now appeals on the basis of a due process violation.

**Reasoning:** The court cites numerous federal cases recognizing that an incompetent criminal defendant should not be required to stand trial. The court then cites the Colville Tribal Civil Rights Act and the Indian Civil Rights Act, and states that the due process guarantee to a fair trial under the CTCRA and the ICRA include the right of a defendant not to be convicted or sentenced while incompetent. However, the court then states that the tribal court is not required to use the same criteria as other jurisdictions in determining when a person is incompetent to stand trial, reasoning that criminal defendants before a tribal court may be intimidated by the process and may react "differently than they would be expected to based upon the standards applied in other courts. Therefore, we give deference to the first hand observations of a sitting judge in the Tribal Court and view precedent from other jurisdictions with caution as to its applicability in Tribal Court." The court says that the same applies when a court decides

whether to order a competency hearing or in making a competency determination as under state or federal statutory law. The court states that due process guarantees under CTCRA and ICRA are not necessarily identical to those under the federal constitution.

(The court looked to the choice of law provisions in the Colville Tribal Law and Order Code, and since that provision did not refer to state statutes, the court declined to use them.) Since the parties did not provide the court with any tribal statutory or case law that touch on the issue, the court looked instead to Washington state common law in regard to competency procedures, together with federal common law for reference on how procedural and substantive standards applied by the Tribal Court affect due process guarantees under ICRA and CTCRA.

The court looked to several Washington State and Supreme Court cases to establish the general precedents for the effect of competency on trying a criminal defendant. It then rejected appellant's argument that the tribal court was required by a Washington state statute to order a competency hearing, but went on to review the trial court's refusal to "make further inquiry as to the appellant's competency for abuse of discretion." The court cited an early Washington case concerning the court's duty in ascertaining a criminal defendant's competency to stand trial (that case held that absent a specific statute directing the court to order a competency evaluation for an accused claiming incompetency, the trial court has discretion in terms of whether it will question the accused's sanity in determining the right of the state to try him).

"We conclude that when a question is raised by either party as to a criminal defendant's competency to stand trial, a two step process occurs. The threshold question is whether the party raising the issue presents evidence raising a significant question as to a defendant's competency to stand trial from which the Court should make further inquiry. The second stage of this analysis is for the Court to make a competency determination, based upon evidence, whether the defendant is able to stand trial. The Tribal Court has wide discretion in selecting the process or mode of proceeding to make the determination. CTC 1.5.05. If the defendant is found to be incompetent, the condition is presumed to continue until the contrary is shown (citing Washington law)." In determining the answers to these two questions, the court looked to numerous cases from Washington state and federal courts, and determined that the trial court did inquire into all of the factors listed in the cited cases. "The Tribal Court judge was in a position to observe Seymour's demeanor, listen to his responses on examination, assess whether his not taking medication affected his mental state to the extent that a substantial question was raised as to his competence to stand trial. The Tribal Court judge was also in a position to determine whether Seymour might be malingering and trying to avoid trial. Although the record below raises some question as to Seymour's competence, we conclude that the appellant has not shown that the Tribal Court clearly abused its discretion in concluding that the appellant understood the charges against him, the consequences if convicted or the facts giving rise to his arrest." As to Seymour's ability to assist his attorney in preparation of a defense, the Tribal Court could have given more weight to the opinion of defense counsel as to Seymour's ability to assist. Under the circumstances, the Panel finds that defense counsel's opinion was given sufficient weight by the Tribal Court as to Seymour's ability to assist in his defense.

**Palmer v. Millard**  
Colville Confederated Tribes Court of Appeals  
Case No. AP94-005  
March 22, 1996

**Procedural History:** Palmer appeals from the trial court's decision to grant the tribes' motion to dismiss his civil action for injunction and declaratory judgment and damages. He alleges various violations of his due process rights, equal protection rights and civil rights under the Colville Tribal Civil Rights Act, related to the seizure and destruction of his property without proper administrative process or notice. He also seeks to enjoin the Tribes and the officers from applying CTC 11.3 to seize and destroy domestic animals on the Reservation in a similar manner without notice and hearing. The record shows at the prior to filing this matter in Tribal Court and at the time of hearing, Palmer had not filed an administrative claim under 28 U.S.C. § 2675, which, with two exceptions, is a prerequisite to instituting a civil suit for damages against federal employees. The Tribes contend that the Tribal Court lacks jurisdiction to entertain the claim. The Tribes contended that, at the time Palmer's dogs were seized and destroyed, the officers were performing law enforcement services under a federal contract between the United States and the Confederated Tribes pursuant to the Indian Self-Determination Act, 25 U.S.C. § 450 et seq. to provide law enforcement services.

**Issue:**

**Facts:** Palmer's three Rottweilers were taken from his fenced yard and destroyed by Animal Control, a department of the Colville Tribal Police Services. The enclosure was five feet high and chain link. The dogs had not previously been found to be vicious, and were being kept by Palmer for breeding purposes. Millard (an animal control officer) alleges that the officers were acting within their official capacities at the time.

**Reasoning:** The only way for Palmer to prevail on his tort claim for monetary damages against a federal employee acting within the scope of his employment is through the Federal Tort Claim Act, which waives federal sovereign immunity. The notice requirements are strictly construed. (The court discussed the fact that Palmer did not name the U.S. as a defendant, as he was required to do, and that the Tribes did not notify the US attorney general of this suit so that the US could be substituted as a defendant, which they were also required to do.) "Thus, we are faced with a situation in which, on one hand, the appellees did not seek a scope of employment certification and on the other, Palmer did not name the United States as defendant or exhaust his administrative remedies under § 2675. Regardless of a determination by the Attorney General that a federal employee was acting within the scope of his employment, under the facts of this case we believe filing an independent administrative claim remains a jurisdictional prerequisite to filing suit."

The Federal Tort Claim Act specifically excepts the requirement of filing of an independent administrative claim with the appropriate federal agency in cases which a federal employee violates the United States Constitution. In Tribal Court, federal constitutional protections extend to individual Indians only to the extent incorporated by the Indian Civil Rights Act. The United States Constitution is not binding on Indian Tribes, and that fundamental principle of tribal sovereignty applies to statutes enacted by the Colville Business Council and to the administrative process followed by tribal agencies applying the law, and to proceedings before the Tribal Court. Statutory due process and equal protection guarantees under the Indian civil Rights Act are not coextensive with similar protections afforded under the Bill of Rights. Tribal forums are available to vindicate rights created under ICRA; however, we do not read FTCA as providing a constitutional basis for an action under the Act. The Federal courts agree.

Significantly, the Indian Self-Determination and Education Assistance Act provides that nothing in that Act shall be construed as affecting, modifying, diminishing, or otherwise impairing sovereign immunity from suit enjoyed by an Indian tribe. At most, such contracts contain a limited waiver of immunity authorizing the United States to seek indemnification against the tribe. Thus, it appears that the officers and Tribes' immunity with regard to Palmer's theory of constitutional tort requires that any such action be brought against the United States, not the individual officers and the Tribes. Moreover, Palmer's contention that the statutory due process and equal protection guarantees under CTCRA should be treated as a constitutional tort is contrary to the view adopted by the United States Supreme Court, which refused to imply a third exception to FTCA employee immunity. The Indian Civil Rights Act does not abrogate tribal sovereign immunity with respect to its due process and equal protection guarantees. Unless there is an express waiver of the Tribes' sovereign immunity or congressional authorization for such suit the Court is without jurisdiction. We conclude that the Court lacks jurisdiction to hear Palmer's tort claims as the subject has been pre-empted by federal law. (Discussion of the enforceability of the Animal Control Ordinance and procedural issues concerning the seizure of domestic animals is omitted, as it centered completely on tribal law)

**Waters v. Colville Confederated Tribes**  
Colville Confederated Tribes Court of Appeals  
Case No. AP94-012  
May 20, 1996

**Procedural History:** Waters appeals from a judgment and sentence from a jury verdict finding him guilty of battery in violation of CTC 5.1.04. He asserts that the tribal court erroneously denied his motion for a mistrial due to prosecutorial misconduct, and erroneously allowed testimony from a witness called by the prosecution for the primary purpose of impeaching her.

**Issue:** Whether the prosecution's actions during defendant's jury trial, and the failure of the court to call a mistrial, resulted in a deprivation of defendant's right to a fair trial.

**Decision:** Conviction reversed and remanded for new trial. The tribe engaged in numerous instances of prosecutorial misconduct, which may have amounted to harmless error if committed alone, but their cumulative effect was of a denial to Defendant's right to a fair trial. The court compounded the effect of the prosecutor's misconduct by repeatedly allowing the [infractions regarding the] hearsay and impeachment evidence to occur in the presence of the jury.

**Facts:** Colville Tribal Police received a call which resulted in their dispatch to a HUD home. The source of the call was not the location of the home to which they were dispatched, and the person who initiated the call was not the one who actually called the police. The incident resulted in the filing of a charge of battery, alleged to have been committed by the defendant against his girlfriend (LaFontaine). [The court went on to describe the events at trial, which basically consisted of the prosecution, repeatedly and over objection, attempting to introduce inadmissible hearsay; calling a witness for the primary purpose of impeaching her; mischaracterizing the defendant's closing statement as one which accused the tribal police of lying; and finally, of the prosecution referring to evidence admitted solely for impeachment as if it were substantive evidence in its closing argument.]

**Reasoning:** The tribal code gives the tribal court latitude in admitting and excluding evidence, indicating that courts are not bound by common law rules of evidence, and may use its own discretion as to what evidence it deems necessary and relevant to the charge and the defense. The code also requires proof beyond a reasonable doubt, affordance of a full opportunity to present a defense, and requires that "[a]ll additional procedures set out in this Code will be followed in any criminal action to the extent that they are applicable." The Tribal Business Council has not expressly adopted any established evidence rules, and the Code itself only contains generalized rules. The court then pointed out a major conflict between two provisions of the Code—CTC 4.1.11 and CTC 3.4.03.

CTC 4.1.11: "Applicable Law"

In all cases the Court shall apply, in the following order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law.

CTC 3.4.03: "Applicable Law" [but appearing in the Chapter titled "Civil Procedure"]

In all civil cases the Court shall apply, in the following order of priority, any applicable laws of the Colville Confederated Tribes, tribal case law, tribal customs, state statute, state common law, federal statutes [sic.], and federal custom [sic.] law, and international



law.

The court ponders whether the older provision was overlooked or purposefully ignored when 4.1.11 was adopted, since the more recent provision removes any reference to tribal customs or state statutes, but retained, “curiously,” state common law. The court then notes that neither applicable law section refers to any rules of court, even though its apparent that the tribal court used the FROE as governing principles for the issues of hearsay and impeachment. The court points out that the trial court relied on federal rules despite this court’s earlier expression in Condon v. CCT, “that another body of federal court rules, specifically, the Federal Rules of Criminal Procedure, are not controlling in this court system. Rather, as we held in Condon, this Court must review the proceedings below in light of whether the Tribal Court provided ‘adequate constitutional safeguards to fair process within the framework of the [ICRA and CTCRA].’”

The court notes that the HS rule has some basis in the Confrontation Clause of the US Constitution, adopted by Congress in analogous form and made applicable to Indian Tribes as the ICRA, and by the Tribal Business Council as the CTCRA, both of which control, where applicable, the operations of the Colville Tribal Court.

We conclude that, at least pertaining to the questions presented here as to the admissibility of hearsay and impeachment evidence in Tribal Court criminal proceedings, the Federal Rules of Evidence, and the federal case law interpreting them, are the current law of the Colville Confederated Tribes. We reach this conclusion in part because we detect from the Tribal Business Council an apparent disapproval of state law analogies in directing us, in effect, to ignore state statute, and then to apply “state common law, federal statutes, and federal common law,” in that order (CTC 4.1.11). Then, we note that, certainly, “state common law” as to matters of evidence has been all but overruled by the adoption in recent years of the Washington Rules of Evidence, although there is now some state case (i.e., common) law interpreting these rules, which in many cases have simply codified their common law predecessor principles. Yet, since there are no “federal statutes” applicable to the issues of hearsay and impeachment, and since the “federal common law” has also been superseded by the Federal Rules of Evidence, our choice of the federal version of the Rules of Evidence is admittedly based upon the sketchiest of guidance in the language of the Colville Tribal Code itself. Still, we believe that, at least as to the questions presented in this appeal, which involve the hearsay rule and its exceptions, and the use of impeachment testimony, the Federal Rules of Evidence and its case law progeny should be the guiding principles for our analysis.

(After deciding that the Federal Rules of Evidence are controlling, the court held for the defendant on all of his claims, all based on the federal rules, federal law, and some case law from various states).

**Pouley v. Colville Confederated Tribes**  
Colville Confederated Tribes Court of Appeals  
Case No. AP96 -009, AP96-013, AP96-014, AP96-021  
November 21, 1997

**Procedural History:** (not indicated)

**Issue:** Whether the blood quantum methodology used in determining plaintiff's Indian blood was valid.

**Decision:** in the interests of justice the decision of the Trial Court is Reversed and this matter is Remanded for a new hearing to determine if the action by the 1967 BIA correction of Victor Frank Desautel's blood quantum from 1/2 to 5/8 was valid, and, whether Mr. Victor J. Desautel's legal residence was on the reservation at the time in question.

**Facts:** Felix Desautel was an enrolled member of the Tribes. He died prior to compilation of the 1937 Census Roll of the Tribes, the Base Roll, and, therefore, his name is not on that roll. Victor Frank Desautel, son of Felix Desautel, is typewritten on the 1937 Census Roll as being 1/2 degree of Indian blood. In 1967 his blood degree was altered in handwriting on the 1937 roll to 5/8 degree by action of the BIA in response to a request for a blood degree revision of an indirect ancestor, Myrtle Peone. Victor Frank Desautel's mother, Mary Paul, in 1968 had a properly executed blood degree increase which ordered her corrected from 1/2 to 4/4 and the blood degree of her descendants corrected "accordingly." At the time of the birth of each of Victor J. (Skip) Desautel's daughters, Theresa M. Pouley, Deborah Desautel, and Sandra Lynn Desautel, Skip Desautel, the son of Victor Frank Desautel, was working outside the boundaries of the Colville Indian Reservation and living with his family in rented homes outside the Colville Indian Reservation. He testified that he could not find work to support his family on the Reservation. He further testified that he and his family regularly returned to the Reservation, especially on week-ends, and stayed with his parents in Inchelium on the Reservation. He and his family received mail at his home off the Reservation and he also received mail at his parents home on the Reservation.

**Reasoning:** In 1988, the Tribes approved an amendment to their constitution which provided that all "Indian Blood" identified on the 1937 roll was to be considered Indian blood of the tribes which constitute the Confederated Tribes of the Colville Reservation regardless of whether it was in fact Indian blood of a member tribe or some other tribe. The amendment also repealed all corrections to blood quantum made by the BIA since 1937. "The clear language and policy of Amendment IX, Section 4(1) protects against all blood decreases. The unrefuted legislative history states that all BIA corrections on the roll were to be reversed. Mainly, we wanted to assure the membership that no changes could be made to their Colville blood degree, without due process. To the extent the amendment is interpreted to nullify corrections to the 1937 roll that have been made over the years, it would not appear that this action would abrogate or modify any legal right or entitlement of any tribal member or violate the due process or equal protection provisions of the Indian Civil Rights Act. The amendment specifically provides that no tribal member's blood degree will be decreased as a result of the amendment...the intent is to negate all subsequent changes and return to the original calculations of Indian blood identified on the 1937 roll."

**Colville Confederated Tribes v. Jack**  
Colville Confederated Tribes Court of Appeals  
Case No. AP02-012  
November 21, 2003

**Procedural History:** appellee def sent subpoenas to the tribal PD for his upcoming jury trial on the charge of reckless endangerment. At the pretrial readiness hearing both parties said they were ready to go to trial. Just before trial appellee moved to continue saying his subpoenas hadn't been served on material eye witnesses. It was granted and the trial was reset. At the pretrial hearing the defendant moved to dismiss and the court granted it, dismissing the charges with prejudice though neither party requested it. The tribes appeal.

**Issue:** Whether the failure of the police to serve the Appellee's subpoenas amounts to a denial of the Appellee's right to compel material witnesses to testify at his trial. (Did the Trial Court err in dismissing with prejudice the charges against the Appellee under the circumstances of this case based on the fact the Tribal Police Department failed to serve the Appellee's subpoenas?)

**Decision:** Reversed and remanded. The Trial Court erred in dismissing the case and, further it erred in sua sponte dismissing the case with prejudice.

**Facts:** See procedural history

**Reasoning:** Under the CTCRA and ICRA, appellee has the fundamental right to call witnesses on his own behalf. Other jurisdictions have very little cases to guide us. [The court looked to two state cases—one from Louisiana and one from Pennsylvania—to flesh out its Confrontation Clause standard.] “The government has a responsibility not to hinder or prohibit a defendant from compelling a witness to testify, either by enacting or not enacting a statute which infringes on this right.” The Colville Tribes' statutes provide for the Colville Tribal Police Department to serve subpoenas. It is the Chief of Police's duty to provide policemen to perform service of process, it is a tribal police officer's duty not only to know what the law states regarding service of process, but also to perform the duty as assigned. In the best of all possible worlds, subpoenas would be issued, given to the police department, and served immediately. Experience dictates otherwise. The laws of the Colville Tribes do not hinder the parties from having subpoenas issued for service of process. The Colville Tribes have enacted adequate laws to ensure that a defendant's right to compel attendance of an essential witness is protected. It is up to the defendant's advocate, as an integral part of trial preparation, to check whether a subpoena has been served. If it hasn't, it must be brought to the attention of the Court in a timely fashion, and appropriate remedies must be pursued. A continuance is such a remedy; herein it was sought and granted. No one asked the Chief of Police to give reasons for the failure to serve the subpoenas. The Trial Court went right from non-service to dismissal.

To ensure justice and protect sovereignty, the Court must protect the rights of all the parties in a case. In Pakootas v. CCT, 4 CCAR 1, 2 (1997), we stated, “...in order to maintain independence as a sovereign nation, the Tribal Court must strive to protect Tribal interest.” In this instance, the Court appeared to grant the dismissal based solely on the ground that the subpoenas had not been served, without inquiry regarding the efforts made or the reasons why. We do not feel this decision protects Tribal interests. Just as a defendant is allowed to have his day in court, the Tribes also must be allowed to have its day in court. We hold that it was error by the Trial Court to dismiss charges for failure to serve subpoenas without inquiry as to what diligent efforts were made by the Police Department to serve, and by the Appellee to ensure the subpoenas were served. The trial judge dismissed the charge of Reckless Endangerment against the Appellee with

prejudice. There is nothing in the record which reflects that either party requested the dismissal with prejudice. We find this an error of law, and reverse.

**Tonasket v. Colville Confederated Tribes**  
Colville Confederated Tribes Court of Appeals  
Case No. AP03-002  
January 26, 2004

**Procedural History:** Appellant appeals from a guilty verdict on a battery charge.

**Issue:** Whether the trial court erred in denying appellant's motion to set aside the verdict and motion for a new trial, based on the Appellant's assertion that two jurors slept during the closing arguments, thereby committing juror misconduct in violation of the Appellant's due process rights under the ICRA.

**Decision:** Affirmed.

**Facts:** After a jury trial, appellant was found guilty of battery. Three days before his sentencing hearing the Appellant's mother told him she saw some of the jurors sleeping during the closing arguments at the trial. Appellant informed the court of this at the sentencing hearing but his motions to set aside the verdict and for a new trial were denied. The Court, without a hearing, reviewed the record and several affidavits from the jurors and Court staff and found the facts did not support a finding that any juror slept during the closing arguments. The Appellant asserts he should have been allowed a hearing to cross-examine the jurors and Court staff regarding the allegations, and that he has a statutory right to make a closing argument in a jury trial. He argues that this is a fundamental right of due process, and that if a juror is asleep, he is not mentally present during a critical component of his case, amounting to juror misconduct as a matter of law.

**Reasoning:** Appellant argues that his right to make closing remarks is raised to a fundamental due process right because the Tribes statutorily recognizes it. This argument is not supported by any authority and is not persuasive. It is standard to instruct the jury that the arguments of counsel are not evidence, and are only to help the jurors evaluate the evidence. A fundamental right is derived implicitly or explicitly from the Constitution, and from the common law upon which it is based. We find guidance in a seminal U.S. Supreme Court case (Twining v. State of New Jersey, quote omitted). The statutory provision, CCT §1-2-43 (Final Argument), providing for closing arguments assists the parties in presenting evidence on one's own behalf; it is not an inalienable nor a fundamental right. Its roots cannot be traced to a tribal custom or tradition, nor to a common law of any jurisdiction on the Colville Reservation, nor to the Colville Tribal Constitution, nor to the ICRA, all of which guide us on questions of fundamental rights.

In evaluating the standard for juror misconduct, the court cited several federal and state court cases. It also cited FRE 606b: "Specifically what is this Court to consider in finding "juror misconduct?" The federal courts have Federal Rule of Evidence (FRE) 606(b) to guide them. This is a case of first impression for our Court. After reviewing other jurisdictions' decisions, we find the Supreme Court's decision in Tanner v. U.S., 483 US 107 (1987) instructive." (Discussion of Tanner omitted) One recognized exception to the prohibitions of FRE 606(b) is "...to retain the common-law exception allowing post-verdict inquiry of juror incompetence in cases of substantial if not wholly conclusive evidence of incompetency." (emphasis added) Id. at p.125. We adopt this standard when inquiring into juror incompetence, finding the public policy considerations of FRE 606(b) persuasive. If we examine the alleged facts of the Appellant in the most favorable light and accept that one or more of the jurors slept during closing arguments, we find this would not rise to the level of substantial nor wholly conclusive evidence of incompetency.

Appellant asserts his due process rights were irreparably impaired when the Court disallowed a hearing on the issue of juror misconduct and conducted its own inquiry. One of the questions in *Tanner* was “whether the District Court was required to hold an evidentiary hearing, including juror testimony, on juror alcohol and drug use during the trial.” For the public policies set out in *Tanner*, the general rule of FRE 606(b) is that the juror’s shall not be subjected to a post-verdict hearing. The limited exceptions to this rule are: “except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror.” No one alleges that either extraneous prejudicial information or outside influence affects the jurors in this case.

Our jury system is rooted in western common law; we are directed in other criminal matters to use federal law as a guidance; the public policy of providing finality to litigation is valid for our Courts; the public policies of FRE 606(b) regarding protecting the privacy of the jury deliberations are valid in our Courts. The Trial Court conducted an inquiry into the allegations and found the facts did not support a finding that a juror slept during the closing arguments. We cannot ignore these findings of fact. As such, we cannot find that the Appellant was prejudiced by not being able to make an independent inquiry about the issue. Even assuming we accept as fact that a couple of the jurors nodded off during the closing arguments, the Appellant has not shown any causal connection between the napping jurors and the guilty verdict. Statutorily-allowed closing arguments are procedural rights and not fundamental rights. The Appellant was not denied a closing argument. At best he was not paid attention to; a new trial would not guarantee this either. There was no jury misconduct in this case, nor a right to an independent inquiry into the juror’s conduct by the Appellant.

## Appendix 1.3

## Coquille Indian Tribal Court (2 cases)

### *Dawson v. Springer*

Coquille Indian Tribal Court

Case No. C02-001

June 26, 2003

**Procedural History and Facts:** Plaintiff seeks damages and other relief from Defendant, alleging that Defendant wrongfully suspended Plaintiff's gaming license and terminated him from his job at the casino, and denied him due process at an administrative appeal hearing held at Plaintiff's request. Plaintiff asserts that the ICRA and the Coquille Evidence Code authorize this court to take jurisdiction over his claims.

**Decision:** Dismissed.

**Reasoning:** "The ICRA provides that the privilege of the writ of habeas corpus shall be available to any person in a court of the United States to test the legality of detention by order of an Indian tribe. 24 U.S.C. Section 1303. A court of the United States is a Federal Court. This is a Tribal Court. The ICRA does not provide Tribal Court remedies. Some Tribes have chosen to grant subject matter jurisdiction in their Courts over claims arising under the ICRA by legislatively adopting the Act. The Coquille Indian Tribe has not done so. This Court can find no authority authorizing it to recognize an ICRA remedy without legislative authority from the Coquille Tribal Council."

*Thomas v. Coquille Indian Tribe*

Coquille Indian Tribal Court

Case No. C03-001

March 8, 2004

**Procedural History:** Defendants move to dismiss plaintiff's complaint; motion granted.

**Facts:** Plaintiff applied for a position as a Tribal Police Officer, and was not hired. He alleges he was the only qualified tribal applicant who applied, and as such was legally entitled to the job, to which the tribe applied in-house tribal hiring preferences. Among other causes of action, Plaintiff claims that the Defendant's actions during the interview process and refusal to hire him denied him equal protection of the laws and denied him an entitlement without due process of law, in violation of the ICRA. Defendants move to dismiss based on failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction.

**Reasoning:** "The Indian Civil Rights Act of 1968 proscribes Indian tribes from, among other things, denying individuals within their jurisdictions due process and equal protection, 25 U.S.C. Sec. 1302 (8), and provides, by way of remedy, that '[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.' 25 U.S.C. Sec. 303. The Act does not provide for a remedy in this or any other tribal court. Similarly, Article VI, Section 3 (b) (11) of the Coquille Tribal Constitution does not create remedies in this tribal court for denials of due process or equal protection, under either the Coquille Tribal Constitution or the incorporated provisions of the Indian Civil Rights Act of 1968."

"Whether such remedies exist in tribal court is an issue to be resolved, if at all, on another day. The court need not address the matter in this case, for the complaint does not state a claim for denial of due process or equal protection. Due process is only impacted when a property interest is affected. *Cleveland Board of Education*, 470 US 532, 84 LEd 2d 494, 105 S Ct 1487 (1985) Although there are cases holding that an employee has a protected property interest, e.g., *Synoski v. Confederated Tribes of Grand Ronde*, A-01-10-001 (Grand Ronde Court of Appeals, January 22, 2003), there is no authority found to support plaintiff's claim that an applicant for employment has a protected property interest. Plaintiff cites no authority from any jurisdiction to support the contention that a tribal "entitlement" is a protected property interest, nor can the court find any, despite an exhaustive search of decisions of other courts, including tribal courts. Similarly, no support is found for plaintiff's equal protection claim."

"In *Dawson v Springer*, supra, this court allowed a defense motion to dismiss a case brought under the Indian Civil Rights Act of 1968 by one individual against another individual who was an agent of a tribal enterprise and not an officer or official of the Tribe. The court held that the federal court remedy created by the Indian Civil Rights Act of 1968 did not give plaintiff a remedy against that defendant in this court. Insofar as it stands for the proposition that this court lacks jurisdiction over a claim brought under the Indian Civil Rights Act of 1968, application of the *Dawson v Springer* ruling is limited to the allegations in that case."

"The court does not address whether plaintiff may bring a claim against tribal officials under the Indian Civil Rights Act of 1968 because it finds that, as with his due process and equal protection claims in his second cause of action, and for the same reasons, plaintiff does not state a claim upon which relief can be granted."



## Appendix 1.4

## Coushatta Tribal Court (1 case)

### *Pitre v. Coushatta Tribal Council*

Case No. 2000 11 C 0197

March 22, 2001

**Procedural History:** Tribe makes motion to dismiss.

**Facts:** Petitioner filed a claim for injunctive relief, asking that the court enjoin the Tribe from enrolling new members because it lacked the authority to do so. Petitioner alleged that enrolling new members would be contrary to the desires of tribal voters, due to an election held in order to determine whether the tribal enrollment ordinance should be amended. Prior to the preliminary hearing on that matter, the Tribe filed this motion to dismiss based on lack of subject matter jurisdiction due to its sovereign immunity.

**Issue:** Whether suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

**Decision:** Yes.

**Reasoning:** The court makes no detailed discussion of the ICRA; it only mentions the ICRA in a cite to Santa Clara, and holds without further analysis that the petitioner failed to persuade “this court that the holding in Santa Clara Pueblo does not also apply in tribal courts. Therefore, this court finds that there is no Congressional abrogation of sovereign immunity.” The court goes on to cite numerous circuit court cases holding that tribal officials acting in their representative capacity and within the scope of their authority are protected by the tribe’s immunity from suit.

**Appendix 1.5**

**Eastern Band of Cherokee Indians Tribal Courts (3 cases)**

<b>Name</b>	<i>Jacobson v. Eastern Band of Cherokee Indians</i>
<b>Date</b>	Nov 18, 2005
<b>Court</b>	Eastern Band of Cherokee Indians Court
<b>Case #</b>	No. CV-05-101
<b>Judge(s)</b>	Martin
<b>Citation</b>	33 ILR 6001
<b>Procedural History</b>	Both parties cross-motined for summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure.
<b>Facts</b>	Tribe changed its absentee voting statute to require non-resident enrolled members to return to the reservation to vote, unless they can meet certain exceptions. Resident members who are not on the reservation on voting day can vote by absentee ballot. Plaintiff resides off-reservation and did not meet any of the named criteria that would allow her to vote by absentee ballot.
<b>Issue</b>	Plaintiff alleges Tribe violated her right to equal protection under the ICRA.
<b>Holding</b>	The right to vote by absentee ballot is not a fundamental right, and under rational basis analysis, the voting statute bears a rational relationship to a legitimate tribal end.
<b>Law Applied</b>	United States Supreme Court case law
<b>Notes</b>	<p>The court noted that the equal protection given by the ICRA differs from that under the 14<sup>th</sup> amendment, and also noted that “Tribal custom and tradition may be brought before the court in analysis of whether a statute comports with 25 U.S.C. § 1302(8) where it would not be relevant in a traditional federal constitutional analysis.”</p> <p>However, the court then notes that “[n]evertheless, alleged violations of the fundamental right to vote are reviewed by the court on a strict scrutiny basis.” The court then applies U.S. Supreme Court case law.</p>

<b>Name</b>	<i>State of North Carolina ex rel Maney v. Maney</i>
<b>Date</b>	May 27, 2005
<b>Court</b>	Cherokee Supreme Court Eastern Band of Cherokee Indians
<b>Case #</b>	No. CV 99-558
<b>Judge(s)</b>	Martin
<b>Citation</b>	
<b>Procedural History &amp; Facts</b>	Plaintiff sued defendant for child support in 1999. Defendant and the children are enrolled members of the tribe. An order for child support payments issued. Plaintiff then filed for divorce in North Carolina District court, and the divorce was granted. After the divorce, defendant was convicted and imprisoned for sexual abuse of one of his children. His sentence is for 20-25 years. Plaintiff filed a motion for distribution of defendant's per capita. Defendant moved to dismiss the case, but the trial court denied his motion and granted plaintiff's motion for per capita distribution. Defendant appeals.
<b>Facts</b>	
<b>Issue</b>	Whether the tribal provision allowing for distribution of a parent's per cap when that parent is incarcerated for more than one year violates the ICRA with respect to equal protection of the laws.
<b>Holding</b>	
<b>Law Applied</b>	North Carolina State Supreme Court case law U.S. Supreme Court case law
<b>Notes</b>	"We conclude that Cherokee Code 110-2A (b) (3) does not create a suspect class, <i>White v. Pate</i> 308 N.C. 759 (1983), nor a quasi-suspect class. <i>Cleburne v. Cleburne Living Center, Inc.</i> 473 U.S. 432 (1985). No fundamental right of defendant is impaired, such as the right to vote or rear children. See <i>Troxel v. Granville</i> , 530 U.S. 57 (2000)." Under the rational basis analysis, the court then holds that the provision does not violate the ICRA.

<b>Name</b>	<i>Biello v. Eastern Band of Cherokee Indians</i>
<b>Date</b>	Jan. 30, 2003
<b>Court</b>	Eastern Band of the Cherokee Indians in the Cherokee Court Qualla Boundary
<b>Case #</b>	No. 01 CV 556
<b>Judge(s)</b>	Martin
<b>Citation</b>	
<b>Procedural History</b>	Defendants move for summary judgment under North Carolina's rules of civil procedure, and to strike the affidavit of plaintiff's expert
<b>Facts</b>	Plaintiff called tribal police to her home because her son had cut himself with a knife. When police arrived, a scuffle ensued and the son grabbed a knife and made argumentative statements to the police. The police hit him with their batons, and one officer was superficially cut on the hand. There is conflicting testimony as to whether plaintiff's son still had the knife when he lunged either toward the door or toward one of the officers. The police shot him twice in the chest, killing him.
<b>Issue</b>	
<b>Holding</b>	Motion for summary judgment denied
<b>Law Applied</b>	United States Supreme Court case law
<b>Notes</b>	<p>"The Supreme Court of the United States recently established a two part test to be applied in claims of qualified immunity in an case of alleged excessive force by law enforcement officers. Saucier v. Katz, 533 U.S. 194 (2001). The Court adopts the Saucier two part test in the case at bar."</p> <p>Excessive force as analyzed in Saucier contemplates the use of force by police which impacts the Fourth Amendment of the Constitution. Id. The Constitution of the United States does not apply to the exercise of tribal authority. Talton v. Mayes, 163 U.S. 379 (1896). Nevertheless, the alleged usage of excessive force by officers Sneed, Pheasant, Smoker and Anthony resulting in Charlie's, death could impact the rights of Plaintiff's decedent under the <b>Indian Civil Rights Act</b>...the analysis is functionally the same."</p>

## Appendix 1.6

## Fort McDowell Yavapai Tribal Courts (3 cases)

### *In re Forfeiture of 1999 GMC Yukon Denali*

Fort McDowell Yavapai Tribal Court

Case No. VF-2003-001

January 8, 2004

**Procedural History:** This case came before the court twice prior to the instant case but for reasons beyond the court's control, never came to a decision.

**Facts:** Petitioner was stopped by the Fort McDowell Police department while driving the Denali. The police found a bag of marijuana on his person. He was criminally charged and pled guilty to possession of a controlled substance. The Tribe then petitioned the court for an order forfeiting the Denali in accordance with the Fort McDowell Yavapai Nation Law & Order Code Section 6-122. Defendant objects to the call for forfeiture based on the claim that, among other things, the forfeiture would violate his rights under 25 USC 1302(7), which prohibits excessive fines.

**Issue:** Whether Section 6-122 of the Law & Order Code is unconstitutional as applied to defendant, in that it violates the ICRA's prohibition against excessive fines.

**Decision:** Section 6-122 is constitutional as applied to defendant.

**Reasoning:** Defendant cites a 9<sup>th</sup> circuit case in support of his argument that the forfeiture fails a two-part test set out in that case. This court found that "the Defendant's position can not be supported because part one of the *El Dorado* test the Defendant used in his analysis has been abrogated by subsequent case law." [The court cites the Supreme Court and a 9<sup>th</sup> circuit cases which alter the requirements of the *El Dorado* test cited by Defendant.]

"The language of §6-122 as amended in 1998, parallels former A.R.S. § 36-1041 except that the Law and Order Code trades the terms 'controlled substances' for the term 'narcotic' as found in the former Arizona Revised Statute. A.R.S. § 36-1041 was repealed by Laws 1979, Ch. 103, § 14, effective July 1, 1981. Although the law has been repealed in Arizona, it still exists in the Law and Order Code of the Ft. McDowell Yavapai Nation and because this is a case of first impression, the Court will look to the Arizona Courts application of A.R.S. §36-1041 prior to its repeal for guidance in interpreting § 6-122."

"The Arizona Court of Appeals interpreted the former A.R.S. §36-1041 in *In the Matter of the 1972 Chevrolet Monte Carlo v. State of Arizona*, 573 P.2d 535 (1977) as follows, "[t]he mere presence of a narcotic drug in the car is enough to support the forfeiture." In that case, the Court went on to state, "[t]he plain language of the statute leaves no room for an additional requirement that a particular amount of narcotic drug be present in a vehicle prior to seizure." See also *In the Matter of one 1965 Ford Econoline Van v. State of Arizona*, 591 P.2d 569 (1979). The Court interprets §6-122 in the same manner. There is neither a threshold amount of controlled substance that must be present to trigger forfeiture, nor is there a requirement that a criminal act be charged. The Court also notes that, with limited exception, there is no specified exception for an innocent owner. Once unlawful possession is proven, forfeiture is mandatory. The Court recognizes the possibilities for future vehicle forfeitures, including the potential impact of forfeiture against an innocent owner under §6-122. However, as the Arizona Court of Appeals

stated in *In the Matter of the 1972 Chevrolet Monte Carlo* and *In the Matter of one 1965 Ford Econoline Van*, it is 'a matter within the domain of the Legislature' or in this case the Tribal Council to amend the Law and Order Code, if the Tribal Council sees fit.

***Roehrig v. Fort McDowell Yavapai Nation***

Fort McDowell Yavapai Supreme Court

Case No. CR-2001-049

January 26, 2004

**Procedural History:** Defendant was convicted of aggravated assault, in violation of Section 6-52(a)(3) of the Nation's Law and Order Code. Defendant was sentenced to 6 months imprisonment and costs.

**Facts:** Defendant took his family shopping, leaving his 15 year old stepson home. When the family returned, the van and the child were missing. He did not have a license, had not been given permission to use the van, and had recently experimented with drugs and alcohol. Defendant searched for and located the van, along with his stepson and two other teens. Defendant yelled at the boys and then struck one of his son's friends in the face (the friend was sitting in the passenger seat of the van). Defendant went to the home of his son's friend, told his parents what happened, including that he hit the boy, then apologized and offered to pay for any medical bills. The boy's parents then called the police. The police went to Defendant's home, interviewed him outside his front door, where he admitted hitting the boy. Defendant was arrested and charged with aggravated assault.

**Issue:** Whether the inclusion of non-member employees in the jury pool violates defendant's rights due to being not representative.

**Decision:** No. There is nothing in the ICRA that prevents the tribe from composing a jury pool in the manner that it has.

**Reasoning:** "Defendant's third objection to the jury pool - - that tribal members are under-represented in it as compared to non-member tribal employees - - rests upon the fact that non-tribal-member employees outnumber tribal members in the jury pool by an approximate two-to-one ratio. There are about 1,000 non-member employees in the pool, and about 500 tribal members. These numbers result from about the facts that about 800 employees work at the tribal casino, that about 85 work in other tribal enterprises, that about 225 employees work in tribal government, and that about 100 of these tribal employees are also tribal members."

"The Nation has chosen to include non-member tribal employees who work on the reservation in the jury pool. In criminal cases, where the tribal courts have no jurisdiction over non-Indians, this choice results in a majority of the jury pool being composed of people not subject to the court's jurisdiction. Defendant, however, does not point to any provision of either the Nation's Constitution or the Indian Civil Rights Act that prevents the Nation from making the choice to include non-member employees, or from making that choice when the result is that non-members outnumber tribal members in the jury pool. In addition, this objection, like defendant's other objections to the jury pool, was not made prior to the selection of the jury, as it should have been."

***Dorchester v. Fort McDowell Yavapai Nation***

Fort McDowell Yavapai Nation

Case No. CR-2003-037

September 2, 2003

**Procedural History:** Defendant appeals her conviction of assault in violation of Section 6-51 of the Nation's Law and Order Code.

**Facts:** Defendant and her husband got into an argument while driving on the reservation, during which Defendant called tribal police on her cell phone. The police went to her home. She and her husband were not there but arrived before the police left. The husband, who had been drinking, was bleeding from a cut over his right eye. One officer testified that when Defendant's husband was questioned, he said that Defendant hit him in the face during the argument they had in the car, and responded that "she did it," when asked how he got the cut over his eye. When Defendant was questioned, she said she hit her husband, and that he didn't hit her back. She was arrested and charged with assault and convicted after a bench trial.

**Issue:** Whether or not it was reversible error to read Miranda warnings from federal court to the defendant, rather than from tribal court.

**Decision:** No.

**Reasoning:** "Since the Nation currently appoints free counsel for tribal members (although it is not required to do so by the Indian Civil Rights Act) we are unclear as to how 'federal court' Miranda warnings would meaningfully differ from 'tribal court' warnings. We need not explore this matter, however, because, after being arrested and receiving a warning, defendant declined to answer any further police questions. Prior to being placed under arrest, defendant did admit to police that she had struck Kill and, in questioning police about the cause of her arrest, defendant asserted that Kill had "deserved [it]." These incriminating statements, however, were not the product of custodial interrogation and would be admissible in evidence even if the subsequently given Miranda warnings were defective."



**Appendix 1.7 Mohegan Tribal Courts (1 case)**

<b>Name</b>	<i>Cherestal v. Office of the Director of Regulations</i>
<b>Date</b>	Aug. 27, 2002
<b>Court</b>	Mohegan Gaming Disputes Trial Court
<b>Case #</b>	GDTC-AA-02-132
<b>Judge(s)</b>	Manfredi
<b>Citation</b>	
<b>Procedural History</b>	Plaintiff appeals a decision of the Director of Regulations regarding revocation of a gaming license
<b>Facts</b>	Plaintiff, an employee of the Casino, was barred from the Casino based on his arrest for carrying a dangerous weapon and carrying a weapon in a vehicle. At his hearing, the only evidence presented against plaintiff was a copy of the letter barring him from the casino and a copy of the police log from the day he was arrested. Plaintiff testified that he was carrying the weapon as a result of disarming another person who was attempting to start a fight with his cousin in a parking lot. The hearing officer made no decision at that time because the weapons charges against him had not yet been disposed of.
<b>Issue</b>	Whether plaintiff is entitled to due process protections under the Indian Civil Rights Act
<b>Holding</b>	Reversed. The court finds that the decision to revoke plaintiff's gaming license was arbitrary and capricious.
<b>Law Applied</b>	U.S. Supreme Court case law
<b>Notes</b>	<p>The Court finds that the Plaintiff's continued right to employment upon the Reservation is a substantial right which entitles him to due process protections found in the ICRA.</p> <p>The court cites <i>Mathews v. Eldridge</i> in its analysis of procedural due process. "Substantive due process on the other hand relates to the idea that "no person shall be deprived of his life, liberty, or property for arbitrary reasons." 16 (a) AmJur 2nd Constitutional Law Section 816. This concept is embodied in Mohegan Ordinance No. 95-6 Section 2 (j)."</p>

## Appendix 1.8

## Passamaquoddy Tribal Courts (3 cases)

### *Kennard v. Dore*

Tribal Court Appellate Division

Case No. 93-C-02

July 14, 1994

**Procedural History:** The Census Department notified plaintiff through a series of letters over a number of years that her children's membership status was in dispute, and that they would be removed from or denied membership unless plaintiff provided blood work showing the contrary. She did not respond to any of the letters nor attend any hearings. Her children were subsequently denied membership and she sues on behalf of them, claiming among other things that the action by the tribe constitutes a violation of their due process and equal protection rights under the ICRA.

**Facts:** Plaintiff P. Kennard brought this case on behalf of her two minor children. Phyllis is a tribal member listed on the membership rolls as having 50% Passamaquoddy blood. Subsequent paternity information (pertaining to the plaintiff's parents) and blood tests shed some doubt on plaintiff's assertion that she has 50% tribal blood. If the more recent information is correct, plaintiff's children are not eligible for tribal membership.

**Issue:** Did the Passamaquoddy organs of government exercise its tribal membership determination in a way as not to violate Plaintiffs' Indian Civil Rights Act, 25 U.S.C.A. §1301 et. cet. protections, if those protections are applicable?

**Reasoning:** The Court below seems to have found an I.C.R.A. violation of Plaintiffs' due process rights by finding that Brad Jr. had acquired something of an "entitlement" to allocated yearly per capita income and from the actions of tribal organs in placing Brad JR's membership status and distribution of this per capita "on hold." This Court finds absolutely nothing unreasonable or violative of Plaintiff Brad JR's due process or equal protection of the law rights as guaranteed by I.C.R.A. by the Nation's actions. The Nation had evidence by way of sworn affidavit of Lewey Dana as far back as December 10, 1987 that any children of Phyllis Kennard would lack the requisite 25% Passamaquoddy blood. Scientific confirmation of that fact occurred with the Roche Biomedical report issued in 1990.

For the Court below to agree that the Pleasant Point Tribal Council had the right to remove Brad Jr. from the membership rolls on December 15, 1993 but to somehow maintain that Brad Jr., clearly never entitled to Tribal membership, yet possessed some type of "entitlement" to per capita monies, which "entitlement" only Tribal members would have, is a veritable conundrum. If he is not a member he has no "entitlement" to per capita. If he is not a member the question may also be raised whether he ever had entitlement to I.C.R.A. protections. The decision of the Court below that the part of the Court's decision conferring the "entitlement" and the finding. -of the I.R.C.A. violation, will stand: cannot stand. The record below shows due process disallowance of Kayla's application for membership and due process disenrollment of Brad Jr. When these things

occurred any “entitlement” ceased ab initio. Any other result would result in an absurdity whereby a non-member would possess a continuing right to per capita income from a Tribe to which he did not belong.

In passing this Court will note that the question of timeliness of the appeal, which may turn on what Rules of Court the Nation is using or what customs respecting filing of documents may or may not have evolved respecting acceptance of facsimile pleadings, are confusing at best. It appears as if Appellant-Defendant’s Motion for Reconsideration below was partly denied because the Court would not accept facsimile pleadings, which admittedly were timely. Defense Counsel argued that facsimile pleadings were customarily accepted by the Court in the past. This Court will take judicial notice of the fact that the procedure in the Tribal courts has not always been as rigidly applied as it may be in State courts. While adoption of rules of court and application of those rules is desirable, nevertheless, it appears from the record below that the Court below proceeded through much of what occurred below, without itself knowing which rules applied to the proceedings. In the end the Court applies the Maine Rules of Civil Procedure and does so rigidly to disallow, in part, Defendant-Appellant’s Motion for Reconsideration. Hopefully at some time in the future, the rules of court of the Passamaquoddy Nation Tribal Court will have the same degree of certitude in application as do state court rules. Certainly as of the date of Defendant’s filing Motions for Reconsideration and Motions for Appeal, such certitude was non-existent. That being the case this appeal will be allowed as being timely and Judgment for Defendant will be entered as set forth above.

***Indian Township Passamaquoddy Reservation Housing Authority v. Socobasin***

Tribal Court Appellate Division

Case No. P93-C-03

July 4, 1994

**Procedural History:** Plaintiff Housing Authority appeals the decision of the tribal court which dismissed its complaint for forcible entry and detainer.

**Facts:** The Housing Authority rented housing to the defendant, and notified the defendant by letter that the Authority was terminating his lease, due to loud music and disturbances. The Authority sent a second letter which warned defendant that continued violations could result in termination of defendant's lease. The transcript from the proceedings below indicate that the defendant received the letters, was aware of the HA's reasons for terminating his lease, and admitted that the noises were as the HA described, and that the police had visited his home several times for loud music. Defendant further acknowledged that he knew he had been given a notice to quit after a grievance hearing, but that he didn't leave. At the grievance hearing, the HA called several witnesses who testified to the persistent noise problems. The director of the HA also testified that she had never brought an eviction against anyone for reasons of loud noise and music, but that she brought it in this case because this situation had become intolerable.

**Issue:** Whether the tribal court was correct in dismissing plaintiff's action for forcible entry and detainer.

**Decision:** No, dismissal was not appropriate. Reversed and remanded.

**Reasoning:** Defendant, like all Native Americans, is entitled to the protections afforded to him by the Indian Civil Rights Act. See 25 U.S.C.A. §1301 et. cet. That Act applies to the Tribe in exercising powers of self-government. It is not completely clear whether or not the Authority, in the case at bar, was acting in that capacity, but assuming arguendo that it was, this Court finds it clear from the record below, that no I.C.R.A. rights of Defendant were violated. Quite the contrary: One is struck by the amazing patience and forbearance exhibited by the Authority. It is clear from the record that the Authority not only attempted to extend every right to Defendant, but even gave second, third and fourth chances, where it had the right to evict.

Let us turn now to the narrow basis upon which the Court below dismissed Plaintiff's Complaint. It is clear that the trial Court assumed the applicability of Maine statutory and decisional law. As previously indicated, this Court is not convinced of such applicability, but, assuming for the sake of argument, such applicability, this Court still believes the actions of the Authority pass muster.

[The court finds that defendant was a tenant at will rather than a tenant at sufferance during the period in which the HA filed its complaint.] As a tenant at will on October 28, 1992, the 7 day provisions of 14 M.R.S.A. §6001 did not apply to Defendant and the Authority's Complaint in this action should not have been dismissed; nor should the Trial Court have found lack of jurisdiction.

With respect to the 30-day Notice provisions of 14 M.R.S.A. §6002, this Court will not allow an absurdity to obfuscate, confuse and frustrate. If the Trial Court found a termination of the lease to have occurred on October 8, 1992, then the lease was terminated. The Authority duly served the appropriate Thirty Day Notice to Terminate Tenancy (Plaintiff's Exhibit 6) on September 8, 1992.

This Court understands the rules respecting strict construction of the statutes in question, but that does not mean they should be permitted to work an absurdity. Enough is enough. The record below is clear, both by way of witness testimony, as well as by Defendant's own admissions, that for some six or seven years Defendant continued to violate the nuisance provisions of §7k of the lease. Defendant was granted every procedural right, and more, than was reasonable.

To the extent, if at all, that this opinion may be in conflict with State of Maine decisional law, to that extent the Appellate Tribunal of the quasi-sovereign Passamaquoddy Indian Nation herewith draws upon that sovereignty to do justice in this case and to insure the internal peace and good order within the public housing of the Nation. Oliver Wendell Holmes had been quoted as saying: "The law is an ass." The law will not be permitted to be an ass in this case.

In *Two Hawk v. Rosebud Sioux Tribe*, 404 F. Supp 1327 (1975 DC SD) the court said: Tribal sovereignty, in the light of the Indian Civil Rights Act means that tribes can make and enforce their own decisions without regard to whether Federal Courts consider those decisions wise-- This Court was particularly impressed by the testimony of Housing Authority Director Tammy Sabattus to the effect that the Authority under her entire six or seven year tenure has brought only one eviction action; i.e the one in question. The record on appeal demonstrates clearly the caution, forbearance and concern for individual rights shown by the Authority in all of Its actions. This Court does not believe that the decision of this Court will in any way jeopardize or endanger the rights of Passamaquoddy tenants. On the contrary; It-will protect those tenants from the conduct of persons like the Defendant. Reversed and remanded.

*Passamaquoddy Tribe v. Francis*  
Tribal Court Appellate Division  
Case No. 00-CA-01  
July 9, 2000

**Procedural History:** Defendant appeals from an order of the tribal court denying his motion for correction of sentence. Defendant pled guilty to 2 counts of assault pursuant to a plea agreement. Included among the conditions of probation, was the condition that Francis not have any contact with the Pleasant Point reservation unless given permission by his probation officer. Francis argues on appeal that the court erred in failing to remove that condition of probation because the condition violates the tribal constitutional prohibition against banishment and because the condition is not related to a legitimate criminological goal.

**Facts:** Defendant had a bad break up with his wife, and custody of their children became an issue. Defendant came to the Social Services office and became agitated and aggressive towards its employees, and assaulted one of them. He then went to the tribal governor's office, and became aggressive and verbally threatening there, after being told that there were no funds available for the food vouchers he requested. Several months later, Defendant had an altercation with his wife, at which time he hit her. On September 10, 1999, pursuant to a plea agreement, Francis pled guilty to two counts of assault, one count of criminal threatening. At the sentencing hearing, counsel for Francis, Attorney John Mitchell, stated that the recommended sentence and conditions of probation were not objected to and were appropriate. He noted on the record that Francis would be required to have the permission of his probation officer before he could come onto the Pleasant Point reservation. Chief Judge Irving inquired on the record of Francis whether he understood the plea agreement, to which he responded that he did.

**Issue:** Whether the special condition of probation, prohibiting defendant from having any contact with the Pleasant Point Reservation was illegal in that it violated the Sipayik Tribal Constitution's prohibition against the banishment of tribal members by the Pleasant Point government?

**Decision:** The condition on probation was legal; trial court affirmed.

**Reasoning:** The Passamaquoddy Tribe has existed as a sovereign Indian nation since time immemorial. In 1979, the Tribe was federally recognized. The Maine Indian Land Claims Settlement Act of 1980 settled the Tribe's claims to territory transferred in violation of law, including the federal Trade and Intercourse Act of 1790. 25 U.S.C. § 1721. The Settlement Act also served to ratify the Maine Implementing Act, which defines certain aspects of the relationship between the Tribe and the State of Maine. 30 M.R.S.A. §6201 et seq. The Tribe retained exclusive jurisdiction over misdemeanor crimes committed by Native Americans on its reservations. 30 M.R.S.A. § 6209. In exercising its exclusive criminal jurisdiction, the Tribe is deemed to be enforcing tribal law, "provided, however, the definitions of criminal offenses . . . the punishments applicable thereto . . . shall be governed by the laws of the State." As a consequence, the Passamaquoddy Tribal Court has utilized the sentencing statutes of the State of Maine in its criminal dispositions. Maine law provides that a court may order a split sentence where the convicted person serves an initial period of incarceration followed by a suspended period of imprisonment and probation. 17-A M.R.S.A. § 1152. As a condition of probation, the court may require the convicted person to "refrain from frequenting specified places." Id. at § 1204 (2-A) (F). The court may impose "any other conditions reasonably related to the rehabilitation of the convicted person, or to public safety or security." Id. at § 1204 (2-A) (M).

Francis argues that the limitation on his presence on Sipayik is a violation of the Sipayik Constitution . . . Article IX, Section 3. Article IV, Section 2 of the Constitution provides that, “Notwithstanding any provision of this Constitution, the government of the Pleasant Point Reservation shall have no power of banishment over tribal members.” The term “banishment” is not defined.

In effect at the time of the adoption of the Sipayik Constitution were the sentencing and probation provisions mentioned above. Also in effect were tribal resolutions adopting, as Passamaquoddy tribal law, the Protection from Abuse and Protection from Harassment provisions of Maine law. (Joint Council Resolutions dated May 28, 1981 and January 3, 1983.) See 19-A M.R.S.A. § 4011(1) (violation of a protective order of the Passamaquoddy Tribal Court is a Class D crime under Maine law.) The Tribal Court may grant relief to a victim of abuse or harassment in the form of an order “directing the defendant to refrain from going upon the premises of the plaintiff’s residence . . . [and/or] from repeatedly and without reasonable cause . . . being at or in the vicinity of the plaintiff’s home, school, business or place of employment.” 19-A M.R.S.A. § 4007 (1) (B) , (C) (2) ; 5 M.R.S.A. § 4655 (1) (B) , (C-1) (2) . Given the small area of Sipayik, where the victim is a resident tribal member employed on the reservation such an order could effectively restrict the abuser from most, if not all, areas of Sipayik. If this Court were to find that the geographical restriction placed on Francis constituted the act of banishment, then similar restrictions ordered in the context of protection from abuse and harassment cases may also be construed to be illegal banishments. The Court should be reluctant to summarily invalidate tribal ordinances. Thus, the Court looks for ways in which to interpret the Sipayik Constitution in such a way as to avoid violence to existing tribal laws.

Francis did not present any legislative history that would explain what the Sipayik membership meant by the term banishment. Given the close communal and interdependent relationships of the Wabanaki tribes, it has been said that historically the imposition of banishment by a tribal community was the equivalent of a death sentence. No longer would the tribal member receive the protection and benefits of being part of a tribal community. Rather the banished person would be forced to make their way alone, isolated and excluded from his or her people. A Passamaquoddy man once explained the continuing vital importance of the tribal community as follows, “With us the sense of community goes right down to an extended family. What you do is governed by your neighbors. Issues are common, you can’t isolate your neighbor. So, when we achieve or when we succeed, we succeed as a community. When we get sick, we get sick as a community . . . we still seem to function as a unit.” “A Passamaquoddy Man From Indian Township,” *The Wabanakis of Maine and the Maritimes*, p. C-65.

The question becomes then, does simply requiring a tribal member to receive permission to step onto the reservation rise to the level of banishment?

A review of local tribal practices and laws reveals that there is a distinction made between “banishment” and “exclusion” of persons. The Mashantucket Pequot Tribal Constitution grants to its Elders Council the authority to “hear and determine any matter concerning the banishment or exclusion of any person from the Mashantucket (Western Pequot) Reservation and tribal lands as necessary to preserve and protect the safety and well-being of the Tribe and the Tribal Community, and the removal of any Tribal benefits and membership privileges ...” Mashantucket Pequot Constitution, Article XII, Section 1(d). The Mashantucket Pequot “Elders Council Guidelines Governing Banishment,

Exclusion and Suspension or Termination of Tribal Benefits and Privileges” further explains that, “[b]anishment orders shall apply to tribal members and exclusion orders shall apply to non-tribal members. A tribal member may be banished or have his or her tribal benefits or privileges suspended or terminated and any non-tribal member may be excluded for conduct that occurs either on or off the Mashantucket Pequot reservation.” Sections 1.1 and 1.4. From these provisions, it may be concluded that banishment includes not only exclusion from tribal lands, but also the loss, of tribal benefits.

There are many privileges that arise from being Passamaquoddy tribal member, apart from the right to reside on the reservation. “Some of these rights include: the right to vote in tribal elections, to vote in tribal referendums, to attend and participate in tribal meetings, to share in any per capita distributions, to receive benefits, such as health care and educational assistance, through tribal programs. It is uncontested that Francis retains many of these privileges.

In the case *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996), members of the Tonawanda Band of Seneca Indians of New York petitioned the federal district court for writs of habeas corpus under the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 and sought to challenge the legality of orders issued by members of the Seneca tribal council purporting to banish them from the tribe and its reservation. The order of banishment at issue in *Poodry* read in part as follows: It is with a great deal of sorrow that we inform you that you are now banished from the territories of the Tonawanda Band of Seneca Nation. You are to leave now and never return . . . . According to the customs and usage of the Tonawanda Band of the Seneca Nation and the HAUDENOSAUNEE, your name is removed from the Tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members. *Id.* at 878.

Clearly, the permission requirement contained in the Tribal Court’s conditions of probation does not come anywhere close to severity and breadth of the banishment order at issue in *Poodry*. The burden was on Francis to demonstrate that the condition of probation requiring him to receive permission from the probation officer before coming onto the Pleasant Point constituted a “banishment”, the Court finds that he failed to meet his burden.

Even if the condition of probation did constitute banishment, Francis voluntarily and knowingly accepted the condition as a means of avoiding prolonged incarceration for his multiple convictions. In the case *Ex Parte Snyder*, 81 Okla. Cr. 34, 159 P.2d 752 (1945), a state constitutional challenge was brought to a condition of parole that required the petitioner to, “immediately upon his release [from prison], leave the said State of Oklahoma; and shall remain out of said state for a period of twenty years. . . .” It was argued that the condition violated the provision of Section 29, Article 2 of the Oklahoma Constitution, which provides: “No person shall be transported out of the State for any offense committed within the State . . . .” The *Snyder* court held that the provision applied to the involuntary transportation of a person out of the state, as punishment for crime. It further found that, “In the instant case, there was no involuntary transportation of the petitioner out of the state. The parole, with all of the conditions set forth therein, was a matter which the petitioner could accept or reject. He gave his written acceptance and, pursuant to its terms, voluntarily left the state.” *Id.* at 39.



The Tribal Court properly found that the Constitution of the Sipayik Members of the Passamaquoddy Tribe prohibits the tribal government, including the Tribal Court, from involuntarily banishing its members. Francis was advised by competent legal counsel at the time of sentencing and voluntarily agreed to reside off the Pleasant Point reservation in exchange for freedom from jail. Just as in Snyder, the condition of probation was a matter that Francis could accept or reject. This Court holds that the voluntary agreement of a criminal defendant to a condition of probation not to have contact the Pleasant Point reservation does not constitute a banishment. The condition was rationally related to the protection of the tribal community, its members, employees and governmental officials. The trial court did not abuse its discretion in declining to vacate the condition.

## Appendix 1.9 Puyallup Tribal Courts (7 cases)

### *Conway v. Conway*

Court of Appeals of the Puyallup Tribe

No. 95-3601B

July 20, 1999

**Procedural History & Facts:** Tort action; intentional infliction of emotional distress. Trial court ordered defendant to pay punitive damages, which could be reduced if he underwent evaluations. Trial court also issued mutual restraining orders. The appeals court remanded to the trial court, at which a pro tem judge found that the defendant made marginal efforts to comply with the original trial orders, and as such reduced the damages award pursuant to the provisions of the original trial court orders, which amounted to 70% of the original punitive damages. The defendant argues on appeal that a pro tem judge has no authority to modify original trial court orders, and the modifications constitute a due process violation under the ICRA.

**Issue:** Whether the trial court judge lacked authority under tribal law to preside over the hearing and modify the existing Court orders.

**Decision:** Trial court is affirmed.

**Reasoning:** “Pro Tem Judges presiding over civil matters are vested with authority under the Puyallup Law and Order Code to modify existing Puyallup Tribal Court Orders. A Pro Tem Judge’s Order modifying an existing Puyallup Tribal Court Order entered by a regularly-appointed Puyallup Tribal Judge does not, as a matter of law, constitute a violation of due process under the Indian Civil Rights Act (Hereinafter, ICRA) or under Puyallup Tribal Law.”

“The ICRA requires the Puyallup Tribal Court to afford defendant’s due process of law consistent with the requirements of the Puyallup Law and Order Code. *Ramos v. Pyramid Tribal Court*, 621 F. Supp. 967, 969 (D.D. Nev. 1895); *R. J. Williams Company v Fort Belknap Housing Authority*. 509 F. Supp. 933, 939 (1981). Federal law imposes an obligation upon the Puyallup Tribal Court to apply any constitutional guarantee made applicable to tribal courts by Congress through the ICRA. See *Santa Pueblo V. Martinez*, 436 US 49, 54, 98 (1978). Title I of the ICRA, codified at 25 U.S.C. Section 1301-1303, provides that no Indian Tribe shall “deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law.” 25 U.S.C. Section 1302 (8).”

“Under the Puyallup Judicial Code, Chapter 3, enacted pursuant to Article VI, Section 1(K) of the Puyallup Tribal Constitution, the Judicial Administration Committee approves the list of eligible Judges serving as judges pro tempore. Section 4.03.130 (6). The Chief Judge for the Puyallup Tribal Court appoints pro tem judges from a list of approved judges under contract with the Puyallup Tribal Council. Section 4.03.240. The Judicial Code does not distinguish between the powers of a pro tem. judge and those of tenured judges.”

“Further review of Puyallup law indicates that under the Puyallup courts and Procedure Code, Chapter 2, a judge is authorized to issue a written judgment stating the relief granted to any party at the completion of a trial. Section 4.02.410. Chapter 2 also vests tribal court judges with the authority to issue any order necessary to accomplish substantial justice. Pursuant to Section 4.02.510, titled Rules not announced, tribal law provides that ‘where this chapter does not expressly address a question, the Court may issue any order to accomplish substantial justice.’ This is a broad provision which can be invoked in circumstances where the Code does not expressly address the question presented.”

“...the Appellate Court shall, as far as possible, interpret all of the Tribal laws to have consistent meaning and applicability whenever possible within these rules of construction and interpretation. This Court finds that the relevant statutes set forth under Puyallup law and reviewed above, are most logically and consistently read as intending to vest the Trial Court Pro Tern Judge with the jurisdiction and authority needed to modify the existing court order under the facts given here. However, the Court’s inquiry does not end here. Pro Tem Judges play a critical role in Tribal Court since they are frequently utilized by small Tribes at remote locations to ensure that every appearance of fairness, as well as actual fairness, is provided within the limited resources available to Tribal Courts. This becomes especially critical in litigation involving the Tribe as a party or a non-member as a party. Therefore, a question which raises issues regarding the limits of the authority of Pro Tem Judges should be completely addressed. Accordingly, this Court has also examined the laws of other jurisdictions. [The court then briefly discusses Ramos v. Pyramid Tribal Court, from the Nevada district court, to highlight the principle that the pro tem judge in both cases was appointed lawfully in accordance with tribal law, and as such may issue any necessary order.]

*Puyallup Tribe of Indians v. Keating*

Puyallup Tribal Court

Case No. CR 00-123

April 17, 2000

**Procedural History:** Defendant made motion to suppress evidence, alleging that the information submitted under an earlier warrant was “stale and deficient.”

**Facts:** The tribal court applied for a search warrant of defendant’s property, and supplemented the warrant with information regarding drug trafficking, meth production, and a Fire Incident Report containing a statement from D. Keating. The warrant was executed and items were seized.

**Issue:** Whether the ICRA’s prohibition against unreasonable searches and seizures is implicated by using the evidence in issue.

**Decision:** No, the search and seizure procedures in this case were not unreasonable.

**Reasoning:** The court looked to U.S. Supreme Court cases for the applicable standard for determining a search warrant’s validity. The Supreme Court case cited by defendant was overruled by a subsequent Supreme Court case, and under the overruling case’s “totality of the circumstances” standard the search warrant was proper and the information gained through it will not be suppressed.

“Under Title 4, Rule 41, there is no requirement that the Tribe provide an affidavit for a search warrant to a defendant. The rule does provide that upon request a copy of the inventory be provided to the person from whom property was taken. The court finds that the search warrant was issued pursuant to a finding of probable cause from a determination based on the ‘totality of circumstances.’”

[NOTE: I am assuming that Title 4, Rule 41 is a reference to a provision in the Puyallup Tribal Code. The opinion does not indicate the body of law from which it comes.]

***Puyallup Tribe v. Conway***  
Puyallup Tribal Court of Appeals  
Case Nos. AP 94-3185, 94-3188  
August 14, 1996

**Procedural History:** Appellants charged with vehicular assault, resisting arrest, battery, flight to avoid prosecution and obstruction of justice, pursuant to the Puyallup tribal code. They pled guilty to two of four charges, and the others were dropped. The Trial Court judge accepted the guilty pleas. Appellants appeal, and petition for a writ of mandamus.

**Facts:** At the time appellants entered their guilty pleas, the trial court judge briefly spoke with one appellant, but not the other. The trial court record indicates that the judge found the appellants to be “aware, knowledgeable, and voluntarily entering into” the plea agreement. The Puyallup Tribal Code requires Trial Court judges to address each defendant in open court and inform him of his due process rights and the consequences of his guilty plea, and to determine that he understands that information. The Code also requires Trial Court judges to determine that the plea is voluntary. The Code also requires that a verbatim record of the proceedings where a guilty plea is entered must contain the trial court’s advice and inquiry into the requirements listed above.

**Issue:** Whether the Trial Court judge’s acceptance of appellants’ guilty pleas violated their due process rights under the ICRA and the Puyallup Tribal Code.

**Decision:** Trial court reversed, cases remanded, due to violation of the appellants’ due process rights by the trial court judge.

**Reasoning:** “A Guilty Plea is a serious and final admission by a defendant. Unlike confessions or other admissions, a guilty plea admits the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.” *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

“In addition, a defendant entering a Guilty Plea waives several due process rights guaranteed by the Indian Civil Rights Act and the Puyallup Tribal Code. Among those rights are the right to trial by jury, the right to confront one’s accusers, the privilege against self-incrimination, the presumption of innocence, and the right to assert defenses.”

“The serious consequences of a Guilty Plea cannot be overstated, and are reflected in the requirements of Title 4, Rules 11(3), 11(4), and 11(7), of the Puyallup Tribal Code. These rules generally follow those used by Federal and State Courts.”

[In a footnote, the court notes that state courts generally follow the Boykin rule and FRCP 11. The court also notes that few published tribal court opinions address the issue of valid guilty pleas: two cases from the Northern Plains Intertribal court of appeals, both of which follow Boykin, and the Navajo Nation Supreme Court, which found in *Stanley v. Navajo Nation*, 18 Indian L. Rep. 6021, 6023 (Nav. Sup. Ct. 1990), that valid guilty pleas [are] made when the defendant makes a “knowing, conscious choice in entering the plea and [ ] the court [takes] care in advising the defendant and entering the plea.”]

“As previously stated, Title 4, Rule 11(3) and Rule 11(4) require Trial Court judges to personally address each defendant entering a Guilty Plea to inform the defendant of certain due process rights, and determine if the plea is knowing and voluntary. ‘Because essential due process rights are waived by a defendant entering a Guilty Plea, any such plea that does not comport with the requirements of this rule is itself obtained “In violation of due process and is therefore void.”’ *Boykin*, 395 U.S. at 243 n.5.

“Setting forth a specific list of questions that must be asked by Trial Court judges when determining if a defendant’s Guilty Plea is knowing and voluntary would be Impractical in a tribal court setting. The number of cases on the docket is increasing, monetary support is often insufficient, and the number of Trial Court judges and staff frequently does not meet increasing demands.”

“In light of these factors, this Court, like the United States Supreme Court, declines to set forth specific ‘guidelines’ for Trial Court judges to follow. McCarthy v. United States, 394 U.S. 394, 467 n.20, 472 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). By doing so, we leave to the discretion of each judge the exact questions to be asked. Each case will be unique, with differing facts and parties, and the tribal Trial Court judge is in the best position to determine how to address the tribal defendant and what inquiries should be made. What is essential, however, is that the judge does comply in each case with Puyallup law as defined by Title 4, Rule 11(3) and Rule 11(4).”

“Tribal court procedures and tribal social customs can differ greatly from those used in Anglo-courts. Judges and parties in tribal courts may be more likely to use non-verbal communication in the courtroom. Eye-contact [or a lack thereof] or a nod of the head are just two examples that frequently occur. To ensure Rule 11 (7) is complied with in such instances, tribal court judges must clearly speak into the record and Indicate what non-verbal communication is taking place between the court and the parties.”

“The Trial Court judge clearly did not comply with Title 4, Rule 11(4) and Title 4, Rule 11(7). As a result, the Appellants were deprived of liberty and property without due process of the law, in violation of the Indian, Civil Rights Act and the Puyallup Tribal Code. As a result, Appellants must have the opportunity to plead anew to the charges brought against them by the Puyallup Tribe.”

***Puyallup Tribe v. McCloud***  
Appellate Division Puyallup Tribal Court  
Case No. 89-1911  
April 6, 1990

**Procedural History:** Not indicated.

**Facts:** Not indicated.

**Issue:** Whether appellant was denied the right to obtain counsel, and whether there must be a unanimous jury verdict for a guilty verdict from a jury of six.

**Decision:** Conviction affirmed.

**Reasoning:** Upon review of the record and oral testimony the Court finds that the appellant was informed of her right to counsel at arraignment and trial, by the Court. The Appellant indicates that she wanted counsel, but proceeded pro se. The ICRA does not mandate a requirement of legal counsel, but infers the right “at your expense.” When appellant proceeded with trial, she waived that right. The Puyallup Law and Order Code ... requires five of six jurors “must vote a finding of Guilty in order to convict a Defendant.” The “Rules of Criminal Procedure” were adopted September 25, 1980. The rules state that there must be a unanimous verdict by the jury, under Rule 31. Rule 1 Section 2, EFFECT - “If there is a conflict between the Puyallup Law and Order Code and the provision of these rules, the Code must prevail,” is specific. The Law and Order Code is the law of the land; while the rules govern procedure, therefore the code must prevail. Therefore a guilty verdict may be maintained by a majority finding of five jurors from a jury of six. Conviction affirmed.

*Puyallup Indian Tribe v. Conway*

Puyallup Tribal Court

Case No. 96-3770

December 16, 1996

**Procedural History:** Plaintiff Tribe moves to disqualify defendant's counsel on the grounds that he was disbarred by the Supreme Court of the state of Washington, and that at the time he applied for admission to the tribal court bar, he did not bring his state disbarment to the attention of the tribal court, in violation of the Puyallup Tribal Judicial Code.

**Facts:** Defendant was disbarred by the Washington state Supreme Court in 1979. He argues that the applicable PTJC provision ("Disciplinary Action Taken by Another Jurisdiction") should not apply on the grounds that it is ex post facto and/or a bill of attainder and/or a denial of due process.

**Issue:** Whether tribal ordinances which prohibit attorneys who have been disbarred in other jurisdictions from appearing for others in tribal court (whether or not the disbarment took place before or after the amendment), and require attorneys to bring such disbarment actions to the court's attention prior to appearing for another, is an unconstitutional deprivation of due process rights.

**Decision:** The prohibition against appearance as applied to defendant's counsel is an unconstitutional bill of attainder; the requirement that a disbarred attorney notify the tribal court of such disbarment is lawful.

**Reasoning:** "The Puyallup Tribal Constitution and by-laws do not expressly mention ex post facto laws or bills of attainder. A review of its provisions, however, reveals that acts of the Tribal Council are subject to limitations imposed by the U.S. Constitution. Before considering those limitations, a review of the Puyallup Tribal Constitution and by-laws is necessary. The Puyallup Tribal Council is empowered by the Puyallup Tribe Constitution and by-laws... the Council enacted the Puyallup Tribal Judicial Code on March 26, 1993."

"The powers of the Tribal Council are subject to any limitation imposed by the statutes or the Constitution of the United States. Clearly, an ordinance enacted by the Puyallup Tribal Council cannot be in opposition to any constitutional provision or statute of the United States of America."

[The court cites the applicable U.S. law as the Constitution (art.9, sec.9, cl.3 – no bill of attainder or ex post facto law shall be passed), the 5th amendment's due process clause, and the ICRA, Section 1302 (8) and (9).]

"The Court therefore holds that Article VI, Section 1 of the Puyallup Tribal Constitution and by-laws prohibits the Tribal Council from enacting any ordinance that is ex post facto or is a bill of attainder or which violates due process."

[The court discusses two Supreme Court cases as guidance for the ex post facto standard, and holds that based on those cases, the PTJC provision is not an ex post facto law because it imposes no criminal penalties.]

[The court discusses Supreme Court cases and federal circuit court cases as guidance for the bill of attainder standard. From those cases, the court identifies a two pronged standard for determining whether a law is a bill of attainder – specific designation of persons and arbitrary deprivation of rights. The court holds that the tribal code provision



is a bill of attainder as applied to the defendant, and that the ordinance is unconstitutional as applied to him.]

“Should Mr. LeBeau be automatically disbarred as required by the ordinance, he would be deprived of property without notice and an opportunity to be heard, i.e. due process. The mandatory requirement of automatic disbarment without due process places PTJC 4.03.640(4) in violation of the constitutions of the Puyallup Tribe of Indians and the United States of America.”

[The Court then holds that the Defendant was obligated by a PTJC provision to bring his disbarment to the court’s attention, and that he should be sanctioned for his failure to do so. The court notes that this situation is a case of first impression, and looked to other jurisdictions for guidance. No cases were precisely on point, but the court found a Washington State Supreme Court case useful]: “A review of Hankins leaves the Court with the conclusion that the matter of sanctions should be referred to a panel of members of the Tribal Bar for the purpose of review and recommendation to the Court regarding an appropriate sanction.”

***Delgado v. Puyallup Tribal Council***

Puyallup Tribal Court  
Civil Case No. 95-3604  
April 3, 1996

**Procedural History:** None noted.

**Facts:** Plaintiff was disenrolled from the Puyallup Tribe of Indians by the Tribal Council.

**Issue:** The only issues before the court are whether tribal law has been observed and whether the rights of the plaintiff have been violated by her disenrollment.

**Decision:**

**Reasoning:** “The Enrollment Code is controlling; a trial on the merits is not practical or appropriate. In determining the issues, the court can only review written materials presented to the Tribal Council and can not consider new evidence.”

“In absence of express legislation by Congress, an Indian tribe has complete authority to determine all questions of its own membership. *Martinez v. Southern Ute Tribe of Southern Ute Reservation*, 259 F.2n 915, (C.A. 10, Colo. 1957). The Puyallup Tribal Council is the sole authority within [t]he Puyallup Tribe for determination of membership. Its grant of authority is by the membership of the Tribe through the provisions of Article IV of the Puyallup Tribe Constitution and Bylaws.”

“Membership in a federally recognized Tribe of Indians is a valuable property right.” [The Court cites several applicable federal cases and holds that membership in the Puyallup of Indians is a property right.] “The United States Constitution states in pertinent part that no person shall be deprived of property without due process of law. U.S. Constitution, Fifth Amendment. Similarly, the Indian Civil Rights Act prohibits an Indian Tribe exercising powers of self-government from depriving any person of property without due process of law. 26 U.S.C. 1302(8).”

“The essence of due process requires notice and an opportunity to be heard. Washington v. Rogers, 127 Wn.2d 270, 898 P.2d 294 (1995). The notice should be ‘reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections ...’ Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 214-315, 70 S.Ct. 652, 657 (1980).”

“Ms. Delgado alleges she was removed as a member of the Puyallup Tribe of Indians without notice and without an opportunity to be heard. The Tribe contends that Ms. Delgado intentionally placed herself where she could not receive mail and thus it was of her own making that she was unable to be notified. This argument is disingenuous for two reasons (discussion omitted).”

“The evidence is clear that Ms. Delgado was not in the United States during the time in question. It is also clear that Ms. Delgado could receive mail that was either of a personal or an emergent nature. The court finds from the evidence presented that Ms. Delgado did not receive notice she was being considered for disenrollment from the Puyallup Tribe of Indians. The court concludes as a matter of law that Ms. Delgado was denied due process of law in violation of the Tribal and United States Constitutions.

On the basis of the foregoing, the Court holds that disenrollment of a member of the Puyallup Tribe of Indians without notice to the member and an opportunity to be heard is a denial of due process and is unconstitutional. IT IS THEREFORE ORDERED that

Janice E. Starr Delgado be re-instated. as an enrolled member of the Puyallup Tribe of Indians.

***In re Guardianship of F.Y.***  
Puyallup Tribal Court of Appeals  
Case No. 91-2213  
February 26, 1996  
Tribal Law

**Procedural History:** The Appellants appeal a decision by the trial court which terminated a guardianship by the paternal grandparents over the above-named minors, placed custody of the minor children with their mother, and placed this matter on the docket as a minor-in-need-of-care action under the same cause number.

**Facts:** None noted.

**Issue:** The father and paternal grandparents argue, among other points, that the failure of the Trial Court to serve the father and paternal grandparents with the guardian ad litem report in a timely manner and consistent with time frames set forth in the Puyallup Tribal Code violated their rights to due process of law and require reversal of the trial court decision.

**Decision:** Appellants due process rights were violated under Puyallup tribal law and under the Indian Civil Rights Act.

**Reasoning:** Appellants were not provided minimum notice under Chapter 1, Section 7 of the Guardianship Code which requires that the Guardianship report be filed with the Court a minimum of ten days before the hearing and served on all parties a minimum of five days prior to the hearing. The Panel further finds that the record below establishes that the failure to timely file and serve the Guardian Ad Litem report in this case rises to a level of deprivation of substantive due process rights.

***Puyallup Nation Housing Authority v. Miles***

Puyallup Tribal Court of Appeals

Civil Case No. 91-2267

December 9, 1991

**Procedural History:** Plaintiff tribe initiated eviction procedures, and defendant was evicted. Defendant appeals based on inadequate notice.

**Facts:** The Puyallup Nation Housing Authority filed a complaint against the defendant for failure to pay rent, and it send a notice to his home, at which point he was two months behind in rent payments. He was given until the end of that month to pay the balance, or eviction procedures would commence. Defendant did not respond to the notice, and the Housing Authority initiated an eviction action in tribal court. After the suit was filed, the Authority discovered that the Defendant allegedly failed to report income from a job. His leasing agreement required him to immediately report a change in income.

**Issue:** Whether the Notice given to defendant pertaining to his upcoming eviction was adequate to satisfy the due process requirements of the Puyallup Tribal Justice Code and the ICRA.

**Decision:** Notice was inadequate, based on the requirements of the Dwelling Unit Lease and the Eviction Procedures Ordinance of the Tribe.

**Reasoning:** Due to Defendant's breach of the lease agreement, the Housing Authority was entitled to evict him. The Dwelling Unit Lease, read together with the Evictions Procedures Ordinance of the Tribe, specify the steps that must be taken to lawfully terminate a tenant's lease, particularly, the terms of proper notice prior to eviction. The Court found that the Notice upon which the eviction action was based was inadequate, because it failed to inform the tenant of his right to make a reply, and to request a hearing, as required by the Dwelling Unit Lease.

[The Court holds that the eviction can not stand based on the tribe's violations of requirements listed in the Evictions Procedures Ordinance. That part of the opinion does not include discussion of ICRA violations and is omitted, but it should be noted that the court relied entirely on tribal law and code in making its determination.]

"Under Section VII (A) (3) [of the Eviction Procedures Ordinance], the Tribal Court must find 'that no substantial right of the tenant accorded by the Puyallup Nation Housing Authority policies or the Indian Civil Rights Act has been violated by the Puyallup Nation Housing Authority in the procedure leading to the filing of the Unlawful Occupancy complaint.' As noted above, the May 6 Notice provided by the Housing Authority did violate substantial rights of the tenant accorded by Housing Authority policies. This also prohibits the Tribal Court from entering an Order of Eviction."

Appendix 1.10

St. Regis Mohawk Tribal Courts (1 case)

*Constitutional Question re Voting*

Saint Regis Mohawk Tribal Court

No docket supplied by the court

September 10, 1998

**Procedural History:**

**Facts:**

**Issue:** Does a voters registration list violate rights of members of the Saint Regis Mohawk Tribe, under the Indian Civil Rights Act?

**Decision:** In answer to the second question whether such voter registration list violates rights of members of Saint Regis Mohawk Tribe, is answered in the negative. The right to vote is not impermissibly burdened by the voters' registration requirement.

**Reasoning:** The Indian Civil Rights Act safeguards those rights restated in entirety in the Constitution of the Saint Regis Mohawk Tribe. Under the Indian Civil Rights Act tribes are prohibited from depriving persons of rights without due process. While Federal, state, and tribal law is not binding authority upon the Saint Regis Mohawk Tribal Court such can act as persuasive authority. The fundamental requirements of due process is the 'opportunity to be heard' *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing must be at a 'meaningful time and in a meaningful manner' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Due process also requires notice, the right to be heard in a full and fair hearing, to call witnesses and to be heard before an impartial decision maker. The Constitution of the Saint Regis Mohawk Tribe safeguards the same rights as those stated in the Indian Civil Rights Act, that is the political, social, and civil rights of duly enrolled members of the Tribe.

The Constitution of the Saint Regis Mohawk Tribe further and more specifically authorizes the mechanism by which political and civil activities are to take place. The process and management of Elections is one such political activity which the Constitution addresses and where it speaks of the powers and responsibilities of the Election Board. The Election Board has powers to administer the election code and regulations in conformity with the Constitution. This requirement of conformity with the Constitution is an important distinction and one which must be staunchly protected and reviewed in all codes and regulations of the Tribe, even following such time that Amendments to the Constitution are effected. Conformity with governing legislation is the standard of all good government, and non-conformity with legislation is the stuff of litigation and judicial pronouncements.

Should regulations regarding elections contain clauses or sections which are inconsistent with the Constitution in that they violate the Constitutional rights of members then these clauses or sections must be void or invalid and seen as an attempt to amend the Constitution indirectly. In *Case #96CIO080 Deborah Thomas et al. v. Saint Regis Mohawk Tribal Council, Saint Regis Mohawk Tribal Clerk, and Saint Regis Mohawk Election Board*, June 7/96, filed an action which challenged inter alia a voting regulation on all voting members which made a requirement of U.S. residency as found in the 1996 Mohawk Tribal Election and Voting Act was invalid and void where no such residency requirement was stated in the Constitution. It was held that the residency requirement in the Mohawk Tribal Election Act was void for inconsistency with the Constitution and that specific requirement alone was struck. In essence the Tribal Court and this Judge in

particular, spoke of the denial of a member's voting privileges which had been guaranteed by the Constitution. This decision also touched on requirements of the Tribal member seeking to be placed on the voters eligibility list and that member's responsibility to ensure any discrepancy or error in the eligible voters list would be addressed in a timely fashion given the requirements of the Mohawk Tribal Election Act which states that a person whose name does not appear on the voters list must apply in writing to the Election Board thirty days prior to the scheduled election. It further requires that the Election Board then conduct an interview of the applicant to ensure that the applicant satisfies the eligibility requirements of a voter. The member would then be placed on the eligible voters list. A member's name must then appear on the voters list at least 72 hours prior to the election in order to vote.

The Elections Regulations stipulate that in all elections a voters list must be prepared and posted or publicized within 90 days of a scheduled election. The time requirements as specified in the Elections Regulations must be strictly followed in order to ensure and comply with principles of fairness with respect to the requirements of public notice. This voters list must be a list which has been updated and certified according to the elections act regulations by the Tribal Clerk.

The process of maintaining and updating a voters list ensures that those members who are newly of age and eligible to vote are registered, and those deceased members can be removed from the list. This process also ensures the registration of those new members who through marriage or other event become eligible to exercise the right to vote as members of Saint Regis Mohawk Tribe. Voter registration thus structures and facilitates access to the right to vote by the process of continuous validation by the Tribal Clerk. The registration process gives effect to the right to vote should the member wish to be registered. The fact that some persons choose not to register and not to vote does not take away the right of that member to be registered and to vote. Should any member of Saint Regis Mohawk Tribe, properly qualified to vote and not presently on the voters list, decide at some future time to vote, he/she must apply to be registered on the voters list within the time limits of the forthcoming election. It is thus the responsibility of the member of Saint Regis Mohawk Tribe to exercise his right to vote by applying for registration on the voters list, and this requirement to register does not impermissibly burden the right to vote. The registration process and the creation of an updated voters list has the effect of constituting the electorate of Saint Regis Mohawk Tribe, and provides an active and current list of voters for purposes of good government.

In *Kavena v. Hopi Indian Tribal Court*, 16 Indian Law Rep. 6063 (Mar. 21, 1989) the Hopi Tribal Court ordered a stay of the election for 90 days, because the voting list was invalid. The community had no election regulations in place and no proper procedure whereby to ensure that a correct voters list was maintained. Given that this case revolved around an important change in the form of government it was essential that the preconditions of the Hopi Constitution were met. Defects in election procedure thus had great impact on the outcome of the elections.

***Romain v. Tunica-Biloxi Indians of Louisiana Tribal Council***

Tunica Biloxi Tribal Court

Case Nos. 98-017, 98-018

October 1, 1998

**Procedural History:** Romain (Plaintiff in 98-017) seeks damages and injunctive relief against Defendant Tribal Council, and against individual members of the Council for actions taken outside their official capacities. Tribal Council (Plaintiff in 98-018) seeks injunctive relief against Romain.

**Facts:** Romain bought a mobile home after applying to the Council for permission to place it in a non-designated area of tribal land, and hearing from individual council members outside of any official proceeding that her application may be approved. She was also told that it may not be approved. The Council denied her application. Romain argues that although the area she desires for her mobile home is now in a non-designated area, at one time mobile homes were allowed there. She argues that denial of her application amounts to a denial of equal protection of the law and due process of law, in violation of the ICRA.

**Issue:** Whether denial of an application to place a mobile home in an area which is now under Council policy not designated for such use, but at one time was used for mobile homes, amounts to a denial of equal protection and due process in violation of the ICRA.

**Decision:** No.

**Reasoning:** “The facts of this case are very similar to those in *Berry v. Arapaho and Shoshone Tribes*, 420 F. Supp. 934 (D. Wyo. 1976) wherein the Tribe denied a liquor license to new applicants in accordance with new policy regarding the prohibition of alcohol sales on the reservation. Although such licenses had been granted prior to the policy change, the federal court determined that no denial of equal protection had occurred because the policy was applied uniformly to all persons similarly situated. Likewise, St. Romain has failed to establish that she was treated differently from other persons similarly situated. The evidence presented at the hearing supports a finding that St. Romain and all others who request initial placement of a mobile home in a non-designated area are treated exactly the same. Further, St. Romain has presented no evidence to support a claim for any other civil rights violation under the Indian Civil Rights Act.”



**Appendix 1.12 Turtle Mountain Band of Chippewa Indians Tribal Courts (5 cases)**

*Monette v. Schlenvogt*  
Turtle Mountain Tribal Court of Appeals  
Case No. TMAC 04-2021  
March 31, 2005

**Procedural History and Facts:** Appellee is the owner of a trailer court. She filed a petition for eviction and back rent against Appellant, a tenant of her mobile home. At the time of the filing, Appellant allegedly had not paid rent for almost one year. Appellant had been personally served with the petition. A notice of a hearing on the matter was later sent to appellant via mail, indicating that a judgment may result if she failed to appear. At the hearing, appellee was present but appellant was not. There are no tapes from this hearing. Since Appellant failed to appear, the trial court issued a default judgment against her. Later, a contempt of court motion was filed. There was no proof of service attached to the motion. Defendant was arrested and arraigned on a contempt of court charge for failure to pay the back rent and failure to remove the mobile home. There were no tapes of the arraignment hearing. Even though the paperwork included a criminal arraignment disposition sheet, the record indicated that the court concluded this to be a civil matter, and scheduled a show cause hearing. At the hearing, Defendant stated that she never received the original notice of the eviction hearing, or else she would have shown up. She also stated that she had the money to pay the back rent owed, but by this time additional rent had accrued. Plaintiff stated that she just wanted Defendant to remove the mobile home, and the court ordered her to do so. The court also gave Plaintiff permission to have the water at the mobile home site shut off if Defendant did not move in 10 days. Defendant appeals to this court requesting a stay of judgment. She alleges that her due process rights were violated under the ICRA since she failed to receive notice of the original hearing due to the use of an incorrect address.

**Issue:** Whether defendant's due process rights were violated under the ICRA because of the lack of notice, and because of the ultimate use of criminal process to enforce a civil judgment.

**Decision:** Defendant's due process rights were violated by inadequate notice.

**Reasoning:** "ICRA is incorporated into the Constitution of the Turtle Mountain Band of Chippewa Indians under Article 14 Separation of Powers Section 3a. Article 14, section 3a states 'the judicial branch of government of the Turtle Mountain Band of Chippewa Indians shall have jurisdiction...to ensure due process, equal protection, and protection of rights arising under the Indian Civil Rights Act of 1968, as amended, for all persons and entities subject to the criminal and civil jurisdiction on the Turtle Mountain Tribe.'"

"A fundamental requirement of Due process is that the parties be given adequate or reasonable notice. 'An elementary and fundamental requirement of due process ...is notice reasonably calculated, under all the circumstance, to apprise interested parties of the pendency of the action...The notice must be of such nature as reasonably to convey the required information...' Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306,314; 70 S.Ct. 652 (1952). Reasonable notice must be given at each new step in the proceedings. Cash v. Cashman, 41 Conn. App. 382,390 (1996)."

“In the present case, Ms. Monette stated at the show cause hearing and at her arraignment that she did not receive the notice of hearing. Under oath, she stated that her address is “P.O. Box 744” and the address the September 2, 2004, notice was sent to “P.O. Box 123.” She further stated that she is the only person who receives her mail. It is clear from the record that Ms. Monette did not receive the September 2, 2004, notice of hearing.”

“Turtle Mountain Rule of Court 2.4 sets out the procedure for parties requesting a hearing or oral argument. This rule rests the responsibility in providing the notice of hearing to the other party squarely on the attorney or advocate seeking a hearing. Turtle Mountain Rule of Court 2.4(a) states, ‘...The party requesting oral arguments shall secure a time for the argument and serve notice upon all other parties...’ In the present case, it is unclear why the Clerk of Court would send out a notice of hearing, when it is the moving parties responsibility.”

*Lenoir v. Monette*

Turtle Mountain Tribal Court of Appeals

Case No. CIV-02-0039

June 28, 2002

**Procedural History:** The acting Chairman of the Tribe and members of the Tribal Council appeal to this court from a decision of the lower court, vacating a temporary restraining order enjoining former Chairman Monette from conducting business as Chairman of the Band. The TRO was entered pursuant to a request from the tribal Council to judicially enforce a Tribal Council resolution, purporting to remove Monette from his elected position for various reasons laid out in the resolution.

**Facts:** The Turtle Mountain Tribal Council enacted a resolution purporting to remove the Chariman (Monette) from his position and to replace him with Appellee Lenior, the Tribal Vice-Chair, for the balance of the Chairman's term. Monette was not present at the Council meeting where this resolution was passed, although various events show that he may have had notice. Attempts were made to get him to the meeting, and he was in the building at the time of the hearing, so the Council proceeded with it without him. He was not given written notice with any particularized charges.

**Issue:** Whether the Tribal Council Chairman's removal had been conducted in accordance with the Turtle Mountain Tribal Constitution and the Indian Civil Rights Act, see 25 U.S.C. § 1301 et seq.

**Decision:** No, the Chairman did not receive adequate notice so as to satisfy the due process requirements of the ICRA.

**Reasoning:** "The Court below found the removal of the Chairman constitutionally deficient because it concluded that no ordinance was in place that 'prescribe(d) regulations, charges, and reasons for removal... .' This ruling ignores the existence of Chapter 13.1301, which clearly defines the grounds for removal. Judge DeLorme, without reaching the issue of whether 13.1301 survived the amendments to Chapter 13 in 1996, found this section wanting because it did not prescribe 'regulations' for the removal. This Court disagrees with the lower court that an ordinance must lay out the exact procedure to be utilized by the Council in removing elected officials before a removal proceeding can be commenced. Courts should exercise caution in attempting to micro-manage the legislative removal process because such a proceeding is a "political" proceeding that does not implicate the same liberty and property interests as a courtroom proceeding. See Indian Political Action Committee v. Tribal Executive Committee of the Minnesota Chippewa Tribe, 416 F. Supp. 655 (D.Minn. 1976). A Tribal Council need not have formal procedures, contained in an ordinance, governing the introduction of testimony, cross-examination, a written record, and written reasons for decision, in order to conform to the due process requirements of the Indian Civil Rights Act. As one Court has ruled in assessing what type of procedure must be utilized in a removal proceeding, the Chairman "was entitled to the even-handed application of tribal customs, traditions and any formalized rules relative to the impeachment proceeding itself." Stands Over Bull v. BIA, 442 F. Supp. 360, 376 (D. Mont. 1977)."

"This Court concludes that Chapter 13.1301 of the 1976 Tribal Code remains intact as the method of Tribal Council removal of elected officials and that this section comports with the constitutional mandate of Article VIII, Section 2, of the Turtle Mountain Constitution that the Council enact ordinances governing removal proceedings. To the extent, therefore, that Judge DeLorme found that the Chairman was removed in violation of substantive due process, or the lack of applicable law, we disagree. A decision of the

lower court should be affirmed, however, if any ground relied upon by the trial court is upheld. Judge DeLorme also found that the Chairman was removed in violation of procedural due process and it is this ruling we now turn our attention to.”

As Judge DeLorme correctly noted, the right to continue to hold elective office is a property right that cannot be taken without due process of law. See Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). (T)he process due in removal proceedings includes, at a minimum “oral or written notice, an explanation of the ...evidence, and an opportunity for an (elected official to present his side of the story.” Loudermill, at 546, 548. This includes the requirement that the allegations contained in a removal notice be specific enough to allow an elected official to respond. As one commentator has noted:

“The law has tended toward the requirement that, even where no particular procedure is prescribed whereby the power to expel an officer may be exercised, such proceedings should be had as will give the person charged an opportunity to be heard. See Am Jur 2d, Public Officers and Employees (1st ed 215). The power to remove a public officer, considered by itself alone, has been characterized as executive in nature, when it is associated with the discretionary prerogatives of high executive office, at least. However, when, as essential prerequisites to the exercise of that power, there must be a formulation of charges, notice thereof, a hearing, and a decision. See Am Jur 2d, Public Officers and Employees (1st ed 216). 115 ALR 3, 159 ALR 627.

***Monette v. Lenoir***

Turtle Mountain Tribal Court of Appeals  
No Docket Number Available  
May 22, 2002

**Procedural History:** Appellant is the elected Chairman of the Turtle Mountain Band of Chippewa Indians. He petitions for an interlocutory appeal from a lower court decision temporarily restraining him from conducting business as Chairman of the Tribe. That order was apparently entered pursuant to a request from the Appellees to judicially enforce a Tribal Council resolution, purporting to remove the Appellant from his elected position for various reasons laid out in the resolution. The removal was effectuated through a resolution and the Appellant asserts that he was not given notice of the attempt to remove him and that his removal was effectuated in violation of the Turtle Mountain Tribal Constitution and Code of Laws.

**Facts:** On May 13, 2002 the Council enacted a resolution purporting to remove the Appellant from his position as the Chairman of the Tribe and to replace him with Appellee Lenoir, the Tribal Vice-Chair. Sometime after the enactment of this resolution the Appellees filed a request with the Tribal Court for a TRO to prevent the Appellant from conducting business as the Chairman of the Tribe. Initially, the Court below entered an ex parte TRO dated May 14, 2002 restraining the Appellant from conducting any business as the Chairman of the Tribe and scheduling the matter for hearing on a permanent injunction for May 24, 2002. That order was vacated on the same day and the Court below ordered the Appellant to show cause why he should not be restrained from conducting business as the Chairman on May 15, 2002. A hearing was conducted on May 15, 2002 on which date the Appellant appeared and participated. The Court below, as the result of that hearing, entered a TRO essentially recounting the same restrictions as the previous one. The May 15, 2002 order purports to be temporary although it does not clarify the period of time the order will remain in effect and does not have a return date for a permanent restraining order hearing. From that May 15, 2002 order the Appellant has filed an interlocutory appeal in which he invites this Court to step into this dispute and take jurisdiction over all issues involved.

**Issue:** Whether the issuance of a TRO by the lower court violated Appellant's rights under the ICRA in that there was inadequate notice and failure to provide due process.

**Reasoning:** "This Court declines to grant the interlocutory appeal. Although this Court realizes the gravity of the instant dispute and the need for a quick resolution of the matter, it also has an obligation to preserve the structure of the legal system created by the people of the Turtle Mountain Band of Chippewa Indians. Nothing in that system, either constitutionally or by tribal ordinance, grants this Court original jurisdiction over disputes such as this. Nor does the Tribal Code exempt disputes such as this from the general rule that this Court only has jurisdiction to review 'final' orders from the lower Court. This Court is not inclined to resolve by appellate judicial fiat political disputes that have not been fully developed before the trial court, especially when such intervention may circumvent a political process still running its course. Contra Bush v. Gore (US Supreme Court resolves election of the federal president by judicial decision in an arguably undemocratic manner).

This does not mean that this Court lacks the authority to direct the lower court to resolve issues promptly to vest this Court with its discretionary jurisdiction. Nor can it be said that this Court has no role to play in the resolution of political disputes involving the

removal of elected officials. The right to elective office is a property right that cannot be taken without due process of law. See Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). Removal proceedings of a tribal chairman can implicate the Indian Civil Rights Act. See e.g. Stands Over Bull v. BIA, 442 F. Supp 360 (D. Mont. 1977)(removal proceedings against Tribal Chairman implicates due process rights under the ICRA.) The Court below and this Court have an especial obligation to ensure that both the Tribal Constitution and the Indian Civil Rights Act are honored in removal proceedings. The type of process due, however, in a removal proceeding of an elected official is not coterminous with due process rights afforded persons in tribal court. Removal proceedings of elected officials are heavily imbued with political considerations that this Court must be cautious of ignoring. It is not appropriate for a Court to substitute its opinion for that of elected officials in deciding what constitutes cause for removal of an elected official provided the process by which that decision was reached comports with due process of law and the Tribal Constitution. See Baker v. Carr, 369 U.S. 186 (1962)(Courts should not exercise jurisdiction over purely political disputes where the constitution vests another branch of government with exclusive authority to resolve an issue).

With this background in mind, it is apparent to this Court that the Court below has not rendered its final verdict on this weighty issue. It has only issued a temporary restraining order and not a permanent one. In general, a temporary restraining order should only remain in effect until such time as the Court below can conduct a full evidentiary hearing after all parties have had sufficient notice. In this case the temporary restraining order does not have an expiration date nor a date for hearing on a permanent injunction. The Court below should conduct a hearing on a permanent restraining order addressing the following issue: whether the Appellees removed the Appellant in accordance with the Turtle Mountain Tribal Constitution and the Indian Civil Rights Act. After that review, this Court would have jurisdiction to either grant or deny the Appellant's request for this Court's review of the decision.

***Strickland v. Decoteau***  
Turtle Mountain Tribal Court of Appeals  
Case No. TMAC 04-003  
March 14, 2005

**Procedural History:** Appellants Sky Dancer appeal from an order declaring that they are not entitled to sovereign immunity and granting declaratory and injunctive relief to plaintiff-appellees Strickland.

**Facts:** Sky Dancer Casino is a tribally owned and operated casino located on the Turtle Mountain reservation and subject to a tribal state gaming compact and the IGRA (25 USC 2701-2721). Strickland and other EEs were terminated for testing positive for drugs. They alleged that the drug testing was not random and impinged on their non-working hours. Strickland filed a complaint requesting various forms of relief including cessation of employee drug testing and damages for unlawful detention of employees. Sky Dancer responded with the defense of sovereign immunity. The lower court found that Skydancer was not entitled to the defense of sovereign immunity.

**Decision:** remanded to the trial court with instructions to dismiss it on the grounds that the Defendants are entitled to sovereign immunity

**Reasoning:** “It is well-settled that Indian tribes are sovereign nations that cannot be sued without their specific consent or an unambiguous abrogation of their immunity. See *Santa Clara Pueblo v. Martinez*, 436 US 48 (1978). Tribal officials and entities are also entitled to sovereign immunity when they act within the official scope of their duties, except when they exceed their authority and violate the rights of individuals. In that case, the officials and entities are entitled to qualified immunity and are protected as long as their actions were taken in good faith and reliance on adopted policy.”

“Strickland argues that only the Turtle Mountain Tribe is entitled to sovereign immunity, and that the casino, not being the Tribe, is subject to suit. This issue was definitively decided in *St. Claire v. Turtle Mountain Chippewa Casino, Turtle Mountain Tribal Court of Appeals* 1998, in which Chief Justice Jones determined that the casino is an arm of the tribal government, and as such is entitled to immunity from suit.”

“Strickland places heavy reliance on the decision in *Gourd v. Robertson, Spirit Lake Tribal Court* 2001 in arguing that Skydancer’s behavior violated his due process rights under the Indian Civil Rights Act, 25 USC Sec. 1302(8). This Court would point out that the drug testing in that case was not only non-random, but it was also in violation of the casino’s personnel policy and procedure manual. In the instant case, Skydancer employees utilized randomized testing that conformed to the existing personnel policy and procedure manual. That policy had been approved by the Tribe and was a valid exercise of the Tribe’s sovereign authority to regulate the behavior of its members. Because of this particular fact, there was no violation of Strickland’s rights under the Indian Civil Rights Act, and immunity applies.”

“Strickland has not shown that the Turtle Mountain Tribe has waived its immunity in any form. Judge May cited the Amended Gaming Compact Between the Turtle Mountain Band of Chippewa Indians and the State of North Dakota, which states that:

A. Nothing in this Compact shall be deemed to be a waiver of the sovereign immunity of the Tribe.

B. Sovereign immunity must be asserted by the Tribe itself and may not be asserted by insurers or agents. The Tribe waives sovereign immunity for personal injury arising out of its gaming activities, but only to the extent of its liability insurance coverage limits.”

“The above provision is not a waiver of sovereign immunity that the Plaintiffs can take advantage of to pursue their action against Skydancer. Strickland asserts that she and the other Plaintiffs were wronged by the actions of the casino management. It is the casino, in its position as an arm of the Tribe, that is asserting its immunity, not its insurer or agent.”

“Sovereign immunity is a jurisdictional bar to suit and precludes a Court from hearing a case. The immunity defense is not only a defense to liability, but is an entitlement not to stand trial. *Mitchell v. Forsyth*, 472 US 511 (1985), affirmed by *Saucier v. Katz*, 533 US 134 (2001). This case is an excellent example of the need for Tribal governments to be protected from the costs in time and money of lawsuits against it.”



*Davis v. Park Place Apartments*  
Turtle Mountain Court of Appeals  
Case No. TMAC 03-002  
March 31, 2005

**Procedural History and Facts:** On March 11, 2003, appellant Davis filed a petition requesting a waiver of appellate court filing fees and an appellate review from a small claims court order entered against him. From a review for the record, the appellee, Park Place Apartments, alleged that this amount was for rent owed and electricity furnished to the appellant by the appellee. The record also indicates that a hearing was held at 9:15 a.m. on February 18, 2003, in front of Judge Victor Delong. It appears from the record that the appellant failed to appear for the hearing and a Default Judgment was entered against him on that date. The appellant claims that he shown up for court at 9:14 a.m. on the date of hearing, but he was told by a clerk that he was too late. He also states that he looked at his watch when he arrived and according to his watch, he was one minute early. Mr. Davis is requesting that the Turtle Mountain Court of Appeals grant his request for a remand to small claims court and for the appellate court to waive the appellate court fee. On June 9, 2004, the Turtle Mountain Court of Appeals held a status conference hearing to determine if the Court had an accurate administrative record. Both parties were sent notices and orders informing them of this hearing. Neither the appellant nor the appellee appeared.

**Issue:** In reviewing the appellant's request for appellate review, the Court must address two issues: 1) Can the Turtle Mountain Court of Appeals waive its filing fee in civil cases and 2) Can the tribal district court issue a Default Judgment when a party fails to appear.

**Reasoning:** "The appellant has filed a request that the Court of Appeal's \$150 filing fee be waived and that question of whether the Turtle Mountain Court of Appeals posses the authority to waive the appellate filing fees is before the Court. While the Turtle Mountain Code, Constitution, Ethical Codes and Rules of Court give no guidance on this topic, the Court in this circumstance must look to other sources of law in interpreting this matter. In Anglo-American jurisprudence, it has long been an established practice to waive the filing fees for an indigent individual in criminal cases. In fact, the Ninth Circuit has stated that when a Tribe decides to grant appeals rights, and its appeal procedures are Anglo-American in origin, then 'federal constitutional standards are employed in determining whether the challenged procedure violates the (Indian Civil Rights) Act.'" See Crowe Tribe of Indians v. Bull Tail, 2000 Crow 8 (Crow10-12-2000), citing to Randall v. Yakima Nation Tribal Court, 841 F. 2d. 897,900 (9th Cir. 1988)."

"In civil actions in North Dakota, an indigent individual may receive a waiver of filing fees. The North Dakota Century Code § 27-01-07 states that 'any filing fees connected with any civil action to be heard in any of the courts of the judicial-system . . . may be waived with or without a hearing, at the court's discretion, by the filing of an in forma pauperis petition accompanied by a sworn affidavit of the petitioner relating the pertinent information regarding indigency.'"

**"However, in previous cases, we have stated that tribal courts are not courts that mirror the strict formality of Anglo-American jurisprudence.** See Mathiason v. Gate City Bank, No. TMAC- 04-2002 (Turtle Mountain 2005)(citing to Christine Zuni, Strengthening What Remains, in Justin B. Richland and Sarah Deer, INTRODUCTION TO TRIBAL LEGAL STUDIES 114,118 (2004). As such, this Court will endeavor "to

infuse the tribal court system with our own concepts justice which more closely reflect our societal beliefs.” See id.”

“Moreover, this Court takes judicial notice of the fact that the Turtle Mountain Indian reservation currently has approximately a 65% unemployment rate. Further, a shortage of adequate family housing exists on the Turtle Mountain Indian Reservation. Some Turtle Mountain families share an apartment or a house with extended family so as not to have family members living in the outdoors. However, there remains in many Turtle Mountain families a common oral tradition of helping others who are in need of help.”

“Since the present case is a civil action, the Court is not concerned with the federal constitutional standards for criminal appeals. But the court is concerned that the procedures for obtaining a filing fee waiver, especially in criminal cases, is not spelled out in any Codes or Rules of Court. This is especially troubling since many people in Turtle Mountain cannot afford the \$150 appellate filing fee. To some people this fee is a barrier to the appeals process and a barrier to them exercising their due process rights guarantee under the Turtle Mountain Band of Chippewa Indian’s Constitution.”

**Appendix 1.13      Wisconsin Oneida Appeals Commission (1 case)**

<b>Name</b>	<i>Cornelius v. Hill</i>
<b>Date</b>	Aug. 16, 2001
<b>Court</b>	Oneida Appeals Commission Appellate Court
<b>Case #</b>	No. 01-AC-007
<b>Judge(s)</b>	Wigg-Ninham, Hughes, Liggins, McLester, Stevens
<b>Citation</b>	
<b>Procedural History</b>	Appellant's appeal the decision of the Personnel Commission, which resulted in a protective order issued to Petitioner for a confidential disclosure
<b>Facts</b>	
<b>Issue</b>	Whether the Personnel Commission's decision was outside the scope of their authority which violated appellant's rights under the ICRA
<b>Holding</b>	Affirmed
<b>Law Applied</b>	None
<b>Notes</b>	The court finds that plaintiffs failed to show how they were harmed under the ICRA.

## **Appendix 2 – Mashantucket Pequot Tribal Courts (Westlaw) (42 cases)**

Baker v. Sebastian, 4 Mash. Rep. 356 (2005)

The court must therefore analyze the due process rights of the tribal members in any issue of comity. The Indian Civil Rights Act of 1968 (25 USC §§ 1301-03) provides that no Indian tribe in exercising powers of self-government shall deprive any person of property without due process of law.

With respect to procedural due process and the issue of notice, the United States Supreme Court has observed: “This Court has not hesitated to approve of resort to publication as a customary substitute [for personal service] where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.” *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 317, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The Supreme Court has approved substituted service where the notice is “reasonably calculated, under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 314, 70 S.Ct. 652; *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940); *Cato v. Cato*, 226 Conn. 1, 8, 626 A.2d 734 (1993).

Eldred v. Mashantucket Pequot Gaming Enterprise, 4 Mash. App. 1 (2003)

As discussed in the decision in *Krepcio v. Mashantucket Pequot Gaming Enterprise*, 6 MPR 22, 3 Mash.App. 50 (2003), also issued this date, the question of who is to make the disciplinary decision is determined by the policy and procedure, an administrative rule or promulgation. *Krepcio* at 25, 3 Mash.App. at ----. It does not rise to the level of a due process challenge under Tribal law, the U.S. Constitution or the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1990). As explained in *Krepcio*, constitutional considerations generally concern notice and the right to present objections to actions proposed or taken. *Krepcio* at 24, 3 Mash.App. at ----; see also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). This Court has recognized that “due process merely assures reasonable procedural protection for a fair resolution of the issue presented in a given case.” *Johnson v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 15, 19, 1 Mash.App. 21, ---- (1996) (citing *Plato v. Roudebush*, 397 F.Supp. 1295, 1310 (D.Md.1975) and *Betts v. Brady*, 316 U.S. 455, 462, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942)).

Fletcher v. Mashantucket Pequot Tribal Nation, 3 Mash. Rep. 456 (2002)

The court (Shibles, J.) found that the plaintiff's pleadings set forth a claim that he was wrongfully discharged in retaliation for his efforts to publish his manuscript, inasmuch as it could be construed to allege a violation of free speech under the Indian Civil Rights Act, 25 U.S.C. 1302(1). Fletcher, 3 Mash. 265, 281, 2 Mash.Rep. 443, ----. The defendant Tribe requests this court to re-examine and review that holding. The court declines to do so, and adopts that holding as the law of the case.

Craig v. Mashantucket Pequot Gaming Enterprise, 3 Mash. App. 448 (2002)

The Indian Civil Rights Act, 25 U.S.C. § 1302(8), permits hearsay testimony and evidence if it is appropriate and not in violation of an employee's due process rights. Olderman v. Mashantucket Pequot Gaming Enterprise, 3 Mash. 220, 221, 3 Mash.Rep. 79, ---- (1999). The Board of Review can hear reliable hearsay. Johnson v. Mashantucket Pequot Gaming Enterprise, 1 M.P.R. 15, 20, 1 Mash.App. 21, ---- n. 4 (1996) (Johnson II ) ("management may continue its usual and customary practice at Board of Review hearings of presenting management's representatives for testimony ... including reliable hearsay"). "The plaintiff's due process rights are not violated by the Board's consideration of hearsay evidence which is 'trustworthy,' " Olderman at 221, 3 Mash.Rep. at ---- (quoting Dugan v. Mashantucket Pequot Gaming Enterprise, 1 Mash. 104, 107, 1 Mash.Rep. 142, ---- (1995)), or "reliable," Johnson II at 20, --- Mash.Rep. at --- n. 4.

Eldred v. Mashantucket Pequot Gaming Enterprise, 3 Mash. Rep. 366 (2001)

The plaintiff contends that evidence regarding knowledge of his arrest and the underlying charges by employees and business associates of the entertainment department is nothing more than speculative and unreliable hearsay, and should be disregarded by the court. Under certain conditions, the presentation and consideration of hearsay testimony and evidence is appropriate and not in violation of an employee's due process rights under the Indian Civil Rights Act, 25 U.S.C. § 1302(8). In Johnson v. Mashantucket Pequot Gaming Enterprise, 1 MPR 15, 1 Mash.App. 21 (1996), the Mashantucket Pequot Court of Appeals, while reversing a termination of employment on other grounds, observed that "management may continue its usual and customary practice at Board of Review hearings of presenting management's representatives for testimony, supplemented by the introduction of documentary evidence, including reliable hearsay". Johnson, supra at 20, --- Mash.App. at ---- (n. 4).

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The plaintiff asserts that the standard of "off-duty conduct which reflects adversely on MPGE" sets forth no standards or regulations, is so vague that it violates his right to due process under the Indian Civil Rights Act, 25 U.S.C. § 1301 et. seq., and should be declared void for vagueness.

"The party challenging a statute's unconstitutionality has a heavy burden of proof; the unconstitutionality must be proven beyond all reasonable doubt. Additionally, in a

vagueness challenge, such as this, civil statutes can be less specific than criminal statutes and still pass constitutional muster. To prove that a statute is unconstitutionally vague, the challenging party must establish that an ordinary person is not able to know what conduct is permitted and prohibited under the statute. The fact that the meaning of the language is fairly debatable is not enough to satisfy the burden of proof”, *Bottonne v. Westport*, 209 Conn. 652, 658, 553 A.2d 576 (1989) (citations omitted). A statute is not void for vagueness because it may be open to more than one possible construction, or because the imagination can conjure up hypothetical situations in which the meaning of some terms may be questionable. *McKinney v. Coventry*, 176 Conn. 613, 619, 410 A.2d 453 (1979).

“Condemned to the use of words, we can never expect mathematical certainty from our language.” *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The Gaming Enterprise recognizes and accepts this principle when it states, in the preamble to its Standards of Conduct, that “[i]t is not possible to list all forms of behavior that are considered unacceptable ...” (R., p. 22). It is unrealistic to expect perfect precision in drafting regulations such as standards of conduct. “Unconstitutional vagueness must, therefore, be contrasted with mere ambiguity, which the court has within its power to correct through a narrow interpretation of the statute”. *State v. Wilchinski*, 242 Conn. 211, 220, 700 A.2d 1 (1997).

*Milios v. Mashantucket Pequot Gaming Commission*, 3 Mash. App. 12 (2001)

Knowing that his claim for the actual jackpot is not cognizable in the tribal court, Mr. Milios attempts a different route to reach his desired jurisdictional destination. Relying primarily on our decision in *Healy II*, and other cases involving appeals in the employment area, he insists that the actual claim for which he seeks redress is not one for a gaming loss at all, but rather is a claim arising from the Gaming Commission’s alleged violation of his rights guaranteed under ICRA (albeit during the Executive Director’s hearing on his gaming loss). Mr. Milios asserts that *Healy II* and other cases in the employment context, read together, stand for the proposition that the tribal court does have jurisdiction to hear all claims asserting ICRA violations allegedly committed by tribal administrative entities.

This Court cannot agree. Mr. Milios reads too much into our holding in *Healy II*. The underlying action there was a dispute regarding employment--a matter which the tribal court has general authority to hear appeals pursuant to Title VIII of tribal law.

*Cives Corp. v. Mashantucket Pequot Tribal Nation*, 3 Mash. Rep. 300 (2001)

It is basic and settled law that Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers, that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed, and that in the absence of any unequivocal expression of contrary legislative intent, suits against the Tribe under the ICRA are barred by its sovereign immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106, 115 (1978). “[A] waiver of tribal immunity must exist before the Tribal Court is empowered to impose substantive liability upon the Mashantucket Pequot Tribe, its employees or

agencies.... [The] waiver ... must be express and unequivocal.” Healy v. Mashantucket Pequot Gaming Enterprise, 1 MPR 63, 66, 2 Mash.App. 28, ---- (1999). Schock v. Mashantucket Pequot Gaming Enterprise, 3 Mash. 258, 260 (1999).

Mashantucket Pequot Gaming Enterprise v. Ziffer, 3 Mash. Rep. 188 (2000)

The defendant asserts that the provisions of the Debt Collection Ordinance that limit types of special defenses and prohibit the filing of counterclaims “violate every notion of due process and fairness” because they restrict the ability of defendants “to plead defenses and counterclaims which are otherwise valid defenses and counterclaims.” The defendant contends that this results in a violation of his right to due process and equal protection under the Indian Civil Rights Act, 25 U.S.C. § 1302, et. seq.

The defendant’s argument presumes that the special defense and counterclaim he filed in this action would be considered as valid in the absence of the restrictive provisions of the Debt Collection Ordinance. As discussed earlier, however, the facts alleged as a special defense are not sufficient to support a claim that the plaintiff violated an implied contractual duty and good faith and fair dealing. Similarly, those facts do not support a counterclaim sounding in tort; the counterclaim was filed long after the statute of limitations had run. Because the special defense and counterclaim would not be “otherwise valid” in the absence of the restrictive provisions of the Debt Collection Ordinance, the underlying premise of the defendant’s due process and equal protection argument fails. In these circumstances, the Debt Collection Ordinance cannot be found to be a violation of the Indian Civil Rights Act.

For the above reasons, the defendant’s special defense and counterclaim are dismissed.

Grossi v. Mashantucket Pequot Gaming Enterprise, 3 Mash. Rep. 176 (2000)

Under certain conditions, the presentation and consideration of hearsay testimony and evidence is appropriate and not in violation of an employee’s due process rights under the Indian Civil Rights Act, 25 U.S.C. Sec. 1302(8). In Johnson v. Mashantucket Pequot Gaming Enterprise, 1 MPR 15, 1 Mash.App. 21 (1996) (Johnson II ), the Mashantucket Pequot Court of Appeals, while reversing a termination of employment on other grounds, observed that “management may continue its usual and customary practice at Board of Review hearings of presenting management’s representatives for testimony, supplemented by the introduction of documentary evidence, including reliable hearsay”. Johnson II, supra at 20, --- Mash.App. at ---- (n. 4).

The plaintiff’s due process rights are not violated by the Board’s consideration of hearsay evidence which is “trustworthy,” Dugan v. Mashantucket Pequot Gaming Enterprise, 1 Mash. 104, 107, 1 Mash.Rep. 142, ---- (1995) or “reliable”. “Johnson II “, supra at 20, 1 Mash.App. at ---- (n. 4). See also Fargo v. Mashantucket Pequot Gaming Enterprise, 2 Mash. 188, 192, 2 Mash.Rep. 145, ---- (1997) and Olderman v. Mashantucket Pequot Gaming Enterprise, 3 Mash. 220, 221, 3 Mash.Rep. 79, ---- (1999), affirmed 4 MPR 7, 3 Mash.App. 5 (2000).

Eldred v. Mashantucket Pequot Gaming Commission, 3 Mash. Rep. 140 (1999)

The defendant's argument that this court cannot proceed with this case under Title VIII is at variance with the specific language and holding of Healy II. This court is required to follow the doctrine of stare decisis. 1 M.P.T.L. Ch. 1, 85. Under the doctrine of stare decisis, the trial court, exercising "inferior jurisdiction" must accept the law as developed by its Appellate Court until it is overruled or qualified. Cf *White v. Burns*, 213 Conn. 307, 335, 567 A.2d 1195 (1990). Healy II made the following observations:

1. The Tribal Council is under a duty to apply ICRA as tribal law. Healy II at 66[, 2 Mash.App. at ----].
2. This necessarily includes judicial review under ICRA of a gaming enterprise's action relating to employer-employee relationships. *Id.* at 66 [, 2 Mash.App. at ----].
3. The Tribal Court's exercise of jurisdiction of a Title VIII claim would not violate the tribe's sovereign immunity. *Id.* at 67[, 2 Mash.App. at ----].
4. The reason the Tribal Court would not violate the tribe's sovereign immunity is because any ruling by the Tribal Court would be limited to determining whether the Gaming Enterprise violated one of the plaintiff's rights under ICRA. *Id.* at 67[, 2 Mash.App. at ----].
5. If the Tribal Court found an ICRA violation, "The action will be set aside and a Board of Review convened." (emphasis added) *Id.* at 67[, 2 Mash.App. at ----].

*DeSaulniers v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. App. 1 (1999)

At the outset it is noted that the Appellee's rights to due process were clearly violated at his hearing before the Board on January 6, 1998. More than two years prior to the hearing, Chief Judge Shibles ruled in a reasoned opinion, *inter alia*, that the "principles of ICRA (the Indian Civil Rights Act) apply to Board of Review hearings" including an opportunity to be heard and "to cross-examine evidence or any witnesses appearing at the hearing". *Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 104, 107, 1 Mash.Rep. 142, ---- (1995). See also, *Durand v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 63, 65-66, --- Mash.Rep. ----, ---- - ---- (1996). In addition, this Court in 1996 affirmed a terminated employee's right to have retained counsel at a Board of Review hearing to ensure competent representation for the essential purposes of cross-examining management's witnesses and to assemble rebuttal evidence. *Johnson v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 15, 20, 1 Mash.App. 21, ---- (1996).

The Gaming Enterprise concedes the deprivation of due process procedures at Appellee's hearing, but claims the Appellee waived his right to call and cross-examine witnesses. A waiver of a constitutional right must be an intelligent, voluntary and intentional act. *Carnley v. Cochran*, 369 U.S. 506, 514, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). The waiver of a due process right can "neither be presumed nor may it be lightly inferred." *United States v. Mapp*, 476 F.2d 67, 77 (2d Cir.1973) (internal citations omitted). Indeed, a court must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Zerbst*, 304 U.S. at 464, 58 S.Ct. 1019. See also *Doe v. Marsh*, 105 F.3d 106, 111 (2d Cir.1997). Whether a party knowingly and voluntarily waived due process rights may "only be determined after a careful evaluation of the totality of all surrounding circumstances." *United States v. Lynch*, 92 F.3d 62, 65 (2d Cir.1996), quoting *United States v. Anderson*, 929 F.2d 96, 99 (2d Cir.1991). See also *United States v. Local 1804-*



1, 44 F.3d 1091, 1098 n. 4 (2d Cir.1995)(in civil cases as well as in criminal cases, a waiver of a fundamental right must be voluntary, knowing and intelligent).

*Schock v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. Rep. 129 (1999)

The Mashantucket Pequot Tribal Council has enacted a limited waiver of sovereign immunity to allow a suit to be brought for “any action taken by the Tribal Police alleging a violation of the Indian Civil Rights Act ...” I M.P.T.L. ch. 3, § 11(b). The Council, has not however, enacted any other waiver of sovereign immunity for suits based on alleged violations of the ICRA by the Tribe, its agencies or employees. The plaintiff’s claim does not reference Tribal Police action, thus her claim is barred by sovereign immunity. Judgment shall enter for the Gaming Enterprise on Count Seven.

*Louchart v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. Rep. 102 (1999)

The Drug Testing Policy does not define the term “reasonable cause.” Section XI provides that employee appeals must be decided in accordance with tribal law; however, where no tribal law exists with respect to a particular issue, the Court “may be guided but shall not be bound by the principles of law applicable to similar claims arising under the laws of the State of Connecticut or of the United States.” VIII M.P.T.L. ch. 1. This Court is mindful that: “The guarantees afforded to individuals under the ICRA, such as the right to due process, are similar but not identical to those provided for under the United States Constitution. Both federal and tribal courts have acknowledged that Congress did not intend the due process principles of the Constitution to disrupt settled tribal customs and traditions.” *Johnson*, 1 Mash. at 118, 1 Mash.Rep. at ----. In this appeal, no Mashantucket Pequot custom or tradition has been argued to be implicated. Thus, the Court will look to general U.S. constitutional principles, as articulated by federal and Connecticut courts, for guidance in this matter.

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The term “reasonable suspicion” is defined by Black’s Law Dictionary (6th ed.1990) as a suspicion of illegal activity which “must be based on specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant intrusion.” This definition mirrors that developed in *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), where the United States Supreme Court first defined the term for purposes of the Fourth Amendment, explaining that a suspicion could not be reasonable unless it is supported by “specific and articulable facts which, taken together with rational inferences from those facts, warrant [the search or seizure].” The Doyon court and others have similarly defined the standard in the context of drug testing under the Fourth Amendment. See also *Poulos v. Pfizer*, 244 Conn. 598, 711 A.2d 688 (1998), *Fowler v. New York City Dept. of Sanitation*, 704 F.Supp. 1264, 1272 (S.D.N.Y.1989); *Bailey v. City of Baytown, Texas*, 781 F.Supp. 1210, 1215 (S.D.Tex.1991). Tribal courts have also relied upon Fourth Amendment standards in determining the propriety of searches under tribal law and the Indian Civil Rights Act. *Duckwater Shoshone Tribe v. Thompson*, 25 ILR 6131, 6132 (Duckwater Shoshone Tr. Ct., 1998) (“Federal Indian Law experts agree that 25 U.S.C. § 1302(2), which nearly mirrors the Fourth Amendment, is derived from the U.S. Constitution ...”); *Southern Ute Tribe v. Scott*, 18 ILR 6105 (S. Ute Tr. Ct.,

1991) (utilizes U.S. Supreme Court rulings to determine voluntariness of consent to search).

*Olderman v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. Rep. 79 (1999)

Under certain conditions hearsay testimony and evidence is appropriate and not in violation of an employee's due process rights under the Indian Civil Rights Act, 25 U.S.C. Sec. 1302(8). In *Johnson v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 15, 1 Mash.App. 21 (1996) (*Johnson II*), the Mashantucket Pequot Court of Appeals, while reversing a termination of employment on other grounds, observed that "management may continue its usual and customary practice at Board of Review hearings of presenting management's representatives for testimony, supplemented by the introduction of documentary evidence, including reliable hearsay". *Johnson II*, supra at 20, --- Mash.App. at ---- (n. 4).

The plaintiff's due process rights are not violated by the Board's consideration of hearsay evidence which is "trustworthy", *Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 104, 107, 1 Mash.Rep. 142, ---- (1995) or "reliable". "*Johnson II*", supra at 20, 1 Mash.App. at ---- (n. 4). Here, the plaintiff asserts that the redaction of the names of some of the persons who complained about the plaintiff's actions of sexual harassment result in hearsay which was not trustworthy or reliable. \*3 In *Fargo v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 188, 2 Mash.Rep. 145 (1997) the court, citing *Stafford v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 158, 2 Mash.Rep. 103 (1997) held that the use of redacted statements was not in violation of the due process rights of the employee. *Fargo* at 192, 2 Mash.Rep. at ----. The *Fargo* court noted that the employee knew the identity of some of the witnesses even though their names were redacted in the statements. Here, the plaintiff also knew the names of witnesses even though they had been redacted. (R. at 167-169; 241, 242). In *Stafford*, the challenged evidence consisted of a report by the employee's supervisor which contained redacted information. The supervisor testified at the hearing and was available for cross-examination. The plaintiff in this case extensively cross-examined Ms. Domijan and was afforded an opportunity to test the trustworthiness and reliability of the redacted statement. In the circumstances of this case, the Board's consideration of the redacted statement was not in violation of the plaintiff's due process rights.

B. Cross-examination. The plaintiff claims that she was deprived of her right to cross-examine the witnesses whose names were redacted from the statement considered by the Board. As found by the Mashantucket Court of Appeals in *Johnson II* and the tribal court in *Dugan*, *Fargo* and *Stafford*, and for the reasons discussed in Section I(A) of this memorandum, the plaintiff's due process rights were not violated.

*Johnson v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. Rep. 74 (1999)

The Indian Civil Rights Act, 25 U.S.C. § 1302, adopted by the Mashantucket Pequot Tribe as tribal law, 1 M.P.T.L. ch. 3, § 10, provides in pertinent part that no one within the jurisdiction of an Indian tribe exercising the powers of self-government shall be deprived of property without due process of law. 25 U.S.C. § 1302(8). The right to due process conferred by the ICRA "shall apply in the Tribal Court." 1 M.P.T.L. ch. 3, §

10(a); *Healy v. Mashantucket Pequot Gaming Enterprise*, Decision on Rehearing En Banc., 1 MPR 63, 2 Mash.App. 28 (1999), and applies to the plaintiff's property interest in continued employment. "It is settled law that the ordinances and policies of the Mashantucket Pequot Tribe 'manifestly accord job security protections to employees of the Gaming Enterprise. Once the property interest in employment is conferred, the employee cannot be deprived of that interest without due process safeguards.'" *Johnson v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 273, 277, 2 Mash.Rep. 249, ---- (1998) (*Johnson III*), citing *Johnson v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 15, 19, 1 Mash.App. 21, ---- (1996) (*Johnson II*); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

Minimum due process standards require that the plaintiff receive "adequate notice" of proceedings affecting his livelihood. *Wood v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 214, 217, 1 Mash.Rep. 294, ---- (1996). This is among the "fundamental requisites of due process." *Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash 104, 106, 1 Mash.Rep. 142, ---- (1996). "An elementary and fundamental requirement of due process ... is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action ... The notice must be of such nature as reasonably to convey the required information..." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Reasonable notice must be given to a party at each new step in the proceedings. *Cashman v. Cashman*, 41 Conn.App. 382, 390, 676 A.2d 427 (1996). "Fundamental tenets of due process, moreover, require that all persons directly concerned in the result of an adjudication be given reasonable notice and the opportunity to present their claims and defenses." *Kron v. Thelen*, 178 Conn. 189, 193, 423 A.2d 857 (1979).

*Healy v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. Rep. 64 (1999)

Given that the plaintiff was conferred with a property interest in employment, he may not be deprived of that interest without appropriate due process safeguards. *Johnson*, at 1 MPR 19, 1 Mash.App. 21. The plaintiff asserts that the amended Board of Review policy deprives him of his right to due process and equal protection under the ICRA, 25 U.S.C. 1302(8), which provides that "No Indian tribe in exercising powers of self-government shall ... (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(8). "The due process clause of the ICRA applies to all tribal proceedings: criminal, civil and administrative." *Johnson v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 273, 276, 2 Mash.Rep. 249, ---- (1998), quoting *Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 104, 105, 1 Mash.Rep. 142, ---- (1995). The ICRA is to be interpreted in a manner "consistent with Tribal practice or custom." I M.P.T.L. ch. 3, § 10(b).

"The guarantees afforded to individuals under the ICRA, such as the right to due process, are similar but not identical to those provided for under the U.S. Constitution." *Johnson* at 1 Mash. 118, 1 Mash.Rep. at ----. See *White Eagle v. One Feather*, 478 F.2d 1311, 1312-1313 (8th Cir.1973).

This court is mindful of its duty to honor the customs, traditions and cultural practices of the Mashantucket Pequot Tribal Nation. The defendant in this case, however, does not

offer any Mashantucket Pequot tribal custom, tradition or cultural practice as support for the amendment to the Board of Review policy. Where there is no evidence of a tribal custom, tradition or cultural norm that will be disrupted, the court may apply general federal and state principles of due process. Johnson, at 2 Mash. 276- 277, --- Mash.Rep. at ---- - ----. “[N]o distinctly Mashantucket Pequot tradition or custom has been offered to justify abrogating an employee’s due process rights as understood under general constitutional principles in favor of a lesser standard.” Dugan at 106, 1 Mash.Rep. at ----. “The right to due process is conferred not by legislative grace, but by [ICRA] guarantee.” Johnson at 1 Mash. 119, 1 Mash.Rep. at ----. Absent a relevant tribal custom, tradition or cultural practice, “this due process guarantee is ‘not diminished by the fact that the [Tribal Council] may have specified for its own procedures that it may deem adequate for determining [employee appeals].” Johnson at 2 Mash. 277, 2 Mash.Rep. 249 quoting, Vitek v. Jones, 445 U.S. 480, 491, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). The principle of stare decisis applies to all decisions of the Tribal Court. I M.P.T.L. ch. 1, § 5. This court, as did the courts in the several Johnson decisions, will apply general principles of federal and state principles of due process. Johnson, 1 Mash. 115, 1 Mash.Rep. 165, 1 MPR 15, 1 Mash.App. 21, 2 Mash. 273, 2 Mash.Rep. 249. See also Dugan at 104, 1 Mash.Rep. at ---- (“In determining employee appeals ... this court may be guided by principles of law applicable to similar claims arising under the laws of the State of Connecticut and of the United States.”)

A fundamental requisite of due process is the right to be heard. Dugan at 106, 1 Mash.Rep. at ----, citing Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914). The United States Supreme Court “consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.... The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). See also Perry v. Sindermann, 408 U.S. 593, 603, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (Proof of a property right does not entitle an employee to reinstatement. “But such proof would obligate [the Gaming Enterprise] to grant a hearing at his request, where he could be informed of the grounds for his [termination] and challenge their sufficiency.”) The Supreme Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 542, 84 L.Ed.2d 494 (1985) has “described ‘the root requirement’ of the Due Process Clause as being ‘that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.’ “ (emphasis in original). “This principle requires some kind of hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment.” Bartlett v. Krause, 209 Conn. 352, 372, 551 A.2d 710 (1988) (quotation marks omitted), citing Loudermill, at 542, 105 S.Ct. 1487.

Smith v. Mashantucket Pequot Gaming Enterprise, 2 Mash. App. 43 (1999)

In this regard, the Appellant accurately points out that ICRA, as an integral component of Mashantucket Pequot Tribal Law, 1 M.P.T.L. ch. 3, § 10(a), is applicable in hearings before the Board of Review. The denial of the right to be heard and to cross-examine witnesses at an employee’s Board of Review hearing constitute fundamental

constitutional infirmities which per se mandate judicial relief. *Grossi v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 55, 2 Mash.App. 19 (1998).

The due process safeguards prescribed in ICRA and the legal principles enunciated in *Grossi*, however, are of little avail to the Appellant. Despite the absence of written rules embracing due process rights in the Board of Review Policy, the Record \*45 in the instant case clearly reveals that the Appellant in fact was afforded every opportunity to be heard “in a meaningful manner”, *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

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Under these circumstances, the hearing before the Board of Review, as actually conducted, provided the Appellant with sufficient due process protections for a more than adequate resolution of the issues related to Appellant’s termination from employment. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (due process is a flexible doctrine and “calls for such procedural protections as the particular situation demands”); *Johnson v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 15, 19, 1 Mash.App. 21, 26 (1996) (due process assures “reasonable procedural protection for a fair resolution of the issue presented in a given case”).

*Father v. Mother*, 3 Mash. Rep. 45 (1999)

Relying on *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989), *Mother* argues that the legal residence and domicile of the minor child is that of her mother’s, which is Virginia, where the child was born and lived until June 1997. The Court in *Holyfield* noted that, “Well-settled common law principles provide that the domicile of minors, who generally are legally incapable of forming the requisite intent to establish a domicile, is determined by that of their parents, which has traditionally meant the domicile of the mother in the case of illegitimate children.” *Id.* at 48, 109 S.Ct. 1597. In *Eberhard v. Eberhard*, 24 ILR 6059, 6061 (1997), the Cheyenne River Sioux Tribal Court of Appeals rejected “the historically gendered and sexist rules of the western common law” cited by *Holyfield*, and instead adopted a gender-neutral rule which looks to the legal residence or domicile of the spouse who is a member of the Cheyenne River Sioux Tribe. In support of the gender-neutral rule, the Cheyenne River Sioux court noted that the approach has the additional advantages of: “(1) complying with the gender equality protections afforded by the due process and equal protection guarantees of the Indian Civil Rights Act, 25 U.S.C. § 1302(8) and (2) asserting potential tribal court jurisdiction over any children who are enrolled in the tribe or may be eligible for tribal membership by virtue of their parentage.” *Id.* at 6061. The court found that the rule “protects the sovereign interests of the Cheyenne River Sioux Tribe, recognized in other contexts by Congress in the Indian Child Welfare Act, in protecting the sovereign relationship of the tribe with ‘Indian children who are members of or are eligible for membership in an Indian tribe.’” *Id.* citing 25 U.S.C. § 1901(3).

This court finds the *Eberhard* court’s reasoning with regard to the adoption of a gender-neutral rule to be compelling, particularly with respect to situations where the tribal member child is not an infant. In *Holyfield*, the married parents of twin babies moved “promptly” for their adoption following their birth. *Holyfield* at 30, 109 S.Ct. 1597. The common law rule alluded to in *Holyfield* does not take into account that a child born to

unwed parents may subsequently go to live permanently with his or her father for a variety of reasons. This is precisely the situation in the case at hand. The better rule is to look at each parent-child relationship on a case by case basis in a gender-neutral fashion.

Healy v. Mashantucket Pequot Gaming Enterprise, 2 Mash. App. 28 (1999)

Thus, it is explicit that the Tribal Council, while reserving its right to create “divisions” with limited jurisdiction within the overall structure of the Tribal Court, established the Tribal Court as a separate, independent branch of government empowered with original and general jurisdiction over all civil matters under Tribal Law. Any doubt that this broad grant of jurisdiction encompassed ICRA causes of action evaporates in the light of the Tribal Council’s adoption of ICRA in 1993 as “tribal law” which “shall apply in the Tribal Court”. I M.P.T.L. ch. 3, § 10(a).

Based on the express and unequivocal language contained in those enactments, we conclude that the Tribal Court from its inception possesses a broad jurisdictional grant over all subject matters that are cases or controversies under the laws of the Mashantucket Pequot Nation, including ICRA claims. This conforms to the seminal interpretation of ICRA by the Supreme Court in Santa Clara Pueblo wherein it states:

Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indian and non-Indians. [Footnotes and citations omitted.]

Id. at 436 U.S. 65-66, 98 S.Ct. 1670. See also *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. at 19, 107 S.Ct. 971 (ICRA “provides non-Indians with various protections against unfair treatment in the tribal courts”). Because plenary original and general jurisdiction vested in the Tribal Court in 1992, we view references to its jurisdiction in Title VIII in 1994 and Title XII in 1997 as affirmations of jurisdiction previously granted, and not as grants of jurisdiction previously withheld.

DeSaulniers v. Mashantucket Pequot Gaming Enterprise, 2 Mash. App. 480 (1998)

The defendant argues that because the plaintiff failed to avail himself of the proffered additional Board proceedings that he has waived his right now to claim due process violations. It must be initially stated that the plaintiff was not confronted with the option of waiving his rights to a de novo Board hearing. The Court acknowledges that a party may waive due process rights. *Zadvydas v. Caplinger*, 986 F.Supp. 1011, 1020 (E.D. Louisiana 1997). A valid waiver is defined by the well known test of *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) as the intentional relinquishment or abandonment of a known right or privilege. See *In re Manuel R.*, 207 Conn. 725, 543 A.2d 719, 725 (1988). The standard for the waiver of constitutional rights is traceable in part to common law antecedents. See e.g., *O’Keefe v. St. Francis’ Church*, 59 Conn. 551, 22 A. 325, 327 (1890) (noting that a waiver of contract provisions is possible if a party “intentionally relinquished a known right ...” but that “[e]quivocal conduct, or conduct of doubtful import, is not sufficient.”) The general rule is to “indulg[e] every presumption

against the waiver of fundamental rights....” Zerst at 464, 58 S.Ct. 1019. “Doubts must be resolved in favor of protecting the constitutional claim.” *State v. Piorkowski*, 243 Conn. 205, 700 A.2d 1146, 1158 (1997), citing *Michigan v. Jackson*, 475 U.S. 625, 633, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). The waiver of a constitutional right, or in this instance, a right established by the federal Indian Civil Rights Act and Mashantucket Pequot tribal law, “is effective only if, under all the circumstances, it was knowingly, voluntarily and intelligently given.” *In re Donna M.*, 33 Conn.App. 632, 637 A.2d 795, 800, cert. denied, 229 Conn. 912, 642 A.2d 1207 (1994) quoting *State v. Smith*, 185 Conn. 63, 441 A.2d 84, 97 (1981).

In this case, the plaintiff was denied access to the Board’s recommendation concerning his appeal despite his repeated requests. No legal support or justification is offered by the defendant for the withholding of this information from the plaintiff. While the Board’s decision is only a recommendation to the President/CEO, it must carry some weight, otherwise the Board hearing process would be rendered meaningless. The plaintiff was wholly unaware of the Board’s findings, including the Board’s finding evidencing a clear misunderstanding of the term “mitigating circumstances.” Under all the circumstances, even if the plaintiff had been offered a *de novo* Board hearing, he could not have knowingly and intelligently waived his rights without this important information.

*Healy v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. App. 13 (1998)

Second, if management decisions to suspend or terminate employees under the Board of Review Policy amendment for “any violation of conditions of employment” is not reviewable, then virtually every employee of the Gaming Enterprise is subject to severe disciplinary action without any possible redress. This would constitute a drastic reversal of the historical policy of the Mashantucket Pequot Tribe to protect its employees from arbitrary and capricious action, see *Johnson*, 1 MPR 15, 1 Mash.App. 21, and would implicate employees’ rights under ICRA. Before these anomalies are allowed to exist, judicial review of the constitutionality of the provisions of the Board of Review Policy is mandated. Fundamental fairness dictates it. *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670-71, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986); *Mathews*, 424 U.S. at 333, 96 S.Ct. 893.

*Fletcher v. Mashantucket (Western) Pequot Tribe*, 2 Mash. Rep. 443 (1998)

The federal Indian Civil Rights Act of 1968, as amended (ICRA), 25 U.S.C. §§ 1301-[1341](#), “imposed on tribal governments restrictions similar to those in the Bill of Rights of the United States Constitution.” THE INDIAN CIVIL RIGHTS ACT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 1 (June 1991).

Nearly all of the civil liberties set forth in the Constitution are stated in terms of restrictions on State or Federal governmental actions. The Bill of Rights restricts action of the Federal Government, while the 14th amendment restricts actions of the State governments. The plain meaning of the Bill of Rights and the 14th amendment preclude their direct application to tribal governments. Tribes were not established by the Constitution and do not derive their power or right to govern from either Federal or State government.

Id. at 3. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 105 S.Ct. 1900, 85 L.Ed.2d 200 (1985); *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1895); *Iron Crow v. Oglala Sioux*, 231 F.2d 89 (8th Cir.1956).

Section 1302 of ICRA provides, in pertinent part, that: “No Indian tribe in exercising powers of self-government shall--(1) make or enforce any law ... abridging the freedom of speech.” (Emphasis supplied.) The plain language of the statute prohibits an Indian tribe from making or enforcing any law “abridging the freedom of speech.” In *Means v. Wilson*, 522 F.2d 833, 840 (8th Cir.1975), cert. denied, 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976), the court held that “the plain language on the face of the statute ... makes it clear that Congress intended to constrain actions of the tribe and tribal bodies.”

The fourth amended complaint is devoid of any allegation that the Mashantucket Pequot Tribe has enacted a law “abridging the freedom of speech.” In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51-52, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), the United States Supreme Court was confronted with the issue of whether a federal court had jurisdiction to hear an action against the Pueblo and its Governor for declaratory and injunctive relief for alleged violations of the equal protection provision of ICRA by the enforcement of a tribal law which denied tribal membership to the children of female members of the tribe who marry outside the tribe, but not to similarly situated children of men of that tribe. The Court concluded that such actions for declaratory and injunctive relief against the tribe was not authorized by ICRA and, furthermore, was barred by the \*456 tribe’s sovereign immunity from suit. The Pueblo’s Governor was sued in his official capacity for his role in enforcing the Pueblo’s law. In addition, the Court held that ICRA did not authorize federal court actions for declaratory or injunctive relief against tribal officers. Unlike the facts in *Santa Clara Pueblo v. Martinez*, no Mashantucket Pequot tribal law is alleged to have been enacted and/or enforced by the defendants in violation of the ICRA—which this Court finds to be an essential element of an ICRA claim. Cf. *Johnson v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 115, 1 Mash.Rep. 165 (1995), aff’d 1 MPR 15, 1 Mash.App. 21 (1996). As individuals, the defendants are not alleged to have any authority to enact or enforce tribal laws. Consequently, the plaintiff fails to state a claim for relief in Count II and it must be dismissed as to all defendants.

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The third reason proffered by the plaintiff for his termination “lays with his manuscript,” in other words, although the stated reason for his discharge was sexual harassment of other tribal employees, he was actually dismissed in retaliation for his efforts to publish his manuscript as an exercise of free speech. The Indian Civil Rights Act, 25 U.S.C. 1302(1) guarantees to all persons freedom of speech and provides that no Indian tribe in “exercising powers of self-government” shall make or enforce any law abridging that freedom. Many of the cases that have found wrongful and actionable a discharge in retaliation for the exercise of an employee’s right are supported by mandates of public policy derived directly from applicable state statutes and constitutions. *Sheets v. Teddy’s Frosted Foods, Inc.* 179 Conn. 471, 427 A.2d 385, 387 (1980) (internal citations omitted). Construing the complaint broadly and liberally, the plaintiff alleges that his termination was occasioned by his exercise of his “right to speak freely and publicly on matters of public concern ...” Fourth Amended Complaint, Count II, ¶ 105. The Court finds that the



plaintiff has alleged sufficient facts that satisfy the elements required for recovery for wrongful discharge. For the preceding reasons, the motion to strike Count XIII is denied.

Miller v. Mashantucket Pequot Gaming Enterprise, 2 Mash. Rep. 418 (1998)

“The due process clause of the ICRA applies to all tribal proceedings: criminal, civil and administrative.” Johnson v. Mashantucket Pequot Gaming Enterprise, 2 Mash. 273, 276, 2 Mash.Rep. 249, 255 (1998), quoting Dugan v. Mashantucket Pequot Gaming Enterprise, 1 Mash. 104, 105, 1 Mash.Rep. 142, 145 (1995). The ICRA is to be interpreted in a manner “consistent with Tribal practice or custom.” I M.P.T.L. ch. 3, § 10(b). Here, there is no distinctively Mashantucket Pequot tribal custom or tradition or cultural norm which is offered in support of the amendment to the Board of Review policy. In the absence of a clearly demonstrated tribal custom or tradition, and because many provisions of the ICRA, including the due process clause, are in language nearly identical to the Bill of Rights and state and federal constitutions, the court will apply general federal and state principles of due process. Johnson v. Mashantucket Pequot Gaming Enterprise, 2 Mash. 273, 276-277, 2 Mash.Rep. 249, 255-57 (1998).

The ordinances and policies of the Mashantucket Pequot Tribe “manifestly accord job security protections to employees of the Gaming Enterprise. Once the property interest in employment is conferred, the employee cannot be deprived of that interest without due process safeguards.” Johnson v. Mashantucket Pequot Gaming Enterprise, 1 MPR 15, 19, 1 Mash.App. 21, 26 (1996). The Supreme Court “consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.... The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). The Supreme Court has “described ‘the root requirement’ of the Due Process Clause as being ‘that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.’ “ Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985) (emphasis in original). “This principle requires some kind of hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment.” Bartlett v. Krause, 209 Conn. 352, 372, 551 A.2d 710 (1988) (quotation marks omitted), citing Loudermill, supra at 542, 105 S.Ct. 1487.

The amended Board of Review policy does not provide the plaintiff with any kind of hearing or opportunity to be heard regarding the circumstances of the termination of his employment, for violating the Gaming Enterprise’s attendance standards, either before or after his employment is terminated. The plaintiff must be accorded “a meaningful opportunity to be heard.” Johnson v. Mashantucket Pequot Gaming Enterprise, 2 Mash. 273, 279, 2 Mash.Rep. 249, 260 (1998), quoting Tedesco v. Stamford, 222 Conn. 233, 242, 610 A.2d 574 (1992). If this court could consider the plaintiff’s claim under a grant of original and general jurisdiction, or if the plaintiff had brought an action pursuant to legislation authorizing this court to consider the plaintiff’s due process claim, this court would find that the plaintiff was not afforded the “root requirement” of an opportunity to be heard at a meaningful time before the termination of his protected property interest in continued employment, in violation of his due process rights under the Indian Civil Rights Act. For the reasons discussed infra, however, this court does not have jurisdiction

to consider this claim in an action brought pursuant to the provisions of the Employee Appeal Ordinance.

Jones v. Mashantucket Pequot Gaming Enterprise, 2 Mash. Rep. 412 (1998)

“The due process clause of the ICRA applies to all tribal proceedings: criminal, civil and administrative.” Johnson v. Mashantucket Pequot Gaming Enterprise, 2 Mash. 273, 276, 2 Mash.Rep. 249, 255 (1998), quoting Dugan v. Mashantucket Pequot Gaming Enterprise, 1 Mash. 104, 105, 1 Mash.Rep. 142, 145 (1995). The ICRA is to be interpreted in a manner “consistent with Tribal practice or custom”. I M.P.T.L. ch. 3, § 10(b). Here, there is no distinctively Mashantucket Pequot tribal custom or tradition or cultural norm which is offered in support of the amendment to the Board of Review policy. In the absence of a clearly demonstrated tribal custom or tradition, and because many provisions of the ICRA, including the due process clause, are in language nearly identical to the Bill of Rights and state and federal constitutions, the court will apply general federal and state principles of due process. Johnson v. Mashantucket Pequot Gaming Enterprise, 2 Mash. 273, 276-277, 2 Mash.Rep. 249, 255-57 (1998).

Chase v. Mashantucket Pequot Gaming Enterprise, 2 Mash. Rep. 387 (1998)

The plaintiff also complains that his Board of Review hearing was defective in that he was deprived of his rights under the due process clause of the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq. because the Gaming Enterprise did not provide the plaintiff with the documentary evidence (R. at 12-14), submitted at the hearing by Charles Petchark, at least one week in advance before the hearing as required under the Board of Review Policy. (R. at 110). “The ability of any employee to defend against management’s accusations ... is essential, not only to gain a favorable result at the administrative level before the Board of Review, but also to develop a complete and balanced record for meaningful judicial review in the event of an appeal to the Tribal Court.” Johnson v. Mashantucket Pequot Gaming Enterprise, 1 MPR 15, 20, 1 Mash.App. 21, 27 (1996). “Adequate notice of evidence submitted against the plaintiff is a ‘fundamental requisite’ of his due process rights under the Indian Civil Rights Act.” Morris v. Mashantucket Pequot Gaming Enterprise, 3 Mash. 94, 97, 2 Mash.Rep. 358, 364 (1998), citing Dugan v. Mashantucket Pequot Gaming Enterprise, 1 Mash. 104, 106, 1 Mash.Rep. 142, 146-47 (1995). “[D]ue process requires that no one may be deprived of the facts on which the Board of Review or President/CEO is asked to act.... Likewise ‘no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary.’ “ Wood v. Mashantucket Pequot Gaming Enterprise, 1 Mash. 214, 217, 1 Mash.Rep. 294, 300 (1996)(internal citations omitted.)

Here, the Gaming Enterprise did not allow the plaintiff an opportunity to see the two documents submitted to the Board by Petchark. Thereafter, the documents were reviewed by the President/CEO. Since the Board of Review had an opportunity to read the reports before and during Mr. Petchark’s testimony, the plaintiff therefore should have been afforded the same opportunity. The Gaming Enterprise’s refusal to afford the plaintiff an opportunity to see copies of documentary evidence against him before submission to the Board of Review, and thereafter to the President/CEO, deprived the plaintiff of his due

process right to confront the evidence against him. See *Wood* at 217-218, 1 Mash.Rep. at 299-301. Although the documents did not directly relate to the gossiping incident, it is possible that the Board considered them against the plaintiff as evidenced by the Board's finding that: "Ron's veracity was an issue that was looked at." (R. at 6). The Court, therefore, cannot conclude that the deprivation of notice and a reasonable opportunity to confront the Cirrito and Golas documents was not prejudicial to the plaintiff and thus, cannot conclude that the deprivation was harmless error.

*Mercurio v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. Rep. 375 (1998)

The plaintiff also complains that she was deprived of her rights under the Indian Civil Rights Act, 25 U.S.C.A. 1302(a), because she was denied the right to call or cross-examine witnesses at her Board of Review Hearing. An employee is entitled to exercise his or her right to call and cross-examine witnesses at hearings before a Board of Review. *Johnson v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 273, 280, 2 Mash.Rep. 249, 260- 61 (1998). In the instant action there was only one witness, whose testimony was limited to the benefits that could have accrued to the plaintiff's daughter as a result of receiving credit for more cars than she actually parked. The plaintiff, who was represented by an attorney at the hearing, did not disagree with that testimony. In his summary, the plaintiff's attorney mentioned that "we're well aware now of the early outs, or ... other additional benefits that the high [car jockey] can get," without disputing the testimony of the witness. Similarly, the plaintiff did not offer or attempt to present any additional evidence or witnesses at her Board of Review hearing, and does not complain that she was denied an opportunity to present evidence in support of her position that she made an inadvertent mistake. The plaintiff has not demonstrated that she was harmed in any way by an inability to present evidence or call or cross-examine witnesses. Even assuming *arguendo* that the plaintiff's rights to due process under the Indian Civil Rights Act were violated, there is no claim or evidence that she was prejudiced by an inability to exercise those rights. In the absence of harm to the plaintiff, she is not entitled to relief on the ground that she was deprived of her right to due process. *Chickering v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 41, 42, 2 Mash.App. 1, 3 (1998) (Latimer, J.).

*Morris v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. Rep. 358 (1998)

By this time there is no doubt or dispute that "an employee is entitled to retained counsel before the Board of Review." *Johnson v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 15, 21, 1 Mash.App. 21, 29 (1996), and that the Gaming Enterprise's refusal to allow an attorney to represent an employee is a violation of an employee's rights under the due process clause of the Indian Civil Rights Act. *Johnson v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 115, 121, 1 Mash.Rep. 165, 177 (1995), *aff'd*, 1 MPR 15, 21, 1 Mash.App. 21, 28-29 (1996). The Gaming Enterprise contends that the plaintiff waived his right to an attorney because he did not demand at the hearing that he be represented by counsel. At the hearing, however, the plaintiff complained that "my attorney can't get in and see what is in [the investigative reports submitted to the Board of Review]" (Tr. at 11), and that "my attorney can't be here because my rights stopped at Route 2." (Tr. at 22). Even if the plaintiff had not asserted his right to an attorney at the

Board of Review Hearing, a failure to assert that right would not preclude him from raising it on appeal. *Thivierge v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 242, 243, 1 Mash.Rep. 325, 326-27 (1996); *Colvin v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 251, 252, 1 Mash.Rep. 341, 342-43 (1996).

The plaintiff was deprived of his right to an attorney at his Board of Review hearing in violation of the due process clause of the Indian Civil Rights Act. On this ground alone his appeal must be sustained.

The plaintiff also asserts that he was deprived of his due process right to cross-examine witnesses when, on several occasions, Mr. Grillo refused to answer his questions and the Gaming Enterprise employee relations associate stated that “Sam is not allowed to respond to your questions ...”. “[D]ue process requires that proceedings before a Board of Review must include the right to present evidence orally and the right to cross-examine adverse witnesses or evidence.” *Johnson v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 273, 277, 2 Mash.Rep. 249, 257 (1998), quoting *Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 104, 106, 1 Mash.Rep. 142, 146-47 (1995). “In appeals brought under the Employee Appeal Ordinance, no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary.” *Johnson v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 273, 277, 2 Mash.Rep. 249, 257 (1998), quoting *Wood v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 214, 217, 1 Mash.Rep. 294, 299- 300 (1996). The Gaming Enterprise’s refusal to allow the plaintiff to ask Mr. Grillo questions about his investigation or the materials presented to the Board of Review deprived the plaintiff of his right to cross-examination, in violation of the due process clause of the Indian Civil Rights Act.

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Adequate notice of evidence submitted against the plaintiff is a “fundamental requisite” of his due process rights under the Indian Civil Rights Act. *Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 104, 106, 1 Mash.Rep. 142, 146 (1995). The Gaming Enterprise’s refusal to afford the plaintiff an opportunity to see copies of documentary evidence against him which was submitted to the Board of Review, and thereafter reviewed by the President/CEO, deprived the plaintiff of his right to adequate notice in violation of the due process clause of the Indian Civil Rights Act.

*Grossi v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. Rep. 314 (1998)

The right to present and cross-examine witnesses is a substantial right of the plaintiff and the violation of this right may well have had an influence on the findings of the Board of Review and the President/CEO. Thus, this Court cannot conclude that the deprivation of the plaintiff’s due process right was harmless. See *Chickering v. Mashantucket Pequot Gaming Enterprise*, 1 MPR 41, 42, 2 Mash.App. 1, 2-4 (1998) (harmless error exists only where all “basic procedural due process rights were accorded the appellant.”)

The Revised Board of Review policy’s prohibition against the presentation and cross-examination of witnesses violates the due process clause of the Indian Civil Rights Act. It is well established that the remedy for a due process violation is, as stated in *Thivierge*, *Colvin*, and *Johnson I*, a remand of the matter for a new Board of Review hearing. *Colvin* at 252, 1 Mash.Rep. at 342-43. Such is the appropriate remedy in this appeal.

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The plaintiff asserts that due process under the Indian Civil Rights Act requires that Gaming Enterprise employees must be afforded a pretermination hearing. In propounding his argument, the plaintiff relies heavily on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). In *Loudermill*, the Court held that “The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.” *Id.* at 545, 105 S.Ct. 1487. The Court opined, however, that “In general, ‘something less’ than a full evidentiary hearing is sufficient prior to adverse administrative action ... It should be an initial check against mistaken decisions-essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” *Id.* at 545-546, 105 S.Ct. 1487. The Court found that so long as the employee was afforded a pretermination opportunity to respond, coupled with post-administrative procedures allowing for a full hearing, that due process requirements were met. *Id.* at 547, 105 S.Ct. 1487.

The record reveals that the plaintiff was suspended pending further investigation by Official Notice of Unsatisfactory Performance dated April 22, 1997. (R. at 13). Although a section entitled “Employee’s Comments” is provided on the form, it is empty. On that same date, the plaintiff filed a detailed Incident Report giving his version of the encounter with Cook. (R. at 14). The plaintiff was given two opportunities to respond in writing to the charges prior to being terminated on May 1, 1997. The pretermination opportunity to respond, coupled with the post-termination procedures delineated by *Johnson III*, would have provided the plaintiff with all the process that was due.

*Johnson v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. Rep. 249 (1998)

“Under the federal Indian Civil Rights Act, Indian tribes are prohibited from depriving any person of liberty or property without due process of law. The due process clause of the ICRA applies to all tribal proceedings: criminal, civil and administrative.” *Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 104, 105, 1 Mash.Rep. 142, 145 (citation omitted). The Mashantucket Pequot Tribal Council expressly adopted the ICRA as Tribal law to be applied in proceedings in the Tribal Court. I M.P.T.L., ch. 3, § 10. Although the Tribal Court is not required to interpret the ICRA in the same manner as state or federal courts have interpreted the same or similar language, I M.P.T.L., ch. 3, § 10(b), many provisions of the ICRA, including the due process clause, are in language taken nearly verbatim from the Bill of Rights of the United States Constitution and state constitutions. See *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079, 1082 (8th Cir.1975). For this reason decisions of federal and state courts, while not binding on this court, are a useful source of guidance. *Mamiye v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 141, 142, 2 Mash.Rep. 59, 61 (1997). “Congress passed the ICRA to provide some form of ‘Constitutional’ protection to individuals who come under the jurisdiction of an Indian tribe”. *Johnson I* at 118, 1 Mash.Rep. at 171. “Congress also intended to promote the well established federal policy of ‘furthering Indian self-government.’ “ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). The purpose of the ICRA was not to apply, in a wholesale fashion, federal constitutional provisions to American Indian Tribes; but rather, to allow the implementation of unique political, cultural and economic needs of

the various tribal governments. *Id.* Federal and tribal courts have acknowledged that Congress did not intend that due process principles of the Constitution would disrupt “settled tribal customs and traditions.” *Johnson I* at 118, 1 Mash.Rep. at 172. The ICRA is to be interpreted in a manner “consistent with Tribal practice or custom.” I M.P.T.L. ch. 1, § 10(b).

The Gaming Enterprise contends that the Tribal Council’s adoption of the Amended Policy is an exercise of its power of self government, that this policy establishes and defines the nature and degree of due process available to terminated or suspended employees of the Gaming Enterprise, and that the court should look no further than the Amended Policy in its search for applicable standards of due process. The Gaming Enterprise argues that the yardstick by which the Amended Policy should be measured to determine compliance with the requisites of due process is the Amended Policy itself, because it is reflective of the Mashantucket Pequot Tribe’s right of self-government and customs and traditions. This is in sharp contrast to its position in *Johnson I*, where “no tribal custom or tradition [was] argued to be at risk by the application of general U.S. Constitutional principles of due process.” *Johnson I* at 118, 1 Mash.Rep. at 172.

This court is alert to opportunities to implement distinctive customs and traditions of the Mashantucket Pequot Tribe. When and as it does so, however, the court must have a clear understanding of the nature and extent of those customs and traditions. In this action, other than the generalized and undisputed assertion of the right of self-government, there is no evidence of a “settled tribal custom or tradition” which will be disrupted by the application of general federal and state principles of due process. “[N]o distinctively Mashantucket Pequot tradition or cultural norm has been offered to justify abrogating an employee’s due process rights as understood under general constitutional principles in favor of a lesser standard.” *Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 104, 106, 1 Mash.Rep. 142, 146 (1995). “[T]he right to due process ‘is conferred not by legislative grace, but by [ICRA] guarantee.’” *Johnson I* at 119, 1 Mash.Rep. at 173, citing *Bartlett v. Krause*, 209 Conn. 352, 369, 551 A.2d 710 (1988). In the absence of a clearly demonstrated tribal custom or tradition, this due process guarantee is “not diminished by the fact that the [Tribal Council] may have specified its own procedures that it may deem adequate for determining [employee appeals].” *Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). See also *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). This court, as did the courts in *Johnson I* and *Johnson II*, will apply general federal and state principles of due process.

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The plaintiff is entitled to a hearing before the Board of Review at which he may exercise his right of cross-examination. See *Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 104, 106, 1 Mash.Rep. 142, 145-47 (1995) and *Wood v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 214, 217, 1 Mash.Rep. 294, 299-300 (1996) and the cases cited therein. The Amended Policy, which allows the plaintiff to submit questions only in advance of the Board of Review hearing and only in the form of written interrogatories, and which allows the employee relations department to determine whether such questions will be asked, and which does not allow the plaintiff to question witnesses at the hearing, erroneously deprives the plaintiff of his right of cross-examination in violation of the due process clause of the Indian Civil Rights Act, 25 U.S.C. § 1302.

Fletcher v. Mashantucket Pequot Tribe, 2 Mash. Rep. 215 (1997)

Complaint 3 represents such a “shotgun” pleading. The plaintiff fails to identify, as to each count, which particular defendants the claims are asserted against. Each count of the complaint generally seeks relief against “defendants,” however, as mentioned previously, certain of these counts cannot be maintained against certain of the defendants. In addition, several of the counts seek relief under numerous legal theories. For example, Count I claims relief under both the United States Constitution and the laws and constitution of the State of Connecticut for alleged violations of free speech; Count II also seeks relief for violations of the right to free speech but bases the claim on the federal Indian Civil Rights Act and the First Amendment to the United States Constitution; and Count IV seeks relief for alleged due process violations pursuant to both the federal Indian Civil Rights Act and the United States Constitution. Rule 10(b) requires each claim for relief to be presented in a separate count. Given the present cumbersome state of Complaint 3, the court agrees with the defendants’ position that it will be extraordinarily difficult to frame a responsive pleading. Moreover, unless the pleading is amended to more specifically reference the individual defendants with regard to each claim, individual defendants may find themselves burdened with responding to claims that are not even addressed to him or her. As the Anderson court opined, “Experience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court’s docket becomes unmanageable, the litigants suffer, and society loses confidence in the court’s ability to administer justice.” Anderson at 366.

In re Minor Child, 1 Mash. Rep. 123 (1997)

It is well established that the provisions of the United States Constitution including the Bill of Rights are not applicable to Indian tribes. *Talton v. Mayes* 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1895). The Mashantucket Pequot Tribe has adopted as tribal law the provisions of the federal Indian Civil Rights Act, [hereinafter “ICRA”] 25 U.S.C. § 1301 et seq. and has made its provisions applicable to Tribal Court proceedings. I M.P.T.L. ch. 3, § 10. Several of the provisions of ICRA are identical in language to that found in the U.S. Constitution. Caselaw supports the principle that the guarantees of ICRA should be considered flexibly and in light of tribal traditions and governmental structures. *Wounded Head v. Tribal Council of Oglala Sioux*, 507 F.2d 1079 (8th Cir.1975), *Tom v. Sutton* 533 F.2d 1101 (9th Cir.1976).

The Tribe in enacting the Child Protection and Family Preservation Law stated that the policy of the Tribe is: “To protect the health and welfare of children and families within the Mashantucket Pequot community, ... [and] to preserve the unity of the family ...” V M.P.T.L. ch. 1, § 1. The Tribe has a substantial interest in protecting its minor tribal members, but also acknowledges the importance of family integrity. The parent’s right to family integrity is a protected one. “The rights to conceive and to raise one’s children have been deemed ‘essential,’ ‘basic civil rights of man,’ and ‘rights far more precious ... than property rights.’” *In re Juvenile Appeal*, 189 Conn. 276, 284, 455 A.2d 1313, 1318 (1983) citing *Stanley v. Illinois*, 405 U.S. 645, 655, 92 S.Ct. 1208, 31 L.Ed.2d 551

(1972). Thus there are at times competing interests that must be taken into account in custody proceedings.

In administering the Tribe's policy in child welfare matters, this court is mindful of the limitations imposed by ICRA when the Tribe undertakes any form of involuntary intervention in tribal family affairs. Under federal and Connecticut caselaw, "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, and the Ninth Amendment." In re Juvenile Appeal at 1318 citing Stanley v. Illinois, at 651, 92 S.Ct. 1208. Thus, the court must proceed carefully when important due process rights of parents are implicated as they are in the Tribe's motion. In the Connecticut General Statutes, provisions regarding the protection of minor children from abuse or neglect are disbursed throughout both Title 17a, Chapter 391a "Child Welfare" and Title 46b, Chapter 815t "Juvenile Matters." In the case, In Re Juvenile Appeal, the Connecticut Supreme Court opined that:

It is axiomatic that statutes on a particular subject be 'considered as a whole, with a view toward reconciling their separate \*126 parts in order to render a reasonable overall interpretation ... We must avoid a consequence which fails to attain a rational and sensible result which bears most directly on the object which the legislature sought to obtain. This is no less true when the legislature has chosen to place related laws in different parts of the General Statutes.'

Id. at 1320 (internal citations omitted).

The situation of tribal law at present is very similar to that confronted by the court in In re Juvenile, in that provisions regarding minor children are found in both the Child Protection and Family Preservation Law and in the juvenile provisions of the Criminal Court Law. In order that the court "attain a rational and sensible result which bears most directly on the object which the [Tribal Council] sought to obtain," this court finds that provisions of the child protection law may read together with tribal juvenile provisions located elsewhere within tribal law. Id.

Thivierge v. Mashantucket Pequot Gaming Enterprise, 2 Mash. Rep. 14 (1997)

The nature of the evidence necessary to support a finding of civil indirect contempt is one of first impression before the Mashantucket Pequot Tribal Court. Section II of the Employment Appeal Ordinance, VIII M.P.T.L., ch. 1, provides that this Court shall first look to tribal law for direction in its decision-making; however, in the event no such tribal law or precedent exists, "[t]he Court may be guided, but shall not be bound by the principles of law applicable to similar claims arising under the laws of the State of Connecticut or of the United States." Judicial sanctions for civil contempt, under both federal and state court case law, include both a fine or imprisonment. United States v. United Mine Workers, 330 U.S. 258, 303-304, 67 S.Ct. 677, 91 L.Ed. 884 (1947); Board of Education of the City of Shelton v. Shelton Education Association, et al., 173 Conn. 81, 376 A.2d 1080, 1082 (1977). Due to the risk of the loss of liberty attendant to a finding of civil contempt, certain due process safeguards are required by the federal Indian Civil Rights Act, 25 U.S.C. § 1302(8). See Johnson v. Mashantucket Pequot Gaming Enterprise, 1 Mash. 115, 117, 1 Mash.Rep. 165, 170- 71 (1995) referring to Dugan v. Mashantucket Pequot Gaming Enterprise, 1 Mash. 104, 105-106, 1 Mash.Rep. 142, 144-47 (1995).



United States and Connecticut courts have long recognized that “due process requires, therefore, that one accused of indirect contempt be accorded a “fair hearing,” and this includes the presentation of competent evidence in order to prove as a fact the occurrence of the alleged contemptuous conduct.” *Cologne, et al. v. Westfarms Associates, et al.*, 197 Conn. 141, 496 A.2d 476, 483 (1983) citing *Fisher v. Marubeni Cotton Corporation*, 526 F.2d 1338, 1342 (8th Cir.1975). Under Connecticut common law, (while not binding on this court, but nonetheless instructive) “a charge of indirect contempt of court, in the absence of an admission of contempt, had to be proved by sufficient competent evidence, including testimony under oath.” *Westfarms*, at 483, 496 A.2d 476, (internal citations omitted). In *Cologne v. Westfarms Associates*, the Supreme Court of Connecticut vacated a Superior Court judge’s finding of civil contempt, holding that unsworn testimony and representations of opposing counsel were not sufficient to support the contempt findings. *Id.* at 485, 496 A.2d 476.

*Colvin v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. Rep. 16 (1997)

The nature of the evidence necessary to support a finding of civil indirect contempt is one of first impression before the Mashantucket Pequot Tribal Court. Section 11 of the Employment Appeal Ordinance, VIII M.P.T.L. ch. 1, provides that this Court shall first look to tribal law for direction in its decision-making; however, in the event no such tribal law or precedent exists, “[t]he Court may be guided, but shall not be bound by the principles of law applicable to similar claims arising under the laws of the State of Connecticut or of the United States.” Judicial sanctions for civil contempt, under both federal and state court case law, include both a fine or imprisonment. *United States v. United Mine Workers*, 330 U.S. 258, 303-304, 67 S.Ct. 677, 91 L.Ed. 884 (1947); *Board of Education of the City of Shelton v. Shelton Education Association, et al.*, 173 Conn. 81, 376 A.2d 1080, 1082 (1977). Due to the risk of the loss of liberty attendant to a finding of civil contempt, certain due process safeguards are required by the federal Indian Civil Rights Act, 25 U.S.C. § 1302(8). See *Johnson v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 115, 117, 1 Mash.Rep. 165, 170- 71 (1995) referring to *Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 104, 105-106, 1 Mash.Rep. 142, 144-47 (1995).

United States and Connecticut courts have long recognized that “due process requires, therefore, that one accused of indirect contempt be accorded a ‘fair hearing,’ and this includes the presentation of competent evidence in order to prove as \*19 a fact the occurrence of the alleged contemptuous conduct.” *Cologne, et al. v. Westfarms Associates, et al.*, 197 Conn. 141, 496 A.2d 476, 483 (1983) citing *Fisher v. Marubeni Cotton Corporation*, 526 F.2d 1338, 1342 (8th Cir.1975). Under Connecticut common law, (while not binding on this court, but nonetheless instructive) “a charge of indirect contempt had to be proved by sufficient competent evidence, including testimony under oath.” *Westfarms* at 483, 496 A.2d 476 (internal citations omitted). In *Cologne v. Westfarms Associates*, the Supreme Court of Connecticut vacated a Superior Court judge’s finding of civil contempt, holding that unsworn testimony and representations of opposing counsel were not sufficient to support the contempt findings. *Id.* at 485, 496 A.2d 476.

Atkins v. Brown, 1 Mash. Rep. 343 (1996)

This court has previously determined that Gaming Enterprise employees have a limited property interest in their employment under the Gaming Enterprise Personnel Policies and the Ordinance, which interest is protected by Section 8 of the Federal Indian Civil Rights Act. It held that the Gaming Enterprises prohibition against attorney representation of employees before the Board of Review violated the due process clause of ICRA. It found that the remedy permitted a new Board of Review Hearing with the presence of counsel if desired by the Plaintiff. Johnson I, supra, at p. 121, 1 Mash.Rep. at pp. 175-77.

In Phyllis S. Thivierge v. G. Michael Brown, CEO, Mashantucket Pequot Gaming Enterprise, 1 Mash. 242, 1 Mash.Rep. 325, 1996 (Quinn, J.), this court held that in limited circumstances a claim of violation of an employee's due process rights can be sustained even where the employee did not attempt to exercise those rights prior to resorting to his remedy at law. For those employment appeals arising from terminations of employment when Board of Review Hearings were held prior to the entry of the decision in Johnson I, the Defendant's prehearing procedures advised each Plaintiff that counsel could not attend the Board of Review Hearing. Such procedures violated the due process clause of ICRA. The remedy for this violation is as stated in Thivierge and Johnson 1, a remand of the matter for a new Board of Review hearing.

Colvin v. Brown, 1 Mash. Rep. 341 (1996)

This court has previously determined that Gaming Enterprise employees have a limited property interest in their employment under the Gaming Enterprise Personnel Policies and the Ordinance, which interest is protected by Section 8 of the Federal Indian Civil Rights Act. It held that the Gaming Enterprises prohibition against attorney representation of employees before the Board of Review violated the due process clause of ICRA. It found that the remedy permitted a new Board of Review Hearing with the presence of counsel if desired by the Plaintiff. Johnson I, supra, p. 121, 1 Mash.Rep. 175-77.

In Phyllis S. Thivierge v. G. Michael Brown, CEO, Mashantucket Pequot Gaming Enterprise, EA 96-102, July 18, 1996 (Quinn, J.), this court held that in limited circumstances a claim of violation of an employee's due process rights can be sustained even where the employee did not attempt to exercise those rights prior to resorting to his remedy at law. For those employment appeals arising from terminations of employment when Board of Review Hearings were held prior to the entry of the decision in Johnson I, the Defendant's prehearing procedures advised each Plaintiff that counsel could not attend the Board of Review Hearing. Such procedures violated the due process clause of ICRA. The remedy for this violation is as stated in Thivierge and Johnson I, a remand of the matter for a new Board of Review Hearing.

Thivierge v. Brown, 1 Mash. Rep. 325 (1996)

This court has previously determined that Gaming Enterprise employees have a limited property interest in their employment under the Gaming Enterprise Personnel Policies

and the Ordinance, which interest is protected by Section 8 of the Federal Indian Civil Rights Act. It held that the Gaming Enterprise's prohibition against attorney representation of employees before the Board of Review violated the Due Process Clause of the Indian Civil Rights Act. It found that the remedy permitted a new Board of Review hearing with the presence of counsel if desired by the Plaintiff. Johnson I, supra, p. at 121, 1 Mash.Rep. at 175-77.

There is one distinguishing fact between this case and Johnson. In Johnson, the Plaintiff came to the Board of Review hearing with his counsel. Counsel was prohibited from coming into the Board of Review hearing and participating in the hearing process. Here, the Plaintiff did not bring her counsel to the hearing. She states that to have done so would have been to no avail, in view of the prehearing information provided to her.

While this court has not yet passed on the issue of whether or not a claim of a violation of an employee's due process rights can be based on circumstances where the employee did not attempt to exercise those rights prior to resorting to her remedy before the court, Connecticut courts have held in similar circumstances that "the law does not require the doing of a useless thing", *Corsino v. Grover*, 148 Conn. 299, 308, 170 A.2d 267 (1961). Thus the obligation to attempt to exercise the right fully before taking legal action can be said to have been excused where the facts were such that its exercise would have been a nullity.

The Defendant claims that since the Plaintiff did not come to the hearing with counsel present nor assert her right to counsel at the hearing, she is not now entitled to claim a denial of due process. Such an argument is in many ways analogous to a claim that the Plaintiff is required to exhaust her administrative remedies prior to proceeding in court and that by failing to do so, she cannot now raise such claims. To take the argument one step further, although no such argument was made to the court, the claim would be that the court lacks jurisdiction to hear this claim due to the exhaustion doctrine.

The court does not read Johnson I and II as narrowly as the Defendant nor believe that the law is so restrictive, specifically as it relates to due process rights to which an employee is entitled. "Due process assumes reasonable procedural protection for a fair resolution of the issue presented in a given case", Johnson II, p. 15, quoting *Plato v. Roudebush*, 397 F.Supp. 1295, 1310 (D.Md.1975), see also *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942). In Johnson II, the court affirmed the holding that one of the procedural protections to which an employee is entitled is representation at the Board of Review hearing.

*McGill v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. Rep. 196 (1996)

The plaintiff points to the fact that Employee A, who was a tribal member, was reinstated to his job with the Gaming Enterprise at the request of the Tribal Council. Whatever the Tribal Council may have done for this employee, it was not the result of an appeal process whereby it was required to take action on behalf of the employee. One isolated incident of consideration being accorded to a tribal member employee does not establish an appeal as of right to the Tribal Council by all employees of the Gaming Enterprise. Likewise, a single, ad hoc request that a tribal member be given another chance at employment is not a violation of the plaintiff's rights under the Indian Civil Rights Act.

Cirioni v. Mashantucket Pequot Gaming Enterprise, 1 Mash. Rep. 207 (1996)

The plaintiff points to the fact that Employee A, who was a tribal member, was reinstated to his job with the Gaming Enterprise at the request of the Tribal Council. Whatever the Tribal Council may have done for this employee, it was not the result of an appeal process whereby it was required to take action on behalf of the employee. One isolated incident of consideration being accorded to a tribal member employee does not establish an appeal as of right to the Tribal Council by all employees of the Gaming Enterprise. Likewise, a single, ad hoc request that a tribal member be given another chance at employment is not a violation of the plaintiff's rights under the Indian Civil Rights Act.

Shea v. Mashantucket Pequot Gaming Enterprise, 1 Mash. Rep. 219 (1996)

The plaintiff points to the fact that Employee A, who was a tribal member, was reinstated to his job with the Gaming Enterprise at the request of the Tribal Council. Whatever the Tribal Council may have done for this employee, it was not the result of an appeal process whereby it was required to take action on behalf of the employee. One isolated incident of consideration being accorded to a tribal member employee does not establish an appeal as of right to the Tribal Council by all employees of the Gaming Enterprise. Likewise, a single, ad hoc request that a tribal member be given another chance at employment is not a violation of the plaintiff's rights under the Indian Civil Rights Act.

Nigrelli v. Mashantucket Pequot Gaming Enterprise, 1 Mash. Rep. 183 (1996)

It is specifically noted that the "Gaming Commission" provided the plaintiff with a notice, hearing, and an opportunity to be heard. The record discloses that a hearing was in fact conducted on June 7, 1995, and the decision from which the plaintiff appeals was the decision of June 23, 1995, issued by the "Gaming Commission", not the "Gaming Enterprise". The Court is not aware, nor has any party suggested that the due process requirements of the Indian Civil Rights Act of 1968 require not only notice and an opportunity for a hearing, but also the right to appeal that hearing to a tribal court. No issues concerning the due process hearing before the "Gaming Commission" have been brought to the Court's attention.

Johnson v. Mashantucket Pequot Gaming Enterprise, 1 Mash Rep. 165 (1996)

In 1968, the United States Congress passed the ICRA to provide some form of "Constitutional" protection to individuals who come under the jurisdiction of an Indian tribe. The Mashantucket Pequot Tribe adopted the ICRA as tribal law applicable in Tribal Court proceedings. M.P.T.O. 113093-03, Sec. 10. The guarantees afforded to individuals under the ICRA, such as the right to due process, are similar but not identical to those provided for under the U.S. Constitution. See *White Eagle v. One Feather*, 478 F.2d 1311, 1312- 1313 (8th Cir.1973). Both federal and tribal courts have acknowledged \*172 that Congress did not intend the due process principles of the Constitution to disrupt settled tribal customs and traditions. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-72, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), *In Re The Welfare of D.D.*, 22 ILR 6020

(Port Gam. S'Klallam Ct.App., Jan. 7, 1994). In this appeal, no tribal custom or tradition has been argued to be at risk by the application of general U.S. Constitutional principles of due process.

It is clear from an examination of the ICRA that the requirement of free counsel for an indigent person in a criminal proceeding under the U.S. Constitution is not included. U.S. CONSTIT. amend. VI. See *Tom v. Sutton*, 533 F.2d 1101, 1105 (9th Cir.1976). Paragraph 6 of Section 1302 provides in relevant part that no Indian tribe shall “deny any person in a criminal proceeding the right ... at his own expense to have the assistance of counsel for his defense ...” *Id.* The right to counsel in civil proceedings is not explicitly guaranteed.

What is at issue in this case is the validity of the prohibition contained in the Board of Review policy against representation by an attorney of an employee at the Board hearing. The policy provides that “no attorney can be present representing the [Gaming Enterprise] or the disciplined employee.” It was on the basis of this policy that the plaintiff was denied representation by Attorney Dixon in his Board of Review hearing. Paragraph 8 of the ICRA provides that no Indian tribe shall “deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law ...” The plaintiff argues that the attorney prohibition violates the Due Process Clause of the ICRA.

It must first be acknowledged that the plaintiff’s ICRA claim depends upon him having a property right in continued employment as a slot technician. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). If the plaintiff has such a right then the Tribe cannot deprive him of this property right without due process. *Id.* Employment with the Mashantucket Pequot Gaming Enterprise is analogous to employment with a federal, state or municipal agency. Such employment does not, in and of itself, give rise to a property interest for due process purposes. Property interests are not created by the U.S. Constitution or by the ICRA, their creation and dimensions “are defined by existing rules or understandings that stem from an independent source such as [tribal] law--rules or understanding that secure certain benefits and that support claims of entitlement to those benefits.” *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

A preeminent source of a property right in employment cases is the “for cause” requirement in the removal process of the employee. The existence of a “for cause” limitation for dismissal establishes an individual entitlement to continued employment that is significant enough to be considered a property right to which due process protection attaches. *Bartlett v. Krause*, 209 Conn. 352, 367, 551 A.2d 710 (1988). The Connecticut Supreme Court has held that personnel manuals may form the basis for an implied promise of continued employment. *Finley v. Aetna Life & Casualty Co.*, 202 Conn. 190, 520 A.2d 208 (1987).

The defendant argues that the sprinkling of disclamatory language throughout the employee handbook is sufficient to defeat any implied promise of continued employment continued therein. The claim of an “at will” relationship between the Gaming Enterprise and their employees is directly contravened by the substance of the \*173 personnel policies and the provisions of the Ordinance. Were the Court to adopt the defendant’s argument, the Ordinance and policies would be rendered meaningless. This Court finds

that the Tribal Council has divested the Gaming Enterprise of the ability to terminate, and in some circumstances, suspend, its employees at will....

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Once it is determined that due process applies, the question remains what process is due. It must be noted that the right to due process “is conferred not by legislative grace, but by [ICRA] guarantee.” Bartlett at 369, 551 A.2d 710, (citations omitted). While the Tribal Council may elect not to confer a property interest in (tribal) employment, it may not “authorize the deprivation of such an interest once conferred, without appropriate safeguards” without violating the provisions of the ICRA. Id. In order to determine what the “appropriate safeguards” are in the context of this appeal, the Court looks to the theory articulated by the United States Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) wherein the Court asserted that “due process is flexible and calls for such procedural protections as the particular situation demands.” Id. at 481, 92 S.Ct. 2593.

*Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. Rep. 142 (1995)

Under the federal Indian Civil Rights Act (hereinafter “ICRA”), 25 U.S.C.A. § 1302(8), Indian tribes are prohibited from depriving any person of liberty or property without due process of law. The due process clause of the ICRA applies to all tribal proceedings: criminal, civil and administrative. NATIONAL INDIAN JUSTICE CENTER, LEGAL EDUCATION SERIES: INDIAN CIVIL RIGHTS ACT 47, 60 (1988). The Mashantucket Pequot Tribe specifically adopted the ICRA as tribal law to be applied in proceedings in the Tribal Court. M.P.T.O. # 113093-03, Sec. 10.

The meaning of due process under the ICRA is similar to due process as interpreted under the fifth and fourteenth \*146 amendments to the United States Constitution, however, the meanings are not identical. See NATIONAL INDIAN JUSTICE CENTER, supra at 45. Both tribal and federal courts have acknowledged that Congress did not intend the due process principles of the Constitution to disrupt settled tribal customs and traditions. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-72, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), In *Re The Welfare of D.D.*, 22 ILR 6020 (Port Gam. S’Klallam Ct.App., Jan. 7, 1994). The editors of *FELIX COHEN’S HANDBOOK OF FEDERAL INDIAN LAW* (1982) state the problem as “one of interpreting the ICRA limitations in the context of tribal traditions and governmental structures.” Id. at 669. In this appeal, no distinctly Mashantucket Pequot tradition or cultural norm has been offered to justify abrogating an employee’s due process rights as understood under general Constitutional principles in favor of a lesser standard.

In determining employee appeals brought under the Ordinance, this court may be guided by principles of law applicable to similar claims arising under the laws of the State of Connecticut and of the United States. Sec. XI. Fundamental requisites of due process are adequate notice and the meaningful opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914), See e.g. *Tedesco v. Stamford*, 222 Conn. 233, 242, 610 A.2d 574 (1992). In *Lidy v. Sullivan*, 911 F.2d 1075 (5th Cir.1990), the Court concluded that parties to agency adjudications have an absolute due process right to confront and cross examine all evidence adverse to their position. Although Section VIII(d)(3) of the Ordinance provides that “no formal rules of evidence or procedure shall

be required ...,” ICRA requires that the hearing before the Board of Review conform to principles of due process. The hearing must include the right to present evidence orally and the right to cross examine adverse witnesses or evidence. See *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). These safeguards are critically important because many of the Gaming Enterprise’s employees, the plaintiff included, have a limited ability to communicate in writing and because many of the disciplinary controversies turn on the veracity of witnesses. See *id.*

**Appendix 3 – Indian Law Reporter (26 cases)**



<b>Name</b>	<i>Cheyenne River Housing Authority v. Howard</i>
<b>Date</b>	Sep. 23, 2005
<b>Court</b>	Cheyenne River Sioux Tribal Court of Appeals
<b>Case #</b>	No. A-04-008
<b>Judge(s)</b>	Pommersheim, Chasing Hawk, Clinton
<b>Citation</b>	32 ILR 6165
<b>Procedural History</b>	Appeal of order of eviction
<b>Facts</b>	Defendant Tribal Housing Authority instituted eviction of Plaintiff based on alleged failure to keep connected to utilities and failure to keep home in habitable condition. Plaintiff repeatedly failed to answer the Defendant's notices and failed to vacate the unit. This was a result of his involuntary commitment to a detoxification facility and his mandated inpatient treatment resulting from his alcohol dependency. The order for his involuntary commitment came from the trial court, although from a different judge. Plaintiff appeared pro se before the trial court in his eviction hearing, apparently directly from release from the detox facility. Plaintiff did not present witnesses and when asked to make his closing statement, proceeded to make a defense, which included statements concerning the Housing Authority's failure to deliver to him certain services and the fact that he'd since managed to have several of his utilities reconnected. The trial court granted the order of eviction.
<b>Issue</b>	Whether plaintiff's due process rights were violated by the trial court's failure to conduct a competency hearing, or appoint him counsel, and by its failure to swear him in as a witness when it became apparent that he was presenting a defense in his closing argument.
<b>Holding</b>	Reversed. The proceedings below resulted in a violation of plaintiff's due process rights under the ICRA
<b>Law Applied</b>	Tribal case law and traditions United States Supreme Court case law
<b>Notes</b>	<p>The court briefly cites <i>Mullane v. Central Hanover Bank</i>, 339 U.S. 306 (1950) for the proposition that timely notice and the opportunity to be heard and present evidence is basic to the concept of due process, but spends far more time discussing the "basic Lakota concepts of fairness and respect" and the ICRA, which both guarantee due process: "Every [CRST] court is bound both by customary Lakota concepts of respect and by the requirements of due process of law protected by the federal Indian Civil Rights Act...to assure that the parties before them are all afforded due process of law."</p> <p>The court cites <i>Clown v. Coast to Coast</i>, an earlier case from the CRST courts, which held that pro se parties are subject to the same rules as represented parties. The court notes that courts should nonetheless go out of its way to assure that pro se plaintiffs fully understand the proceedings, and have adequate notice and a reasonable opportunity to prepare their case.</p> <p>The court concludes that the trial court's order denied the plaintiff "fundamental fairness and respect due from a Lakota court and deprived him of due process of law in violation of the Indian Civil Rights Act."</p> <p>[In a footnote explicitly directed to the Tribal Council, the court discusses at length the need for and benefits of a public defender office in the event of cases such as this, and references the codes of other tribes which provide for such services.]</p>

<b>Name</b>	<i>In the Matter of the Suspension of Leisah C. Bluespruce</i>
<b>Date</b>	Aug. 23, 2004
<b>Court</b>	Cheyenne River Sioux Court of Appeals
<b>Case #</b>	04-006-A
<b>Judge(s)</b>	Pommersheim
<b>Citation</b>	31 ILR 6105
<b>Procedural History</b>	The tribal court issued an order suspending an attorney from practicing before the tribal court.
<b>Facts</b>	Appellant was suspended from practicing law before the Tribe's courts based on a motion to disqualify and sanction her, made by the Tribal Prosecutor. The trial court's order issued without a hearing and without any findings of fact.
<b>Issue</b>	Whether the failure to provide a hearing on the motion to suspend and sanction Appellant and the subsequent order of suspension violated Appellant's due process rights.
<b>Holding</b>	Vacated. The tribal court shall promptly hold a hearing.
<b>Law Applied</b>	None
<b>Notes</b>	"Since there is nothing on the record that exists before this Court to indicate ... a hearing was held and such a hearing is clearly required by the due process guarantee of the Indian Civil Rights Act...and of...the Law and Order Code of the Cheyenne River Sioux Tribe," a prompt hearing is ordered.

<b>Name</b>	<i>In the Matter of Tribal Council Ordinance 14</i>
<b>Date</b>	Sep. 24, 2004
<b>Court</b>	Cheyenne River Sioux Tribal Court of Appeals
<b>Case #</b>	04-001-A
<b>Judge(s)</b>	Pommersheim, Dupris, Jones
<b>Citation</b>	31 ILR 6141
<b>Procedural History</b>	Original action
<b>Facts</b>	The Tribe filed this declaratory action/complaint asking the court to hold that certain proposed amendments dealing with referendums were valid under the constitution and any other applicable law. The court published the complaint, which was answered by three enrolled members of the tribe.
<b>Issue</b>	Whether the amendments substantially impair the right of the people to petition for a referendum, or merely procedurally implement the right, and if they are merely procedural, whether they are constitutionally reasonable.
<b>Holding</b>	The amendments are unconstitutional.
<b>Law Applied</b>	Tribal case law and custom
<b>Notes</b>	<p>In support of its position that the amendments are constitutional, the tribe indicated that no tribal court cases dealt with the issue, and cited numerous state court cases which held that procedural rules relative to time limits for filing a referendum challenge are constitutional under the state constitutions. The Tribe acknowledged that state cases are not binding on this court, but in the absence of applicable tribal cases, the tribe asked the court to find such an unbroken line of cases as persuasive authority.</p> <p>The court declined to do so. <u>“It is not constitutionally persuasive because the line of state cases all assume a constitutional predicate that does not exist on the Cheyenne River Sioux Reservation [emphasis in original].”</u> The court noted that notice is that constitutional predicate, and in a footnote to that statement, the court states that “due process is a core guarantee of the Indian Civil Rights Act and Lakota tradition.” The court cites an Oglala Sioux civil case for the proposition that “Lakota tradition includes the due process concepts of notice and the opportunity to be heard.”</p> <p>The court reasons that in the state context, legislative actions are reported daily in various media forms, communicated to the public by various political parties, and filed with public officials. In contrast, the court notes that little, if any notice of that type is regularly available on the reservation, and for that reason the amendments are unconstitutional.</p>

<b>Name</b>	<i>High Elk v. Veit</i>
<b>Date</b>	Jan. 31, 2006
<b>Court</b>	Cheyenne River Sioux Tribal Court of Appeals
<b>Case #</b>	No. 05-008-A
<b>Judge(s)</b>	Pommersheim, Chasing Hawk, Clinton. Per Curiam
<b>Citation</b>	33 ILR 6033
<b>Procedural History</b>	Although styled as an interlocutory appeal of the tribal court's order, this court finds that this case is actually an appeal of a final collateral order from the tribal court that purported to garnish rents paid by second-in-time subleasees to Defendants and direct those payments to be held in escrow.
<b>Facts</b>	Plaintiffs subleased pasture from Defendants for several years. Plaintiffs prepaid the initial payments for the new year's lease so that payment could then be paid to the BIA in a timely fashion. Plaintiffs did not have any written confirmation or authorization from Defendants that the lease would be renewed, but assumed that it would based on the long-standing relationship between the parties. Defendants did not renew their sublease for that year, and instead entered into a pasturing authorization agreement with another party, which was approved by the BIA. This litigation concerns Plaintiffs' efforts to get back the money they voluntarily prepaid.
<b>Issue</b>	Whether the trial court's order of garnishment was final, and therefore appealable, and if so, whether that order was lawful. Appellants object to the garnishment order as violative of ICRA §1302(8)
<b>Holding</b>	The trial court's garnishment order was final and therefore appealable, but the order was a departure from Lakota traditions of respect and honor, was contrary to law, and violated guarantees of due process under the ICRA. Order vacated.
<b>Law Applied</b>	Lakota traditions and customs
<b>Notes</b>	The court cites another of its cases to reassert that "this Court recently reaffirmed the traditional Lakota values embodied in the term due process of law. Just as Lakota tradition requires the respectful listening to the position of all interested persona on any important issue, the legal requirement of due process of law require that all persons interested in a matter receive adequate written notice of any proceeding that would implicate their personal interests..."

<b>Name</b>	<i>Williams v. Colville Confederated Tribes</i>
<b>Date</b>	Apr. 30, 2002
<b>Court</b>	Confederated Tribes of the Colville Reservation Court of Appeals
<b>Case #</b>	AP99-003
<b>Judge(s)</b>	Dupris, Bonga, Pascal
<b>Citation</b>	29 ILR 6068
<b>Procedural History</b>	Appellant moved to dismiss his case in the trial court, arguing that he was prejudiced by not receiving a probable cause hearing. The trial court denied that motion and he appealed.
<b>Facts</b>	Appellant was arrested for DUI, and was arraigned in less than 24 hours. The judge dismissed that case without prejudice due to lack of specificity in the complaint/report. Prosecutor filed an amended complaint 9 days after appellant's arrest and attached an affidavit of probable cause. At arraignment, appellant did not make a motion for determination of probable cause. At trial, appellant moved for dismissal based on not being given a timely probable cause review. The motion was denied, Appellant entered a guilty plea and was sentenced, and filed an appeal.
<b>Issue</b>	Whether appellant was entitled to a determination of probable cause immediately after his arrest, and whether the court should have required a probable cause hearing within 48 hours of his custodial arrest.
<b>Holding</b>	Affirmed. The facts of the case do not support the assertion that a probable cause hearing was required.
<b>Law Applied</b>	Tribal code
<b>Notes</b>	<p>Appellant cited <i>Gerstein v. Pugh</i>, 420 U.S. 103 (1975) and <i>County of Riverside v. MacLaughlin</i>, 500 U.S. 44 (1991) for his assertions that his arrest was unreasonable without an immediate probable cause hearing. In finding that no pre-trial incarceration occurred, meaning that no probable cause hearing was required, the court looked to the facts of the case. "Just as the United States is the ultimate authority on how the Bill of Rights applies to its citizens, so to (sic) is the Colville Tribe the authority on how the Indian Civil Rights Act...applies to its members and others over whom it rightfully exercised jurisdiction. Through its Law and Order Code and through court practices over many years, it is clear that the Tribe does not require a probable cause determination before that court within 48 hours of arrest. Instead, the Tribe has found that the (ICRA and CICRA) are satisfied by an initial appearance within 72 hours of arrest."</p> <p>The court also specifically declined to apply U.S. law: "[The Court agrees with the trial court that] <i>Gerstein</i> is not applicable to the tribal court. The court points to the fact that the U.S. Constitution does not apply to Indians, therefore the cases cited by appellant that interpret the Fourth Amendment do not apply to this matter, as the Fourth Amendment, as well as the other provisions of the Bill of Rights, do not apply to any sovereign Indian tribe in the United States, including the Colville Confederated Tribes."</p>

<b>Name</b>	<i>Colville Confederated Tribes v. Swan</i>
<b>Date</b>	Jun. 27, 2001
<b>Court</b>	Confederated Tribes of the Colville Reservation Tribal Court
<b>Case #</b>	No. CR-MD-2000-23777
<b>Judge(s)</b>	Aycock
<b>Citation</b>	28 ILR 6167
<b>Procedural History</b>	Defendant moves to dismiss two counts of disorderly conduct
<b>Facts</b>	A county officer was transporting Defendant to the county jail in a patrol car. A civilian was in the front passenger seat for a police-authorized ride along. The officer started talking with Defendant about a prior incident, and Defendant responded with continuous obscene comments directed toward the officer and the civilian.
<b>Issue</b>	Whether Defendant's comments are protected as free speech and whether the words were spoken in a "public place."
<b>Holding</b>	Motion denied.
<b>Law Applied</b>	United States Supreme Court case law
<b>Notes</b>	<p>Defendant argues that his words are protected by the Colville Tribal Civil Rights Act. However, the court states that because the provision of the Act protecting free speech is "a verbatim recitation of the Indian Civil Rights Act, this Court will approach the Tribal Civil Rights Act in the same way the Court of Appeals has said to approach the Indian Civil Rights Act."</p> <p>The court notes that there is no tribal law or code which further explains the free speech provision, and that the United States Constitution is not binding on the court.</p> <p>The court applies the rules of law from several United States Supreme Court decisions (<i>Chaplinsky v. New Hampshire</i>[fighting words] and <i>Miller v. California</i> [obscenity]) in its reasoning, and applying them to the facts at bar, finds that Defendant's speech was obscene and therefore unprotected.</p>

<b>Name</b>	<i>Stoneroad-Wolf v. Colville Confederated Tribes</i>
<b>Date</b>	Oct. 11, 2006
<b>Court</b>	Confederated Tribes of the Colville Reservation Court of Appeals
<b>Case #</b>	No. AP06-012
<b>Judge(s)</b>	Dupris, Pascal, Bonga
<b>Citation</b>	33ILR 6113
<b>Procedural History</b>	Appellant filed an interlocutory appeal, claiming that the trial court's repeated grants of continuance violated her right to a speedy trial.
<b>Facts</b>	Appellant was arraigned on a charge of battery. Appellant twice requested and was twice granted a continuance, based on the fact that one prosecutor was on maternity leave and another had a conflict of interest.
<b>Issue</b>	Whether the trial court violated Appellant's right to a speedy trial by setting the trial 66 days beyond the end of the 90-day limit provided for in the statutory laws of the Tribes.
<b>Holding</b>	The trial court violated Appellant's right to a speedy trial. Remanded for an order to dismiss without prejudice, unless the statute of limitations has run, necessitating a dismissal with prejudice.
<b>Law Applied</b>	United States Supreme Court case law The Court specifically declines to apply Washington state law
<b>Notes</b>	<p>The Colville Tribal Code makes the ICRA § 1302(8) applicable to Colville Courts.</p> <p>The court looks to an earlier CCT case – <i>Stensgar v. CCT</i> – which analyzed the applicability of the right to a speedy trial to a right to be sentenced within the time for trial set by statute. However, the court notes that the <i>Stensgar</i> court determined whether the right to a speedy trial was violated by looking to factors found in <i>Barker v. Wingo</i>, 407 U.S. 434 (1973).</p> <p>The court looked to <i>Doggett v. U.S.</i>, 505 U.S. 647 (1992) to determine whether Appellant's case was possibly impaired because of the delay.</p> <p>The court references CCT cases holding that prosecutors have discretion in choosing which cases to prosecute, it holds that such discretion did not exist in this case.</p>

<b>Name</b>	<i>Finley v. Colville Tribal Services Corporation</i>
<b>Date</b>	Mar. 6, 2006
<b>Court</b>	Confederated Tribes of the Colville Reservation Court of Appeals
<b>Case #</b>	No. AP05-008
<b>Judge(s)</b>	Dupris, Nelson, Bonga
<b>Citation</b>	33 ILR 6038
<b>Procedural History</b>	Plaintiff appeals a finding of the tribal administrative law court that he had no right to appeal his termination from employment.
<b>Facts</b>	Plaintiff is an enrolled member of the tribe, formerly employed in various capacities by the Colville Tribal Services Corporation. Each time his assigned project changed, so did his job classification. He had no disciplinary actions against him in his employment history and had received positive evaluations. At one point, he was temporarily laid off, then recalled, laid off again, rehired again, and then fired for allegedly violating company policy. The CTSC considered him to be a seasonal employee at that time, and at his administrative appeal hearing, CTSC argued that as a seasonal employee on probationary status, he had no right to appeal his termination.
<b>Issue</b>	Whether the tribal administrative law court denied Plaintiff due process of law by denying him a hearing regarding the termination of his employment. Plaintiff contends that the denial deprived him of his property without due process of law.
<b>Holding</b>	Reversed. Appellant is a seasonal employee with a reasonable expectation of continued employment, and is entitled to an appeal.
<b>Law Applied</b>	United States Supreme Court case law
<b>Notes</b>	<p>Plaintiff alleges violation of the Colville Tribal Civil Rights Act, but the court notes that the provision he cites is identical to the Indian Civil Rights Act.</p> <p>The Court cites <i>Roth v. Board of Regents</i>, 408 U.S. 564 (1972) for the proposition that reasonable expectation of continued employment may be a property interest protectable under the due process clause.</p> <p>The court explicitly adopts the rule of law (outlining when a benefit is a property interest for due process purposes) from <i>Perry v. Sinderman</i>, 92 S. Ct. 2694 (1972) as guidance for this case.</p> <p>The court references one case from the Ho-Chunk Nation Courts, but only in reference to burden shifting regarding the clarification of employee status and rights.</p>



<b>Name</b>	<i>Colville Confederated Tribes v. Marchand</i>
<b>Date</b>	Feb. 7, 2006
<b>Court</b>	Confederated Tribes of the Colville Reservation Tribal Court
<b>Case #</b>	Nos. CR-2004-27279, CR-2004-27339, CR-2004-27396 and CR-2005-28060
<b>Judge(s)</b>	Aycock
<b>Citation</b>	33 ILR 6036
<b>Procedural History</b>	Four consolidated cases construing a tribal domestic violence court are before the court.
<b>Facts</b>	The tribe enacted a domestic violence code, which includes a provision allowing a victim to make an oral or written statement without appearing in court. Defendants argue that under the Colville Tribal Civil Rights Act and the ICRA, they have the right to confront witnesses against them.
<b>Issue</b>	Whether a defendant in a domestic violence case has the right to confront witnesses notwithstanding a provision in the tribal code allowing a victim to make a statement without appearing in court.
<b>Holding</b>	The court issued a preliminary order and requests formation of an elders' panel to explain any traditions or customs as they relate to the right to confront accusers.
<b>Law Applied</b>	Tribal Law, Traditions and Customs
<b>Notes</b>	<p>Defendants cite <i>Washington v. Crawford</i>, 541 U.S. 36 (2004) in support of their position that they have a right of confrontation. The court declines to adopt that case because “it is not binding on the court, [and] adopting it would be contrary to the history of the Confederated Tribes of the Colville Reservation.”</p> <p>The court cites another of its cases for the proposition that “the Unites States Constitution is not binding on this court,” and that “rights set out in ICRA are to be fleshed out by this Court.”</p> <p>The court noted that in <i>Crawford</i>, the Supreme Court went into great lengths about the English history of the right to confrontation. The court then states: “However, that history is not the history of the Colville Tribes. In elucidating the meaning of the generic phrase ‘right of confrontation,’ this court must look to our history, not the history of the United States nor the history of England. Thus, to adopt <i>Crawford</i> would be to adopt the history of governments and peoples not pertinent to our inquiry in this case. Only the Tribes history is important in this inquiry.”</p>

<b>Name</b>	<i>Buckman v. Colville Confederated Tribes</i>
<b>Date</b>	Dec. 14, 2006
<b>Court</b>	Confederated Tribes of the Colville Reservation Court of Appeals
<b>Case #</b>	No. AP05-004
<b>Judge(s)</b>	McGeoghegan, Chenois, Pouley
<b>Citation</b>	34 ILR 6002
<b>Procedural History</b>	Trial court found Appellant guilty of aggravated assault and battery. He appeals.
<b>Facts</b>	Appellant was charged and convicted in a jury trial of attempted criminal homicide and battery, arising from an incident in which he stabbed a person in the jaw with a screwdriver and bit another on the arm. At the trial level, appellant asserted that he was acting in self-defense, objected to a jury instruction, and asked that his intoxication be considered by the jury.
<b>Issue</b>	Whether the trial judge manifestly abused her discretion in violation of the ICRA or the CICRA when she did not give defendant credit for time served when setting his sentence, and whether appellant's sentence exceeds the trial court's authority and violates the ICRA and the CICRA.
<b>Holding</b>	Verdict affirmed; judgment and sentences affirmed in part and vacated in part
<b>Law Applied</b>	Tribal case law U.S. Circuit Court case law (3 <sup>rd</sup> and 7 <sup>th</sup> )
<b>Notes</b>	<p>In its analysis of the first issue, the court exclusively cites its own precedents in support of the principle that the discretion of trial judges in sentencing is protected unless it is restricted by the tribal code or constitution. “[W]here the tribal legislature does not restrict the judge’s discretion to grant or deny credit for pre-trial time served, this Court declines to do so.”</p> <p>In its analysis of the second issue, the court notes that there is no tribal law directly on point, but that federal law is “instructive.” The court notes that federal law is not binding on the court, but finds “the reasoning sound and adopts the rule.” The court applies the reasoning of <i>U.S. v. Guervemont</i>, 829 F.2d 422 (3<sup>rd</sup> Cir. 1987) and <i>U.S. v. Makres</i>, 851 F.3d 1016 (7<sup>th</sup> Cir. 1988) and finds that the trial court erred in imposing probation without a suspended sentence, which exceeded the statutory maximum limits.</p>

<b>Name</b>	<i>DeCoteau v. Fort Peck Tribes</i>
<b>Date</b>	Dec. 5, 2002
<b>Court</b>	Fort Peck Tribal Court of Appeals
<b>Case #</b>	No. 363
<b>Judge(s)</b>	Sullivan, Schuster
<b>Citation</b>	30 ILR 6069
<b>Procedural History</b>	Tribal court dismissed plaintiff's petition for a restraining order. Plaintiff appeals.
<b>Facts</b>	Appellee mailed Appellant a memorandum indicating that Appellant was in violation of the Tribes' abandoned vehicle statute. One week later, Appellant filed in trial court for a TRO, arguing that the Tribes were attempting to deprive him of his property through unfounded threats of criminal action and coercion without due process of law. The tribal court issued the TRO. Appellees moved for dismissal due to lack of personal and subject matter jurisdiction under the doctrine of sovereign immunity. The tribal court later dismissed the action due to lack of jurisdiction.
<b>Issue</b>	Whether the tribal court has adjudicatory jurisdiction of a civil action brought against the Tribes, elected tribal officials and tribal employees under the ICRA
<b>Holding</b>	Affirmed. The courts do not have jurisdiction due to the tribe's sovereign immunity.
<b>Law Applied</b>	Tribal statutory law
<b>Notes</b>	The court first examines tribal sovereign immunity in the federal courts, mainly in reference to Santa Clara Pueblo. The court then notes that the issue here is the tribe's immunity in tribal courts. The court finds that a provision of the tribal code is dispositive in that it expressly states that the tribes are immune from suit. In a footnote, the court notes that both parties cite "various decisions of this court as sustaining their respective positions," but that it will not examine those cases since the issue is resolved by statutory law.

<b>Name</b>	<i>Synowski v. Confederated Tribes of Grand Ronde</i>
<b>Date</b>	Jan. 22, 2003
<b>Court</b>	Confederated Tribes of the Grand Ronde Community of Oregon Court of Appeals
<b>Case #</b>	A-01-10-001
<b>Judge(s)</b>	Costello, Miller, Thompson
<b>Citation</b>	31 ILR 6117
<b>Procedural History</b>	The trial court held that the appellee's right to due process was violated at an internal hearing due to inadequate notice and denial of his right to assistance of counsel.
<b>Facts</b>	Appellee worked as a mental health counselor for the Tribe. He had previous experience as a counselor and had a master's degree, but he was not licensed by the state of Oregon. Three years later, the tribal Health Authority adopted a police requiring all health professionals be licensed by the state of Oregon. Since Appellee was not licensed, he was terminated. Asserting that he was fired without proper notice or justification, Appellee was granted a hearing before the Internal Review Board, at which attorney representation and witness presentations are prohibited. The IRB upheld his termination. Appellee petitioned for a review of the decision with the trial court, which reversed and remanded Appellee's case. The tribe appeals.
<b>Issue</b>	Whether Appellee's right to due process was violated by the Tribe's rule prohibiting assistance of counsel for employees at IRB hearings
<b>Holding</b>	Affirmed.
<b>Law Applied</b>	U.S. Supreme Court case law.
<b>Notes</b>	<p>The court notes that the right to due process for persons within the Tribe's jurisdiction derives from the ICRA rather than the U.S. Constitution.</p> <p>The court acknowledges (and cites several tribes' case law in a footnote) that other tribal courts have held that the tribe's own interpretation of due process is controlling, it also notes that in this case "the Tribe does not argue that any tribal custom or tradition is at risk if the general principles of due process under the [U.S.] Constitution are applied in this case," and that in its opening brief, the Tribe endorsed the trial court's application of the <i>Mathews v. Eldridge</i> test.</p>

<b>Name</b>	<i>Pearsall v. Tribal Council for the Confederated Tribes of the Grand Ronde Community of Oregon</i>
<b>Date</b>	Feb. 19, 2003
<b>Court</b>	Confederated Tribes of the Grand Ronde Community of Oregon Tribal Court
<b>Case #</b>	Nos. 02-02-004 and 02-04-002
<b>Judge(s)</b>	Lezak
<b>Citation</b>	31 ILR 6129
<b>Procedural History</b>	The Tribal Council suspended Petitioner for 5 months without pay
<b>Facts</b>	Petitioner was temporarily suspended from the Tribal Council due to improper threats and intimidation toward a tribal member. At an evidentiary hearing in which petitioner presented witnesses and was represented by counsel, the hearing officer found that petitioner committed three violations of the Tribe's Ethical Standards Ordinance. Petitioner was then suspended without pay for 7 months (thereafter amended to five months).
<b>Issue</b>	Whether the terms of Petitioner's suspension constitute an unconstitutional excessive fine in violation of the ICRA
<b>Holding</b>	Affirmed. Appeal denied.
<b>Law Applied</b>	9 <sup>th</sup> Circuit case law Delaware Supreme Court case law
<b>Notes</b>	The court states that it may overturn a sanction such as this only if it violates the tribal constitution or the ICRA. The court cites a 9 <sup>th</sup> Circuit case and a Delaware Supreme Court case for the proposition that a fine is constitutionally excessive if it is grossly disproportionate to the offense or if it is so disproportionate that it shocks public sentiment.

<b>Name</b>	<i>Loges v. Confederated Tribes of the Grand Ronde Community of Oregon Tribal Court</i>
<b>Date</b>	Mar. 26, 2003
<b>Court</b>	Confederated Tribes of the Grand Ronde Community of Oregon Tribal Court
<b>Case #</b>	C-01-10-001
<b>Judge(s)</b>	English
<b>Citation</b>	31 ILR 6152
<b>Procedural History</b>	The tribal Enrollment Committee denied petitioner's application for enrollment in the tribe. She appeals.
<b>Facts</b>	Petitioner was denied enrollment because her mother was not an enrolled member at the time required by the tribe's enrollment provisions. She was granted a reconsideration but the Committee upheld its initial decision.
<b>Issue</b>	Whether the tribe's provision is unconstitutional in violation of the ICRA because it denies membership to new applicants who have the same blood quantum as other family members who are enrolled, and whether petitioner's due process rights were violated because she did not receive notice of the pending constitutional amendment that changed the membership requirements.
<b>Holding</b>	Affirmed. Petitioner's due process and equal protection rights under the ICRA were not violated.
<b>Law Applied</b>	U.S. Supreme Court case law 6 <sup>th</sup> , 7 <sup>th</sup> and 9 <sup>th</sup> Circuit case law
<b>Notes</b>	Regarding the first issue, the court finds that the amendment is not unconstitutional because members of the same family with the same blood quantum are treated differently, and cites U.S v. Antelope and United States v. Male Juvenile (9 <sup>th</sup> Cir.) in support of the proposition that "any disparity in treatment based on blood quantum...is based on tribal political affiliation, not on race or ethnicity per se," and as such is not subject to strict scrutiny.  Regarding the second issue, the court finds that petitioner's due process rights were not violated because she was not entitled to notice of the pending constitutional amendment. The court cites numerous circuit court cases and U.S. Supreme Court cases in support of the proposition that "[n]o notice or opportunity to be heard need proceed any legislative action of general applicability."

<b>Name</b>	<i>Ballini v. Confederated Tribes of Grand Ronde</i>
<b>Date</b>	Dec. 5, 2003
<b>Court</b>	Confederated Tribes of the Grand Ronde Community of Oregon Court of Appeals
<b>Case #</b>	Nos. A-01-08-1, A-01-08-(11-15), A-01-08-(17-23)
<b>Judge(s)</b>	Costello, Miller, Thompson
<b>Citation</b>	31 ILR 6065
<b>Procedural History</b>	
<b>Facts</b>	
<b>Issue</b>	
<b>Holding</b>	The Enrollment Committee did not retroactively apply the enrollment amendment to the applicants, and so its rejection of their applications was not arbitrary or capricious.
<b>Law Applied</b>	None – the ICRA issue is not reached
<b>Notes</b>	The court acknowledges that retroactive legislation may sometimes implicate due process concerns under the ICRA and the Grand Ronde Constitution, which incorporates the ICRA. However, because the court is able to resolve the issue presented on statutory construction grounds, it does not reach the constitutional issue.

<b>Name</b>	<i>In the Matter of C.G.</i>
<b>Date</b>	Mar. 29, 2005
<b>Court</b>	Confederated Tribes of the Grand Ronde Community of Oregon Court of Appeals
<b>Case #</b>	No. (Confidential)
<b>Judge(s)</b>	Miller, Johnson, Thompson
<b>Citation</b>	32 ILR 6073
<b>Procedural History</b>	Appellant appeals decision of the tribal court changing “return of custody” permanency plan to an “adoption” permanency plan.
<b>Facts</b>	Mother and her uncle challenge a permanency plan order in a juvenile dependency case. No further facts are given in order to protect child’s right to privacy.
<b>Issue</b>	Whether the trial court judge misapplied the standard of proof in the trial court case, thereby abusing her discretion in changing the permanency plan.
<b>Holding</b>	Affirmed. Appellants did not show that trial judge abused her statutorily-conferred discretion.
<b>Law Applied</b>	Maine Supreme Court case law
<b>Notes</b>	The court very briefly touches on the ICRA. The standard of proof in permanency plan hearings is a preponderance of the evidence, and “[n]o higher standard of proof is required by the Indian Civil Rights Act at this stage of the proceedings.” In support of this proposition, the court cites <i>In re Sabrina M.</i> , 460 A.2d 1009 (Me. 1983), which “interpret[ed] the similar provisions of” the 14 <sup>th</sup> Amendment to the U.S. Constitution.



<b>Name</b>	<i>Pearsall v. Tribal Council for the Confederated Tribes of the Grand Ronde Community of Oregon</i>
<b>Date</b>	Jan. 30, 2004
<b>Court</b>	Confederated Tribes of the Grand Ronde Community of Oregon Court of Appeals
<b>Case #</b>	A-03-02-002
<b>Judge(s)</b>	Miller, Johnson and Thompson
<b>Citation</b>	31 ILR 6154
<b>Procedural History</b>	The tribal court affirmed the decision of the tribal council which suspended appellant for 5 months without pay. He appeals.
<b>Facts</b>	Petitioner was temporarily suspended from the Tribal Council due to improper threats and intimidation toward a tribal member. At an evidentiary hearing in which petitioner presented witnesses and was represented by counsel, the hearing officer found that petitioner committed three violations of the Tribe's Ethical Standards Ordinance. Petitioner was then suspended without pay for 7 months (thereafter amended to five months).
<b>Issue</b>	Whether petitioner's due process rights under the ICRA were violated when he and his attorney were not allowed to appear at the tribal council meeting where his suspension was decided, and whether the tribe's sanction was excessive or unusual in violation of the ICRA.
<b>Holding</b>	Affirmed. Petitioner received all the due process that is required by the ICRA and the Council's sanction was not excessive
<b>Law Applied</b>	U.S. Supreme Court case law Federal district court case law
<b>Notes</b>	<p>The court finds that the petitioner was given the opportunity to be heard in a reasonable time and manner, thus affording him due process under the ICRA. In so holding, the court applied federal case law, but noted in a footnote that "[s]ome tribal courts have held that due process can have a different meaning in a tribal court than in a federal or state court," and cites to the Hopi and Navajo courts. The court goes on to state that petitioner and respondent both analyzed tribal due process under federal case law, and the court thus "leave[s] it for another day to determine whether this court will develop a Grand Ronde definition of due process that might differ from the federal court interpretation."</p> <p>The court finds that the ICRA provision petitioner cites in support of his claim of excessive fines is inapplicable, because it applies only to criminal sanctions.</p>

<b>Name</b>	<i>McGee v. Spirit Mountain Gaming, Inc.</i>
<b>Date</b>	Feb. 11, 2004
<b>Court</b>	Confederated Tribes of the Grand Ronde Community of Oregon Tribal Court
<b>Case #</b>	No. C-03-09-002
<b>Judge(s)</b>	Goodman
<b>Citation</b>	32 ILR 6014
<b>Procedural History</b>	Hearing for petitioner's motions to supplement the record and for an expedited hearing
<b>Facts</b>	Petitioner was involuntarily terminated from his employment with the Spirit Mountain Casino.
<b>Issue</b>	Whether the process afforded by respondent to petitioner to challenge his termination of employment violated petitioner's right to due process under the ICRA
<b>Holding</b>	The court does not reach the issue of due process violation due to its resolution of other claims
<b>Law Applied</b>	United States Supreme Court case law Tribal case law
<b>Notes</b>	<p>In declining to decide the issue of alleged ICRA violations, the court cites <i>Clay v. Sun Ins. Office, Ltd.</i>, 363 U.S. 207 (1960) for "the well-established judicial practice of declining to rule on constitutional issues if a case before the Court can be resolved on grounds other than constitutional interpretation." "Because petitioner raises issues other than his due process claim, the Court will adopt the time-honored practice of considering those issues first in its deliberations. If the court finds that petitioner prevails on one of those other issues, the Court may not need to address the constitutional 'due process' question."</p> <p>In a footnote, the court cites to several of its own cases and notes that "the court would have discretion to address the constitutional question... if in the court's determination it is an issue that is apt to rise again on remand."</p>

<b>Name</b>	<i>Hockaday v. Karuk Tribal Housing Authority</i>
<b>Date</b>	Oct. 7, 2005
<b>Court</b>	Karuk Tribal Court Civil Division
<b>Case #</b>	No. CI-6/05-001
<b>Judge(s)</b>	Flies Away
<b>Citation</b>	32 ILR 6169
<b>Procedural History</b>	After attempting to resolve the dispute through the Peacemakers' Court, Plaintiff filed a statement of claim with this court, alleging an unresolved conflict with the Housing Authority.
<b>Facts</b>	Plaintiff filed a statement of claim pro se, alleging an unresolved conflict with the tribe's Housing Authority. Plaintiff attempted to address the dispute first with the Peacemaker's court but Defendant did not participate. According to Plaintiff, this is because the Housing Authority felt it explained its position adequately in a letter sent to Plaintiff. Plaintiff then filed in this court, stating that he is still without a place to live.
<b>Issue</b>	Whether the Tribe provided Plaintiff with due process under the Karuk Tribal laws and Constitution, and under the ICRA.
<b>Holding</b>	Dismissed. Plaintiff received due process.
<b>Law Applied</b>	None specified.
<b>Notes</b>	This is the first case brought before the Karuk Tribal Court Civil Division.  The court finds that Plaintiff received the process due him under the ICRA. In its introduction to the case, the court states that it reviewed Karuk tribal law in its analysis, but does not engage in any further discussion of tribal law in relation to the ICRA.

<b>Name</b>	<i>Cherestal v. Office of the Director of Regulations</i>
<b>Date</b>	Aug. 27, 2002
<b>Court</b>	Mohegan Gaming Disputes Trial Court
<b>Case #</b>	GDTC-AA-02-132
<b>Judge(s)</b>	Manfredi
<b>Citation</b>	
<b>Procedural History</b>	Plaintiff appeals a decision of the Director of Regulations regarding revocation of a gaming license
<b>Facts</b>	Plaintiff, an employee of the Casino, was barred from the Casino based on his arrest for carrying a dangerous weapon and carrying a weapon in a vehicle. At his hearing, the only evidence presented against plaintiff was a copy of the letter barring him from the casino and a copy of the police log from the day he was arrested. Plaintiff testified that he was carrying the weapon as a result of disarming another person who was attempting to start a fight with his cousin in a parking lot. The hearing officer made no decision at that time because the weapons charges against him had not yet been disposed of.
<b>Issue</b>	Whether plaintiff is entitled to due process protections under the Indian Civil Rights Act
<b>Holding</b>	Reversed. The court finds that the decision to revoke plaintiff's gaming license was arbitrary and capricious.
<b>Law Applied</b>	U.S. Supreme Court case law
<b>Notes</b>	<p>The Court finds that the Plaintiff's continued right to employment upon the Reservation is a substantial right which entitles him to due process protections found in the ICRA.</p> <p>The court cites <i>Mathews v. Eldridge</i> in its analysis of procedural due process. "Substantive due process on the other hand relates to the idea that "no person shall be deprived of his life, liberty, or property for arbitrary reasons." 16 (a) AmJur 2nd Constitutional Law Section 816. This concept is embodied in Mohegan Ordinance No. 95-6 Section 2 (j)."</p>

<b>Name</b>	<i>Cornelius v. Hill</i>
<b>Date</b>	Aug. 16, 2001
<b>Court</b>	Oneida Appeals Commission Appellate Court
<b>Case #</b>	No. 01-AC-007
<b>Judge(s)</b>	Wigg-Ninham, Hughes, Liggins, McLester, Stevens
<b>Citation</b>	
<b>Procedural History</b>	Appellant's appeal the decision of the Personnel Commission, which resulted in a protective order issued to Petitioner for a confidential disclosure
<b>Facts</b>	
<b>Issue</b>	Whether the Personnel Commission's decision was outside the scope of their authority which violated appellant's rights under the ICRA
<b>Holding</b>	Affirmed
<b>Law Applied</b>	None
<b>Notes</b>	The court finds that plaintiffs failed to show how they were harmed under the ICRA.

<b>Name</b>	<i>Jackson v. Kahgegab</i>
<b>Date</b>	Aug. 11, 2003
<b>Court</b>	Saginaw Chippewa Indian Tribe Appellate Court
<b>Case #</b>	No. AC-1014
<b>Judge(s)</b>	Vicenti, Petoskey, Pommersheim
<b>Citation</b>	33 ILR 6105
<b>Procedural History</b>	Plaintiff-Appellant appeals the order of the Community Court, which dismissed the suit based on sovereign immunity of the tribe.
<b>Facts</b>	Appellant was Chairperson of the 1939 Committee, and sued Appellee in his capacity as Chief of the tribe. Appellant sought a declaratory judgment to declare the 1986 Constitution void, so that the voter roll reverted to that under the 1938 Constitution. Appellee raised a defense of sovereign immunity under a provision of the tribal code.
<b>Issue</b>	Whether the ICRA constitutes a waiver of tribal sovereign immunity in tribal courts.
<b>Holding</b>	The lower court is affirmed, but for different reasons. The Appellate Court holds that Appellant lacks standing to bring an action that is barred by laches and that tribal sovereign immunity is not a bar to claims brought under the ICRA.
<b>Law Applied</b>	Tribal law & custom (Cheyenne River Sioux and Oglala Sioux) United States Supreme Court case law
<b>Notes</b>	<p>The Court cited <i>Santa Clara Pueblo v. Martinez</i> for the proposition that the ICRA did not “waive a tribe’s sovereign immunity exposing it to suit in federal court for alleged violations of ICRA.”</p> <p>The court looks at the language in <i>Santa Clara Pueblo</i>, noting that the Supreme Court “also observed that ‘§1302 has the substantial and intended effect of changing the law which the [tribal] forums are obliged to apply.’ It is the interpretation and application of this language – rather than <i>Ex Parte Young</i> analysis – that has been at the heart of most tribal court decisions involving due process and equal protection claims made under ICRA. The sheer volume of such cases commends itself as to the proper analytical focus for the matter at hand. <u>The overwhelming weight of these basic civil rights decisions . . . is that such actions are not barred by tribal sovereign immunity. It is also to be noted that many of these cases state that such lawsuits uphold and vindicate significant tribal values.</u>”</p> <p>The court goes on to cite cases from the Cheyenne River Sioux and the Oglala Sioux for the proposition that “<u>the due process and equal protection guarantees of ICRA also vindicate important tribal cultural values that ought not to be jeopardized by unduly expansive notions of tribal sovereign immunity.</u>”</p>

<b>Name</b>	<i>Bryant v. Saginaw Chippewa Tribal Clerk</i>
<b>Date</b>	Mar. 21, 2005
<b>Court</b>	Saginaw Chippewa Tribe of Michigan Appellate Court
<b>Case #</b>	No. 04-CA-1016
<b>Judge(s)</b>	Vicenti, Pommersheim, Petoskey
<b>Citation</b>	32 ILR 6090
<b>Procedural History</b>	Appeal of trial court decision handed down after remand from this court. The trial court (on remand) held that X. Appellant appeals.
<b>Facts</b>	Plaintiffs challenge changes in membership requirements effectuated by the 1986 Constitution. Changes at issue in this case involved the elimination of the residency requirement, and the creation of a final 18 month window for descendancy enrollment.
<b>Issue</b>	Whether the general modes of constitutional interpretation dictate that the terms of the Constitution created an inflexible period of application, so that equitable considerations implicit in the due process and equal protection guarantees of the ICRA do not apply?
<b>Holding</b>	The decision of the Community Court is affirmed.
<b>Law Applied</b>	United States Supreme Court case law
<b>Notes</b>	The court finds that Appellee’s approach would deny some individuals basic due process and equal protection guarantees as required by the ICRA if it were literally applied. The court notes a particular provision that would treat minors and adults differently in such a way as to deny minors due process and equal protection; minors “must rely on some adult...to file an application on their behalf in order to take advantage of a <i>one time constitutional opportunity</i> to obtain tribal membership [Emphasis in original].” <u>The court cites <i>In re Gault</i>, 387 U.S. 1 (1967) for the proposition that minors should not be denied opportunities for benefits such as tribal membership simply because of their youthful status, and that “[g]iven the importance of tribal membership, it would be a clear deprivation of due process and equal protection to deny such individuals the full 18 month window to apply as adults.”</u>

<b>Name</b>	<i>Morigeau v. Confederated Salish &amp; Kootenai Tribes</i>
<b>Date</b>	May 3, 2005
<b>Court</b>	Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation Court of Appeals
<b>Case #</b>	No. AP-02-295-CV
<b>Judge(s)</b>	Wall, Matt, Windham
<b>Citation</b>	32 ILR 6071
<b>Procedural History</b>	Defendant-Appellant Tribes appeal decision of the lower court holding that inconsistent provisions relieved plaintiff from complying with statutory requirement of arbitration, and that he may proceed to trial of the wrongful discharge cause alleged in his complaint.
<b>Facts</b>	Plaintiff-Appellee was terminated from his position as Head of Tribal Health and Human Services. He pursued a grievance under Ordinance 69B, which was denied. He then sought arbitration as required by the same ordinance. An arbitrator was appointed, but at that point Plaintiff filed an action for declaratory judgment and other relief. Plaintiff did so based on an alleged conflict between Ordinance 69B and the Wrongful Discharge Ordinance.
<b>Issue</b>	Whether the tribal ordinances at issue conflict, and if so, what the is the effect of that conflict
<b>Holding</b>	There is no conflict
<b>Law Applied</b>	None
<b>Notes</b>	The court only refers to the ICRA in disagreeing with the tribal court's finding that the arbitration provisions of Ordinance 69B denied Plaintiff due process under the ICRA. The court makes no other ICRA analysis.



<b>Name</b>	<i>Bear Don't Walk v. Confederated Salish and Kootenai Tribal Council</i>
<b>Date</b>	May 28, 2004
<b>Court</b>	Confederated Salish and Kootenai Tribes Court of Appeals
<b>Case #</b>	AP-03-218-CV
<b>Judge(s)</b>	Wall, Windham, Dupuis
<b>Citation</b>	31 ILR 6061
<b>Procedural History</b>	Trial Court granted Tribal Council's motion to dismiss. Appellant appeals.
<b>Facts</b>	Plaintiff was a part-time employee of the Tribal Community College. When her supervisor resigned, that position was advertised and plaintiff was one of three finalists. At her interview, she was subjected to demeaning questions which were not asked of the other candidates. The other candidates were offered the job and both declined. The job was not offered to plaintiff. Another round of interviews took place and substantially similar events took place. The College hired a non-tribal member who was less qualified than plaintiff. Plaintiff filed suit against several parties, including the tribal council because they knowingly permitted the college to violate the tribal preference law.
<b>Issue</b>	Whether plaintiff has alleged any facts which would bring her within the tribal statutory exceptions to sovereign immunity.
<b>Holding</b>	
<b>Law Applied</b>	None – the ICRA does not apply
<b>Notes</b>	The court finds that appellant failed to allege any facts bringing her within the statutory exceptions to sovereign immunity.

<b>Name</b>	<i>Gwin v. Four Bears Casino and Lodge</i>
<b>Date</b>	Feb. 10, 2003
<b>Court</b>	Three Affiliated Tribes of the Fort Berthold Reservation District Court
<b>Case #</b>	No. 2002CV0034
<b>Judge(s)</b>	Jones
<b>Citation</b>	30 ILR 6120
<b>Procedural History</b>	A third party administrator upheld plaintiff's termination. She appeals.
<b>Facts</b>	Plaintiff was employed by the casino and approved for leave on certain dates. She became stranded in another state and was unable to return on her scheduled return date. She attempted to contact her supervisor several times, but never reached her. She instead communicated her situation to the co-workers she spoke with on her attempted calls to her supervisor. Those co-workers in turn informed plaintiff's supervisor of the situation. Plaintiff was terminated for not coming to work and for not properly informing her supervisor of the fact that she wouldn't be reporting to work.
<b>Issue</b>	Whether Defendants Tribal Business Council and Tribal Chairman are immune from suit
<b>Holding</b>	Reversed. Plaintiff is to be reinstated to work.
<b>Law Applied</b>	Tribal case law
<b>Notes</b>	The court finds that the ICRA does not apply, and cites an earlier of its own cases for the proposition that a casino employee does not have "a property right entitled to due process protection under the [ICRA]"

<b>Name</b>	<i>Thompson v. Wilkinson</i>
<b>Date</b>	Nov. 12, 2001
<b>Court</b>	Three Affiliated Tribes of the Fort Berthold Reservation Tribal Court
<b>Case #</b>	Civ. No. 2001RO0193
<b>Judge(s)</b>	Pechota
<b>Citation</b>	29 ILR 6051
<b>Procedural History</b>	Plaintiff obtained a restraining order against defendant for allegedly defamatory and threatening statements
<b>Facts</b>	Plaintiff alleges that defendant made defamatory and threatening statements about her. No witnesses supported this allegation; only plaintiff herself felt that her personal safety was threatened. Defendant claimed to have never met plaintiff before the trial, and that his statement (“[i]t’s time to get her out of the way”) referred to his belief that another person should be responsible for the operation of the kidney dialysis unit on the reservation. Operation of the Unit had become a matter of public concern on the Reservation
<b>Issue</b>	Whether defendant’s statements were threatening or defamatory so that a restraining order against him is justified
<b>Holding</b>	Dismissed. Defendant’s statements were neither threatening nor defamatory
<b>Law Applied</b>	United States Supreme Court case law State Supreme Court case law (North Dakota, South Dakota, Tennessee, Alaska) D.C. Circuit Court case law
<b>Notes</b>	The Court cited primarily U.S. Supreme Court case law in its analysis of restraint on free speech: “Any prior restrain of expression bears a heavy presumption of being unconstitutional, as the First Amendment is incorporated into the Indian Civil Rights Act by 25 U.S.C. § 1302(1), and any person seeking such restraint bears a heavy burden of showing justification.”  The court cited primarily case law from the supreme courts of various states in its analysis of defamatory statements.

<b>Name</b>	<i>Davis v. Park Place Apartments</i>
<b>Date</b>	Mar. 31, 2005
<b>Court</b>	Turtle Mountain Court of Appeals
<b>Case #</b>	No. TMAC 03-002
<b>Judge(s)</b>	Ahsan, Gardner, Jongeling
<b>Citation</b>	
<b>Procedural History</b>	Appellant filed a petition requesting waiver of appellate court filing fees and an appellate review from a small claims court order entered against him.
<b>Facts</b>	Appellee filed a claim against appellant in small claims court for back rent and other costs. A hearing was held, but Appellant alleges that when he arrived, a clerk told him that he was too late, despite his own watch indicating he was one minute early. Judgment was entered against him on that date and he appeals.
<b>Issue</b>	Can the Turtle Mountain Court of Appeals waive its filing fee in civil cases
<b>Holding</b>	Yes
<b>Law Applied</b>	Tribal traditions
<b>Notes</b>	<p>The court notes that “in Anglo-American jurisprudence, it has long been an established practice to waive the filing fees for an indigent individual in criminal cases,” and notes the 9<sup>th</sup> Circuit’s proposition that “when a Tribe decides to grant appeals rights, and its appeal procedures are Anglo-American in origin, then ‘federal constitutional standards are employed in determining whether the challenged procedure violates the (Indian Civil Rights) Act.’ See <i>Crowe Tribe of Indians v. Bull Tail</i>, 2000 Crow 8 (Crow10-12-2000), citing to <i>Randall v. Yakima Nation Tribal Court</i>, 841 F. 2d. 897,900 (9th Cir. 1988).”</p> <p>“However, in previous cases, we have stated that tribal courts are not courts that mirror the strict formality of Anglo-American jurisprudence. See <i>Mathiason v. Gate City Bank</i>, No. TMAC- 04-2002 (Turtle Mountain 2005).” (citing to Christine Zuni, Strengthening What Remains, in Justin B. Richland and Sarah Deer, INTRODUCTION TO TRIBAL LEGAL STUDIES 114,118 (2004). As such, this Court will endeavor "to infuse the tribal court system with our own concepts justice which more closely reflect our societal beliefs." See id.</p> <p>The court notes that the employment and housing situation on the reservation is currently poor, and that “there remains in many Turtle Mountain families a common oral tradition of helping others who are in need of help.”</p> <p>“Since the present case is a civil action, the Court is not concerned with the federal constitutional standards for criminal appeals.” The court notes, however, that the filing fee in civil cases presents a barrier to some people, and that it is problematic that waiver procedures aren’t clearly spelled out for the benefit of those individuals. “To some people this fee is a barrier to the appeals process and a barrier to them exercising their due process rights guarantee under the Turtle Mountain Band of Chippewa Indian's Constitution.”</p>



## NO TRIBAL COURT IS AN ISLAND? CITATION PRACTICES OF THE TRIBAL JUDICIARY

Rose Carmen Goldberg\*

*“Modern tribal courts have the unenviable task of doing justice in two worlds. They must be familiar with and incorporate traditional practices in order to maintain internal credibility with the very tribal members that they are appointed to serve, and simultaneously appease the non-Indian judicial world.”*

- Tribal Court Judge BJ Jones<sup>1</sup>

### INTRODUCTION

Tribal courts' position at the intersection of two worlds is indeed unenviable. And it might be even more complex than tribal court Judge BJ Jones' statement suggests. One of the worlds in which tribal courts do justice, the world of tribal law and custom, might not respect tribal boundaries. Instead of restricting their gaze to their own jurisprudence, tribal courts might look to other tribes for guidance.<sup>2</sup> Tribal court judges might cite other tribes' opinions<sup>3</sup> for several reasons. For one, issues that arise under tribal law may not be common subjects of adjudication in United

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<sup>1</sup> B.J. Jones, *Tribal Courts: Protectors of the Native Paradigm of Justice*, 10 ST. THOMAS L. REV. 87, 87 (1997).

<sup>2</sup> Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 453 (1992) (“Tribal precedents from other reservations, however, may also be relevant.”); according to WestlawNext's tribal government product sales website “[r]ecent decisions now evidence tribal courts citing other tribes when crafting opinions. This has created a demand for a systematic, professional compilation of cases from tribal law courts.” WESTLAWNEXT, <http://legalsolutions.thomsonreuters.com/law-products/practice/government/tribal-government> (last visited Nov. 18, 2014).

<sup>3</sup> Throughout this article, this practice is referred to as “intertribal citation.”

States courts.<sup>4</sup> For instance, tribal membership does not have a full equivalent in the United States legal system.<sup>5</sup> Other tribal courts, however, might have extensive rulings on such matters. In addition, some tribal courts are young<sup>6</sup> and do not have many previous decisions of their own to draw upon. With similar effect, some tribes might not have the resources to maintain records of prior adjudications in accessible formats, or at all.<sup>7</sup> To the extent that such tribes want to ground their rulings in legal precedent, they must look outward. Looking to other tribes' courts, as opposed to United States courts, might help them maintain internal legitimacy insofar as other tribes' opinions might be more consistent with their traditions than United States courts'.<sup>8</sup>

Yet there are barriers to intertribal citation that might reduce its incidence. Some tribal courts' opinions may not be available to other tribes because resource limitations preclude dissemination.<sup>9</sup> Alternatively, some tribes might not want their jurisprudence to be publicly available, irrespective of resource requirements. This insularity could be motivated by privacy concerns, fear of ridicule, or a tribal tradition of non-public mediation. Moreover, citing tribal courts themselves might be unable or hesitant to look to other tribes' opinions, for similar reasons. Other tribal courts' opinions might only be available through databases with subscription

<sup>4</sup> Throughout this article, "U.S. courts" refers to all courts within the U.S. (e.g., the Supreme Court, Federal courts, state courts) *except* for tribal courts.

<sup>5</sup> Tribal membership disputes often turn on blood quantum determinations, for which there is no close analogy in U.S. state or national citizenship adjudications. For more information about tribal membership and blood quantum criteria, see Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437 (2002).

<sup>6</sup> See, e.g., Pommersheim, *supra* note 2, at 454 ("In light of many tribal courts' relative youth, much tribal court litigation involves cases in which there is no controlling authority."); see also Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 2 (1997).

<sup>7</sup> See, e.g., Maria Odum, *Money Shortage Seen as Hindering Indian Justice*, N.Y. TIMES, Oct. 4, 1991, at B9 ("legal research on precedents is difficult because, due to lack of money, the volume reporting the past three years of judgments in the Indian tribal court system never went to press"); Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 124 (2001) (characterizing tribal courts as "dismally underfunded"); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law; Indian Law Symposium*, 24 N.M. L. REV. 225, 263 n.40 (1994) ("The scarcity of resources is a constant barrier.").

<sup>8</sup> Valencia-Weber, *supra* note 7, at 254 ("Sometimes customary tribal law will produce results different from an Anglo-American court's determination because the substantive law arises from a fundamentally different view on the matter at issue. In the use of tribal trust lands and in probate distribution of property there is an important difference. The Anglo-American concept of property as individualized ownership and exploitation is not germane.").

<sup>9</sup> Pommersheim, *supra* note 2, at 450, 456 n.161 ("[P]ractitioners often exhibit a lack of familiarity with the precedent of the very court they are practicing before. This problem is often exacerbated by irregular publication of opinions in the Indian Law Reporter.").

fees that some tribes find prohibitive.<sup>10</sup> And even if the citing tribal court has access, the research and process of applying the other tribe's opinion to the case at hand might be too time-intensive. Additionally, some tribes may have historical or current conflicts that make intertribal citation politically unsavory.<sup>11</sup> Finally, some tribal judges might stand with Justice Scalia in staunch opposition to citation of "foreign" courts,<sup>12</sup> and may consider other tribes foreign for citation purposes. According to this view, judicial opinions are based on laws that uphold particularized cultural norms, and as such, are not applicable beyond the deciding court's jurisdiction.<sup>13</sup>

This article examines how tribal courts manage their "unenviable task"<sup>14</sup> of doing justice in multiple worlds through the lens of citation practices. In so doing, it sheds light on the current state of tribal court jurisprudence and provides a preliminary empirical basis to guide needed reforms. It also enriches the body of scholarship on judicial citations—while much of the literature engages in theoretical debate about the functions and effects of citations, this article documents and dissects actual practices. By contributing to a fuller picture of *how* citations are used, this article brings this line of inquiry closer to answering the underlying question of *why*.

The article begins with a background section that consists of three subparts. The first provides a brief overview of tribal courts, to situate the article's tribal court citation research findings. The second two subparts survey the existing literature on judicial citations generally, and on tribal court judge citation practices in particular. Part I begins the article in earnest by detailing the citation review methodology and also provides an overview of the availability of tribal court opinions. Part II presents the research findings, starting with a summary of results, moving to a more detailed analysis of intertribal citations, and concluding with brief discussions of the article's findings on citation of United States and foreign courts.

<sup>10</sup> See, e.g., WestlawNext's fee-based "Tribal Cases" database at <http://info.legalsolutions.thomsonreuters.com/westlawnext/> (last visited Nov. 18, 2014).

<sup>11</sup> See, e.g., Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in A North American Indigenous Vision of Law and Peace*, 82 CAL. L. REV. 981, 992 (1994) (discussing the "Beaver Wars" fought between the Iroquois and Algonquians in the 1700s).

<sup>12</sup> See, *Roper v. Simmons*, 543 U.S. 541, 608 (2005) (Scalia, J., dissenting).

<sup>13</sup> See, e.g., Steven G. Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1337 (2006).

<sup>14</sup> Jones, *supra* note 1.



Part III concludes the article by discussing the implications of the study's research findings. The findings suggest that tribal courts have responded to their unenviable position at the intersection of two worlds by retreating to one—intertribal citation is exceedingly rare. In conclusion the article argues that these low citation rates are likely a function of tribal courts' limited access to court opinions and highlights the importance of removing barriers to access. A short addendum recommends several avenues for future research that could contribute to concrete improvement in tribal courts' access to "justice."

## I. BACKGROUND

### A. Tribal Courts

Today, more than 250 tribes operate their own court systems,<sup>15</sup> adjudicating on behalf of an estimated one<sup>16</sup> to two<sup>17</sup> million people. These tribal courts<sup>18</sup> resemble their United States court counterparts to varying degrees. The majority of tribal courts operate in near full conformity with prevailing formal adversarial processes.<sup>19</sup> Professional and sometimes United States law school trained<sup>20</sup> judges preside, and adjudication usually results in clear winners and losers.<sup>21</sup> In addition, some tribes' court systems contain hierarchical levels of appellate review that more or less mirror the United States court system's tiered model.<sup>22</sup> A lesser number of tribal courts still practice traditional forms of dispute resolution, such as "Elder Council"<sup>23</sup> mediation or "peacemaking."<sup>24</sup> Elder Councils

<sup>15</sup> Matthew L. M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 718 (2006).

<sup>16</sup> O'Connor, *supra* note 6, at 1.

<sup>17</sup> Odum, *supra* note 7.

<sup>18</sup> Throughout this article, courts operated by tribes are referred to as "tribal courts."

<sup>19</sup> Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 237 (1997).

<sup>20</sup> Valencia-Weber, *supra* note 7, at 240.

<sup>21</sup> Valencia-Weber, *supra* note 7, at 250.

<sup>22</sup> For instance, the Navajo Nation court system is two-tiered, THE NAVAJO NATION JUDICIAL BRANCH, <http://www.navajocourts.org/> (last visited Nov. 18, 2014) ("The Navajo Nation operates a two-level court system: the trial courts and the Navajo Nation Supreme Court, which is the appellate court."), and the Confederated Tribes of the Colville Reservation also have a two-tiered system, COLVILLE TRIBES TRIBAL COURTS, [http://www.colvilletribes.com/tribal\\_courts.php](http://www.colvilletribes.com/tribal_courts.php) (last visited Nov. 18 2014) ("The Tribal Court consists of a trial court and the Colville Tribal Court of appeals.").

<sup>23</sup> See, e.g., Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 363 n.278 (2000); Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 66 (2007).

<sup>24</sup> Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17, 19 (1997).

and peacemaking courts are characterized as using community mediators instead of judges and basing resolution on unwritten customary law.<sup>25</sup> They are also commonly viewed as focusing on restoring harmony to the tribe as a community,<sup>26</sup> as opposed to United States courts' emphasis on delivering justice in accord with individual rights and obligations.<sup>27</sup> Mainly because of lack of resources, parties in tribal court proceedings are frequently not represented by counsel.<sup>28</sup>

Enactment of the Indian Reorganization Act (IRA) in 1934<sup>29</sup> marked the birth of the tribal court systems that operate on reservations across the country today.<sup>30</sup> The IRA empowered tribes to adopt their own constitutions, and many tribes adopted constitutional provisions creating tribal courts.<sup>31</sup> These courts replaced almost all of the federal government-run "Courts of Indian Offenses" that had previously been the principal legal forums for reservations.<sup>32</sup> The Courts of Indian Offenses, which still serve a limited number of tribes,<sup>33</sup> operate according to the United States court-style adversarial model. The continued existence of some of these courts has been the subject of much criticism.<sup>34</sup>

Tribal courts' jurisdiction is limited. They do not have inherent jurisdiction over non-Indians in criminal cases.<sup>35</sup> Rather, this authority requires explicit congressional authorization.<sup>36</sup> Congress recently provided just such a grant in the context of domestic violence. The Violence Against Women Reauthorization Act of 2013 gives tribal courts the power to convict non-Indians who assault Indian

<sup>25</sup> See, e.g., Joh, *supra* note 7, at 124-125.

<sup>26</sup> *Id.* at 123.

<sup>27</sup> Porter, *supra* note 19, at 251.

<sup>28</sup> Odum, *supra* note 7.

<sup>29</sup> 25 U.S.C. §§ 461-79 (2006); Valencia-Weber, *supra* note 7, at 236.

<sup>30</sup> Pommersheim, *supra* note 2 at 417.

<sup>31</sup> Zuni, *supra* note 24, at 20-21.

<sup>32</sup> Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 291 (1998).

<sup>33</sup> BJ Jones, *Role of Indian Tribal Courts in the Justice System*, INDIAN CHILD TREATMENT TRAUMA CENTER (Mar. 2000) at 1, <http://www.icctc.org/Tribal%20Courts.pdf>.

<sup>34</sup> See, e.g., Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473, 477 (2002) ("From the beginning, many recognized that "there was, at best, a shaky legal foundation for these tribunals. There was no statutory authorization for the establishment of such courts...."); Aaron F. Arnold et al., *State and Tribal Courts: Strategies for Bridging the Divide*, 47 GONZ. L. REV. 801, 808 (2011).

<sup>35</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>36</sup> *Id.* at 208 ("Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.").

partners or spouses or who violate a protection order.<sup>37</sup> However, tribal courts are still subject to limitations in the criminal sentences and fines they can adjudge. Until recently, the Indian Civil Rights Act (ICRA) restricted tribal imprisonment orders to one year and fines to \$5,000 per offense.<sup>38</sup> These limits were increased by the Tribal Law and Order Act of 2010.<sup>39</sup>

Tribal courts' central mandate is to apply tribal law.<sup>40</sup> Tribal law includes codes,<sup>41</sup> constitutions,<sup>42</sup> tribal common law,<sup>43</sup> and customary law.<sup>44</sup> While tribal courts are not directly bound to uphold the United States Constitution, ICRA provides parties in tribal court proceedings with protections similar to those in the Bill of Rights.<sup>45</sup> For instance, ICRA requires tribal courts to provide a jury trial to anyone charged with a criminal offense for which incarceration is a possible penalty and to consider the accused as having a right to remain silent.<sup>46</sup> However, federal court review of tribal court decisions is only available after tribal court remedies have been exhausted or through habeas corpus claims.<sup>47</sup>

<sup>37</sup> Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. § 904 (2013) (enacted).

<sup>38</sup> Indian Civil Rights Act, 25 U.S.C. § 1302 (2006).

<sup>39</sup> Tribal Law and Order Act of 2010, 25 U.S.C. § 2801 (Supp. IV 2010).

<sup>40</sup> Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241, 279 (1998).

<sup>41</sup> See, e.g., Yurok Tribal Code, Yurok Tribal Council Ordinance, [http://www.yuroktribe.org/documents/YurokTribalCouncilOrdinance\\_v13.pdf](http://www.yuroktribe.org/documents/YurokTribalCouncilOrdinance_v13.pdf) (last visited Nov. 18, 2014); Swinomish Tribe Criminal Code, <http://www.swinomish-nsn.gov/government/tribal-code/title-4-criminal-code.aspx> (last visited Nov. 18, 2014).

<sup>42</sup> See, e.g., Constitution of the Cherokee Nation, <http://www.cherokee.org/Portals/0/Documents/2011/4/308011999-2003-CN-CONSTITUTION.pdf> (last visited Nov. 18, 2014); Minnesota Chippewa Tribe Constitution [http://www.llojibwe.org/government/mctDocs/constitution\\_revised.pdf](http://www.llojibwe.org/government/mctDocs/constitution_revised.pdf) (last visited Nov. 18, 2014).

<sup>43</sup> See, e.g., Valencia-Weber, *supra* note 7, at 245.

<sup>44</sup> Fletcher, *supra* note 23, at 57 (“[T]he importance of customary law in American Indian tribal courts cannot be understated.”).

<sup>45</sup> Talton v. Mayes, 163 U.S. 376 (1896); 25 U.S.C. §§ 301-1341 (2006); B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457 (1998) (“Before the enactment of the Indian Civil Rights Act, it was generally recognized that the United States Constitution did not regulate an Indian tribe's treatment of its members or non-members.”).

<sup>46</sup> Jones, *supra* note 45, at 474.

<sup>47</sup> Clarkson, *supra* note 34, at 481.

## B. Judicial Citations

Judicial citation<sup>48</sup> has received a healthy dose of scholarly attention,<sup>49</sup> but is generally not regarded as a top field of study.<sup>50</sup> The corpus of writing that does exist is at war with itself over the functions and effects of citation. A survey of this conflicted body of research suggests three predominant theories of judicial citation. The first considers citations as reflecting the legally prescribed basis for a judge's decision. Under this theory, citations are dictated by *stare decisis* and judges have little to no room for creative adjudicative maneuvers.<sup>51</sup> The second and more cynical theory views citations as "mere masks"<sup>52</sup> for the non-legal determinants behind a decision, such as ideology or politics.<sup>53</sup> The third, middle-of-the-road theory characterizes citations as an essential component of a court's legitimacy insofar as they promote judicial constraint. Judges cannot let their personal ideology or politics alone decide the case; they must at least find *some* basis for their decision in pre-existing law. According to this last view, citations operate as gentle guideposts that keep judges from becoming activists, but they are not straightjackets.<sup>54</sup>

Assessing the accuracy or normative desirability of these three citation theories is beyond the scope of this article. Instead, this article takes the less traveled road of empirical analysis of citation practices. By painting a concrete picture of the current state of judicial citation, empirical research is an important step in understanding the functions and effects of citations. Namely, understanding *how* citations are used can be revealing of *why* they are, or are not, used. So while this article does not directly engage in the theoretical debate, it does contribute to

<sup>48</sup> This reference to judicial citation refers to all judges, not just tribal court judges.

<sup>49</sup> See, e.g., William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 LAW LIBR. J. 267 (2002) ("there have been numerous empirical studies of appellate court citation practices").

<sup>50</sup> See, e.g., Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1932 (2008) ("Legal sophisticates these days worry little about the ins and outs of citation.").

<sup>51</sup> See, e.g., Lawrence M. Friedman ET AL., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 793 (1981) ("According to our legal theory, judges decide "according to law." They are not free to decide cases as they please. They are expected to invoke appropriate legal authority for their decisions."); Chad Flanders, *Toward A Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 60 (2009).

<sup>52</sup> Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 493 (2010).

<sup>53</sup> See, e.g., Schauer, *supra* note 50 ("[T]he citation of legal authorities in briefs, arguments, and opinions is scarcely more than a decoration.").

<sup>54</sup> Cross, *supra* note 52.

it. Moreover, statistical documentation of citation practices is lacking.<sup>55</sup> The limited research that does exist focuses primarily on the citation practices of the United States Supreme Court<sup>56</sup> and state appellate courts.<sup>57</sup> And empirical research on tribal court citation is nearly non-existent. The following subsection focuses on the one exception.

### **C. Tribal Court Citations**

An extensive review of tribal law and citation literature only uncovered one study on the citation practices of tribal courts.<sup>58</sup> Barsh reviewed a sample of 359 tribal court opinions published in the *Indian Law Reporter*<sup>59</sup> between 1992 and 1998. The sample included opinions issued by fifty-six tribal courts at the trial and appellate levels. Particular attention was paid to whether judges based their decisions on “indigenous jurisprudence”<sup>60</sup> as the central aim of the study was to determine the extent to which tribal courts rely on “traditional law,” as opposed to “Western law.”

Barsh hypothesized, and the findings ultimately confirmed, that tribes tend to lean heavily on their own internal law. Of the 359 opinions in the sample, 284 (eighty percent) relied to some extent on tribal authority. The majority of these internal law opinions relied on tribal court precedent (fifty-six percent), while the

<sup>55</sup> See, e.g., *id.* at 491 (“[T]he use and practical effect of citations has received little rigorous analysis, however.”).

<sup>56</sup> See, e.g., Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971-1999*, 75 *IND. L.J.* 1009 (2000); William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 *LAW LIBR. J.* 267 (2002); Corey Rayburn Yung, *Supreme Court Opinions and the Justices Who Cite Them: A Response to Cross*, 97 *IOWA L. REV. BULL.* 41 (2012); John Hasko, *Making Law with Nonlegal Materials*, 46 *ADVOC.* 22 (2003).

<sup>57</sup> See, e.g., James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 *ALB. L. REV.* 783 (2003); Tina S. Ching, *The Next Generation of Legal Citations: A Survey of Internet Citations in the Opinions of the Washington Supreme Court and Washington Appellate Courts, 1999-2005*, 9 *J. APP. PRAC. & PROCESS* 387 (2007); Paul Hellyer, *Assessing the Influence of Computer-Assisted Legal Research: A Study of California Supreme Court Opinions*, 97 *LAW LIBR. J.* 285 (2005).

<sup>58</sup> Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, *KAN. J.L. & PUB. POL'Y*, (1999) at 74 [hereinafter Barsh]. While an earlier article (Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 *AM. INDIAN L. REV.* 285 (1997)) focuses on tribal court citation practices, its findings do not have an empirical basis; See also, Bonnie Shucha, ‘Whatever Tribal Precedent There May Be’: *The (UN)availability of Tribal Law*, 106 *LAW LIBR. J.* 199, (2014) (also discusses tribal court citations, but does not have a statistical grounding).

<sup>59</sup> The *Indian Law Reporter* is a print collection of tribal court opinions available for purchase; See *INDIAN LAW REPORTER*, <http://www.indianlawreporter.org/> (last visited Nov. 18, 2014).

<sup>60</sup> Barsh, *supra* note 58, at 77.

rest referred to tribal legislation. Barsh also found that reliance on internal rulings or laws was most prevalent in cases focused on “internal social, cultural or political relationships.”<sup>61</sup>

In contrast, tribes in the sample tended to look to United States courts for guidance on matters of a “jurisdictional or procedural nature.”<sup>62</sup> Federal law was a more popular citation source (forty-six percent of cases contained at least one reference) than state law (only twenty-eight percent). Overall, twenty-six percent of cases relied solely on United States law, not citing any tribal authority. Half of these cases were procedural or jurisdictional.

Citation to other tribes’ cases or laws was relatively rare. Ten percent of the cases in the sample (36 out of 359) included an intertribal citation. In contrast, tribes cited their own jurisprudence or legislation in seventy-nine percent of cases. Despite the stark difference between inter- and intra-tribal citation rates, the study did not develop its intertribal citation finding. Instead, it focused on a perceived need for tribal courts to rely more heavily on traditional law, whether inter- or intra-tribal.<sup>63</sup>

Barsh claims that tribes shy away from relying more strongly on traditional law because of a desire to appear legitimate in front of non-tribal audiences. The study calls for a reeducation of tribal judges to better acquaint them with traditional legal reasoning and for judges to in turn educate their communities about these practices.<sup>64</sup> While such an initiative may be of value to tribes, the study does not provide strong grounding for its underlying assertion that the lack of citation to tribal law is motivated by tribal judges’ “fear of non-Indian professionals’ opinions.”<sup>65</sup> Moreover, Barsh does not entertain other explanations, such as a lack of access to opinions or inferior quality of previous rulings.

This article uses Barsh’s work as a springboard to contribute to a field that has received close to no attention. First, this article provides a needed update by analyzing contemporary tribal court opinions (issued in 2013); Barsh reviewed

<sup>61</sup> See Barsh, *supra* note 58, at 79.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 93.

<sup>64</sup> *Id.* at 89 (“To indigenize their own thinking, tribal judges must be prepared to re-learn legal reasoning from a local indigenous perspective; they must risk some of the status they have earned in the non-Indian legal profession; and they must embark on the long-term challenge of educating litigants and their community as a whole.”).

<sup>65</sup> *Id.* at 89.



opinions issued between 1992 and 1998 and tribal courts have changed in the past fifteen years. Indeed, some were not yet in existence when Barsh undertook his study.<sup>66</sup> Notably, this article will also provide a more nuanced discussion of intertribal citation. It will analyze instances of intertribal citation according to cited tribe, the nature of the citation, and the type of dispute at bar. As such, it will contribute to ongoing debates about the existence of an intertribal “common law.”<sup>67</sup>

In addition, in an era of increasing reliance on the internet this article’s utilization of an internet-based tribal court opinion database, as opposed to Barsh’s use of a print compilation, might be more reflective of current or future tribal practices. Even if tribal courts do not currently rely heavily on internet-based sources of tribal law, they will likely do so more in the future. This article’s review of the currently available online tribal court opinion data sources reveals serious gaps, particularly in the number of tribes whose opinions are available online. This deficiency may hinder tribes from building coherent inter- or intra-tribal bodies of law. By bringing attention to this problem, this article hopes to contribute to a growing movement for improved availability.<sup>68</sup>

## II. METHODOLOGY

### A. Data Source

This article’s analysis of tribal court citation practices is based on a three-year sample (May 18, 2010 to May 18, 2013)<sup>69</sup> of tribal court opinions. The sample was extracted from WestlawNext’s online fee-based Native American law database.<sup>70</sup> While WestlawNext has opinions issued as far back as 1997 for some tribes,<sup>71</sup> the time-intensiveness of manual review and this study’s limited research resources made a more expanded timeframe infeasible. The most recent three-years were selected so that findings would speak most directly to current

<sup>66</sup> See, e.g., Greg Skinner, *Council Establishes Tribal Court*, JUNEAU EMPIRE (Sept. 5, 2007), [http://juneauempire.com/stories/090507/loc\\_20070905026.shtml](http://juneauempire.com/stories/090507/loc_20070905026.shtml).

<sup>67</sup> See, e.g., Valencia-Weber, *supra* note 7, at 226 (“The focus of this paper is the development of American Indian law derived from custom, especially common law, among the indigenous nations.”).

<sup>68</sup> See *infra* note 87 (discussing a partnership the Native American Rights Fund and Westlaw have developed to increase the availability of tribal court opinions).

<sup>69</sup> These dates refer to the date each opinion was issued.

<sup>70</sup> While WestlawNext’s Native American law database also includes Federal Indian law case opinions issued by U.S. courts, this article’s review was limited to opinions issued by tribal courts.

<sup>71</sup> See *infra* Table 1 (WestlawNext coverage dates for each reporting tribe).

practices. Opinions from all court levels were included. This ranged from trial, intermediate appellate, to supreme courts. It also included one court whose jurisdiction is limited to gaming disputes.<sup>72</sup>

Print compilations of tribal court opinions, such as the Indian Law Reporter<sup>73</sup> (utilized by Barsh), were ruled out as sources. Online databases present numerous advantages, including advanced search (by terms, dates, or courts), cataloguing, and opinion extraction tools. Some also include linking functionalities that open cited cases at the click of a mouse on the citing opinion. WestlawNext's tools are particularly advanced and were one of the principal bases for its selection as this article's data source.

WestlawNext was also attractive because of its relative comprehensiveness. While it contains opinions for twenty-three tribes,<sup>74</sup> LexisNexis only has opinions for five.<sup>75</sup> WestlawNext also narrowly beat out several lesser-known competitors. For instance, Versuslaw, an online fee-based opinion database, contains opinions for one less tribe than WestlawNext (twenty-two compared to twenty-three).<sup>76</sup> Similarly, the Tribal Court Clearinghouse,<sup>77</sup> while accessible for free online, also only contains opinions for twenty-two tribes. While these latter two sources' tribal court counts do not differ greatly from WestlawNext's, their online functionalities pale in comparison.

<sup>72</sup> Mohegan Gaming Disputes Court, THE MOHEGAN TRIBE, [http://www.mohegan.nsn.us/Government/gc\\_main.aspx](http://www.mohegan.nsn.us/Government/gc_main.aspx) (last visited Nov. 18, 2014).

<sup>73</sup> The Indian Law Reporter has also been criticized as a source of tribal court jurisprudence on non-technological grounds. See, e.g., Jones, *supra* note 45, at 514 n.78 ("Although there is an Indian Law Reporter which compiles tribal court decisions, as well as federal and state law decisions involving Indian law issues, the decisions contained therein are voluntarily submitted by tribal courts and there is no regulated method of gathering tribal court decisions.").

<sup>74</sup> Two of these twenty-three are actually tribal court reporters, one is an intertribal court, and a few are courts for confederated tribes. Each of these nominal "tribes" includes opinions for more than one tribe. (Information about the actual number was not available.) As a result, WestlawNext likely contains opinions for more than twenty-three tribes. For ease of expression, these reporters, multi-tribal courts, and confederacies are grouped with other WestlawNext tribal opinion sources, and are included in references to "twenty-three tribes" throughout this article. Such oversimplification is not unprecedented. See, e.g., *American Tribal Law Reporter Now on Westlaw*, Paul L. Boley Law Library, LEWIS & CLARK LAW SCHOOL, <http://lawlib.lclark.edu/spotlights/TribalLawReporter> (last visited Nov. 18, 2014) ("The Tribal Law Reporter provides tribal, appeals and supreme court opinions from 21 American tribal courts...").

<sup>75</sup> The tribe count was obtained in an interview with a Lexis representative on May 26, 2013.

<sup>76</sup> Versuslaw.com, <http://www.versuslaw.com/help/library/LibCatProfessional.aspx#tribal> (last visited Nov. 18, 2014).

<sup>77</sup> Tribal Court Clearinghouse, <http://www.tribal-institute.org/lists/decision.htm> (last visited Nov. 18, 2014).



Some tribes make their opinions available on their own websites.<sup>78</sup> In addition, some tribes participate in joint court systems, sharing judges and prosecutors. Some of these multi-tribe systems make their members' opinions available on a single website, such as the Northwest Intertribal Court System's website.<sup>79</sup> However, compiling opinions from separate websites would introduce the risk of manual error (e.g., failing to include opinions within the sample timeframe or miscategorizing opinions). In addition, constructing a multi-tribe sample within a single timeframe would be challenging, as these separate sources contain opinions issued over different spans of time. In contrast, WestlawNext does not require manual compilation or categorization, and the website contains a search functionality that selects cases issued within specified timeframes.

While WestlawNext is the most analytically advanced and comprehensive source available, it is not without limitations. Crucially, its supply of tribal court opinions is severely limited relative to the number of tribes with tribal courts. Currently, there are 566 federally recognized tribes,<sup>80</sup> and according to one estimate, 400 unrecognized tribes.<sup>81</sup> Roughly half of recognized tribes (283) have tribal courts.<sup>82</sup> WestlawNext's database only contains opinions for approximately one-tenth<sup>83</sup> of these tribes.

As of four years ago, tribes had added incentive to report their opinions to WestlawNext. In 2009, the Native American Rights Fund (NARF) formed a "strategic alliance" with West whereby they work together to increase access to

<sup>78</sup> See, e.g., Navajo Nation Supreme Court decisions, <http://www.navajocourts.org/suctopinions.htm> (last visited Nov. 18, 2014); Cherokee Nation Supreme Court, <http://www.cherokeecourts.org/SupremeCourt/SupremeCourtCaseOpinionsandInformation.aspx> (last visited Nov. 18, 2014).

<sup>79</sup> Northwest Intertribal Court System, <http://www.nics.ws/opinions/opinions.htm> (last visited Nov. 18, 2014).

<sup>80</sup> Bureau of Indian Affairs Notice, 78 Fed. Reg. 26384 (May 6, 2013).

<sup>81</sup> GAO, Federal Funding for Non-Federally Recognized Tribes. GAO-12-348. Apr. 2012.

<sup>82</sup> David Selden, *Basic Indian Law Research Tips—Tribal Law*, National Indian Law Library at the Native American Rights Fund, [http://www.narf.org/nill/resources/tribal\\_law\\_research\\_2012.pdf](http://www.narf.org/nill/resources/tribal_law_research_2012.pdf) (last visited Nov. 18, 2014).

<sup>83</sup> This percent may actually be a bit higher. As previously mentioned, the twenty-three "tribes" in WestlawNext include an intertribal reporter and court, as well as confederated tribes. Each of these was only counted once, since accurate figures were not available. This percent should be read as an estimate.

tribal law.<sup>84</sup> Under the alliance, materials submitted to one entity are shared with the other. NARF posts materials to its online library;<sup>85</sup> WestlawNext includes them in its fee-based database.<sup>86</sup> Tribes are encouraged to submit materials by being offered free access to WestlawNext.<sup>87</sup> However, the success of this initiative so far appears to be limited. As just discussed, WestlawNext only has opinions for twenty-three tribes. Moreover, the number and recentness of opinions for some tribes are limited as well.<sup>88</sup> Nevertheless, WestlawNext was the best option available. Table 1 provides a summary of the tribal court opinions in WestlawNext.

**TABLE 1. Summary of Tribal Opinions on WestlawNext (May 2013)**

	<b>Native American Indian Tribe/Court With Opinions Available on Westlaw</b>	<b>Number Opinions on Westlaw</b>	<b>First Year Westlaw Coverage</b>	<b>Date Most Recent Opinion on Westlaw</b>	<b>Principal Locations</b>	<b>Federally Recognized</b>
1	Cherokee Nation of Oklahoma	120	1997	June, 2012	OK	Yes
2	Cheyenne River Sioux	22	2001	October, 2007	SD	Yes

<sup>84</sup> *NILL & Westlaw Work with Tribes to Improve Access to Tribal Law*, NATIONAL INDIAN LAW LIBRARY BLOG (Aug. 27, 2009, 12:58 PM), <http://nilllibrary.blogspot.com/2009/08/nill-westlaw-work-with-tribes-to.html>.

<sup>85</sup> National Indian Law Library, <http://nill.softlinkliberty.net/liberty/libraryHome.do> (last visited Nov. 18, 2014).

<sup>86</sup> Westlaw tribal law database directory, <http://directory.westlaw.com/default.asp?GUID=WDIR000000000000000000000000001872&RS=W&VR=2.0> (last visited Nov. 18, 2014).

<sup>87</sup> *NARF Announces New Alliance with Westlaw to Improve Access to Tribal Law*, NARF, <http://narf.convio.net/site/DocServer/westlaw0809.pdf?docID=1521> (last visited Nov. 18, 2014).

<sup>88</sup> For instance, there were only nine opinions on WestlawNext for the Fort McDowell Yavapai Nation, the most recent of which is seven years old. See Table 1 for the number and recentness of opinions on WestlawNext by tribe.

3	Confederated Salish & Kootenai Tribes	35	1997	May, 2007	MT	Yes
4	Confederated Tribes Colville Reservation	126	1997	December, 2012	WA	Yes
5	Confederated Tribes Grand Ronde Community	103	1999	December, 2005	OR	Yes
6	Eastern Band of Cherokee Indians	117	2000	August, 2010	NC	Yes
7	Fort McDowell Yavapai Nation	9	2001	July, 2006	AZ	Yes
8	Fort Peck Tribes	149	1997	January, 2008	MT	Yes
9	Grand Traverse Band	96	1997	June, 2009	MI	Yes
10	Ho-Chunk Nation	157	1997	July, 2011	WI	Yes
11	Hopi	115	1997	June, 2012	AZ	Yes
12	Inter-Tribal Court of Appeals of Nevada	185	1997	December, 2006	NV	Membership Varies
13	Leech Lake Band of Ojibwe	26	2002	February, 2010	MN	Yes
14	Little River Band of Ottawa Indians	93	1998	May, 2009	MI	Yes
15	Little Traverse Bay Bands of	46	1998	June, 2009	MI	Yes

	Odawa Indians					
<b>16</b>	Mille Lacs Band of Chippewa Indians	10	1998	November, 2008	MN	Yes
<b>17</b>	Mohegan	203	1997	April, 2013	CT	Yes
<b>18</b>	Navajo Nation	246	1997	February, 2013	AZ, NM, UT	Yes
<b>19</b>	Oklahoma Tribal Courts	1,017	1979	February, 2007	OK	Membership Varies
<b>20</b>	Oneida Tribe of Indians of Wisconsin	755	1997	September, 2011	WI	Yes
<b>21</b>	Sac & Fox Nation	18	1998	March, 2007	OK	Yes
<b>22</b>	Tulalip Tribes	72	1997	April, 2013	WA	Yes
<b>23</b>	West's Mashantucket Pequot	556	1992	May, 2013	CT	Yes
<b>T O T A L</b>	<b>Total Number Tribal Opinions on Westlaw</b>	<b>4,276</b>				

Despite being the optimal choice, using WestlawNext data may have resulted in a biased sample. Tribes that share their opinions with WestlawNext have the resources for publication and distribution.<sup>89</sup> As a result, wealthier tribes are likely overrepresented. Moreover, tribes that report their opinions do so

<sup>89</sup> The author contacted WestlawNext for more information about its tribal law solicitation and publication processes and policies. However, WestlawNext has a policy of not publicly discussing its methods of obtaining legal materials.

voluntarily. This willingness may be associated with practices that are more consistent with United States courts' and less vulnerable to external criticism. Thus the sample might contain a disproportionate number of United States-style courts. Moreover, WestlawNext does not necessarily contain all opinions issued by reporting courts. Since reporting is at the courts' discretion, tribes may only report a portion of their caseload.<sup>90</sup> And tribes' bases for selection may bring in other dimensions of bias.

In addition, several tribes may be overrepresented in WestlawNext. Nearly one-quarter (1,017 out of 4,276)<sup>91</sup> of all opinions in WestlawNext's tribal database are from a single reporter, namely, the Oklahoma Tribal Courts Reports. While precise information about which courts' opinions are in this reporter was not available, it is unlikely that the number of opinions actually issued by these courts accounts for one-quarter of all opinions issued by tribal courts.<sup>92</sup> The Oneida Tribe of Wisconsin reported the second greatest number of opinions, accounting for nearly one-fifth (755 out of 4,276) of the tribal opinions in WestlawNext. To put this in context, the Oneida Tribal Courts had jurisdiction over 16,567 members in 2010,<sup>93</sup> whereas Navajo courts adjudicated on behalf of roughly 332,129 people that year.<sup>94, 95</sup> Only six percent, compared to Oneida's eighteen percent, of WestlawNext's tribal opinions were issued by the Navajo Nation.

<sup>90</sup> Barsh, *supra* note 58, at 80 ("It must be borne carefully in mind that the sample consists of published decisions, rather than total caseload. It could be argued that unpublished decisions involve more "traditional," or at least more informal, approaches to dispute settlement.").

<sup>91</sup> These figures may contain a limited number of double counted opinions. While several duplicate opinions were identified and removed from the article's three-year sample (see this paper's Methodology section for more detail about this process), conducting the same data cleaning procedure for WestlawNext's entire tribal court opinion database was beyond this study's scope.

<sup>92</sup> The study author was unable to obtain reliable information about the precise number of tribes and/or tribal courts covered by the Oklahoma Tribal Courts Reports. A rough estimate suggests that approximately twenty tribal courts are included. See Oklahoma Legal Services Inc., *Seeking Native Justice*, <http://thorpe.ou.edu/OILS/court.html> (last visited Nov. 18, 2014). While these reports also contain opinions issued by Courts of Indian Offenses (administered by the U.S. government), the study's three-year sample did not contain any and WestlawNext's overall tribal court database did not appear to either.

<sup>93</sup> Oneida Nation of Wisconsin, *Tribal Statistics*, <http://witribes.wi.gov/docview.asp?docid=5637&locid=57> (last visited Nov. 18, 2014).

<sup>94</sup> United States Census Bureau, *The American Indian and Alaska Native Population: 2010*. In discussing tribal population size, this article alternates between Census data, based on "tribal groupings," and membership counts publicized by tribes themselves. While these figures are not strictly comparable, population size data was not available for all tribes based on a single metric.

<sup>95</sup> Admittedly, tribe size is not necessarily proportionate to tribal court caseload. (For instance, some tribes might be more litigious than others, some might resort frequently to extra-judicial

WestlawNext also suffers from underrepresentation. The largest tribal affiliation according to the most recent United States Census is the Cherokee Nation, and their opinions only account for a fraction of WestlawNext's inventory.<sup>96</sup> The two Cherokee Nation courts in WestlawNext (the Cherokee Nation of Oklahoma and the Eastern Band of Cherokee Indians) together only account for five percent of the total opinions. Several other tribes ranked as among the largest were completely missing from WestlawNext. For instance, the Choctaw is the third most numerous tribe<sup>97</sup> but did not have any opinions.<sup>98</sup> Several more of the top ten most numerous tribes, including the Chippewa, Sioux, Apache, Blackfeet, and Creek also were not represented in WestlawNext's database.<sup>99</sup>

### **B. Study Sample**

The three-year sample extracted from WestlawNext totaled 231 opinions. An opinion title and number comparison revealed that twenty-three were included in duplicate.<sup>100</sup> These duplicates were dropped. This resulted in the removal of one-tenth of the initial sample, leaving a final sample of 208 opinions. These opinions were issued by seventeen tribal courts. See Table 2 on the next page for a summary of the final sample.

Two tribal courts together accounted for almost half of the sample. The Navajo Supreme Court had the most, accounting for nearly one quarter. The two Mashantucket Pequot courts (trial plus appellate) were a close second, with twenty-one percent of the sample's opinions. Barsh's sample was also dominated by these two tribes' courts. Barsh noted that the numerosity of Navajo opinions makes sense, in light of that tribe's size.<sup>101</sup> However, Barsh viewed the high

mediation, and some might lean heavily on U.S. courts.) This study uses tribe size as a rough estimate of expected opinion issuance figures, since tribal court caseload data is not available.

<sup>96</sup> Census, *supra* note 94 ("The Cherokee tribal grouping had the largest alone-or-in-any-combination population, with 819,000.").

<sup>97</sup> *Id.*

<sup>98</sup> However, Choctaw rulings were the subject of two of the intertribal citations identified within the study's three-year WestlawNext sample. See Table 6 for more information.

<sup>99</sup> Census, *supra* note 94. It should be noted that while some of these tribes are included in the Oklahoma Tribal Courts Reports, none of their opinions were in WestlawNext.

<sup>100</sup> Discussions with WestlawNext representatives (on May 23, 2013) revealed that WestlawNext was not aware that it was publishing some tribal opinions more than once. The study author's inquiry initiated an investigation that revealed a pattern of double postings within WestlawNext's tribal court database. WestlawNext was of the opinion that the double postings were not the result of duplicate submissions by tribes. Rather, the duplication was due to WestlawNext error.

WestlawNext subsequently notified the study author that the errors had been corrected.

<sup>101</sup> Barsh, *supra* note 58, at 77-78 ("It should not be surprising that Navajo is heavily represented

number of Pequot opinions as misrepresentative because many were casino-related, and excluded Pequot opinions for this reason.<sup>102</sup> Presumably, this decision was motivated by the study's focus on traditional law and an assumption that gaming is beyond this scope. This article aims to shed light on citation practices more generally, and thus did not follow Barsh in disregarding Pequot opinions.<sup>103</sup>

**TABLE 2. 3-Year Sample Tribal Opinions (May 18, 2010- 2013)**

	<b>Tribal Court Name</b>	<b>Number of Opinions</b>	<b>Level in Tribal Court System</b>
<b>1</b>	<b>Appellate Court of the Hopi Tribe</b>	13	Appellate Court
<b>2</b>	<b>Cherokee Court Eastern Band of Cherokee Indians</b>	1	Trial Court
<b>3</b>	<b>Cherokee Nation Supreme Court</b>	9	Supreme Court
<b>4</b>	<b>Colville Tribal Court of Appeals</b>	18	Appellate Court
<b>5</b>	<b>Coquille Indian Tribal Court</b>	1	Trial and Appellate Court
<b>6</b>	<b>Ho-Chunk Nation Supreme Court</b>	2	Supreme Court
<b>7</b>	<b>Ho-Chunk Nation Trial Court</b>	18	Trial Court
<b>8</b>	<b>Mashantucket Pequot Court of Appeals</b>	6	Appellate Court

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since it has the largest population and caseload.”).

<sup>102</sup> *Id.* at 78 (“The Pequot court is clearly overrepresented in relation to the size of that tribe, however—an artifact of the high volume of disputes involving the Pequots’ casino, which accounted for 12 percent of all the reported cases. For this reason, the Pequot decisions have been deleted from some of the analyses presented below.”).

<sup>103</sup> Barsh reported two sets of findings, each based on a different sample. One sample included and the other excluded Pequot opinions. Since this study included Pequot opinions, the Barsh findings it discusses are based on the Pequot-inclusive sample.

9	<b>Mashantucket Pequot Tribal Court</b>	37	Trial Court
10	<b>Mohegan Gaming Disputes Court of Appeals</b>	2	Appellate Court
11	<b>Mohegan Gaming Disputes Trial Court</b>	16	Trial Court
12	<b>Mohegan Tribal Trial Court</b>	5	Trial Court
13	<b>Oneida Tribal Judicial System Trial Court</b>	17	Trial Court
14	<b>Shoshone and Arapaho Tribal Court</b>	1	Trial and Appellate Court
15	<b>Supreme Court Eastern Band Cherokee Indians</b>	2	Supreme Court
16	<b>Supreme Court Navajo Nation</b>	46	Supreme Court
17	<b>Tulalip Tribal Court of Appeals</b>	14	Appellate Court
<b>TOTAL</b>	<b>Total Number of Opinions in Sample</b>	208	

In contrast, several courts in the sample only had one or two opinions. For instance, the Coquille Tribe and Shoshone-Arapaho Tribes' joint court each only had one opinion. As one might expect based on this small turnout, all three of these tribes are small. Coquille's membership is estimated at 695 people,<sup>104</sup> in stark contrast to the Navajo Nation's 332,129.<sup>105</sup> The Shoshone and Arapaho

<sup>104</sup> Coquille Tribe, NORTHWEST PORTLAND AREA INDIAN HEALTH BOARD, [http://www.npaihb.org/member\\_tribes/tribe/coquille\\_tribe/](http://www.npaihb.org/member_tribes/tribe/coquille_tribe/) (last visited Nov. 18, 2014).

<sup>105</sup> Census, *supra* note 94.



Tribes are larger than Coquille, at 7,400 and 4,200 respectively,<sup>106</sup> but still small compared to some of the other tribes in the sample. As such, these three tribes' limited representation in the sample may actually be proportionate to their real-world judicial presence. However, the small number of opinions limited the inferences that could be made. Clearly, one opinion (or even quite a few more) for a single tribe or court is not revealing of an overall citation "practice."

The courts with opinions in the sample were well-balanced numerically in terms of court level. Of the sample's issuing courts, six were at the trial level, five were appellate (excluding supreme courts), and four were supreme. (Two of the courts, not included in the foregoing, operate on both the trial and appellate levels.) However, this numerical balance is surprising since not all tribes have appellate courts and not all cases are appealed. Thus, one would expect a greater proportion of trial-level courts, as well as opinions. Forty-five percent of the sample's opinions were issued by trial courts, whereas reason suggests that trial opinions should account for the vast majority.

One possible explanation is that appellate courts are more able or eager to report their opinions, perhaps because of greater access to resources or more confidence and willingness to expose their adjudication. Alternatively, cases that reach appellate levels may be high-profile or particularly far-reaching, and tribal communities may demand decisional details. Regardless, this study's findings might be more reflective of appellate than overall citation practices, which likely have a wider basis in trial court adjudication.

### ***C. Data Analysis***

Each of the 208 opinions in the sample was reviewed using a standardized review instrument. The instrument was developed based on the results of a review of a sub-sample (totaling thirteen opinions), consisting of the tribal court opinions issued within the last six months available on WestlawNext. This preliminary review suggested ten citation categories to guide citation tracking: (1) cite to same court (self-referential); (2) cite to lower court (same tribe); (3) cite to higher court (same tribe; excluding tribal supreme court opinions); (4) cite to supreme court (same tribe); (5) cite to other tribal court; (6) cite to state court in tribe's primary

<sup>106</sup> Frequently Asked Questions, THE ARAPAHO PROJECT, <http://www.colorado.edu/csilw/arapahoproject/contemporary/faq.htm> (last visited Nov. 18, 2014).

state; (7) cite to other state court; (8) cite to Circuit court; (9) cite to United States Supreme Court; and (10) cite to foreign court.

While the preliminary sub-sample review also revealed citations to legal materials other than opinions (for instance, Black's Law Dictionary<sup>107</sup> made several appearances) as well as a variety of non-legal sources (ranging from Goethe<sup>108</sup> to Forrest Gump<sup>109</sup>), only citations to court opinions were routinely tracked.

For each opinion, citations were identified and logged according to the ten categorizes. These findings were recorded in a master database. This analysis did not account for the nature of the citation. For instance, negative treatment was not differentiated from positive. Such nuanced assessment was prohibitively time-intensive, and raw citation counts are quite meaningful in their own right. Even if a case is cited as not dispositive, such reference still functions as an acknowledgement that the cited court's rulings are potentially relevant. Moreover, references to other courts' opinions are revealing of courts' access to external law, regardless of the level of deference shown.

Citations in opinion footnotes, in addition to those in the body of the opinion, were recorded. The analysis did not differentiate citations based on their location. In addition, when a citation itself explicitly referred to another opinion,<sup>110</sup> each cited opinion was recorded separately. However, cited opinions were only counted once per citing case, not each time they appeared if they were referenced multiple times. While analyzing the number of times individual cases are cited in a given opinion might speak to the weight given to the cited material, assessing depth of treatment was beyond this study's scope. Finally, cited opinions were not

<sup>107</sup> See, e.g., *K.F. v. Quil Ceda Village Liquor Store*, 2013 WL 1812229 (Tulalip C.A.), 5 (“Black's Law Dictionary, Centennial Edition (1991), defines “pro se” as “For one's own behalf.”).

<sup>108</sup> *Walton v. Mashantucket Pequot Gaming Enter.*, MPTC CV-AA-2011-174, 2012 WL 4513385 (Mash. Pequot Tribal Ct. Oct. 1, 2012) (“Thus, unlike Goethe's Dr. Faust...who made [his] own deals with the devil and got at least temporary benefits, here the plaintiff received very little (only a few sips of beer) in return.”).

<sup>109</sup> *EXC, Inc. v. Kayenta Dist. Court*, SC-CV-07-10, 2010 WL 3701050 (Sept. 15, 2010) (“The buttes are featured in ...recent movies such as *Forrest Gump*...”).

<sup>110</sup> E.g., *Sandoval v. Navajo Election Admin.*, SC-CV-62-12, 2013 WL 775403 (Feb. 26, 2013); *In re Appeal of Vern R. Lee*, 6 Am. Tribal Law 788, 789–90 (Nav.Sup.Ct.2006) (citing *Begay v. Navajo Nation Election Admin. (NEA)*, 8 Nav. R. 241, 250, 4 Am. Tribal Law 604 (Nav.Sup.Ct.2002)).

examined to determine if the cited text itself contained another citation. While this was likely the case in a few instances, this study was only concerned with tribal courts’ explicit reliance on other opinions.

**III. FINDINGS**

**A. Results Overview**

According to a detailed review of the three-year sample, tribal courts look predominantly to tribal law in their citations. Seventy percent of all citations to other opinions (1,197 out of a total 1,706 citations in the sample) were to tribal court decisions. In comparison, tribal courts only turned to United States court jurisprudence for thirty percent of their citations (508 out of the total 1,706 citations). Strikingly, tribal courts barely acknowledged foreign courts’ existence, with a mere one citation in the entire sample. See Table 3 below for a summary of these findings.

**TABLE 3. Summary of Citation Findings**

<b><u>Total</u> Number of Citations in Sample</b>	<b>Average Number of Citations per Opinion</b>	<b>Number of Citations to <u>Tribal</u> <u>Courts</u></b>	<b>Average Number of Citations to Tribal Courts per Opinion</b>	<b>Number of Citations to <u>United</u> <u>States</u> <u>Courts</u></b>	<b>Average Number of Citations to United States Courts</b>	<b>Number of Citations to <u>Foreign</u> <u>Courts</u></b>
1,706	8	1,197	6	508	2	1

On average, opinions in the sample cited eight cases. This rate does not differ greatly from rates reported for some United States courts. For instance, one study found that the United States Supreme Court cites an average of seven Court

decisions in each opinion, and cites elsewhere infrequently.<sup>111</sup> State supreme courts, however, appear to cite more heavily. According to one study, state supreme court opinions include an average of fourteen citations.<sup>112</sup> Similarly, a study of the New York Court of Appeals (the state's highest court) found an average of eleven citations per opinion.<sup>113</sup> Relative to these United States courts, tribal courts appear to be on the lower end of the citation spectrum.

However, there are many United States courts that may be more comparable to tribal courts for which citations rates were not available. These similarities, such as lack of legal resources, judges' with limited training, and geographic remoteness, could affect citation rates. And if rates for these United States courts are indeed low, the overall rate for United States courts may actually be closer to tribal courts' than the studies suggest.

### ***B. Citations to Tribal Courts***

The vast majority of citations to tribal precedent was self-referential.<sup>114</sup> Just over eighty percent of all citations to tribal opinions (967 out of a total of 1,197 citations to tribal courts) were to opinions previously issued by the citing court itself. In some instances this insularity is likely largely due to the fact that some tribal court systems only consist of one court, which functions on both the trial and appellate levels. Two tribal courts included in the sample, the Coquille Indian Tribal Court and the Shoshone and Arapaho Tribal Court, each play this dual role. These courts cannot cite tribal court opinions other than their own without looking outside their own tribes.

These two courts each only accounted for one opinion out of the sample's 208. So the fact that some tribal court systems are single-tiered likely does not fully account for the finding that tribal courts cite their own decisions so much more frequently than they cite other courts in their tribe's judicial system. Alternatively, tribal courts' insularity could be an indication that even access to opinions issued

<sup>111</sup> Cross, *supra* note 52, at 530.

<sup>112</sup> Lawrence M. Friedman ET AL., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 795 (1981).

<sup>113</sup> *New York Appellate Decisions Show Preference for Recent Cases, Commentaries and Bill Memos*, N.Y. St. B.J., May 2002, at 8.

<sup>114</sup> A "self-referential" citation is when the citing tribal court refers to one of its own opinions.

within the same tribal court system, but at different levels, is limited. See Table 4 below for a summary of the findings on citations to tribal courts.<sup>115</sup>

**TABLE 4. Citations to Tribal Courts: Findings Summary**

<b>Total Number of Citations to <u>Tribal Courts</u></b>	<b>Number of <u>Self-Referential Citations</u></b>	<b>Number of Citations to <u>Lower Courts</u> (Same Tribe)</b>	<b>Number of Citations to <u>Higher Courts</u> (Same Tribe)</b>	<b>Number of Citations to <u>Tribal Supreme Court</u> (Same Tribe)</b>	<b>Number of Citations to <u>Other Tribes</u><sup>116</sup></b>
1,197	967	55	103	62	10

While the foregoing suggests that tribal courts are strongly focused on their own jurisprudence, they are not blind to the other courts that adjudicate on behalf of their tribes. Almost one-tenth of citations to tribal courts (103 of the 1,197 total) were to higher courts within the same tribal court system. Courts looked to their tribe's supreme court to a lesser extent, only citing supreme courts in five percent of their citations to tribal courts. However, this finding should be read in light of the fact that a number of tribes do not have supreme courts. Thus this low citation rate may largely be the result of necessity and not choice. Citation to lower courts within the same tribe was only slightly less frequent than citation to supreme courts, accounting for just under five percent.

In contrast, the number of citations to other tribes' courts was strikingly small. A mere one percent of citations to tribal courts (10 out of 1,197) were intertribal. These ten intertribal citations appeared in six opinions. (See Table 5 on the following page for a detailed description of each of the ten instances of

<sup>115</sup> The categories in Table 4 are mutually exclusive. For instance, even though a citation to a tribal supreme court may technically be a citation to a higher court, citations to mere appellate courts were disaggregated from courts identified as "supreme." Similarly, if a tribal supreme court cited itself, this citation only counted towards the "self-referential" citation tally.

<sup>116</sup> As noted in this article's Introduction, the practice of citing to other tribes is generally referred to as "intertribal citation" throughout this article.

intertribal citation.) This low rate of intertribal citation may be the result of a lack of access to other tribal courts’ decisions.<sup>117</sup> It could also be due to inter-tribal animosity, or a general distaste for citing “external” tribal jurisprudence because of perceived differences in tribal custom.

Barsh’s findings on intertribal citation are not directly comparable to this article’s, but not for the reason discussed previously (i.e., a difference in the unit of analysis, namely, percentage of opinions versus citations). The Barsh study included citations of tribal legislation within its intertribal citation category, and this study only recorded citations to other tribes’ decisions. Barsh found that ten percent of opinions included at least one citation to another tribe’s law or legal decision. In contrast, this study found that only three percent of opinions (6 out of 208) included at least one intertribal citation. That Barsh found a greater prevalence of intertribal citation than this study is not unexpected since Barsh’s definition of intertribal citation was broader.

**TABLE 5. Citations to Tribal Courts: Detailed Findings**

	<b>Citing Opinion Title</b>	<b>Citing Opinion Date</b>	<b>Citing Opinion Type Case</b>	<b>of</b>	<b>Citing Tribal Court</b>	<b>Tribal Court Cited</b>	<b>Description Of Intertribal Citation</b>	<b>Availability of Cited Opinion</b>
<b>1</b>	Bradley v. Tulalip Tribes, 10 Am. Tribal Law 283	May, 2012	Tort Law		Tulalip Tribal Court of Appeals (WA)	Hoopa Valley Tribal Court of Appeals (CA)	Other tribe's opinion cited in reference to "the common law of sovereign immunity."	Unable to locate online in publicly accessible tribal court opinion databases. (Not on Westlaw)

<sup>117</sup> Aaron F. Arnold ET AL., *State and Tribal Courts: Bridging the Divide*, CENTER FOR COURT INNOVATION (2011) at 12 ([T]ribal courts often lack the technological capacity to store and retrieve information from court cases, and they do not have reliable access to compilations of tribal court decisions from other jurisdictions.”).

						Cited portion of other tribe's opinion is in turn a citation to a Federal Circuit court opinion.	
<b>2</b>	Bradley v. Tulalip Tribes, 10 Am. Tribal Law 283	May, 2012	Tort Law	Tulalip Tribal Court of Appeals (WA)	Hoop Valley Tribal Court of Appeals (CA)	Other tribe's opinion cited in reference to "the common law of sovereign immunity."	Publicly available online at Northwest Intertribal Court System website <sup>118</sup> (as noted by the citing opinion). (Not on Westlaw)
<b>3</b>	Bradley v. Tulalip Tribes, 10 Am. Tribal Law 283	May, 2012	Tort Law	Tulalip Tribal Court of Appeals (WA)	Puyallup Tribal Court (WA)	Other tribe's opinion cited in reference to "the common law of sovereign immunity."	Publicly available online at Versuslaw.com <sup>119</sup> (Not on Westlaw)
<b>4</b>	Zavala v. Milstead, 10 Am. Tribal	Sept., 2011	Family Law (child custody)	Colville Tribal Court of Appeals	Navajo Nation Supreme Court	Citing court cites other tribe's opinion in	Publicly available online at Navajo Supreme Court website <sup>120</sup>

<sup>118</sup> Northwest Intertribal Court System, <http://www.nics.ws/opinions/opinions.htm> (last visited Nov. 18, 2014).

<sup>119</sup> VersusLaw, <http://www.versuslaw.com/> (last visited Nov. 18, 2014).

<sup>120</sup> Navajo Supreme Court, <http://www.navajocourts.org/suctopinions.htm> (last visited Nov. 18, 2014).

	Law 195			(WA)	(AZ)	reference to the fact that it is the only case mentioned by appellant. Citing court notes that they do not find Navajo law persuasive.	(Available on Westlaw)
5	C.S. v. Tulalip Tribes Housing Dept., 9 Am. Tribal Law 407	Feb., 2011	Employment Law	Tulalip Tribal Court of Appeals (WA)	Hoopa Valley Tribal Court of Appeals (CA)	Other tribe's opinion cited in reference to courts' duty to proactively establish jurisdiction.	Unable to locate online in publicly accessible tribal court opinion databases. (Not on Westlaw)
6	C.S. v. Tulalip Tribes Housing Dept., 9 Am. Tribal Law 407	Feb., 2011	Employment Law	Tulalip Tribal Court of Appeals (WA)	Squaxin Island Tribal Court of Appeals (WA)	Other tribe's opinion cited in reference to courts' duty to proactively establish jurisdiction.	Unable to locate online in publicly accessible tribal court opinion databases. (Not on Westlaw)
7	Desautel v. Dupris, 10 Am.	Jan., 2011	Tribal Enrollment and Judicial	Colville Tribal Court of	Navajo Nation Supreme	Other tribe's opinion cited in	Publicly available online at Versuslaw.com <sup>121</sup>

<sup>121</sup> VersusLaw, *supra* note 119.



	Tribal Law 188		Misconduct	Appeals (WA)	Court (AZ)	reference to courts' "inherent powers." Citation is indirect; it refers to another of the citing court's own opinions, which contains the other tribe's citation.	(Not on Westlaw)
8	Nissen v. Coquille Economic Dev. Corp., Am. Tribal Law	Dec., 2010	Tort Law	Coquille Indian Tribal Court (OR)	Cherokee Court of the Eastern Band of Cherokee Indians (NC)	Other tribe's opinion cited to support assertion that principles of estoppel do not apply to subject matter jurisdiction. Citation introduced with statement that "at least one tribal court is in accord."	Unable to locate online in publicly accessible tribal court opinion databases. (Available on Westlaw)

9	Billie v. Collins, Am. Tribal Law	Sept., 2010	Family Law (divorce)	Ho-Chunk Nation Trial Court (WI)	Choctaw Tribal Court (OK)	Other tribe's opinion cited in reference to divorce and custody ruling.	Unable to locate online in publicly accessible tribal court opinion databases. (Not on Westlaw)
10	Billie v. Collins, Am. Tribal Law	Sept., 2010	Family Law (divorce)	Ho-Chunk Nation Trial Court (WI)	Choctaw Tribal Court (OK)	Other tribe's opinion cited in reference to modification of divorce and custody ruling.	Unable to locate online in publicly accessible tribal court opinion databases. (Not on Westlaw)

One tribal court, the Tulalip Tribal Court of Appeals of Washington State, was responsible for half of the instances of intertribal citation. This finding is not surprising in light of the fact that the Tulalip Tribal Court of Appeals is administered by the Northwest Intertribal Court System (NICS).<sup>122</sup> NICS is a “consortium of Indian tribes” that provides legal services to its tribal members.<sup>123</sup> The NICS judges who sit on the Tulalip Tribal Court of Appeals bench and write the court’s opinions also adjudicate for other tribes. Some of these judges are members of other tribes.<sup>124</sup>

Moreover, all of the Tulalip Appeals Court’s intertribal citations were to decisions issued by other NICS member tribes—the Hoopa, Puyallup, and Squaxin Island tribes are all members.<sup>125</sup> It is also notable that all of the Tulalip’s

<sup>122</sup> *Tulalip Appellate Justices*, TULALIP TRIBAL COURT, <http://www.tulaliptribes-nsn.gov/Home/Government/Departments/TribalCourt/AppellateJudgeBio.aspx> (last visited Nov. 18, 2014).

<sup>123</sup> *About NICS*, NORTHWESTERN INTERTRIBAL COURT SYSTEM, <http://www.nics.ws/> (last visited Nov. 18, 2014).

<sup>124</sup> *Tulalip Appellate Justices*, *supra* note 122.

<sup>125</sup> *Tribal Court Contacts*, NORTHWESTERN INTERTRIBAL COURT SYSTEM, <http://www.nics.ws/tribes/tribes.htm> (last visited Nov. 18, 2014).

intertribal citations involved positive treatment. The other courts' decisions were referred to as applicable authority, and not for the sake of distinguishing. Moreover, three of these five citations were in reference to the existence and persuasiveness of an intertribal common law. Taken together, these facts suggest that the Tulalip court's propensity for intertribal citation is a function of the intertribal nature of the Tulalip court itself.

Two other tribes were each responsible for two instances of intertribal citation. One of these courts, the Colville Tribal Court of Appeals, cited the Navajo Supreme Court on both occasions. Interestingly, the Colville court's treatment of Navajo jurisprudence was contradictory. In one instance, the Colville court only noted the Navajo case because it was cited in a party's submissions, and explicitly stated that it does not find Navajo law persuasive.<sup>126</sup> (However, the citing court did take the Navajo decision seriously enough to bother distinguishing it.) In the other instance, the Colville court cited a Navajo decision positively, albeit indirectly, to establish a court's duties.<sup>127</sup> The citation supported an assertion that all courts have "inherent powers" of review. It was indirect insofar as the citation referred to an opinion issued by the citing court itself that cited the other tribe (Navajo).

This apparent inconsistent treatment could be the result of the small sample size (a review of a larger number of decisions may actually reveal a more consistent trend) or perhaps no fixed view on the persuasiveness of other tribal courts' decisions. The fact that the negative instance of intertribal citation was in a family law matter (conceivably related to tribe-specific custom) and the positive treatment appeared in an enrollment/judicial misconduct case (more procedural in nature, and perhaps more generalizable across tribes) invites speculation about whether the nature of the case affects a court's willingness to apply other tribes' decisions. However, the significance of such an inference is negated by the small sample size.

The second tribal court that was responsible for two instances of intertribal citation, the Ho-Chunk Nation Trial Court, also cited the same court on both occasions. However, these two citations (to the Choctaw Tribal Court) were more procedural and neutral than the instances of intertribal citation just discussed. Both citations referred to the Choctaw court rulings for factual purposes, to establish the

<sup>126</sup> *Zavala v. Milstead*, AP09-008, 2011 WL 5172905 (Sept. 12, 2011) ("Even if we were persuaded to follow Navajo case law, which we aren't at this time, *Miles* is not apposite to the holdings herein.").

<sup>127</sup> *Desautel v. Dupris*, AP10-012, 2011 WL 7867369 (Jan. 21, 2011).

outcome of previous adjudication.<sup>128</sup> Thus these two instances of intertribal citation did not reveal a strong disposition one way or the other towards other tribal courts' jurisprudence.

The remaining instance of intertribal citation, by the Coquille Indian Tribal Court, was notable for its demonstration of broad receptivity to other tribal courts' jurisprudence. It introduced the other courts' opinion by stating that "[a]t least one tribal court is in accord."<sup>129</sup> This statement could be read to suggest that the Coquille court generally considers other tribal courts' jurisprudence as persuasive, and may not distinguish the degree of authority according to the precise identity of the other court.

### **C. Citations to United States Courts**

In citing United States courts, tribes frequently turned to state courts. Half of the citations to United States courts were to state courts (247 out of the 508 citations to United States courts). The Barsh study also found what it characterized as a high level of citation to state courts, reporting that nearly thirty percent of opinions in its sample relied to some extent on state law. Barsh found this dependence disturbing in light of tribal courts' need to distinguish themselves from state courts to legitimize their separate existence.<sup>130</sup> To the extent that tribal courts compete with state courts, they are most directly in competition with those in their own states. As a result, tribal courts' rates of citation to their own states might speak most directly to their chances of survival as independent entities. In particular, high rates of citation to their own states could be a harbinger of reduction, or even demise, of tribal court jurisdiction.

This strong tendency could be the result of a number of conditions. Tribal court judges might be particularly well-versed in the laws of their own states. In addition, tribes might have better access to decisions issued by courts in their states than to the opinions of other United States courts. This superior access could be the result of geographic proximity or state-tribal court partnerships.<sup>131</sup>

<sup>128</sup> *Billie v. Collins*, CV 10-51, 2010 WL 4076348 (Sept. 13, 2010).

<sup>129</sup> *Nissen v. Coquille Econ. Dev. Corp.*, C10-03, 2010 WL 4939527 (Dec. 3, 2010).

<sup>130</sup> Barsh, *supra* note 58, at 80 ("The frequency with which tribal courts rely on state law is troublesome, however, in the context of tribal courts' historical efforts to distinguish themselves from state courts, and justify their continued existence as separate judicial institutions.").

<sup>131</sup> Arnold, *supra* note 117. ("Just as important as the written agreements and new court procedures, tribal-state court forums have helped to open new lines of communication and improved relationships between tribal and state court judges, administrators, and practitioners.").

Tribal courts' overwhelming reliance on their own states could also be due to the fact that tribal and state courts have overlapping jurisdiction over a range of matters, from family law to criminal law.<sup>132</sup> As a result, the legal questions that arise in their adjudications, as well as the specific disputes themselves, may be the same. See Table 6 below for a summary of the findings on citations to United States courts.

**TABLE 6. Citations to United States Courts: Findings Summary**

<b>Total Number of Citations to <u>United States Courts</u></b>	<b>Number of Citations to Courts in Citing Tribe's <u>State(s)</u><sup>133</sup></b>	<b>Number of Citations to Courts in <u>Other States</u></b>	<b>Number of Citations to <u>Federal Circuit Courts</u></b>	<b>Number of Citations to the <u>United States Supreme Court</u></b>
508	194	53	98	163

Tribal courts devoted the other half of their United States citations to federal circuit courts and the United States Supreme Court. The Supreme Court was almost twice as popular as all circuit courts combined. While thirty-three percent of United States court citations were to Supreme Court decisions, only twenty percent were to circuit courts. This disparity may be due in some part to a greater number of tribes' viewing Supreme Court precedent as relevant, whereas circuit courts may only be considered persuasive by tribes in their jurisdictions. Tribal court judges may also be more aware of Supreme Court decisions because of greater publicity or emphasis in legal training.

<sup>132</sup> *Id.* at 2 (“[T]hese courts share overlapping legal jurisdiction—including shared authority to adjudicate matters and issue binding orders—in areas like domestic relations, criminal prosecution, and contracts.”).

<sup>133</sup> A tribe was generally considered to be associated with state(s) where their central government offices (courts, etc.) are located.

### ***D. Citations to Foreign Courts***

The three-year sample only included one citation to a foreign court.<sup>134</sup> Moreover, the foreign court is not in a distant land. It was neighboring Canada. Somewhat surprisingly, the citing court was the Navajo Supreme Court, which did not frequently cite beyond its own chambers. Indeed, almost all of the Navajo Supreme Court's citations (eighty-four percent)<sup>135</sup> were to opinions it issued itself. Even its one foreign court citation was somewhat self-referential. Its reference to the Canadian court was based on a lower Navajo court opinion<sup>136</sup> that discussed the Canadian opinion "at length."<sup>137</sup>

However, the Navajo Supreme Court opinion itself includes a detailed discussion of Canadian law and its relevance to the tribal customs involved in the child custody dispute at bar. The Navajo Supreme Court even faults the lower Navajo court for not sufficiently considering Canadian law. Its basis for this chastisement is that Canadian law should be used as a lodestar because its underlying principles mirror Navajo custom.<sup>138</sup> Specifically, the Navajo Supreme Court looked to Canada to establish that "tribal judges will look to the welfare of the child before the rights of a natural parent."<sup>139</sup>

That the one citation to a foreign court involved a matter of custom may initially seem counterintuitive. Arguably, custom is unique to each society. According to this view, foreign nations' cultural beliefs may be too alien to be relied upon. However, tribal courts might actually be particularly willing to cite further afield on customary matters because of a lack of legal precedent closer to home. In addition, decisions based on custom may be harder to explain because of weak

<sup>134</sup> *In re A.M.K.*, SC-CV-38-10, 194, 201, 2010 WL 4159270 ("See *Deer v. Okpik*, 4 Canadian Native L. Rep. 93 (Cour Supérieure de Quebec 1980) (explaining that tribal judges "will look to the welfare of the child before the rights of a natural parent").").

<sup>135</sup> The Navajo Supreme Court opinions in the study's three-year sample contained a total of 581 citations to legal precedent. Of these citations, 486 were self-referential.

<sup>136</sup> *Goldtooth v. Goldtooth*, 3 Nav. R. 223 (W.R.Dist.Ct.1982).

<sup>137</sup> *In re A.M.K.*, *supra* note 134.

<sup>138</sup> *Id.* at 200 ("The [lower Navajo] court further failed to consider the family law of Canada which closely tracks our own fundamental principles in its subordination of the right of parents to the best interest of the child and emphasis on extended family.").

<sup>139</sup> *Id.* at 201.

foundations in traditional legal logic. In these cases, wide-ranging citations might actually help establish legitimacy.<sup>140</sup>

According to the Navajo Supreme Court, not all external court citations are created equal. In particular, the Navajo Court emphasized Canadian law's superiority relative to United States law for family law matters: "The emphasis on extended family in both Navajo and Canadian law diverges markedly from the traditional Anglo-American nuclear vision."<sup>141</sup> However, this preference does not appear to apply to all Navajo Supreme Court adjudication. In the sample, the Navajo Supreme Court's citations relied far more heavily on United States precedent than Canadian (or other foreign) precedent. Its one citation to a Canadian court pales in comparison to its eighty-two citations to United States courts.

The Navajo Supreme Court, and tribal courts generally, are not unique in their limited reliance on foreign courts. For instance, the United States Supreme Court is often characterized as having an "aversion" to citing foreign courts.<sup>142</sup> Although they may have company, tribal courts' insular citation practices might be to their detriment. By overlooking external law, they may be "fail[ing] to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems."<sup>143</sup>

## CONCLUSION

Taken together, this study's findings suggest that tribal courts have responded to their unenviable position at the intersection of two worlds by retreating to one. Essentially, they are islands in a jurisprudential archipelago. They rarely cited beyond tribal chambers—seventy percent of all citations were to tribal courts. And nearly all of these citations were self-referential, suggesting that each tribal court is secluded on its own island. Intertribal citation was almost non-

<sup>140</sup> In the Navajo case under discussion, one party (the father) was a Canadian citizen. This fact likely accounts in part for the Navajo court's deference to Canadian custom, although the opinion supports this citation by characterizing Canadian custom as similar to Navajo tradition.

<sup>141</sup> *In re A.M.K.*, *supra* note 134, at 200.

<sup>142</sup> Adam Liptak, *U.S. Court is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 17, 2008, at A1; see, e.g., *Atkins v. Virginia*, 536 U.S. 304, 342-325 (2002) (Rehnquist, C.J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 598 (Scalia, J., dissenting).

<sup>143</sup> Aharon Barak, *Foreword: A Judge on Judging: The Role of A Supreme Court in A Democracy*, 116 HARV. L. REV. 16, 114 (2002).

existent, only surpassed in its infrequency by citation to foreign courts. In the limited circumstances when tribal courts did look beyond their own rulings, they tended to stick close to home. Their citation practices suggest a preference for decisions issued by courts in their own states, over United States courts further afield.

These findings raise the question of whether tribal courts' insularity is the result of circumstances that may to some extent be beyond their control, such as limited access to opinions. This study's review of sources of tribal court opinions suggests that lack of access may indeed be a significant factor. The optimal source in terms of usability and comprehensiveness (WestlawNext) only contained opinions for a few dozen tribes, whereas 566 tribes are federally recognized and hundreds more are not.

The article's intertribal citation findings further support the theory that low citation rates are a function of poor access. The court responsible for the most instances of intertribal citation is a member of an intertribal court system. The judges that adjudicate for this tribe have extensive access to other member tribes' opinions—indeed, they write them. All of this tribe's intertribal citations were to tribes that also belong to the intertribal court system. In addition, according to a judge who sits on several tribal courts,<sup>144</sup> most tribal judges prefer citing other tribes to United States courts. This preference is based on the fact that tribes share cultural practices and some disputes common to tribes do not frequent United States courts. The judge claimed that the main reason tribal court judges do not rely more heavily on other tribes' opinions is lack of access.

If access is indeed the primary cause of tribes' low citation rates and tribes actually desire to cite more widely, then the pressing question becomes what can be done to help tribal courts escape their islands to become "a part of the main."<sup>145</sup> Answering this question could have serious implications for tribes, and for the growing number of non-tribal parties who fall within their courts' jurisdiction.<sup>146</sup> Crucially, the power to cite other courts extensively could help preserve tribal

<sup>144</sup> Interview with Judge BJ Jones, Chief Justice of the Turtle Mountain Tribal Court of Appeals, Special Magistrate of the Non-Removable Mille Lacs Band of Ojibwe Tribal Court, and alternate judge of the Three Affiliated Tribes Tribal Court (Mar. 8, 2013).

<sup>145</sup> JOHN DONNE, *No Man is an Island, Meditation XVII*, in DEVOTIONS UPON EMERGENT OCCASIONS (1624).

<sup>146</sup> *E.g.*, Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. § 904 (2013) (enacted) (creating special domestic violence jurisdiction).



courts' severely limited resources.<sup>147, 148</sup> Citations to prior decisions can replace time-consuming step-by-step legal analysis and can substitute for re-explanation of frequently adjudicated rules of law.

Moreover, access to legal materials can shape the law itself. The ability to draw upon a broader supply of jurisprudence could help tribes respond to each dispute's unique circumstances with more nuance, and could create a richer tribal common law. Tribal courts might also be able to lean more heavily on their own customary law and tradition if they could more easily look to other tribal courts that have done so for support. And each tribe's body of customary law, in turn, could be strengthened over time through considered analysis and application. So ultimately, much is at stake in whether tribes resolve their current access limitations. With greater access, tribal courts could venture forth from their islands, better equipped to mete out tribal justice.

<sup>147</sup> See, e.g., Sophie Harnay & Alain Marciano, *Judicial Conformity Versus Dissidence: An Economic Analysis of Judicial Precedent*, 23 INT'L REV. L. & ECON. 405, 408 (2003) ("A precedent thus serves to economize on the costs of decision-making.").

<sup>148</sup> See, e.g., Douglas B.L. Endreson, *The Challenges Facing Tribal Courts Today*, 79 JUDICATURE 142, 145 (1995) ("[T]hese systems have historically been underfunded.").

### ADDENDUM—FUTURE RESEARCH

While this article will help bring greater visibility to the need for greater availability of tribal court opinions, its limited sample size and methodology leave room for additional, and more generalizable, analysis. For instance, an expanded timeframe (beyond this study's three-year scope) would facilitate longitudinal assessment of citation practices. Changes over time could reveal the impact of changes in the accessibility of opinions. The strength of the sample could also be improved by increasing the number of tribal courts included therein. Moreover, including tribes that have not chosen to publish their opinions on WestlawNext would help eliminate any bias associated with the willingness or wherewithal to make opinions available.

Increasing the breadth of materials analyzed could help contextualize this study's findings. A review of tribal legislation is particularly promising. At least one tribe has adopted a code that explicitly permits its tribal court to refer to other courts<sup>149</sup> and another has enacted legislation requiring the application of state law.<sup>150</sup> In addition, future research could review the portions of tribal constitutions creating tribal courts for directions as to how courts should treat external law. Some countries' constitutions contain such provisions: "The openness of some legal systems to foreign law is reflected in their constitutions. The South African Constitution ... says that courts interpreting its bill of rights "must consider international law" and "may consider foreign law."<sup>151</sup>

The methodology could also be expanded beyond numerical review. For instance, the treatment of cited opinions could be assessed along a negative to positive continuum. Understanding whether external law is primarily cited as authority or as inapplicable would help reveal how tribal courts view themselves within larger legal communities. A high rate of positive treatment for citations to other tribes' opinions would support the view that there is in fact a "tribal common law." High rates of negative treatment would not necessarily counter this theory. The fact that judges mention another tribe's law at all suggests a commonality that

<sup>149</sup> Valencia-Weber, *supra* note 7, at 253 (according to the Sitka Tribe of Alaska Community Association Code and court rules, the Sitka Tribal Court "may refer to other sources of law for guidance, including the law of other tribes, federal, state or international.").

<sup>150</sup> Cross, *supra* note 52, at 80 ("Pequot tribal legislation directs the tribal courts to apply Connecticut law in private civil actions.").

<sup>151</sup> Liptak, *supra* note 142; Constitution of the Republic of South Africa Act 108 of 1996, Ch. 2, § 39.

invites cross-application. Arguably, the legal issues most frequently subject to positive treatment might form the core of any tribal common law.

Finally, future research should focus on determining what drives or hinders citation in practice. A large-scale standardized interview of tribal judges is the most promising approach. Tribal judges likely have informed opinions about what tribal courts and communities might stand to gain or lose from increased external citation. If it seems likely that the result would be a net gain, then judges could also be consulted for practical suggestions about how the most serious barriers to citation might be overcome.

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## PUTTING THE TRIBE IN TRIBAL COURTS: POSSIBLE? DESIRABLE?

At the 1997 Tribal Law and Governance Conference, Christine Zuni argued that “preserving, strengthening and incorporating our native concepts of justice [are] of particular importance in the appraisal of our tribal court systems.”<sup>1</sup> American Indian tribal courts evolved from police courts instituted in the 1880s by the superintendents of Indian reservations to help pacify tribes and promote “civilized” values.<sup>2</sup> The British Empire pursued the same approach in Africa, painstakingly educating local magistrates in the Common Law and legal reasoning, and thereby promoting ideals of formality, authority and consistency at the expense of African traditions of flexibility and negotiation.<sup>3</sup>

When Indian tribal governments were eagerly assuming control of reservation police departments, courts and jails in the 1970s, funded by the Law Enforcement Assistance Administration and other federal agencies, the guiding philosophy was *professionalization*. Indian tribes built confidence and support with non-tribal police and judges by adopting familiar symbols and formalities, a little like “dressing for success.” Tribal courts have won the respect they sought from the larger American legal community, but at what cost in terms of their credibility among Indians, and the social consequences of fostering a culture of Western legalism?

Many American Indian judges began to recognize this dilemma by the 1980s, and to advocate the indigenization of tribal legal systems through measures such as the establishment of peacemaking bodies as alternatives to adversarial litigation, and development of “tribal common law” based on traditional concepts of justice. The Navajo Nation has been particularly visible in this approach to law reform, due in large measure to the eloquence of its Chief Justice, Robert Yazzie, as a writer of court opinions and learned articles on Navajo conceptions of justice.<sup>4</sup> Canada's Aboriginal peoples have meanwhile eschewed the Western adversarial tradition completely, preferring grassroots “healing circles” based loosely on customary practices.<sup>5</sup> Because Canada has never recognized First Nations' authority to establish courts, Indian communities have been unfettered by a long history of assuming responsibility for operating and reforming Western-style court systems. Instead they have gone directly from subjection to foreign courts, to the design of fresh alternatives of their own, since the mid-1980s.

Canada and the United States therefore offer an interesting contrast of approaches. Do American Indian tribes still cling to adversarial models of justice because they find them more useful or desirable than customary negotiated dispute-settlement models? Have American Indians become so alienated and culturally diverse, within each Indian community, that they lack sufficient consensus to maintain public order without authoritarian institutions? Or, <sup>\*75</sup> alternatively, have tribal leaders and judges become so enamored with, or accustomed to Western adversarial methods and legal reasoning that they can no longer conceive of any other way of organizing a legal system?

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Tribal courts speak in voices as conventionally legalistic as other American courts. Even some peacemakers courts use legal reasoning and punitive consequences borrowed from non-indigenous courts.<sup>6</sup> This is a language of analyzing and managing behavior learned at law school, rather than at home. It may offer tribal judges a cloak of legitimacy in the eyes of external institutions such as state courts and non-Indian police departments, but there is a danger that this cloak of external legitimacy will gradually evolve into a Trojan Horse of cognitive assimilation.

As a first step, it would be useful to ascertain the extent to which tribal courts actually rely on traditional principles of justice when rendering their decisions, and to which they import foreign law into “tribal law.”

### I. What is “tribal law”?

There is a threshold issue of terminology. Use of the term “tribal law” to refer to Indian tribal legislation and decisions of Indian tribal courts is somewhat misleading. The formal legal heritage of most Indian court systems is already rooted firmly in Western thinking: in codes drafted by Western-trained, frequently non-Indian lawyers, and in interpretations of those codes and the “tribal common law” by Western-trained, often non-Indian judges. I will use “indigenous jurisprudence” to mean the basic approach to dispute resolution inherited from pre-colonial practices, and “traditional principles” to refer to specific concepts of proper human behavior and good relationships which can be identified in pre-colonial practices.

Federal case law defines an “Indian tribe” as an historical sovereignty—that is, an independent government—and implies that anything such a polity does is “tribal.” I would like to suggest a different analysis.

The term “tribal” has a very precise meaning in contemporary social science, moreover. A tribe is a group of related people—a *kinship group*—who consider themselves distinct from others and perpetuate their identity through a significant amount of ongoing social interaction among themselves.<sup>7</sup> In a tribe, *kinship* is the principal institution; social, economic, cultural, religious and political activity is organized around kinship groupings, such as lineages and clans. Kinship relationships govern most individual rights and responsibilities. Even the right of access and use of ecosystems is conceptualized in terms of historical kinship ties between humans, plants and animals.<sup>8</sup>

Kinship can be both a uniting and dividing force. A system of highly inclusive, extended kinship tends to integrate families and create diverse cross-cutting personal responsibilities to kin and clan: a system of checks and balances. To this complex web of counterbalanced rights and duties, most tribal societies have added functional organizations, such as the ceremonial and police societies, whose voluntary initiated membership crosscuts kinship groupings. Functional organizations are often divided by gender, rather than blood or lineage, creating a balance of power between men and women while stitching all clans together through society membership. Most tribal societies also traditionally acknowledge individuals \*76 who detach themselves from ordinary kinship roles to serve as clowns or “critics.” Individual healers often play this kind of neutral guidance role as well.

Tribal societies were characterized by dynamic equilibrium. Immediate family, lineage, and household and village co-residence created divisions of loyalty and interests which were balanced by extended kinship ties and cross-cutting society membership. Each successive generation produced new conflicts among families while adding more stitches to the web of connections through adoptions, society initiation, and marriages. A tribal society is a network of complexly-interrelated groups, rather than a group of selfish, largely unrelated individuals. At the Sun Dance with its circle of tipis, or the seating arrangements of a Wapenaki, Hodenosaunee or Pacific Northwest longhouse, each family and clan is distinct, and located in a fixed relationship to all the others. A system of “tribal” law aims to repair any breaches in the web of counterbalancing rights and duties, and necessarily relies on the cooperation of litigants. Litigants must associate

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their personal self-interest and the well-being of their families with the maintenance of goodwill and reciprocity. They must conceive that their happiness, wealth, and security grow in proportion to the diversity and strength of their social relationships. Before the days of federally-approved tribal rolls, individuals who were contemptuous of maintaining their relationships with others were simply expelled.

What, then, should be the “tribal” aspect of tribal law? It is not a corpus of specific rules, I propose, but a *methodology*. Western legal methodology begins with categorization of the case and a selection of applicable rules. Tribal methodology begins with an analysis of the litigants' relationships with each other and with others, focusing on duties and legitimate expectations attached to those relationships. Kinship structure provides the basic set of principles for determining what is just. Justice is a function of individuals' family histories, and the historical relationships between their families.<sup>9</sup> Justice is renewed, furthermore, by *re-negotiating* relationships with the mediation of elders. This is the “tribal” factor, and it can conflict with the canon of individual equality before the law. Tribal law emphatically asserts that people are *not* equal in their relationships or responsibilities, but unique. But are Indian tribes still “tribal”?

The tribal character of American Indian communities has been eroded, but not altogether obliterated by government assimilation projects, electronic mass media, and integration into the market economy. It is popular to blame advertising and consumerism, but I do not think that people succumb to self-indulgent materialism unless they have already lost a great deal of their attachment to their families, and no longer enjoy much satisfaction from social and spiritual life. Studies we have been conducting in Blackfoot territory indicate that younger generations know fewer relatives, do considerably less visiting, and spend proportionally more time with peers (increasingly as organized gangs). They view families other than their own as more foreign and untrustworthy, and think of family responsibilities in terms of a vastly reduced circle of kinsfolk. There are countervailing forces, such as the growth of interest in the sacred societies and Sun Dance, and introduction of Blackfoot immersion in primary grades. On the whole, however, the tribal web is fragmenting into an aggregation of \*77 households. What we see lies somewhere between the alienated individualism of Western liberal society, and the complex integration of balanced individual and group forces in tribal societies.

This fragmentation is accompanied by growing contradictions between individuality and group loyalty, and is reflected in the difficulties tribal courts are experiencing in managing conflicts of interest involving councilmen, judges, lawyers and jurors.<sup>10</sup> Tribal courts recognize that *everyone* in the community is related but try to set arbitrary boundaries on the permissible closeness of relationships, or deny that kinship influences decision-making. In the past, tribal societies recognized that kinship *does* affect decision-making, and they developed kinship systems that contained the requisite checks and balances. Now that kinship systems are fragmenting, personal bias is potentially more of a problem. The *presumption* of family bias is tending to undermine the legitimacy of *all* decisions made by members of the community. Tribal judges aspire to the neutrality of clowns, critics and healers, but such roles depend for their autonomy on an underlying balance of power among families. The easy way out of this dilemma, unfortunately, is to fill judicial posts with outsiders ignorant of local values and traditions.

Most tribal judges would probably concur with the approach taken by Judge Haven in *Fisher v. Pigeon*: “The Saginaw Chippewa Tribal Court, while based on an Anglo system of justice, attempts to incorporate traditional tribal values, symbols, and customs into its decision making.”<sup>11</sup> The house may be Western in design but indigenous jurisprudence suggests architectural modifications and the interior decoration. If the alterations are too extreme, the house will collapse or be condemned as unsuitable by federal and state authorities; if too restrained, Indians will not want to live there. “Our old laws...do not work because the world is changing,”<sup>12</sup> but as long as Indian tribes remain more kinship-oriented than non-Indians, the spirit of the old laws should be unearthed and translated into contemporary practice.<sup>13</sup>

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If we accept this solution, the next question is the extent to which there is evidence of tribal judges engaging in balancing the integrity and external legitimacy of their courts with tribal traditions and values.

## II. A survey of current practice

The general outlines of current tribal court practice are suggested by a statistical analysis of the 359 cases published since January 1995 in the INDIAN LAW REPORTER. This sample is not “random” because tribal courts select cases for publication for various reasons. Neither is there any discernable bias in the selection of cases for publication that would tend to *favor* the hypothesis that tribal courts eschew traditional principles as grounds for decisions. On the contrary, the sample is biased *against* the hypothesis because it is dominated by a small number of tribal courts, some of which appear to be relatively inclined to mention (if not always rely upon) indigenous jurisprudence. Table 1 summarizes the characteristics of the sample. The sample includes decisions by trial courts and courts of appeal of 56 Indian tribes, but the seven tribes individually listed in Table 1 accounted for two-thirds of the total number of cases. It should not be surprising that Navajo is heavily represented since it has the \*78 largest population and caseload. The Pequot court is clearly overrepresented in relation to the size of that tribe, however— an artifact of the high volume of disputes involving the Pequots' casino, which accounted for 12 percent of *all* the reported cases. For this reason, the Pequot decisions have been deleted from some of the analyses presented below.

It would be hazardous to attempt to detect trends within the sample, since the date of publication is not the same as the date of decision, and some tribal courts are relatively slow to submit decisions for publication (e.g. Pequot, as is plain in Table 1). Trend analysis will be avoided here, and the sample will be treated as if all decisions were rendered at approximately the same time.

[See Appendix 1 for Table 1]

For purposes of analysis, tribal court decisions were sorted into ten categories based on the nature of what was ultimately at stake in the dispute, rather than a formalistic classification of legal issues. The categories used for coding the sample, and the abbreviations used in the Tables presented below, are as follows:

CivRts: Civil Rights of a substantive nature relating to the equitable distribution of the benefits and burdens of tribal membership. This includes reasonable criteria for membership, non-discrimination among members and equal protection of members.

Constn: Constitutional matters relating to the balance of power and accountability within tribal government. This includes the delegability and separation of powers, checks and balances, the supervision of elections, and public access to information.

DP-Exe: Due Process in relation to tribal administration. These are chiefly personnel matters such as wrongful termination from employment in public service or tribal enterprises, as well as the procedural aspects of fair access to tribal benefits.

DP-Jud: Due Process in relation to the operations of the courts and police in both civil and criminal proceedings. This includes probable cause, exclusionary rules of evidence, recusal of judges, opportunity to be heard, speedy trial, and proper use of the contempt power.

Family: Family law, including divorce, inheritance, child custody, child support, protection and special needs of children.



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**Jurisd:** Jurisdiction of tribal courts, subject-matter and personal, in matters other than civil rights and constitutional law. This includes sovereign immunity as a bar to civil suits, and comity with respect to foreign courts and their judgments.

**Proced:** Procedural matters (civil, criminal or appellate) not directly involving civil rights or other substantive rights, including ripeness, mootness, standing, stays and bonds *pendente lite*m, and forms of actions.

**Propty:** Private property disputes, including real estate, grazing units, consumer credit, business contracts, and cultural property customarily kept in individual custody or stewardship.

**Stndrd:** Negligence, personal injury and other torts which involve questions of the standard \*79 of care owed to other persons.

**Others:** All other issues, including issues relating to the practices of attorneys, and cases of statutory construction which do not fall within any of the other categories.

These categories usefully distinguish between fundamentally internal tribal political, social and cultural matters; matters chiefly of a relatively neutral procedural nature; and matters which unavoidably involve the interests of non-members, and the authority of other governments. By hypothesis, tradition should play the largest role in informing decisions on internal matters, and the least role in deciding matters which involve federal and state powers and interests.

Table 2 summarizes the sources of law relied upon by tribal courts in the sample, sorted by the issues at stake in each case. Since decisions often relied on multiple sources of law, the sum of each row exceeds the total number of cases which addressed the particular issue. **Ownlaw** refers to the legislation and case law of the deciding court's own jurisdiction; **Tribal** to legislation and decisions of *other* Indian tribes. References to culture and traditions are included in the **Tradtn** column only if they formed a reasoned basis for decision, and not *dictum* or boilerplate.<sup>14</sup> **Policy** refers to reasoned analyses of the social consequences of alternative rules of decision which do not expressly discuss any traditional principles—and which ordinarily invoke concepts such as judicial economy, consistency, or deterrence which are derived from Western jurisprudence.

Table 3 presents the same data as the *percent* of decisions, in each issue category, which relied on each source of law. The last row shows the percent of *all* of the decisions in the sample which relied on each source of law.

[See Appendix 2 for Table 2]

It may be observed, as a preliminary matter, that issues of fundamentally an internal social character (family relations and substantive rights of tribal membership) account for a relatively small proportion of the reported cases (14 percent). Procedural and jurisdiction issues lead the sample (37 percent), followed by disputes over the fair treatment of tribal personnel, residents, civil litigants, and criminal defendants by tribal institutions (33 percent). The quality of fairness or justice due to persons affected by tribal decision-making should, by hypothesis, reflect indigenous jurisprudence as well as Western conceptions of human rights. Not surprisingly, tribal courts were most likely to rely on their own councils' legislation, and their own previous rulings. Of the 284 decisions which relied (at least in part) on internal law, 56 percent invoked previous decisions as precedent, while 44 percent referred solely to tribal legislation. In 26 percent of the cases in the sample, however, the tribal court relied *solely* on foreign law. About half (51 percent) of these cases involved issues of a procedural or jurisdictional nature. Consistent with my hypothesis, tribal courts appear to rely more heavily on other jurisdictions for guidance in cases which do *not* directly involve internal social, cultural or political relationships.



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It should also come as no surprise that the most frequently-cited source of *foreign* law is federal, in view of the historical relationship of Indian tribes to the federal government and their longstanding mistrust of the states which surround them. Federal legislation and caselaw \*80 are most likely to be cited in connection with jurisdictional matters, including sovereign immunity issues; this, too, is intuitively reasonable given the fact that federal law ultimately governs the recognition of political sovereignty, and distribution of sovereign authority within federalism.

[See Appendix 3 for Table 3]

The frequency with which tribal courts rely on state law is troublesome, however, in the context of tribal courts' historical efforts to distinguish themselves from state courts, and justify their continued existence as separate judicial institutions. The fact that more than one-fourth (28 percent) of the tribal rulings in the sample relied (at least in part) on state law is even more provocative in the light of tribal courts' far less frequent use of indigenous jurisprudence—20 cases or a mere 6 percent of the sample. In fact, tribal courts relied more often on BLACK'S LAW DICTIONARY (22 cases) than on indigenous jurisprudence.<sup>15</sup> There were very few instances in which tribal courts confronting a gap in tribal legislation expressly *declined* to adopt state law.<sup>16</sup>

Of course, there is a possibility that the pattern observed here is not representative of tribal courts as a whole, but only of those tribal courts which submit more rulings for publication. It was noted earlier that the Pequot court is overrepresented in the sample; Pequot tribal legislation directs the tribal courts to apply Connecticut law in private civil actions. Deleting the Pequot cases (Table 4) weakens the pattern of tribal reliance on state precedents but does not eliminate it. On other hand, the Navajo Nation alone accounts for 8 (40 percent) of the decisions in which a tribal court relied upon traditional principles. The sample was too small to determine whether other tribes had biased the results by being exceptionally state-oriented, or tradition-oriented.

[See Appendix 4 for Table 4]

Especially intriguing (and counterintuitive) is the reliance of tribal courts on state law when ruling on family and property matters. Unlike jurisdictional disputes, which involve conflicts between tribal, federal and state interests, family relations and property rights are essentially internal concerns which go to the heart of Indian tribes' cultural distinctiveness. One further potential bias merits attention: Recent trends in the subjects and objects of disputes. The number of disputes involving gaming, either directly (e.g. management contracts) or indirectly (personnel grievances and personal injury), has grown considerably. Gaming was a factor in 16 percent of the sample. These disputes often involve non-tribal parties and questions of jurisdiction; they also frequently involve fundamental issues of fairness in contexts in which tribal governments are inclined to seek profits rather than justice. Further growth in the role of gaming as an energizer of litigation could work against efforts to indigenize tribal law.

It must be borne carefully in mind that the sample consists of published decisions, rather than total caseload. It could be argued that unpublished decisions involve more “traditional,” or at least more informal, approaches to dispute settlement. Minor criminal charges dominate the workload of tribal courts much the same as state courts. In state courts, criminal charges tend to be addressed summarily, mainly through pleas rather than trials. Tribal courts moreover appear to follow the Anglo-American rules that restrict criminal charges to express statutory language and limit the discretion \*81 of judges in sentencing. If that correctly describes the unpublished decisions of tribal courts, we should *not* expect them to be any more “traditional” than published ones.

### III. Invoking tradition

I turn now to a textual analysis of the tribal court rulings in the 1992-1998 sample to explore the ways tribal judges explain how they discover and apply traditional principles of justice, or justify *not* applying traditional principles.

#### A. Avoiding tradition

Some tribal courts make ritualized declarations that tribal laws and traditions are paramount, then rely entirely on federal and state precedents.<sup>17</sup> Others refer to traditional principles only as boilerplate. In *St. Regis Mohawk Tribe v. Basil Cooke Enterprises*,<sup>18</sup> for example, the court observed that traditional principles are “consistent” with federal law in relation to the collective nature of interests in reservation land. After going to great lengths arguing that tribal traditions take precedence over federal case law, the Winnebago Supreme Court felt obliged to “confirm” a ruling on standing to challenge tribal elections by showing how “federal law, while not applicable, would require the same result.”<sup>19</sup> Similarly, the Cheyenne River Sioux Court of Appeals defended its application of American hornbook law to a contract-enforcement action by stating that “western law...while not automatically binding as Lakota law, seems to comport in this instance with the Lakota sense of justice” (which the judges did not further define).<sup>20</sup>

What tribal courts refer to as “tribal common law” is often Anglo-American common law that has been adopted without critical comparative analysis, such as the doctrine of “unclean hands” in equity,<sup>21</sup> “general principle[s] of statutory construction,”<sup>22</sup> and the “inherent authority” of courts to enforce their orders and discipline attorneys.<sup>23</sup> Tribal courts also frequently make policy arguments based on familiar Anglo-American concepts such as “judicial economy.”<sup>24</sup> Similar rules and results *could* have been derived directly from an analysis of traditional concepts of fairness, but tribal judges apparently felt that they should not, or need not ground their reasoning in indigenous jurisprudence.

Tribal courts eschew traditional principles even in cases which involve fundamentally internal social and cultural norms, for example whether the principle of separation of powers should apply to the tribal government,<sup>25</sup> what constitutes an electoral “majority,”<sup>26</sup> who has standing to participate in child-custody hearings,<sup>27</sup> and whether women are entitled to compensation for household services rendered during marriage.<sup>28</sup> A particularly poignant case involved a dispute between father and son over the division of family grazing rights, close to the heart of what is involved in being “tribal.” The Cheyenne River Court of Appeals learnedly reviewed federal, state, and tribal decisions, quoted several general legal treatises and BLACK'S LAW DICTIONARY, and invoked principles of “hornbook law,” but nowhere discussed the principles of family relations in Sioux cultural traditions.<sup>29</sup>

#### B. Discovering tradition

Of particular significance are those cases in which tribal courts have declared that no applicable traditional principles exist<sup>30</sup> or have expressed frustration that the parties failed to introduce any evidence of applicable traditional principles of law.<sup>31</sup> Who is responsible for knowing and advancing indigenous jurisprudence?

Most tribal courts appear reluctant to assume the competence to declare indigenous jurisprudence. These courts frequently require the proponent of traditional principles to prove them at trial, like foreign law under the Federal Rules of Evidence.<sup>32</sup> For example, Colville courts have repeatedly declined to take judicial notice “that tradition and culture

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does not recognize jail service” as an appropriate punishment, reasoning that traditional principles are a question of fact.<sup>33</sup> In contrast, the Navajo Supreme Court ruled on its own competence that restitution is the preferred method of redress in accordance with Navajo traditions.<sup>34</sup> Other tribal courts have ruled on their own competence that traditions accord extended family members an interest in the welfare of a child<sup>35</sup> and subordinate the rights of the individual to collective tribal interests.<sup>36</sup>

In a case challenging the selective prosecution of males for statutory rape on Equal Protection grounds, the Winnebago Tribal Court ruled that it was not bound by “federal interpretations” of gender equality, and instead “looked to tribal tradition for some guidance.”<sup>37</sup> “Traditionally a sexual encounter, whether forced or not, outside of marriage was dealt with in a severe manner,” the court found, adding that “[t]ribal tradition imposed punishment on both genders for sexual conduct.” No published source, court testimony or other source was cited, so the court had determined the content of tradition on its own competence.<sup>38</sup> Three months earlier, however, another Winnebago judge had come to exactly the opposite conclusion about traditional gender equality.<sup>39</sup>

The Winnebago gender-equality decisions highlight one of the risks of recognizing judicial competence to discover traditional principles: They may disagree among themselves. Is the solution to require expert testimony from tribal elders at trial? Walker River<sup>40</sup> and Ft. Berthold<sup>41</sup> courts have explored this approach, while other tribal jurisdictions have turned to learned treatises written by Indian scholars.<sup>42</sup>

A core jurisprudential issue, then, is the proper procedure for introducing traditional principles into a proceeding. Is it the duty of the parties to “prove” traditional principles by the production of expert testimony or scholarly publications? Or is it the duty (or at least within the authority) of tribal judges to expound traditional principles in their roles as representatives of tribal justice? I find it paradoxical that tribal judges tend to require proof of the contents of indigenous jurisprudence, as if it were *foreign* law, while presuming that they can pronounce and elaborate principles of federal and state common law without such proof. The implication of this practice is that the tribal judiciary possess authoritative expertise of Western law but not of their own indigenous jurisprudence.

### *C. Using tradition*

When do tribal courts invoke traditional principles, and to what extent (if any) do tribal courts use traditional principles to override inconsistent federal or state caselaw?

As indicated by Tables 3 and 4, traditional **\*83** principles have most frequently been invoked in cases involving property rights, family relationships, and due process (that is, fair treatment by tribal governments). More specifically, tribal courts relied on traditional principles in controversies over species of property, and procedures for the transmission of property rights, which are unique to indigenous customary law: traditional war trophies,<sup>43</sup> for example, as opposed to consumer credit, commercial contracts, or transactions involving reservation lands. There is no logical reason why indigenous conceptions of promise, obligation or honor should be irrelevant to the resolution of a dispute over the sale of a stereo system or a second-hand pickup truck, however.

In family law, traditional principles have most frequently been invoked in connection with interpreting the “best interests of the child” standard (originally borrowed from state law), and relate broadly to the child's right to knowledge and enjoyment of its cultural heritage.<sup>44</sup> Traditional principles have also been applied to the standing of extended family

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members to intervene in child custody proceedings,<sup>45</sup> and the right of divorced women to spousal maintenance.<sup>46</sup> None of the actual results in these cases fell substantially outside the range of state cases on the same questions, hence tribal courts were able to profess fidelity to tradition without jeopardizing their external legitimacy.

In the Navajo Nation, at least, traditional principles have played their most important role in disputes involving political responsibility and fundamental fairness. Recent decisions have dealt with tribal government responsibility to undertake public consultations prior to decision-making,<sup>47</sup> the right to equitable access to public housing,<sup>48</sup> the right to adequate notice and an opportunity to be heard in civil proceedings,<sup>49</sup> and freedom of speech in the work-place.<sup>50</sup> Navajo decisions recognize a “wider zone of [protected] interest” than federal law in the field of substantive due process,<sup>51</sup> and a higher standard of respect for individual freedom—albeit subject to a duty to exercise rights responsibly out of respect for others.<sup>52</sup> Other jurisdictions have rarely explicitly used traditional conceptions of justice in managing contemporary abuses of government power, however.<sup>53</sup>

The Navajo Supreme Court is unique in deriving traditional principles directly and explicitly from concepts embedded in the indigenous language.

Navajo common law is the first law of our courts and we will abide by it whenever possible. Therefore, we agree with appellee that the Navajo way of *k'e* is the prevailing law to be applied. *K'e* recognizes “your relations to everything in the universe,” in the sense that Navajos have respect for others and for decisions made by the group. It is a deep feeling for responsibilities to others and the duty to live in harmony with them. It has to do with the importance of relationships to foster consensus and healing. It is a deeply-felt emotion which is learned from childhood.<sup>54</sup>

Thus “[i]n Navajo law, *k'e* would be the mutual understanding and normative practice that defines a person's legitimate claim to fair procedures,” including “fundamental fairness in all tribal actions.”<sup>55</sup> *K'e* implies responsibilities as well as rights. It “provides that an individual has a fundamental right to express his or her mind,” but must do so “with caution and respect,” and with the aim of “talking things out” (*hoozhoojigo*) and resolving disagreement or bad feelings.<sup>56</sup> Similarly,

[w]hat are charged as offenses today were treated as personal injury or property damage matters [and] were resolved using the traditional Navajo civil process of “talking things out.” *Nalyeeh* (restitution) was often the preferred method to foster healing and conciliation among the parties and their relatives. The ultimate goal being to restore the parties and their families to *hozho* (harmony).<sup>57</sup>

“[T]he end goal of Navajo justice is helping them live well together,” Navajo Chief Justice Robert Yazzie has explained. “Our justice maxim is this: ‘*hazho' sokee*’—stay together nicely.”<sup>58</sup> Everyone shares a duty to minimize conflict, not only by showing respect towards others, but by taking the initiative to resolve grievances privately. Western legal systems have evolved in the opposite direction of litigating every real or perceived injury, and of imposing little or no duty on injured parties to mitigate.

#### ***D. Explaining restraint***

I have dwelt at some length on Navajo decisions because they take traditional principles seriously as an alternative paradigm of justice and not as mere boilerplating. Why have other tribal jurisdictions failed to pursue the approach of the Navajo Supreme Court? One possible explanation is that judges are reluctant to reveal their ignorance of indigenous jurisprudence and prefer to await the leadership of elders and elected legislators. There is also the possibility that judges think traditional principles are antiquated and ineffective based on their personal assessment of contemporary community conditions, or based on their assimilation of Western jurisprudential assumptions and attitudes.

Tribal judges may be inclined to defer to tribal legislative processes because they feel that questions of local tradition and culture should be resolved democratically or, more pragmatically, because they wish to avoid unnecessary conflicts with the elected leaders who employ them. After all, many tribal courts are still struggling to entrench their independence and powers of judicial review. Asserting competence to “discover” traditional law would invite charges of elitism and *ultra vires* excesses of authority, particularly in communities where the judges have not yet earned widespread respect and trust.

Before exploring these alternative explanations, however, we must be satisfied that published tribal court decisions are valid evidence of the extent to which tribal courts actually understand and apply indigenous jurisprudence.

#### **IV. A Critical Assessment**

The foregoing statistical data and textual analysis reveal an apparent inconsistency between tribal courts' express goal of indigenizing tribal law, and the ways tribal judges explain what they are doing in specific cases. Two alternative hypotheses may be proposed. Published opinions may not be representative of the actual decision-making process, either \*85 because the great majority of decisions are regarded as routine and are never published, or because judges cloak their decisions in Western legalese only to defend their legitimacy. Alternatively, tribal judges may talk like non-Indian judges because their training, professional peer pressure, and their struggle for legitimization have combined to make them think like non-Indian judges.

If tribal judges are actually deciding cases on the basis of indigenous processes and reasoning, and merely legitimizing their conclusions by invoking federal and state case law, it would seem unnecessary for them to *conceal* this fact. Legitimization can be achieved by showing how the results reached by the application of indigenous jurisprudence are generally consistent with principles of justice enunciated by other American jurisdictions. Carefully articulated, explicit comparisons between traditional and Western legal principles would seem to establish the legitimacy of tribal courts at least as powerfully as the pretense that tribal courts merely apply conventional case law. It is unclear what purpose is served by concealing the extent to which indigenous jurisprudence plays a role in decision-making, if indeed it does. Purporting to rely on traditional principles while declining to articulate them mystifies and delegitimizes indigenous jurisprudence and violates the underlying reason for writing judicial opinions, which is to render the *ratio decidendi* explicit, reviewable, and a guide for future behavior.

Social conditions on Indian reservations offer the strongest rebuttal to the argument that tribal judges only pretend to apply Western law. Tribal control of police, courts and rehabilitation since the 1970s has had, at best, only modest remedial effects on the prevalence of violence in Indian communities, which still far exceeds the national average.<sup>59</sup> These data suggest that Indians continue to feel powerless, frustrated and angry, and that Indian tribes have proven unable to promote reconciliation, healing, and solidarity. Tribal legal systems are not entirely responsible for the persistence of high levels of violence in Indian communities, of course, nor would it necessarily make a significant difference if tribal courts were more genuinely indigenous in their approach to managing disputes and offenders. If traditional childrearing

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practices and kinship structures disintegrate, indigenous values lose their persuasive force, and tribal courts are left with the same relatively ineffective, deterrent weapons as state courts, economic penalties and incarceration. The argument that tribal courts covertly apply traditional principles necessarily assumes that indigenous values do survive and are respected, however. If this is so, it is appropriate to ask why tribal courts have been unable to stem the violence?

It is difficult to avoid the conclusion that tribal courts do not articulate indigenous jurisprudence because they do wish to do so, or do not know how. In my opinion, tribal courts have become trapped in their own struggle to achieve legitimacy in the eyes of their non-Indian professional colleagues.

### *V. In Defense of Tribal Norms*

Does any of this matter? Are there differences between the Western legal paradigm and indigenous jurisprudence which justify a conscious renewal of tradition?

Systems of indigenous jurisprudence vary, but I believe that they tend to place *greater* emphasis on respect for the individual than the \*86 Western conception of fundamental fairness. The balance between individual conscience and upholding state authority tends to be struck closer to the individual end of the scale. The duty to respect the individual extends to substantive matters, such as distribution of economic and social resources, while Western conceptions of civil rights are predominantly procedural. Paradoxically, tribal judges often state the reverse proposition, that is, that tribal law favors the collective at the expense of the individual. This is arguably an idea culled from uninformed Western liberal criticism of tribal cultures, and illustrates the danger of failing to address traditional principles explicitly in tribal court proceedings and articulate them in court rulings.

Tribal governments are approaching a crisis of legitimacy. The majority of tribal members nationally do not reside in tribal territory and do not speak tribal languages. They depend more on states, municipalities, and the private sector for employment and status than they do on their own communities. Tribal governments remain an important source of per capita payments, dividends, and essential human services for many American Indians, but a source of justice for few. Tribal governments have gained institutional power and resources, but in the process they have acquired powers of abuse and oppression faster than they have devised appropriate checks and balances. Tribal courts have struggled to offset this new form of centralized power with borrowed ideas of “rights.” I suggest that in some indigenous communities, at least, indigenous jurisprudence offers more far-reaching, persuasive, and effective answers to the challenges of tempering power with justice.<sup>60</sup>

As indicated earlier, the codification of “customary law” is incompatible with the most distinctive and useful characteristic of indigenous jurisprudence: broad flexibility to adapt general principles of justice to the unique circumstances of each case, and the specific social relationships of the parties. Changing the substantive law does not alter the authoritarian style of adjudication. It is necessary to change the judges, and judging.

What criteria are being used to select tribal judges? What training or experience are considered relevant? The main thrust of tribal judicial reform since the mid-1970s has been to replace political cronyism with “professionalism,” that is, tribal judges who have the same formal legal training and speak the same arcane technical language as state and federal judges. This change has been defended as a triumph of judicial neutrality and legitimacy over nepotism, favoritism and ignorance. In their rush to create “a government of law and not of men,”<sup>61</sup> Indian tribes have gone to an extreme of favoring non-Indian laws, non-Indian styles of adjudication, and non-Indian judges, as if the very estrangement from of the norms and process could ensure neutrality.



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Tribal norms cannot be discovered in the law library. They can only be articulated and elaborated fully by men and women who have learned them by living them. Expertise on tribal norms must necessarily be found within the community thus resurrecting the spectre of personal bias. Tribal members thereby face a dilemma. They must either find individuals from among themselves that they trust to enunciate and apply distinctly local norms, or surrender their legal systems to external expertise. External legitimacy need not be sacrificed in \*87 the process of renewing local norms. Formal Western-style legal training is not irreconcilable with a knowledge of indigenous jurisprudence, any more than fluency in English is incompatible with Lakota fluency. People are entirely capable of learning and applying two systems of conceptualization and reasoning. The real issue (by analogy) is whether it is considered indispensable that tribal judges are fluent in English, or that they are fully bilingual.

A bilingual-bicultural judiciary would be a first necessary step. As a further step, each tribal court system would need to adopt appropriate local rules or procedures for the pleading and “discovery” of indigenous jurisprudence. This process cannot be straightforward judicial fact-finding based on expert testimony.

American Indian cultures have never been static, and the changes of the past century have been particularly rapid, largely imposed and often divisive. Tribal norms are undergoing change as well, and it would be hazardous to assume that a normative consensus exists within any tribal community, except perhaps at a very high level of generality. A case in point is the dispute in the 1980s over the acceptable physical limits of ritual initiations in the Coast Salish “smokehouse” religion.<sup>62</sup> Some elders argued that “rough” initiations were traditional and necessary, while others argued that these practices were a recent and harmful innovation.

If it was in the very nature of traditional principles to be general and flexible, moreover, indigenous norms were not “rules” with a fixed semantic structure of the form, “If a person does X, the consequence is Y.” Indigenous norms were more likely of the form, “People should [respect]/[not injure]/[be generous to] each other.” The application of broad principles to particular cases is highly contextual, situational, even contradictory, especially under conditions of rapid social change. Even if parties' expert witnesses can agree on an applicable traditional principle, then, it does not go very far towards resolving the case at hand. The judge cannot evade personal responsibility for giving content and life to the (broad) rule by interpreting and applying it.

Navajo courts often begin their analysis with the conceptual framework which is most likely to be shared by Navajo litigants, for example, the Navajo language itself. Concepts such as *k'e* and *hozho* provide widely acceptable starting-points for analysis of the merits of particular disputes. There is no comprehensive definition of *k'e* which can be found in a book, or discovered by adversarial processes, however. The judges themselves ultimately give detailed content to Navajo concepts by applying them in ways that Navajo litigants and the community could regard as just.

Bringing traditional principles into tribal court decisions can never be a matter of pure fact-finding, to pretend otherwise is an evasion of judicial responsibility for the just disposition of cases. By the same token, it is an evasion of responsibility to rely on foreign (state or federal) precedents on the pretense that indigenous jurisprudence is unknown, was not pled or proven, or falls outside of the mandate of the court. Tribal judges must help foster the discourse by directing lawyers to plead and argue indigenous jurisprudence, and by rendering reasoned opinions that bring the challenges of indigenizing tribal adjudication into the public sphere.

What can we learn, if anything, from the history of English Common Law? Medieval England was a recently - aggregated Mulligan \*88 stew of tiny kingdoms, fiefdoms and tribes, each of them with its own language and customary laws. London and the lower Thames may have been inhabited by Romanized Britons and the Norman invaders, but the west country was still Celtic and Pictic, the south shore Belgic, the northeast Saxon, Jute and Danish. Pioneering

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English judges travelled the realm on circuit, relying on local sergeants and pleaders to translate for them. The ultimate disposition of most controversies was left in the hands of local juries on writs *nisi prius*; when necessary, judges apparently “discovered” local law through their interrogation of local aldermen and merchants. The judges' mission was to amalgamate and standardize the laws of the realm, however, not to conserve local legal systems.

American Indian tribal courts share one key feature with the early English legal system: Despite great diversity at the local level, appeals are taken to a relatively small number of circuits dominated by a small number of appellate judges, many of whom are Western jurists who are unfamiliar with indigenous jurisprudence, or consider it their duty to refrain from elaborating traditional principles. The likely outcome of this appellate arrangement is a synthesis of indigenous legal systems into a single new Western dominated normative vision for all tribes. The Common Law is not an appropriate model for the development of American Indian legal systems, unless the goal is assimilation.

## VI. Conclusions

If tribunal courts are to contribute to the survival of Indian tribes as distinct polities, they must embody justice in a way that inspires Indians to place their greatest trust in their own governments. Recently-published tribal court decisions associate justice with judicial independence, neutrality, and consistency; that is, they adopt the same philosophy of judicial authority as the federal and state courts. To the extent that conceptions of fairness continue to differ between Indians and non-Indians, and among different Indian nations, however, tribal judges must delve deeper into indigenous jurisprudence when fashioning philosophies of internal legitimacy. Traditional principles may suggest quite different balances between consistency and the individualization of treatment; between individual rights and responsibilities to the collective; and between prescriptive efficacy (ensuring that rules are enforced) and relational justice (restoring reciprocity among relatives and neighbors).

Since the 1970s, Indian tribal courts have been preoccupied with two related goals: asserting their independence vis-a-vis tribal legislatures, and strengthening their external legitimacy and recognition by federal and state authorities. Attaining each goal reinforced the other. External recognition gave the courts internal political leverage. Judicial independence bolstered the courts' respectability in the eyes of the non-Indian profession. It may be asked why external legitimacy has been so important in the Indian tribal context. One explanation is the vulnerability of Indian tribes. Due to Indian tribes' relatively small populations and economies, they rely on external recognition, political support and investments to maintain their autonomy. Another is the fact that Indian tribes, like those African states which also regained their independence within the last generation, are still engaged in internal struggles to strengthen democracy and accountability. Like Africans, American Indians have \*89 embraced Law as their shield against capricious leaders, undisciplined bureaucracies, and the excesses of electoral majorities.

Western-style law can be a temporary brake on despotism, but it cannot rebuild a healthy society,—that is a task for mothers, grandparents, elders and teachers. Judges can help raise issues of justice, however, and through education and example create an environment which affirms indigenous concepts of justice and good relationships.

Tribal judges must first shift their attention from seeking external legitimacy, to strengthening their internal credibility and authority as representatives of distinctly indigenous, *tribal* conceptions of justice. Most judges are Western-trained to value legal formalism, to emulate the jargon and symbolism of judicial authority, and to aspire to the status and privileges of judicial office. They have had little need to develop expertise on local legal traditions. Indeed, judges who begin invoking tribal norms will undoubtedly meet some initial resistance from litigants who have come to base their expectations on Western rules and values. To indigenize their own thinking, tribal judges must be prepared to re-learn



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legal reasoning from a local indigenous perspective; they must risk some of the status they have earned in the non-Indian legal profession; and they must embark on the long-term challenge of educating litigants and their community as a whole.

While I continue to be critical of contemporary tribal court practice, I remain optimistic about the capacity of tribal judges to return to the roots indigenous justice, water those roots with compassion and a spirit of independence from Western precedents, bring them into the sunlight of public discourse, and let them grow gently, without fear of non-Indian professionals' opinions.

Footnotes

- a1 *Russel Lawrence Barsh is an Associate Professor of Native American Studies, University of Lethbridge (Alberta, Canada), and member of the Washington State Bar Association.*
- 1 Christine Zuni, *Strengthening What Remains*, 7 KAN J. L. & PUB. POL'Y 17 (1997).
- 2 Russel L. Barsh and James Youngblood Henderson, *Tribal Courts, the Model Code, and the Police Idea in American Indian Policy*, 40 LAW & CONTEMP. PROBS 25 (1976).
- 3 See Sally Falk Moore, *Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans About Running "Their Own" Native Courts*, 26 L & SOC'Y REV. 11 (1992).
- 4 See, e.g., Robert Yazzie, "Life Comes From It." *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).
- 5 Russel L. Barsh and Chantelle Marlor, *Alternative Paradigms: Law as Power, Law as Process*, LAW IN SOCIETY: A CANADIAN READER (Nick Larsen ed., Harcourt Brace, in press).
- 6 See, e.g., *Seneca Nation v. Williams*, 23 ILR 6254 (Seneca Peacemakers Court 1996) (trespass on unoccupied reservation land).
- 7 This is essentially the concept of "tribe" reflected in the regulations governing Federal recognition of Indian tribes, 25 C.F.R. Pt. 83.
- 8 See Russel L. Barsh, *The Nature and Spirit of North American Political Systems*, 10 AM INDIAN Q. 181 (1986); Russel L. Barsh and Joe B. Marshall, *Mikmaw Constitutional Law*, ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITIONS 192 (1998).
- 9 As Chief Justice Yazzie expressed it in his commentary on this paper, "always begin by thinking of where you come from."
- 10 E.g., *In re Rick McArthur*, 25 ILR 6133, 6134 (HoChunk Nation S.Ct. 1998); *GNS Inc. v. Blackhawk*, 24 ILR 6263, 6264 (Winnebago S.Ct. 1997); *Cole v. Kaw Housing Authority*, 22 ILR 6092, 6094 (Kaw Dist. Ct. 1995); *Hall v. Tribal Business Council*, 23 ILR 6039, 6042 (Ft. Berth. Dist. Ct. 1996). Compare *Sanders v. Royal Associates Management Inc.*, 24 ILR 6068, 6069 (Chitimacha Ct. App. 1997) (rejecting arguments that nonresident non-Indian plaintiffs could not obtain a fair trial because the judge and jury were all related and all stood to lose financially if the plaintiffs prevailed on their claims).
- 11 24 ILR 6258 (Saginaw Chip. Tr. Ct. 1996).
- 12 *Watt v. Colville Confederated Tribes*, 25 ILR 6027, 6028 (C.C.T. Ct. App. 1998) (Stewart, A.J., concurring).
- 13 See *Beardsley v. Blackman*, 24 ILR 6133, 6135 (Navajo Sup. Ct. 1997).
- 14 Tribal courts sometimes make passing mention that indigenous jurisprudence is *consistent* with principles derived from federal or state case law, without either entering into a discussion of traditional principles, or invoking them as the *ratio decidendi*. This practice, discussed further below, is what I have referred to as boilerplating.

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- 15 Tribal courts in the sample also relied on a wide variety of treatises and practice guides including AMERICAN JURISPRUDENCE and MOORE'S FEDERAL PRACTICE (25 cases), and on the 1982 revision of FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (11 cases). Two decisions relied on ethnographic studies by anthropologists, and one constitutional ruling relied on ROBERTS' RULES OF ORDER.
- 16 *But see* Winnebago Tribe v. Springer, 24 ILR 6141 (Winn. Tr. Ct. 1996) (state standards on admissibility of breathalyzer evidence rejected).
- 17 *E.g.*, Winnebago Tribe of Nebraska v. Pretends Eagle, 24 ILR 6240-6241, 6243 (Winnebago Tr. Ct. 1997) (“reasonable cause” for police to stop and arrest, derived from BLACK'S LAW DICTIONARY); Frechette v. Menominee Tribal Enterprises, 24 ILR 6082, 6083 (Men. Tr. Ct. 1995) (although “the Menominee Tribe as a sovereign nation may shape its own law on any legal issue,” court applies state law to wrongful termination action); Port Gamble S'Klallam Tribe v. Rogers, 22 ILR 6074, 6076 (Pt. Gamble Ct. App. 1994).
- 18 23 ILR 6172, 6174 (St. Regis Tr. Ct. 1996).
- 19 Rave v. Reynolds, 23 ILR 6150, 6159 (Winn. Sup. Ct. 1996). Bird, Jr. v. Ortiz, 24 ILR 6204, 6206 (Winn. Tr. Ct. 1996) (ruled that Nebraska law does not apply to tribal child custody actions, then adopted that state's “best interests of the child” standard. The court explained that it was “not aware of, and the parties did not bring to the attention of the Court, any contrary tribal common law.”).
- 20 Tri-County Water Ass'n Inc. v. Miner, 22 ILR 6141, 6142 (Chey.R.Sx.Ct.App. 1995). Two of members of the appellate panel, Professors Clinton and Pommersheim, were non-Lakota. In *Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners*, 23 ILR 6045, 6048 (Chey. R. Sx. Ct. App. 1996), the same panel applied federal law to allow a tribal employee to appeal his termination, adding “this ruling is also consistent with the Lakota custom of fairness and respect for individual dignity...”; *see also*, Estate of Tasunke Witko v. G. Heileman Brewing Co., 23 ILR 6104, 6108 (Rbd. Sx. Sup. Ct. 1996).
- 21 Simplot v. Ho-Chunk Nation Department of Health, 23 ILR 6235, 6243 (Ho-Chunk Tr. Ct. 1996).
- 22 *E.g.*, Hoh Indian Tribe v Hudson, 22 ILR 6066 (Hoh Ct.App. 1994); LaRocque v. Bennett, 22 ILR 6067, 6068 (Turt. Mt. Tr. Ct. 1995).
- 23 Littlegeorge v. Lowe, 24 ILR 6099, 6100 (Ho-Chunk Tr. Ct. 1996); *In re* G. Russell Stewart III, 24 ILR 6101, 6102 (Mash. Peq. Tr. Ct. 1996); *compare* Three Affiliated Tribes v. Country, 24 ILR 6154 (N. Plns. Intertr. Ct. App. 1997) (duty of judge to recuse self derived from considerations of policy).
- 24 Lulow v. Peterson, 23 ILR 6200, 6201 (C. S. & K.t. Ct. App. 1996); Wilson v. Keuren, 22 ILR 6012, 6013 (Nav. Sup. Ct. 1994); Pueblo of Pojoaque v. Jagles, 24 ILR 6137 (Projoaque Pueblo Tr. Ct. 1997).
- 25 *See* Colville Confederated Tribes v. Tatshama, 23 ILR 6211, 6212 (Colv. Tr. Ct. 1996).
- 26 Jones v. Ho-Chunk Nation Election Board, 23 ILR 6248, 6249 (Ho-Chunk Sup. Ct. 1995) (the court relied upon a conventional analysis of the legislative history of the disputed constitutional provision).
- 27 *See In re* Welfare of C.W., 23 ILR 6213 (N.W. Reg. Tr. Sup. Ct. 1996).
- 28 *See* Lulow v. Peterson, 22 ILR 6069 (Confederated Salish & Kootenai Tribes Tribal Court 1995) (the court applied state law).
- 29 *See* Gesinger v. Gesinger, 22 ILR 6025 (Chy. R. Sx. Ct. App. 1995). *See also* Lulow v. Peterson, 23 ILR 6200, 6201 (C.S.& K.T. Ct.App. 1996) (applies Montana law to property division following breakup of common-law marriage without consideration of tribal traditions because Montana law is “fair”).

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- 30 *E.g.*, *Cole v. Kaw Housing Authority*, 22 ILR 6092, 6094 (Kaw Dist. Ct. 1995) (applies Oklahoma law to issue of propriety of recently-resigned tribal judge serving as defendant's counsel); *Rave v. Reynolds*, 22 ILR 6137, 6139 (Winn. Tr.Ct. 1995) (applies federal law to issue of proper standard for determining whether tribal legislation conflicts with tribal constitution).
- 31 *E.g.*, *Winnebago Tribe of Nebraska v. Pretends Eagle*, 24 ILR 6240, 6243 (Winnebago Tr. Ct. 1997) (“The Court is unable to take into consideration tribal customs or traditions if the parties make no effort to provide this information to the Court”).
- 32 *E.g.*, *Chatterson v. Confederated Tribes of Siletz Indians of Oregon*, 24 ILR 6231, 6232 (Siletz Ct.App. 1997).
- 33 *Pakootas v. Colville Confederated Tribes*, 25 ILR 6024 (Colv. Tr. Ct. 1997); *Accord, Watt v. Colville Confederated Tribes*, 25 ILR 6027 (Colv. Tr. Ct. 1998); *Colville Confederated Tribes v. Smith*, 24 ILR 6145, 6146 (Colv. Tr. Ct. 1997).
- 34 *See Navajo Nation v. Blake*, 24 ILR 6017, 6018 (Nav. Sup.Ct. 1996).
- 35 *See In re Application of L.E.*, 24 ILR 6015, 6016 (C.S. & K.T. Ct.App. 1996) (“In the culture of the Tribes, extended families play a much greater role in raising children” than in European cultures).
- 36 *See Helgesen et al. v. Lac Du Flambeau Band*, 25 ILR 6045, 6053 (Lac Flambeau App. Ct. 1998) (“Prior to European influence, it was a well accepted belief throughout Indian Country that individual rights lie subordinate to the rights of the tribe”).
- 37 *Winnebago Tribe of Nebraska v. Frazier*, 25 ILR 6021 (Winnebago Tr. Ct. 1997).
- 38 *Rave v. Reynolds*, 23 ILR 6150, 6157 (Winn. Sup. Ct. 1996) (on a question of standing to challenge tribal elections, taking notice that tribal traditions “encouraged participatory and consensual resolution of disputes”).
- 39 *Winnebago Tribe v. Bigfire*, 24 ILR 6232, 6233 (Winnebago Tr. Ct. 1997).
- 40 *E.g., In re T.M.M.*, 24 ILR 6039, 6047-48 (Walk. Riv. Juv. Ct. 1996) (elders consulted to determine what constitute traditional medical practices).
- 41 *See In re Guardianship of William Bell, Sr.*, 24 ILR 6105, 6106 (Ft. Bert. Tr.Ct. 1997), *affirmed sub nomine Bell v. Nelson*, 25 ILR 6032, 6033 (No. Plains Intertr. Ct.App. 1998) (rights and responsibilities of traditional custodians of sacred objects in Hidatsa traditions).
- 42 *See Fisher v. Pigeon*, 24 ILR 6258, 6259 (Saginaw Chippewa Tr.Ct. 1996) (tradition of “participatory democracy” overrides technical defects in challenged tribal election); *Rave v. Reynolds*, 23 ILR 6150, 6157 (Winnebago Sup.Ct. 1996) (tradition of “participatory” government supports a broad view of standing to challenge tribal elections).
- 43 *See Percy v. Swan*, 24 ILR 6173 (Ho-Chunk Nation Tr. Ct. 1996). *Similarly Beardsley v. Blackman*, 24 ILR 6133 (evidence sufficient to sustain validity of a traditional oral will); *Bell v. Nelson*, 25 ILR 6032 (No.Plains Intertr. Ct.App. 1998) (rights and duties of traditional custodian of treaty record). *Compare Smith d/b/a Frosty's v. Confederated Salish & Kootenai Tribes*, 23 ILR 6257 (C.S. & K.T. Ct. App. 1996) (federal law dispositive of what is a “taking” of property by the tribe).
- 44 *See Miner v. Banley*, 22 ILR 6044, 6045 (Chey. River Sx. Ct.App. 1995) (right of the child to “cultural” education as an element of the child's best interests); *In re T.M.M.*, 24 ILR 6005, 6006, 6009 (Walker River Juv. Ct. 1996) (right of child to traditional medicine); *Davis v. Means*, 21 ILR 6125, 6126 (Navajo Nation Sup. Ct. 1994) (right of child to establish paternity).
- 45 *See In re Application of L.F.*, 24 ILR 6015, 6016 (C.S. & K.T. Ct.App. 1996).
- 46 *See Naize v. Naize*, 24 ILR 6152, 6153 (Navajo Nation Sup. Ct. 1997).
- 47 *See Rough Rock Community School v. Navajo Nation*, 25 ILR 6059, 6061 (Navajo Nation Sup.Ct. 1998).
- 48 *See Atcitty v. District Court for the Judicial District of Window Rock*, 24 ILR 6013, 6014 (Navajo Nation Sup.Ct. 1996).

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- 49 See *Johns v. Leupp Schools, Inc.*, 22 ILR 6039 (Navajo Nation Sup. Ct. 1995); *Ben v. Burbank*, 24 ILR 6001 (Navajo Nation Sup. Ct. 1996); compare *Lee v. Tallman*, 24 ILR 6034, 6036 (Navajo Nation Sup. Ct. 1996) (traditional principle of respect for authority of the decisionmaker invoked to discourage frivolous appeals).
- 50 See *Navajo Nation v. Crockett*, 24 ILR 6027, 6028, 6030 (Navajo Nation Sup.Ct. 1996).
- 51 See *Atcitty*, 24 ILR at 6014: “Distributive justice requires sharing of Navajo Nation resources [and] has roots in Navajo traditional concepts of community progress through sharing. This is part of Navajo egalitarianism.”
- 52 See *Crockett*, 24 ILR at 6028, 6030.
- 53 See *Rave v. Reynolds*, 23 ILR 6150, 6157 (Winn. Sup.Ct. 1996) (standing to challenge tribal elections); *Fisher v. Pigeon*, 24 ILR 6058, 6059 (Saginaw Chippewa Tr.Ct. 1996) (technical defects do not invalidate election). Compare *Clement v. LeCompte*, 22 ILR 6111, 6117 (Chey. R. Sx. Ct.App. 1994) (traditional principles demand fairness but tribal constitution has not expressly waived sovereign immunity in election disputes).
- 54 *Ben v. Burbank*, 24 ILR 6001 (Navajo Nation Sup.Ct. 1996).
- 55 *Atcitty*, 24 ILR at 6014.
- 56 *Navajo Nation v. Crockett*, 24 ILR 6027, 6028-6029 (Navajo Nation Sup.Ct. 1996) (employees should try to “talk things out” with supervisors before turning to external channels of review and coercive redress).
- 57 *Navajo Nation v. Blake*, 24 ILR 6017, 6018 (Navajo Nation Sup. Ct. 1996).
- 58 *Ben v. Burbank*, 24 ILR 6001, 6002 (Navajo Nation Sup.Ct. 1996). “Living together nicely” is also the way Mohawk jurisprudence has been characterized by Mohawk jurist Patricia Monture-Okanee, *Thinking About Aboriginal Justice: Myths and Revolution*, CONTINUING POUNDMAKER & RIEL'S QUEST 222 (Richard Gosse, James Youngblood Henderson and Roger Carter eds. 1994).
- 59 See RONET BACHMAN, *DEATH AND VIOLENCE ON THE RESERVATION; HOMICIDE, FAMILY VIOLENCE, AND SUICIDE IN AMERICAN INDIAN POPULATIONS* (1992); John S. Hisnanick, *Comparative Analysis of Violent Deaths in American Indians and Alaska Natives*, 41 SOCIAL BIOLOGY 96 (1994); Barbara Chester, Robert W. Robin, Mary P. Koss, Joyce Lopez, and David Goldman, *Grandmother Dishonored: Violence Against Women by Male Partners in American Indian Communities*, 9 VIOLENCE & VICTIMS 249 (1994); David K. Carson, *American Indian Elder Abuse: Risk and Protective Factors Among the Oldest Americans*, 7 J. ELDER ABUSE & NEGLECT 17 (1995); Robert W. Robin, Barbara Chester, Jolene K. Rasmussen, James M. Jaranson, and David Goldman, *Prevalence, Characteristics, and Impact of Childhood Sexual Abuse in a Southwestern American Indian Tribe*, 21 CHILD ABUSE & NEGLECT 769 (1997).
- 60 I strongly agree with Professor Richard Monette that, in the long term, a continual process of popular constitutional reforms (continual negotiated structural revolution) is more democratic and effective than leaving the problem of restraining abuses of power to the courts. In the short term, however, I believe that tribal courts will frequently be called upon to apply the brakes to tribal governments, and should use the opportunity to ground tribal members' rights in their own normative traditions.
- 61 *In re Recusal of Judge Lorene Ferguson*, 25 ILR 6077, 6079 (Nav.Sup.Ct. 1998) (repeating Sir William Blackstone without a reference.)
- 62 See R. Barsh, *Banishing the Spirits: Indian Agents and the Pacific Northwest Winter Dance*, JOURNAL OF THE WEST [in press].

**\*93 Appendix I**

**Table 1**

PUTTING THE TRIBE IN TRIBAL COURTS: POSSIBLE?..., 8-WTR Kan. J.L. &...

Characteristics of the Sample (N=359)

	1992	1993	1994	1995	1996	1997	1998	
Chey.R.		3	2	10	6	2	2	25
Colville				11	15	17	5	48
Flathead				4	14	3	2	23
Ho-Chunk				2	26	7	3	38
Navajo			1	12	8	9	3	33
Pequot	1	3	8	12	21			45
Winnebago				3	10	7		20
NWITC <sup>a1</sup>		3	18	1	1	1		24
Others		1	7	17	27	38	13	103
	1	10	36	72	128	84	28	359

Footnotes

<sup>a1</sup> Northwest Intertribal Court System

**\*94 Appendix II**

**Table 2**

**Sources of Law Relied Upon by Tribal Courts, 1992-1998, Sorted by Issues (N=359)**

PUTTING THE TRIBE IN TRIBAL COURTS: POSSIBLE?..., 8-WTR Kan. J.L. &...

ISSUES	SOURCES RELIED UPON (NUMBER OF CASES)						CASES
	OWNLAW	TRIBAL	FEDERL	STATE	TRADTN	POLICY	
CivRts	13	3	9	2	3	5	14
Constn	19	8	13	5	3	4	22
DP-Exe	52	8	25	11		6	58
DP-Jud	48	8	36	16		9	59
Family	31		12	15	7	4	37
Jurisd	31	3	29	15	2	11	38
Proced	65	5	26	20	2	15	95
Propty	8	1	6	4	3	4	13
Stndrd	8		3	8		1	11
Others	9		6	6		3	12
	284	36	164	102	20	62	359

**\*95 Appendix III**

**Table 3**

**Sources of Law Relied Upon by Tribal Courts, 1992-1998, Sorted by Issues (N=359)**

PUTTING THE TRIBE IN TRIBAL COURTS: POSSIBLE?..., 8-WTR Kan. J.L. &...

ISSUES	SOURCES RELIED UPON (PERCENT OF CASES)						CASES
	OWNLAW	TRIBAL	FEDERL	STATE	TRADTN	POLICY	
CivRts	93%	21%	64%	14%	21%	36%	14
Constn	86	36	59	23	14	18	22
DP-Exe	90	14	43	19	0	10	58
DP-Jud	81	14	61	27	0	15	59
Family	83	0	32	41	19	11	37
Jurisd	82	8	73	39	5	29	38
Proced	68	5	27	21	2	16	95
Propty	62	8	46	31	23	31	13
Stndrd	73	0	27	73	0	9	11
	79	10	46	28	6	17	359

\*96 Appendix IV

Table 4

Sources of Law Relied Upon by Tribal Courts, 1992-1998, Sorted by Issues—Pequot Deleted (N=314)

PUTTING THE TRIBE IN TRIBAL COURTS: POSSIBLE?..., 8-WTR Kan. J.L. &...

ISSUES	SOURCES RELIED UPON (PERCENT OF CASES)						CASES
	OWNLAW	TRIBAL	FEDERL	STATE	TRADTN	POLICY	
CivRts	93%	21%	64%	14%	21%	36%	14
Constn	86	36	59	23	14	18	22
DP-Exe	89	22	51	3	0	14	37
DP-Jud	81	14	61	27	0	15	59
Family	83	0	32	41	19	11	37
Jurisd	79	0	76	33	6	33	33
Proced	64	4	31	14	2	18	84
Propty	62	8	46	31	23	31	13
Stndrd	100	20	40	60	0	0	5
	78	11	48	23	6	19	314

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# KEY CONCEPTS IN THE FINDING, DEFINITION AND CONSIDERATION OF CUSTOM LAW IN TRIBAL LAWMAKING

*Pat Sekaquaptewa\**

## *Introduction*

This is the second in a two-part series exploring how Native Nation legal systems — and the Hopi Tribe in particular — handle custom. The first article, “Navigating Rights within the Formalized Legal Pluralism of the Hopi Nation,”<sup>1</sup> focused on the tensions between the customary law systems persisting under the Hopi national government and international and United States (U.S.) federal government admonishments to protect human and civil rights. The article also focused specifically on the question of whether a Native Nation is legally, morally, and/or pragmatically obligated to bring its customary law systems in line with international treaties/covenants, and/or U.S. federal law with respect to such rights protection, and how this might be accomplished. This second article focuses on exploring the methods of incorporating local custom — using more or less Western processes — with an eye toward the needs of Native Nation legislatures and judges.<sup>2</sup> Specifically, I seek to design an approach for thinking about how local values

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1. Article to be submitted as a part of an edited volume titled *ETHICS, POETICS, AND AESTHETICS AMONG THE HOPI: ESSAYS IN HONOR OF EMORY SEKAQUAPTEWA* (Justin Richland ed.) (forthcoming).

2. In drafting these articles, considerations of target audience, the priorities and foci of the legal and academic discussions, the writing style, and the ideal formats have troubled me, primarily because these considerations orbit around an important debate about whose priorities should govern in the dominant legal academic discourse - those of the Western system or those of Native communities? As Native scholars we are responsible to two audiences, our academic peers in the law as a whole and to those Native thinkers who can be thought of as the Native or tribal academy. We should be committed to speaking to both with equal time and space, lest we stunt the growth of our Native Nations' collective ideas and institutions. My initial decision to put the Western focus first is not some recognition of any superior or foundational perspective, but rather the need to create some touch points for cross-communication both between the Native and non-native audiences and between Native Nations/tribes.

and ways may be captured and integrated into written tribal law (positive or common law). As demonstrated by the topical progression from the first article to the second article, I argue that truly representative Native Nation states must make some attempt to respect and incorporate the multiple customary law systems existing within their borders within their formal legal systems. My intended primary audience includes my peers — tribal judges, leaders, council members, and tribal law academics — particularly those who are also stakeholders.<sup>3</sup>

This inquiry arises from my work as a legal clinician entrusted to advise American Indian tribes on the drafting of tribal constitutions and legislation and my work with the tribal common law as a tribal appellate judge. Over the years I have been struck by the lack of a comprehensive theory to guide tribal lawmakers and judges in their policymaking and lawmaking/law-interpreting activities. I have also been struck by the lack of organically grown legislation with the requisite community notice and input. I have been surprised to find a common practice whereby elder community members are randomly consulted “on the spot” to provide information regarding custom where the context, relevance, and application of such information is reserved to the sole discretion of (often non-Native) drafting attorneys or judges. In the case of judging, there is an expectation that a tribal judge will use his or her knowledge and experience of tribal custom; for instance, the judge can take judicial notice of custom, simply toss out Western-styled court rules and engage instead in the “righting of relationships,” or engage in a more Western-styled fact-finding process to find the relevant, applicable custom that will then be applied within the sole discretion of the judge. In all such cases, drafting attorneys and judges are *de facto* policymakers in great need of useful theories or at least guidelines for working with custom.

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3. Unfortunately, until recently, there seems to have been little to no respected academic space for tribal stakeholders to reflect, theorize, critique, and generally problem-solve without having the discussion hijacked for other purposes - for example, jurisdiction over nonmembers. It is important to find a way to facilitate the priorities of stakeholder dialogue while simultaneously fostering cross-communication. In keeping with this goal, I have set and followed some ground rules for this article. I have attempted to avoid the use of discipline specific vocabulary as a short cut and I have tried to define and explain words and concepts fully in lay-friendly terms. Where I have referred to anthropological or legal theories in the main text, the characterizations and analyses are directed to the primary stakeholder audience. To the best of my abilities, I have used footnotes on points of special concern or interest to the disciplines; otherwise, I myself might have inadvertently hijacked this article for other purposes.

In Part I of this article I set out a functional definition of “custom,” including the identification of custom as a kernel of law and custom of a legal nature in its natural setting. In Part II through Part IX, I reintroduce legal anthropologist Leopold Pospisil’s theory on the basic elements of law (or how to identify custom-as-law in its natural setting) and apply this to the Hopi case of *James v. Smith*.<sup>4</sup> In Part X, I explore the national debates about the pros and cons of using custom. And finally, in Part XI, I discuss the implications for solutions — legislative or otherwise — to problems raised.

### I. Defining “Custom Law”

#### A. Definitions of “Custom” and Debates over Its Use

Legal academics and tribal legal professionals cover a wide range of philosophical, anthropological, sociological, and jurisprudential terrain in an attempt to define what is custom.<sup>5</sup> Some focus on defining “law” to include custom.<sup>6</sup> Some analogize custom to American common law or define it as part of a unique tribal or indigenous common law.<sup>7</sup> Many assert that it is a way of doing things — particularly, resolving disputes and/or repairing

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4. *James v. Smith*, No. CIV-019-94 (Hopi Tribal Ct. Apr. 15, 1998).

5. I use the term “custom” throughout this article to capture all its possibilities without precise definition. I hope that my entire article will serve as a starting point for parsing more precise elements and meaning. I have selected this specific term, as I find that it is the popular shorthand in tribal government circles for whatever the particular tribe, group, or person means by it; as should be clear from a reading of this article, it can mean a universe of different things.

6. See, e.g., James Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT’L & COMP. L. REV. 55, 73 (1997) (defining law as norms enforced by institutions and includes customs “as group of norms”); see also Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287, 315 (1998) (stating that “aligning law with custom in tribal courts promotes efficiency and fairness”).

7. James W. Zion, *Searching for Indian Common Law*, in INDIGENOUS LAW AND THE STATE 121-48 (B.W. Morse & G.R. Woodman eds., 1988) (“For the purpose of a rational discussion of Indian customary law, it is best to use the term ‘Indian Common Law.’ Indian government, law and daily life are founded upon long-standing and strong customs, and since the stated rationale for the English Common Law is that it is a product of custom, that approach may be used for Indian law as well. Indians have every right to assert that their law stands on the same footing as the laws of the United States and Canada. It is unfortunate that the term ‘custom’ implies something that is somehow less or of lower degree than ‘law.’”); Cooter & Fikentscher, *supra* note 6, at 315 (hypothesizing that “the common law process in tribal courts focuses more on relationships and less on rules in resolving disputes”).

relationships.<sup>8</sup> But my purpose here is not to create a definition to legitimize custom, however defined, in the eyes of nonmembers or to distance it from Western law or the stigma of assimilation to legitimize it in the eyes of members. Rather, we need a functional definition to assist us in policymaking, be it a part of the executive decision-making process, legislation, or adjudication.

### *B. Custom as a Way of Doing Things*

Equating custom with traditional dispute resolution is misleading. Traditional dispute resolution constitutes an aspect of custom, but it does not embody the totality of it. Custom is more than a way of resolving disputes; it also includes worldview, values, socially reinforced norms, etc. Further, today there are important questions concerning the source of particular models of “relationship-righting” processes.<sup>9</sup> It has been popular in federal Indian law academic circles to focus on traditional dispute resolution defined

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8. Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL'Y 74, 75-76 (1999) (stating that “‘indigenous jurisprudence’ means the basic approach to dispute resolution inherited from pre-colonial practices and ‘traditional principles’ refer to specific concepts of human behavior and good relationships which can be identified in pre-colonial practices,” and that “[a] system of ‘tribal’ law aims to repair any breaches in the web of counterbalancing rights and duties”); James W. Zion, *Ten Commandments for Integrating Traditional Indian Law into Modern Indian Nation Courts* 8-11 (1988) (paper prepared for the Tribal Law & Policy Institute, on file with author) (stating that “law ‘made by the whole people’ is custom” and includes a process of talking out a dispute; that “traditionally, Indians took their problems to relatives and Elders”; and that contemporary Navajo peacemaking uses “mediators” selected by the community who guides the parties “to cause a ‘cognitive-affective shift’ in thought from ‘head thinking’ or negative attitudes to ‘heart thinking’ or empathy”); see also Cooter & Fikentscher, *supra* note 6, at 315 (hypothesizing that the common law process in tribal courts focuses more on relationships and less on rules in resolving disputes). See generally Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997).

9. See, e.g., Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 125-26 (2000-2001) (recounting how the alternative dispute resolution of the 1960s and 1970s was spearheaded by Chief Justice Earl Warren after he “delivered a number of speeches in which he advocated an alternative to courts that focused less on adversarial tactics, and more on harmony, personal relationships, community, and healing”); Laura Nader & Jay Ou, *Idealization and Power: Legality and Tradition in Native American Law*, 23 OKLA. CITY U. L. REV. 13, 25 (1998) (arguing that “alternative dispute resolution entered reservations in the 1970s via national Indian conferences, professional networks, and government and private institutions” where “federal and state governments, in concert with tribes and corporations began to push for negotiated settlements to resolve disputes that would otherwise have had to undergo prolonged and costly litigation”).

in one of three ways: (1) as unique to a particular tribe's traditional dispute resolution ways; (2) as borrowed and modified from other tribes; or (3) as borrowed and modified from Western mediation, arbitration, or therapeutic models.<sup>10</sup> Dispute resolution is generalized as a process whereby a respected third person facilitates disputing parties to repair broken relationships with each other, their extended family, the community, and the natural world. The goal is not to fact-find or guilt-find and there is no winner or loser.<sup>11</sup> It is important to remember, however, that this is a generalization that cannot possibly be 100 percent accurate in describing the particulars of over 500 different tribal societies. If the dispute resolution model is an import, one must ask: What is the source of the model and does the model supplant persisting local indigenous processes? How should the imported model be usefully modified to reflect local needs and values? Is the intent to have the tribal court use this process to the exclusion of other processes, such as the adversarial process, or to set up court-annexed or independent processes? Traditional dispute resolution processes and imported "relationship-righting" processes are critical components of present-day tribal justice systems, but they must be thoughtfully supported, annexed, or, if private, used by more Western-styled bodies. They should also be modified where necessary. Tribal members and others should have a maximum array of processes and remedies available; however, it should be clear that defining custom as essentially "traditional dispute resolution" is of little assistance in policymaking with respect to substantive custom concerns.

### C. *Judicial Discretion as Custom*

A number of legal scholars assert that in tribal dispute resolution, tribal judges, influenced by their knowledge and sense of fairness based on their experience with tribal ways, focus less on rules and more on relationships.<sup>12</sup>

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10. See, e.g., Joh, *supra* note 9, at 127-28 (pointing to the external resources relied upon in the development of the Navajo Peacemaker Court).

11. See, e.g., Porter, *supra* note 8, at 250-52 ("Peacemaking is the process of resolving disputes by involving respected third parties who induce disputing parties to find common ground and restore their underlying relationship by utilizing a variety of social, spiritual, psychological, and generational pressures.").

12. Cooter & Fikentscher, *supra* note 6, at 314-15 ("A tribe's way of life is the sum of its customs and traditions, which are often imbedded in stories beginning with the creation of the world. The customs and traditions provide an encompassing guide to living backed by sacred sanction. The Way of the tribe should shape the tribal judge's sense of justice. . . . Tribal people live their lives among kin, so a dispute indicates a rupture in these relationships. Dispute resolution in the tribe typically aims to repair relationships. To repair relationships, adjudicators

In a sense, this is also an argument for custom as a way of doing things. The difference here is that the focus is on the tribal judge in tribal court instead of a traditional authority or peacemaker in a traditional or structured “relationship-righting” process like peacemaking. Again, custom is more than dispute resolution, including also worldview, values, socially reinforced norms, etc. There is also an important debate to be had over how much discretion and flexibility a tribal judge should have; in other words, should a tribal judge be required to follow certain statutory provisions or rules governing the nature of the proceeding and the finding and application of custom? Defining custom as “judicial discretion” is also of little assistance for policymaking purposes with respect to substantive custom concerns.

#### *D. Substantive Custom*

It is clear that we need a functional definition of substantive custom for both communication and consideration of what is actually at stake and what outcomes are intended in a given policy debate or judicial deliberation. Equating custom with relationship-righting processes or judicial discretion is imprecise — dull tools for our purposes. The functional definition that I propose is one that distinguishes: (1) custom as a kernel of law; (2) custom of a legal nature in its natural setting; and (3) custom that is enforceable under tribal law.

##### *1. Custom as a Kernel of Law*

Custom as a kernel of law has variously been described as “feelings,” “practice,” “habit,” “usage or practice,” and “beliefs and conduct.”<sup>13</sup> Conduct, habit, practice, and usage connote action by people, something that we can see and measure. Beliefs and feelings are subjective. They are harder to measure. In all societies there is also a noted difference between what

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examine the character of the parties and the history of their interaction, not just the particular event in the legal complaint. Compared to other American courts, we expect tribal courts to attend to relationships more than rules.”) *But see* Joh, *supra* note 9, at 123-24 (suggesting that where “custom is invoked to justify the relaxation, or virtual elimination of Anglo-American procedural rules,” parties “receive neither a Western-style adjudication nor a customary one”).

13. The Western legal definition of “custom” is, “A practice that by its common adoption and long, unvarying habit has come to have the force of law.” BLACK’S LAW DICTIONARY 413 (8th ed. 2004). Barsh defines “traditional principles” as referring to “specific concepts of proper human behavior and good relationships which can be identified in pre-colonial practices.” Barsh, *supra* note 8, at 75.

people say they do (or should do) and what they actually do, making stated beliefs and feelings less reliable than beliefs and feelings demonstrated by conduct, habit, practice, and usage. Our definition of custom as a kernel of law should require both a feeling/belief element and conduct element, as tribes will use this definition to pick and choose which customs should be reinforced by tribal institutions.<sup>14</sup>

## 2. Custom of a Legal Nature in Its Natural Setting

It should come as no surprise that traditional legal systems have already sorted custom kernels, recognizing some as legal and others as mere values. The challenge is identifying where this has happened. In a previous article I distinguished these kernels as “legal norms” and “social norms.”<sup>15</sup> Here scholars begin to disagree about what makes a custom kernel legal. Some argue that a “practice must be commonly adopted by long, unvarying habit,” or “be a long established, unvarying, usage or practice.”<sup>16</sup> Others argue that

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14. Valencia-Webber defines custom to include generally held beliefs and conduct in compliance with such beliefs, but separated from other cultural elements that imply non-formalized ideas or codes of conduct. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 244-46 (1994).

15. I subdivided custom into the following four concepts: social norms, legal norms, traditional practices, and current local practices.

Anthropologists define social norms to be “felt standards of proper behavior.” A legal norm, by contrast, is a felt standard of proper behavior that is “actively protected conduct.” In layman’s terms, social norms are what most people in a given community would consider to be proper behavior (people should refrain from gossiping for example) but which do not rise to the level of an enforceable legal duty. Legal norms are expected proper behaviors backed by official sanctions.

Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL’Y 761, 777 (2000). For an in-depth discussion of social and legal norms, see K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* ch. I-III (special ed. 1992).

16. Zuni prefers the term “indigenous law” or “traditional law” and would define it to include law derived from long established usage or practice, where it has acquired its force by common adoption or acquiescence, and where it does not vary (generally unwritten). Zuni anticipates that “the primary method through which customary law will become part of the tribal legal system is through” both judge-made law and legislation. Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL’Y 17, 27 (1997) [hereinafter Zuni, *Strengthening*]; see also Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law*, available at [http://tlj.unm.edu/articles/volume\\_1/zuni\\_cruz/text.php](http://tlj.unm.edu/articles/volume_1/zuni_cruz/text.php) [hereinafter Zuni Cruz, *Tribal Law*].



more is required or that a certain kind of recognition of the forgoing is required — that some traditional authority must identify the underlying value or principle, restate it as a rule, and apply it in a real case.<sup>17</sup> The liveliest debate surrounds the question of whether the presence of “sanctions” is required, however defined.<sup>18</sup> The most rigorous definition would require the presence of long-established practice, recognized and applied by an authority, and enforced by sanction. Tribal leaders and policymakers should discuss and come to some agreement about what constitutes custom law in its natural setting. For example, should just long established practices qualify or should recent, generally accepted practices also qualify? How do we want to detect these practices, by looking at the past and present decisions of traditional authorities and/or by general community feedback/polling? How or why might the application or non-application of traditional sanctions be relevant or useful?

### 3. Custom Enforceable Under Tribal Law

A central inquiry of this article is what customs should be enforced as part of tribal law. Most scholars argue that this inquiry should be left up to the

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17. Zion describes “law” as consisting of “norms which are [applied] by institutions” through a “process of double institutionalization” - where an institution identifies values in a society, restates them as rules and reapplies them in decisions framed by the rules. He defines “a ‘norm’ [as] a rule . . . which expresses the ‘ought’ aspects of relationships between human beings” and includes values or moral principles. “Values,” according to Zion, “are shared feelings about good ways in life or what conduct should be avoided. A ‘moral principle’ is a fundamental value which people follow” and customs are that “body of norms which are followed in practice.” Zion & Yazzie, *supra* note 6, at 73.

18. *See id.* at 74 (“Indian traditional legal systems are ‘horizontal.’ Indian clan and kinship groups are legal systems. Vertical systems [European law] use hierarchies of power and authority, backed by force and coercion, to operate their legal systems. Horizontal systems are essentially egalitarian and function using relationships. Many reject force or coercion.”); Zion, *supra* note 6, at 3 (punishment, force, and coercion are not necessary elements of law and “it is possible to operate a legal system without police or jails”). *But see* Nader & Ou, *supra* note 9, at 16-17. Nader recounts Ruth Benedict’s book, *Patterns of Culture*, where she portrayed Pueblo society as “characterized by norms of social cooperation and by the internalization of high value placed on social harmony . . . elaborating a system of social control devoid of coercive physical sanctions.” *Id.* This characterization was challenged by E. Adamson Hoebel, given his work finding that “the Pueblos were a complex society known to use extreme forms of physical sanctions applied by designated . . . officials” and reminding us that “the U.S. government [later limited and supervised] Pueblo autonomy in their exercise of penal sanctions.” *Id.* Hoebel “recognized the power of the Pueblo state.” *Id.* at 17.

discretion of a tribal judge as opposed to being legislated.<sup>19</sup> The concern is that legislation tends to freeze custom in time and legislators cannot adequately predict or provide for all variations of an issue or problem. Judges, on the other hand, deal with real parties in live disputes case-by-case and are in a better position to make tough calls tailored to specifics. But even where a judge is the proper and authorized entity to identify, define, apply, and enforce custom, what guidelines should she follow? Again, some scholars say the decision should be left to the judge completely. For example, Zion feels that tribal judges can inject their worldview and experience by using the basic common law method. Tribal judges should: “(1) figure out the right thing to do; (2) look up the law [including finding applicable custom]; and (3) use the law to state the right thing to do in a judgment.”<sup>20</sup> Cooter and Fikentscher would argue that for some tribes it is enough that the Native judge brings her worldview and experience to bear by focusing on broken relationships and their repair, even at the expense of ignoring Western-styled court rules.<sup>21</sup>

The philosophers, anthropologists, and legal scholars tend to provide lengthy lists of criteria of “what is law” or “what should be legal” that might be useful for judges in determining what the tribal common law should recognize and apply.<sup>22</sup> Table 1 below includes proposed criteria for what should be included in the tribal common law. The criteria contained in the left column is derived from the experience of the drafting of the Uniform Commercial Code with a restatement by Valencia-Webber. The criteria in the right column comprises Pospisil’s “basic elements of law.”

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19. Zion, *supra* note 6, at 7-8; Zuni, *Strengthening*, *supra* note 16, at 27 (“The primary method through which customary law will become a part of the tribal legal system is through the development of judge-made law . . .”); Zuni Cruz, *Tribal Law*, *supra* note 16 (discussing the fear of the dangers of codifying traditional law to include “freezing” it or “getting it wrong”).

20. See, e.g., Zion, *supra* note 6, at 7 (contending that the “common law process is superior to legislation” as it is very plastic and adaptable and can grow and respond to changes in societal perception).

21. See, e.g., Cooter & Fikentscher, *supra* note 6, at 315.

22. As noted by German comparative law scholar Wolfgang Fikentscher in his 1988 paper on the anthropological meaning of law, “In legal anthropology and jurisprudence, the number of definitions of law is legion.” WOLFGANG FIKENTSCHER, *MODES OF THOUGHT IN LAW & JUSTICE: A PRELIMINARY REPORT ON A STUDY IN LEGAL ANTHROPOLOGY* 16 (1988).

TABLE 1

Valencia-Webber/Levie <sup>23</sup>	Pospisil
<p>To become enforceable at common law, a custom has to be:</p> <ol style="list-style-type: none"> <li>(1) legal;</li> <li>(2) notorious;</li> <li>(3) ancient or immemorial and continuous;</li> <li>(4) reasonable;</li> <li>(5) certain; and</li> <li>(6) universal and obligatory ("a creature of history").</li> </ol> <p>Valencia-Webber restates this as "the thought and conduct must be known, accepted, and used by people of the present day."</p>	<p>Pospisil argues that, in any group or subgroup,<sup>24</sup> law is comprised of four basic attributes:</p> <ol style="list-style-type: none"> <li>(1) Authority - The principle(s) of the decision passed by a legal authority and where such decision is actually followed by the parties to the dispute;<sup>25</sup></li> <li>(2) Intention of Universal Application - The authority, in making the decision, intends that it apply to all similar situations, whether the authority actually consistently follows through with this or not;<sup>26</sup></li> <li>(3) Obligatio - The authority, recognizes in some way, the relationship of the parties, including a duty owed and breached by one, and the resulting right of the other to have the situation redressed;<sup>27</sup> and</li> <li>(4) Sanction - resulting physical or social/psychological sanctions are applied.<sup>28</sup></li> </ol>

23. Valencia-Weber, *supra* note 14, at 245-46 (attributing this list of criteria to Joseph H. Levie, *Trade Usage and Custom Under the Common Law and the Uniform Commercial Code*, 40 N.Y.U. L. REV. 1101, 1103 (1965), and noting a conceptual connection between the customary basis of common law and its progeny in the UCC).

24. LEOPOLD POSPISIL, *ANTHROPOLOGY OF LAW* 98-99 (1971).

25. *Id.* at 31-32, 37.

26. *Id.* at 79.

27. *Id.* at 81-82.

28. *Id.* at 92.

Although I do not think that it is necessary to adopt such rigid lists, it is important to identify the underlying concerns of these scholars, as these concerns may also matter to a judge in a given case. Important underlying concerns include: (1) legality - was the custom of a legal nature in its natural setting? (Notice that Pospisil's entire list of criteria is testing for such legality); (2) notice - is the custom well-known or notorious? In other words, is it fair to impose it on people; (3) old but continuing - is the custom "ancient or immemorial and continuous?" (But what about considering newer generally accepted practices as well); (4) reasonable and certain - is the given proposed application of custom today practical and is it clearly defined and understandable?; and (5) universal and obligatory - I would argue that the question here is whether the custom is expected to bind all people similarly situated *but within a given legal level*. This would be in line with Pospisil's requirement of an "intention of universal application." It is likely, given the variance in tribal culture and ways, as well as given diverse contemporary needs, that the list of preferred criteria will vary from tribe to tribe.

## *II. Why Look to Theories of the Anthropology of Law in Working with Custom?*

Tribal leaders, legislators, and judges today repeatedly face the task of identifying custom and factoring it into their policymaking. They must also consider when and how to incorporate custom into tribal legislation and into the written decisions of the tribal court. There are important questions concerning the transparency of the respective processes (the decision-making processes of the executive, legislative, or adjudicative branches), the reliability of the sources and characterizations of custom, and the relevancy and applicability of custom to the problems or disputes being addressed.<sup>29</sup>

Why look to anthropology to answer such questions?<sup>30</sup> It has been well

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29. Some, perhaps many, familiar with Hopi ways may find it ironic that a Hopi tribal member, in respecting custom, is arguing for transparency in governance given the traditional village political processes requiring secrecy in higher order decision-making at Hopi. I would ask the reader to take careful note of the policymaking legal level to which I refer - that of the Tribal Council and tribal courts - not the traditional village Kikmongwi/leader, societal leaders, or clans. Here I focus on what the secular tribal leaders are making of, and what they are doing with, custom.

30. There is a chicken and egg quality at work here where outsiders observe tribal societal structure and operations and then apply their analytical skills to describe what they are seeing. Where this is skillfully done, they may just be describing what many Native people already know about themselves. However, the significant value added comes in the form of terminology in the discipline and in the English language that may be used to communicate with

documented that Native people have a long history of distrust and anger when it comes to anthropologists — and in many cases rightly so. Yet it is also the case that sound legal anthropology offers valuable tools for helping tribal policymakers define, communicate, and explore complex modern problems and solutions that involve custom.<sup>31</sup> Finding custom law and analytical tools, derived from anthropological theory, have been useful to the Hopi appellate justices in laying the common law foundation to bolster widely valued custom and to accommodate the changing needs and expectations of the Hopi people. Indeed, the case law of the Hopi Appellate Court reflects the application of these tools: (1) recognizing that Hopi is comprised of multiple legal levels — thus recognizing that no one judge may have the capacity to take judicial notice of tribe-wide custom where it varies from village to village and perhaps within clans;<sup>32</sup> (2) setting up a custom-law-finding-hearing process for the reliable identification of relevant local custom where the villages decline to handle disputes in their own way;<sup>33</sup> (3) recognizing traditional authorities and respecting their decision-making powers and authoritative statements on the applicable local custom and/or tradition;<sup>34</sup> and (4) carefully considering the application of

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our non-member judges, consultants, advisors, and non-Indian leadership and academics to further our highest priorities and values.

31. It may come as a surprise to non-Indians that tribal leaders and judges find themselves looking for the legal in their own custom. There are good reasons for this, which have been hard to explain without useful theory. I will provide one example here. Pospisil's theory that there are multiple legal systems and legal levels within most societies and that every group and subgroup has law, appears to be in line with what many Native people have always known - we have different tribes, clans, bands, societies, etc., and they may have different values and customs. See POSPISIL, *supra* note 24. It is therefore difficult for any one judge or tribal council member to speak for all with respect to custom as he or she belongs to a particular, say, clan or band. So, tribal leaders and judges find themselves looking for law as well.

32. The concept of legal levels is extant among Hopis, their leaders, and their judges and is relevant for at least jurisdiction purposes in almost all non-criminal cases before the Hopi Tribal Courts (primarily on the question of whether the matter should be heard and decided by the village of one or more of the parties or by the tribal court).

33. Hopi Indian Credit Ass'n v. Thomas, No. AP-001-84 (Hopi App. Ct. Mar. 29, 1996), available at <http://www.tribal-institute.org/opinions/1996.NAHT.0000007.htm> (notice and pleading of applicable custom and tradition); Smith v. James, No. 98AP000011 (Hopi App. Ct. Nov. 16, 1999), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1999.NAHT.0000002.htm> (setting out procedures for the trial court to use when conducting custom law finding hearings, including the development and approval of questions to be asked of witnesses, the need for a second round of custom law finding hearings to develop the applicable standard, and the necessity for a fact-finding hearing following the conclusion of a custom-law finding process).

34. Sanchez v. Garcia, No. 98AP000014 (Hopi App. Ct. Nov. 12, 1999), available at <http://>

custom to dissenters and reformers, including the underlying rationales and impacts to the tribe, villages, clans, and individuals.<sup>35</sup>

Below, I borrow Leopold Pospisil's theory of the basic attributes of law to analyze a Hopi land dispute case.<sup>36</sup> I do so with the intent of creating and illustrating a tool box of concepts for use by tribal leaders and judges in their policymaking with respect to custom. I am particularly interested in tools that will assist with: (1) the reliable identification, capture, and integration of custom in tribal legislation and judicial opinions; (2) determining what customs can and should be enforced as part of tribal law; and (3) determining when it is practical and fair to do so. In addition, these tools should ensure that court processes are transparent and responsive to the tribal public impacted by the tribal law and custom at issue.

Pospisil argues that law can be found in every group and subgroup of any society, regardless of the existence of formal state institutions.<sup>37</sup> He further argues that, in any group or subgroup, law is comprised of four basic attributes: (1) Authority; (2) Intention of Universal Application; (3) Obligatio; and (4) Sanction.<sup>38</sup>

I have selected Pospisil's theory over that of others for a number of persuasive reasons. First, unlike many of his predecessors, those studying and writing about the origins of law, he developed his theory by living for extended periods of time with diverse tribal cultures, by actually learning their languages, and by observing the resolution of their disputes.<sup>39</sup> Pospisil himself has been highly critical of those who engage in Western-biased philosophizing or speculation without undertaking rigorous field work — that is, observing how

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[www.tribalresourcecenter.org/opinions/opfolder/1999.NAHT.0000001.htm](http://www.tribalresourcecenter.org/opinions/opfolder/1999.NAHT.0000001.htm).

35. I do not survey the Hopi trial and appellate case law here, which would make up the body of another law review article, but it is fair to say that the Hopi judges strive to do this in every case where custom is raised. *See generally James*, No. 98AP000011; *Sanchez*, No. 98AP000014; *Thomas*, No. AP-001-84.

36. *See* POSPISIL, *supra* note 24.

37. *Id.*

38. POSPISIL, *supra* note 24, at 32-32, 37, 79, 81-82, 92.

39. Leopold Pospisil began his studies on Roman law at the Charles University in Prague. He continued his studies in the United States at Willamette University in Oregon and then at the University of Oregon, where he submitted a masters thesis on the topic of the "Nature of Law" in the Department of Anthropology. He undertook his early fieldwork on the Hopi Indian Reservation in 1952. Following this, he pursued a doctorate at Yale University and entered the field again, living with and researching among, the Kapauku Papuans of West New Guinea from 1954-55 and in the summers of 1959 and 1962. In 1957 he conducted research among the Nunamiut Eskimo of Alaska and in 1962 began research among the Tirol of Austria. POSPISIL, *supra* note 24, at xi-xiii.

people actually handle disputes.<sup>40</sup> Second, he argues that all functioning groups of people have law, not just values or “mere custom,” but law.<sup>41</sup> There are few anthropological or legal theories out there that offer this possibility, at least comprehensively, and it is a prerequisite for any theory to be helpful to tribes in their policymaking and lawmaking. Finally, Pospisil’s theory elements are not too generalized and go deep enough to find law where it is unwritten.

### *III. Our Dispute Example: James v. Smith*

I have selected the Hopi case of *James v. Smith*, by way of example, as it is the first fully documented, comprehensive attempt at custom law finding in the Hopi Tribal Court.<sup>42</sup> This case deals with a very common, highly charged, set of meta-issues at Hopi — the right of off-reservation Hopis to return home and make a home for themselves and the desire of long-time resident Hopis to protect the integrity of the clan and the village and to perpetuate the ceremonial cycle. At the parties’ eye-level, this is a land dispute. To make the discussion that follows clearer, I will refer in a familiar manner to the parties as Aunt Ruth and her nieces. In the tribal court proceedings the nieces sued their Aunt Ruth, and Aunt Ruth countersued her nieces to “quiet title” to a bean field in the village where Aunt Ruth wished to build a home.<sup>43</sup>

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40. See Pospisil’s discussion on the three traditions in legal-anthropological thinking around the problem of the definition of law:

The first tradition, which identified law with custom or norms that are somehow automatically observed without requiring leadership, legal authority, and adjudication, made the term “law” obsolete by identifying it with prescribed behavior and divorcing it from the decision-making process of authority (or group leaders). The second tradition represents a reaction to the first in attempting to define law by rigorous criteria, thus dissociating it from the body of prescriptive customs and making it an analytically meaningful concept. The failure of this tradition lied in the fact law has been defined, not on the basis of extensive cross-cultural research and experience, but in ethnocentric, narrow terms in the legal tradition of Western civilization. The third tradition, the most recent, tries to correct the extreme of ethnocentricity by moving to another extreme, that of cultural relativity. As a result, no analytical definition of law is given: only dogmatic statements concerning folk classifications and criticisms (often unjustified) of anthropologists who have designed analytical legal definitions are offered to the puzzled reader . . . .

*Id.* at 18.

41. *Id.* at 125.

42. *James v. Smith*, No. CIV-019-94 (Hopi Tribal Ct. Apr. 15, 1998).

43. *Smith v. James*, No. 98AP000011 (Hopi App. Ct. Nov. 16, 1999), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1999.NAHT.0000002.htm>.

This family comes from the old village of Oraibi, located on the third mesa of the Hopi Reservation in northeastern Arizona. Village history and family structure become important because the federally recognized Hopi Tribe and its courts, under tribal constitutional and common law, recognize and reinforce the traditional village land tenure customs. In *James*, that law originates with the Oraibi matrilineages. Prior to 1906, the Oraibi leaders explained and reinforced the land tenure system by ceremonially retelling the emergence and migration stories of the clans.<sup>44</sup> This ceremony demonstrated how it came to be that the leader of the Bear Clan is also the Oraibi Village Chief (“Kikmongwi”) and the theoretical caretaker or “owner” of all Oraibi lands.<sup>45</sup> As the story goes, a deity called Máasaw held the original claim to the land but upon meeting the leader of the first clan to arrive — the Bear Clan — Máasaw gave him responsibility for the land and insisted that he continue as the chief of his people.<sup>46</sup> The Bear-Kikmongwi selected a large plot of land near a flood plain at the base of the village, a good portion of which was then allotted to various ceremonial leaders from other clans. As new clans arrived they were allotted other lands in exchange for ceremonial or other services.<sup>47</sup> Finally, there was a large tract of “free land” upon which any good citizen with the Kikmongwi’s consent could farm. The test of good citizenship included frequent participation in the ceremonies and participation in communal work parties (hauling wood, cleaning springs, farming for the Kikmongwi, sponsoring dances, etc.).<sup>48</sup> Over time the boundaries of the various Kikmongwi, clan, and free lands were marked and were publicly known.<sup>49</sup> Much of the contemporary discussion of Hopi village land tenure in the literature has focused on “clan lands,” characterizing them as joint estates where land use rights are inherited within the matrilineal clan corporation.<sup>50</sup>

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44. MISCHA TITIEV, *OLD ORAIBI: A STUDY OF THE HOPI INDIANS OF THIRD MESA* 61 (1944).

45. *Id.* at 61-62.

46. *Id.*

47. *Id.* at 63.

48. *See id.* at 63 fig.5 (Oraibi land holdings).

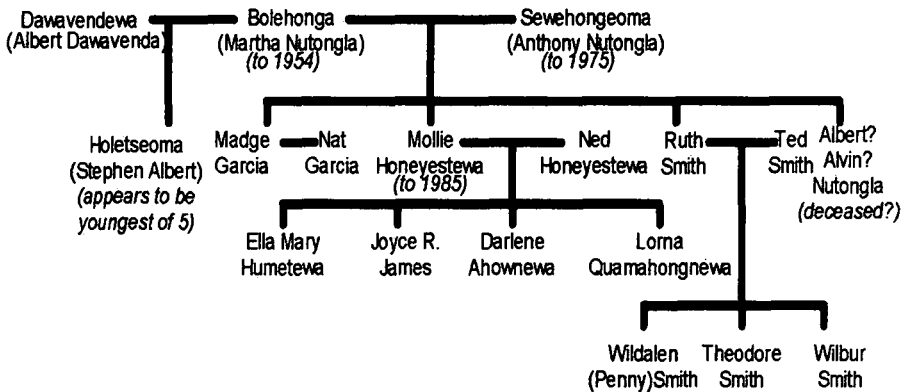
49. *Id.* at 62.

50. PETER WHITELEY, *RETHINKING HOPI ETHNOGRAPHY* 62-68 (1998) [hereinafter WHITELEY, *RETHINKING*]. Whiteley challenges the prevailing view, reminding observers that there were a number of different types of land holding and that not all clans had clan lands. Additionally, based on information provided by Hopi consultants and practices witnessed by the author, even clan lands appear to be controlled by the leading family or lineage segment that controlled a particular ceremony and were not necessarily apportioned to other decent-group members. Finally, he stresses that, in the minds of his Third Mesa Hopi consultants, clan lands were intimately connected to and reinforced by the Oraibi ceremonial cycle. When that ritual



In *James*, members of the parties' family now reside in the "new" village of Hotevilla, which was formed after the famous split of Oraibi in 1906. The implications are that this family's (and their clan's) lands were once part of Oraibi village and the newly acquired Hotevilla village lands are now held and transferred under some newer and uncertain set of Hotevilla village laws. If the Village of Hotevilla follows the old Oraibi land tenure system in some way, then it would be important to look at the family structure to determine which clanswomen had rights to which parcels of land at different points in time.<sup>51</sup> An argument might be made that the land rightfully passes from mother to daughter to be held on behalf of the clan (some would argue that it transfers to the oldest, others argue that it transfers to the youngest). If some kind of new village law applies, then anything is possible. See the family tree in Diagram 1 below to trace the matrilineage.

DIAGRAM 1: TOBACCO CLAN FAMILY TREE  
(reconstructed from court records - the birth order  
is unknown within each generation)



order was broken in 1906, the justification for and reinforcement of the Oraibi clan lands system also broke. *Id.* I lay out Whiteley's characterization of Hopi land tenure in more detail before preceding Table 2.

51. Simultaneous with the final editing of this article Peter Whiteley published a comprehensive, two-part analysis of the Oraibi Split which critically reassessed both Hopi social structure and the causes of the split. Whiteley makes a compelling argument that anthropologists to date have misidentified both the composition and parameters of Hopi "clans" including the applicable land tenure rules. This is problematic because most Hopis now speak English and use the terms "clan" and "clan lands" to describe their understood land tenure system. It is also possible that past anthropological characterizations have now been internalized by younger Hopis confusing matters even further. See PETER WHITELEY, THE ORAYVI SPLIT A HOPI TRANSFORMATION 33-38 (2008) [hereinafter WHITELEY, THE ORAYVI SPLIT].

The parties' relevant family history begins in 1906 in the Village of Oraibi, when a majority of that village's population, including the parties' mother/grandmother, Martha Nutongla (Bolehonga), and her first husband, Albert Dawavendewa, left with other members to form a new village.<sup>52</sup> Oraibi, before 1906, was considered to be the largest of all the Hopi villages.<sup>53</sup> Over a roughly twenty-five-year period, from 1881 to 1906, government officials and outside visitors documented increasing factionalization, predominantly between the leading clans of the village, the Spider, Kokop, and Bear clans.<sup>54</sup> Mischa Titiev<sup>55</sup> argues that weak village and supra-clan social structures could not withstand the stronger internal clan ties and motivations. He and others, such as Harry C. James, also focus on the influence of the American government, including the forced schooling of village children and attempts to move people out of their mesa-top village to individually allotted parcels in the valley below, as fueling a split between those "friendly" to American policy and those "hostile" to it.<sup>56</sup> A more recent study of the split conducted by Peter M. Whiteley, and in consultation with older, knowledgeable Hopi consultants, reveals a deliberate decision and plot on the part of village leaders to split their village given increased corruption in higher-order religious societies.<sup>57</sup> They did so, according to Whiteley, by polarizing their followers around the issue of cooperation with American education and land policy, and by invoking known

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52. See Petitioners' Affidavit in Support of Motion for Preliminary Injunction at 2, *James v. Smith*, No. CIV-019-94 (Hopi Tribal Ct. July 28, 1994); Verified Petition for Injunctive Relief at 2, *James*, No. CIV-019-94 (July 28, 1994); Amended Petition to Quiet Title and for Injunctive Relief at 2, *James*, No. CIV-019-94 (Aug. 16, 1994); see also Transcript of Hearing of Mar. 22, 1995, at 13, *James*, No. CIV-019-94 (testimony of petitioner L.Q.).

53. See, e.g., HARRY C. JAMES, PAGES FROM HOPI HISTORY 16 (1974) (stating the population for 1890-91 was 903); TITIEV, *supra* note 44, at 56 ("[A]t the turn of the twentieth century, Orayvi, the only Third-Mesa village, had, by far, the largest population of the Hopi villages, accounting for at least half the total population in census records from 1885 to 1900.").

54. See TITIEV, *supra* note 44, at 69-95; JAMES, *supra* note 53, at 130-45; WHITELEY, RETHINKING, *supra* note 50, at 71-118.

55. TITIEV, *supra* note 44, at 69-95.

56. *Id.* at 71-95; JAMES, *supra* note 53, at 130-45.

57. Specifically this refers to the division of the village into two primary governance/religious factions, with the duplication of lead ceremonies and officers and the establishment of a second Chief's kiva. The analogy would be to having two U.S. capitals with two sets of congresses, supreme courts, and executives.

prophecies and predictions of such a split.<sup>58</sup> I will not plunge into the details of Oraibi religious politics here, but note only that our parties belonged to that part of the Oraibi village populace that came to be known as “hostile” to the U.S. government and to their seemingly cooperative village leadership. The hostiles ultimately left Oraibi in 1906 and moved on to form the new villages of Hotevilla and Bacavi.

We know from court papers and hearing testimony that the parties’ mother/grandmother, Martha Nutongla, and her first husband, Albert Dawavendewa, left Oraibi with the hostile faction on September 7, 1906.<sup>59</sup> Roughly six weeks later,<sup>60</sup> Albert Dawavendewa was arrested by American government troops, likely stemming from his role in the split and a renewed refusal to send his children to the American government boarding school. He was taken for a period of five years to either Fort Wingate prison, near present day Gallup, New Mexico, or to Carlisle Indian School in Carlisle, Pennsylvania.<sup>61</sup> According to the parties, while he was gone, Martha remarried

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58. WHITELEY, RETHINKING, *supra* note 50, at 243-84. A long-standing Hopi prophecy is that a long-lost brother, known as “Pahana” (some argued that this was the Americans), would return to Hopi during corrupt times to restore order. However, the hostiles publicly argued that formal recognition of a false Pahana (the U.S. government, for example) would result in the end of the world. The true Pahana was understood to return to “cut off the head” of the Hopi troublemakers and return order to the Hopi world. *Id.*

59. Petitioners’ Affidavit in Support of Motion for Preliminary Injunction, *supra* note 52, at 2; Verified Petition for Injunctive Relief, *supra* note 52, at 2; Amended Petition to Quiet Title and for Injunctive Relief, *supra* note 52, at 2; *see also* Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 13 (testimony of petitioner L.Q.).

60. Here I summarize Whiteley’s retelling of U.S. government interference after the split: Then-Commissioner of Indian Affairs Francis E. Leupp submitted a report to President Roosevelt apparently recommending that the military be sent in to remove the “Hostile” leaders. Reuben Perry, superintendent of the Navajo Agency at Fort Defiance, was selected to take charge. Perry arrived at Oraibi on October 23, 1906 and held preliminary meetings with leaders from both the “Friendlies” and the “Hostiles”, where Hostile leaders reiterated their opposition to the schools and the white man’s way. They also requested that they be returned to Oraibi village and urged Perry to “cut the Friendly chief’s head off and end the trouble.” Perry summoned troops which arrived on October 27. Perry threatened the Hostile men with force if they refused to attend a meeting at the Oraibi Day School the next day. They complied and some Hostile men were arrested on October 28. On November 3 troops arrested the remaining Hostile men. (This is probably the round up that included Dawavendewa.) The following day, the Hotevilla camp was surrounded and eighty-two children were seized and taken to the Keam’s Canyon Boarding School. WHITELEY, RETHINKING, *supra* note 50, at 110-13.

61. Petitioners’ Affidavit in Support of Motion for Preliminary Injunction, *supra* note 52, at 2 (stating that Dawavendewa was sent to Alcatraz Prison near San Francisco, Cal.); *see also* Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 13 (testimony of petitioner L.Q.) (stating that he was sent to Fort Wingate near Gallup, N.M.); JAMES, *supra* note 53, at 140

to their father/grandfather Anthony Nutongla (Sewehongoema).<sup>62</sup> The nieces argue that after their grandmother's first husband was taken away, she and her son Stephen Albert (Holetseoma),<sup>63</sup> the nieces' maternal uncle, began cultivating the land in dispute.<sup>64</sup> Aunt Ruth disagrees with this account, arguing that it was her father, Anthony Nutongla (Sewehongoema), that first cultivated the disputed land.<sup>65</sup> The nieces clearly wish to establish that it was their clan relatives (their grandmother Martha and their maternal uncle Stephen) that first perfected an interest in the land and that such land should continue to pass through the Tobacco clanswomen according to the custom. Aunt Ruth argues that there is a newer custom in Hotevilla that men can acquire and transfer an interest in land by cultivating it. She argues that her father first cultivated the land and then transferred it to her during his lifetime.

Observers since at least the late nineteenth century have attempted to characterize Hopi land tenure patterns into roughly four distinct categories: house sites within the village,<sup>66</sup> clan land,<sup>67</sup> land associated with ceremonial

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(displaying a photograph of those arrested in Hotevilla and Shungopavi in 1906, including an "Albert Tewaventewa" who was "en route to Fort Wingate"). *But see* EDMUND NEQUATEWA, TRUTH OF A HOPI: STORIES RELATING TO THE ORIGIN, MYTHS AND CLAN HISTORIES OF THE HOPI 68 (Wilder Publishing 2007) (1936) (naming "Albert Tawaventiwa" and describing his arrest in Hotevilla after the leaders there refused to send their children to school). According to Nequatewa, Albert Tawaventiwa was diverted to Carlisle Indian School in Carlisle, Pennsylvania for five years before returning home. *Id.*

62. Petitioners' Affidavit in Support of Motion for Preliminary Injunction, *supra* note 52, at 2-3; *see also* Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 13-14 (testimony of petitioner L.Q.).

63. Hopis traditionally have a number of one-word names given to them at birth by their father's clanswomen. During the American boarding school period, starting in the late 1800s and continuing until recently, Hopi children were assigned an American first name and had their most used Hopi name pushed to a last name. Other older Hopis seem to have acquired both American first and last names, but retained use of both.

64. *See* Petitioners' Affidavit in Support of Motion for Preliminary Injunction, *supra* note 52, at 2; Verified Petition for Injunctive Relief, *supra* note 52, at 2; Amended Petition to Quiet Title and for Injunctive Relief, *supra* note 52, at 2; Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 15 (testimony of petitioner L.Q.).

65. *See* Respondent's Answer to Amended Petition to Quiet Title and for Injunctive Relief/Counter Petition to Quiet Title and for Injunctive Relief at 1-2, James v. Smith, No. CIV-019-094 (Hopi Tribal Ct. Sept. 6, 1994) [hereinafter Respondent's Answer to Amended Petition]; Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 74-75 (testimony of petitioner R.S.).

66. *See* ALBERT YAVA, BIG FALLING SNOW: A TEWA-HOPI INDIAN'S LIFE AND TIMES AND THE HISTORY AND TRADITIONS OF HIS PEOPLE 165 (Univ. of N.M. Press 1992) (1978) (app. III, "Hopi Petition to Washington"). This petition was drafted by a local non-Indian trader named Thomas Keam to Washington on behalf of 123 principals of the kiva societies, clan chiefs, and village chiefs of Walpi, Tewa, Sichomovi, Mishongnovi, Shongopovi, Shipaulovi, and Oraibi

office,<sup>68</sup> and village lands outside the village (“free,” “common,” or “waste” land).<sup>69</sup> There appears to be consensus among these observers that house sites and clan lands may only be held and inherited through the female members of a given clan (see Table 2 *infra*). However, it is unclear whether there was a consistent practice with respect to “free,” “common,” or “waste land” outside the village. There is some agreement that any person could make use of it and had a respected right to do so as long as such use continued, after which any other person could make use of it.<sup>70</sup> Peter Whiteley in his very recent work on the Old Oraibi Split offers an intriguing argument that the Kikmongwi (the village chief) and officers in higher order religious societies had the bulk of the best land and land use rights tied to their exercise of office but that such land did not necessarily pass within the clan after such a person died or ceased to perform the office. He also argues that only the leading family within a particular clan, the one in control of the “clan house” containing the religious objects passed down, had true “clan lands.” He seems to be arguing that everyone else could make use of free, common or waste land without the same restrictions.<sup>71</sup> The central question in *James* would seem to be, what category of land is in dispute, land associated with ceremonial office, clan land, house site, or free land?<sup>72</sup> Both sides assert that the field in dispute is not “clan land” — an acknowledgement that Oraibi clan lands in the Hotevilla area, if any, no longer exist. The question of whether the disputed land is considered a house site within the village is a difficult one given the recent vintage of Hotevilla as a village and the increase in the building of home structures in outlying areas. This question was not raised before, or addressed by, the court record in *James*. Consequently, the

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villages who signed with their clan symbols. The petition described the Hopi land tenure system and urged the U.S. government to cease its effort to allot the clan lands and to institute individual, private land holding. *Id.*; see Harold S. Colton, *A Brief Survey of Hopi Common Law*, MUSEUM NOTES, Dec. 1934, at 22-23 (vol. 7, no. 6); Ernest Beaglehole, *Ownership and Inheritance in an American Indian Tribe*, 20 IOWA L. REV. 304, 306 (1935).

67. YAVA, *supra* note 66, at 165-66; Colton, *supra* note 66, at 22-23; Beaglehole, *supra* note 66, at 312-13.

68. Colton, *supra* note 66, at 22-23; Beaglehole, *supra* note 66, at 313-14.

69. Colton, *supra* note 66, at 22-23; Beaglehole, *supra* note 66, at 314.

70. Colton, *supra* note 66, at 22-23; Beaglehole, *supra* note 66, at 314.

71. WHITELEY, THE ORAYVI SPLIT, *supra* note 51, at 42-57.

72. Although the parties in this dispute cite to these observers' characterizations in their pleadings, *see, e.g.*, Brief in Support of Respondent's Claims at 4, *James v. Smith*, No. CIV-019-94 (Hopi Tribal Ct. June 26, 1995) (citations omitted) [hereinafter Brief in Support of Respondent's Claims of June 26], it must be stressed that such publications are not necessarily authoritative in tribal court absent a demonstration that they reliably document occurrences or perspectives in this particular village (Hotevilla).

court could have applied any number or combination of traditional use and transfer rules (see the host of possibilities in Table 2 below).

TABLE 2

	THOMAS KEAM & 123 LEADERS (1894) <sup>73</sup>	HAROLD S. COLTON (1934) <sup>74</sup>	ERNEST BEAGLEHOLE (1934/1935) <sup>75</sup>
Land/Use Categories	(1) House site; and (2) Field.	(1) House site in pueblo; (2) Common land lying just outside pueblo; (3) Allotted clan agricultural lands related to offices; and (4) Common grazing land outside the allotted agricultural land.	(1) House site; (2) Clan land; (3) Land associated with political and ceremonial office; and (4) Land broken in from the waste and cultivated.
House Site	The man builds the house but the woman is the owner.	Houses are owned by the women and inherited through the female line.	"If a married man builds a new house . . . [it] becomes the wife's property and descends to her daughters."
Clan Land	A man plants the fields of his wife or mother but may not dispose of them at will. Fields always remain with the mother's family.	Agricultural land allotted to the clan by the pueblo chief - A member of a clan has the right to cultivate any suitable unused agricultural land of his wife's clan or his own clan as assigned by the clan chief.	"The senior woman is the controlling agent for the land her lineage or household uses. There is reserved enough clan waste land to enable the household to shift its cultivable areas should land be flooded or sand-covered by wind."

73. YAVA, *supra* note 66, at 165 (app. III, "Hopi Petition to Washington").

74. Colton, *supra* note 66, at 22-23.

75. Beaglehole, *supra* note 66, at 306, 311, 313, 314.

Land Associated w/Office	N/A	Mentions the category but does not explain further.	Sections of cultivable land are associated with political and ceremonial office, either parts of clan land or distinct fields. These are cultivated by village-wide work parties to allow the office holder to devote all his time to his duties.
Other Cultivated Land	N/A	<p>“Unused common land outside the pueblo” - can be used for agriculture, bean patches, or peach orchards, without consulting anyone. However, the land cannot be sold or willed and again becomes common when not used.</p> <p>“Common grazing land outside the allotted agricultural land” - Anyone has a right to graze stock here, and today a man can fence it for agricultural use and at his death it reverts to his children.</p>	A man may break in land from the waste and cultivate it (with fruit trees, squash, and beans). The waste land is usually part of the village land. Upon death the land becomes village waste, or is taken over by clan relatives or by the son of the deceased. If the land goes out of cultivation during the owner’s lifetime, another interested in the field may take it over.

The litigation in *James* begins with the filing of a motion for a preliminary injunction by the nieces in the Hopi Tribal Court.<sup>76</sup> The motion included a request that their Aunt Ruth be enjoined from going on or near the disputed property pending a final determination of rights in the land by the Village of Hotevilla.<sup>77</sup> The nieces claimed that their aunt was interfering with their use of the property by dividing it, attempting to fence it in, and by planting fruit trees in their bean field.<sup>78</sup> The trial court granted temporary injunctive relief and

76. Petitioner’s Motion for Preliminary Injunction, *James v. Smith*, No. CIV-019-94 (Hopi Tribal Ct. July 28, 1994).

77. Petitioners’ Motion for Preliminary Injunction, *James*, No. CIV-019-94 (July 28, 1994).

78. Petitioners’ Affidavit in Support of Motion for Preliminary Injunction, *supra* note 52, at 4.

enjoined Ruth from going on or near the disputed land.<sup>79</sup> The nieces moved to amend their trial court petition to include a request to quiet title to the disputed parcel after receiving notification from the Village of Hotevilla recommending that this matter be handled by the tribal court.<sup>80</sup> The nieces then filed a petition to quiet title in their favor and to declare that they have exclusive rights to the land.<sup>81</sup> Aunt Ruth filed an answer and a counterpetition to quiet title requesting that the court quiet title in her favor and to declare that she has exclusive rights to the disputed land.<sup>82</sup> After an initial fact-finding hearing, the trial court ordered further briefing on “the Village of Hotevilla’s custom, tradition, rule or law” and set a second hearing date where the parties could call traditional experts to testify as to the applicable custom.<sup>83</sup>

The nieces, who were represented by attorneys, filed pleadings containing a complex cluster of custom arguments:

Traditional Hopi family relations dictate that a man moves to his wife’s village to live in her home after marriage. Upon moving to his wife’s village, the man is a visitor/servant to the village and shall endeavor to do work for his wife and her family within the village. . . . a most common Hopi principle.<sup>84</sup>

Another basic concept in Hopi land usage is the idea of stewardship. Stewardship requires proper attendance to the needs of the land so that the land is always abundant.<sup>85</sup>

Hopi tradition dictates that Hopis are not to raise fences around their property. Fencing is viewed in Hopi as a means of limiting yourself and your land. Tradition further speculates that fences will eventually determine the boundaries of the White Man’s invasion, whereby the non-Indians will take all that is not fenced. Once a

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79. Order to Show Cause at 2, *James*, No. CIV-019-94 (July 29, 1994).

80. Petitioners’ Motion for Leave to Amend Petition at 2, *James*, No. CIV-019-94 (Aug. 16, 1994).

81. Specifically they requested that the court “[d]eclare that Petitioners are entitled to the peaceful and quiet use of the above-described tract of land located in Village of Hotevilla and that Respondent and all persons claiming under Respondent shall have no interest in the same area of land.” Amended Petition to Quiet Title and for Injunctive Relief, *supra* note 52, at 6-7.

82. Respondent’s Answer to Amended Petition, *supra* note 65, at 6.

83. Order, *James*, No. CIV-019-94 (May 2, 1995).

84. Petitioners’ Memorandum of Points and Authorities at 3, *James*, No. CIV-019-94 (June 6, 1995).

85. *Id.* at 4.



fence is put in place by a Hopi, the extent of the land base is defined and you cannot expand in the Hopi way.<sup>86</sup>

The thrust of their argument seems to be that, underlying each of these customs, is a principle that land use rights should be situated in the clanswoman who is in the best position to put the land to a beneficial use on behalf of the clan.<sup>87</sup> They further argue that Aunt Ruth forfeited her land use rights when she moved away and married a non-Hopi who did not return with her to properly tend to it.<sup>88</sup>

Aunt Ruth, who was represented by an attorney at the trial level, filed a counterpetition to quiet title, also arguing custom but citing to written observations by outsiders:

Hotevilla does not have traditional land holdings as do other villages because of the recency of its settlement. Hopi women in general are possessors of land, however, a more recent tradition has allowed men to be possessors of the lands that they cultivate.<sup>89</sup>

She further argued that her father gave her the land and the fact that she left the reservation at an early age and married a non-Hopi, and has not resided on the Hopi reservation for a lengthy period of time, should not preclude her from asserting her rights to it.<sup>90</sup> She argued that no custom requires such a result<sup>91</sup> and that she has not abandoned the land.<sup>92</sup>

The parties, by making conflicting claims with respect to Hotevilla custom, put the trial judge in a position of law finding to determine Hotevilla's current custom of land inheritance/transfer and use rights.<sup>93</sup> The nieces appear to be asserting that, although they deny the existence of Oraibi clan lands in the new village of Hotevilla as a result of the split at Oraibi,<sup>94</sup> some notion of custom still

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86. *Id.* at 5.

87. *Id.* at 3-7.

88. *Id.*

89. Brief in Support of Respondent's Claims at 5, *James*, No. CIV-019-94 (June 16, 1995) [hereinafter Brief in Support of Respondent's Claims of June 16] (citing Colton, *supra* note 66; Beaglehole, *supra* note 66, at 314; John W. Ragsdale, *The Institutions, Laws and Values of the Hopi Indians: A Stable State Society*, 55 *UMKC L. REV.* 335 (1987)).

90. *Id.*

91. *Id.* at 3, 5.

92. *Id.* at 6.

93. The village of Hotevilla has never adopted any sort of statute or common law to override the traditional land system.

94. The known Oraibi "clan land" parcels, up to 1906, probably included land in areas now comprising the new village of Hotevilla and its surroundings.

applies as (1) land still passes between clanswomen; (2) a man has no interest in land except to cultivate it for his wife, mother, or sisters during his lifetime; and (3) a woman who has an interest in land can lose it if she does not live up to her obligations to family, clan, and village, suggesting some sort of reversion of interests to her sister(s) or her sister's female children.<sup>95</sup>

The logic of the nieces' argument would go something like this: even though the clan lands system of Oraibi broke down after the split of 1906, and even where men converted empty lands to fields (at the beginning of the establishment of the Village of Hotevilla), a kind of clan land tenure persists as men are expected to cultivate land on behalf of their wives, mothers, sisters, etc. Once the man ceases to do so or dies, the land is then understood to belong to that woman's clan, to be used by the woman (or her clan members or husband on her clan's behalf). The nieces would then be arguing that their maternal grandmother, Martha, and her son Stephen, both members of the Tobacco clan, first cultivated the land on behalf of the Tobacco clan, which is also the nieces' clan. This would make all the parties, Aunt Ruth and the nieces, eligible to have use rights exclusive as to third parties. As between them, the nieces appear to be arguing that Aunt Ruth has lost her rights as she has breached her duties and obligations to her family (clan).

In opposition, Aunt Ruth appears to be asserting that under Hotevilla custom, men — not women — own the land they cultivate.<sup>96</sup> She argues that this is a new custom. She further asserted that it was her father Anthony Nutongla, who first cultivated the land in dispute, and that he conveyed it to her during his lifetime.<sup>97</sup> The question squarely before the trial judge from Aunt Ruth's

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95. There is also some reference to the nieces' uncle Stephen Albert (Holetseoma) acquiring an interest in the disputed land, but this is confused with assertions that his role is also one of advisor or witness with respect to Martha Nutongla (Bolehonga)'s desires with respect to the land and her daughters. See Verified Petition for Injunctive Relief, *supra* note 52, at 3-4 (citing Notarized Statement of Stephen Albert (Holetseoma) (Sept. 1, 1993), in Verified Petition for Injunctive Relief, *supra* note 52, at Exhibit B [hereinafter Statement of Stephen Albert]); Amended Petition to Quiet Title and for Injunctive Relief, *supra* note 52, at 3-6 (citing Statement of Stephen Albert, *supra*); Petitioners' Answer to Respondent's Counter Petition at 1-2, *James*, No. CIV-019-94 (Hopi Tribal Ct. Mar. 22, 1994); Petitioners' Memorandum of Points and Authorities, *supra* note 84, at 1-7.

96. Respondent's Answer to Amended Petition, *supra* note 65, at 1-2; Brief in Support of Respondent's Claims of June 26, *supra* note 72, at 2-5.

97. Respondent's Answer to Amended Petition, *supra* note 65, at 1-2. *But see* Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 75 (testimony of petitioner R.S.) (testifying that she doesn't remember who started cultivating the disputed land, "but all I know was that my Dad was always there. . . . So I've always known that was ... his field, and we always ... go[t] the fruit from there."); *see also id.* at 79 (describing when her father divided the land in dispute

perspective was whether, under present day Hotevilla custom, men have some bundle of interests in the land they cultivate, and if so, whether they can transfer these interests to another?

The trial judge hearing this case was from a different village than that of the parties. He could not take judicial notice of Hotevilla's custom: "[T]he Court is unclear as to the custom, tradition, rule or law of that village as it relates to the ownership and relinquishment of land by female members of that village . . . ."<sup>98</sup> Consequently, after hearing testimony regarding the facts of the dispute, he ordered a second round of hearings with party selected, court-approved, traditional expert witnesses that would answer a list of party submitted, court-approved questions addressing the issue of Hotevilla's applicable custom as he had framed it.<sup>99</sup> After hearing from six of the nieces' and seven of Aunt Ruth's witnesses in the Village of Hotevilla,<sup>100</sup> the trial judge found in favor of the nieces:

Respondent [Aunt Ruth] has not shown the Court that she has a superior right to use and occupy the disputed land under the applicable custom of the Village of Hotevilla . . . . Petitioners [the nieces] have made such a showing . . . . IT IS THEREFORE ORDERED that the exclusive right to use and occupy the land that is the subject of this dispute belongs to Petitioners. Petitioners are hereby entitled to the peaceful and quiet use of the land.<sup>101</sup>

The trial judge declined to address the questions of whether only women hold interests in cultivated land on behalf of the clan, or whether some new custom had evolved recognizing that men had interests in land that they cultivated and that they could freely transfer.<sup>102</sup> Rather, the judge focused on party conduct,

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and gave half to Ruth and half to her sister Mollie (the nieces mother).

98. See Order, *supra* note 83, at 1; Minute Entry at 1-2, *James*, No. CIV-019-94 (Dec. 6, 1995) [hereinafter Minute Entry of Dec. 6, 1995]; Minute Entry at 1, *James*, No. CIV-019-94 (Apr. 16, 1996) [hereinafter Minute Entry of Apr. 16, 1996].

99. See Order, *supra* note 83; Minute Entry of Dec. 6, 1995, *supra* note 98; Minute Entry of Apr. 16, 1996, *supra* note 98.

100. It is difficult to tell from the transcript how many of these witnesses actually testified as not all individuals testifying are sufficiently identified. See Transcript of Hearing of Mar. 22, 1995, *supra* note 52. For lists of proposed witnesses, see Petitioners' Notice of Readiness for Hearing and Questions to be Propounded to Witnesses at Hearing, *James*, No. CIV-019-94 (Oct. 16, 1996); Petitioners' Notice of Amendment of Witness List, *James*, No. CIV-019-94 (Dec. 5, 1996); Respondent's Questions to Be Propounded to Witnesses at Hearing, *James*, No. CIV-019-94 (Oct. 18, 1996).

101. *James*, No. CIV-019-94, at 5.

102. *Id.* at 2-5.

setting out a rule that: (1) A person who tends to, uses, and properly cares for the land on a consistent basis and/or regularly participates in the traditional activities of the village may obtain exclusive rights to use and occupy village land;<sup>103</sup> (2) With respect to inheritance, land is obtained by attending to the personal needs of a person whose exclusive right it is to use and occupy such lands and/or by regularly participating in the traditional activities of the village;<sup>104</sup> (3) Any person who has the exclusive right to use and occupy land within the village must tend to, use, and properly care for the land on a consistent basis to maintain that right, otherwise any relative may then come in and use the land;<sup>105</sup> and (4) “[i]n the case of a married woman who has or acquires the right to use and occupy village land, custom and tradition requires that the woman’s husband tend to and use the land for farming purposes on a consistent basis.”<sup>106</sup>

In finding for the nieces, the trial judge found that Aunt Ruth had married a non-Hopi and moved away, had infrequently returned home, and had failed to properly care for her parents (Martha and Anthony).<sup>107</sup> He also found that she failed to properly care for the disputed parcel and did not regularly participate in the traditional activities of the village.<sup>108</sup> By contrast, he found that the nieces and their mother had cared for Martha and Anthony, maintained the disputed parcel, and were regular participants in village traditional activities.<sup>109</sup>

In *James v. Smith* we have a case where an off-reservation Hopi woman, Aunt Ruth, and her on-reservation, long-time resident relatives, her nieces, came to the tribal court for a declaration of who had the superior legal right to use the land in dispute. Aunt Ruth was likely fighting for her right to return home and to build a house. Her nieces felt that she had lost this right due to her long absence and from neglect of her family and by neglecting to care for the land itself. The nieces’ characterization of the applicable custom — that clan land tenure persists with the corollary that cultivated land must pass only between clanswomen — in practice functions to sustain clan and village ceremonial cycles by tying land use rights to the clan matriarchy. Both sides offered conflicting versions of custom to support their position. The trial judge held hearings to find the custom law of their village. He heard competing arguments from the parties’ traditional experts about the applicable custom. Ultimately he

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103. *Id.* at 2-4.

104. *Id.* at 3-4.

105. *Id.* at 3.

106. *Id.* at 2.

107. *Id.* at 4.

108. *Id.*

109. *Id.* at 4-5.

assumed that Ruth and her sister Mollie (the nieces' mother) acquired some interests in the disputed land. The judge then applied the tests he constructed from the testimony of the nieces' experts that conditioned the maintenance of land use rights on appropriate personal conduct — specifically, caring for one's parents, making a proper use of land, and participation in village ceremonial life. Below I use the facts, arguments, and findings made in this case to explore Pospisil's basic elements of law and their implications for working with custom in general.

#### *IV. Legal Levels & Multiple Legal Systems*

*Any human society, I postulate, does not possess a single consistent legal system, but as many such systems as there are functioning subgroups. Conversely, every functioning subgroup of a society regulates the relations of its members by its own legal system, which is of necessity different, at least in some respects, from those of the other subgroups.<sup>110</sup>*

Nonmember judges, as well as other outsiders, may fail to see the legal structure in tribal societies below the level of the tribal councils and courts. This may also be true where member judges come from different villages or clans than the parties before them. This has to do in large part with the outsider's biases and lack of knowledge of the multiple groups and subgroups that make up any given contemporary tribal society. Pospisil would say tribal societies have multiple legal levels and legal systems.<sup>111</sup> He would also say

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110. POSPISIL, *supra* note 24, at 98-99.

111. *Id.* at 98-99. Contemporary law and anthropology scholars call this "legal pluralism" of the early, non-ethnic type, the existence of multiple sites where law could be generated, where every social subgroup had its own internal law, such as families, clans, and communities. This is to be distinguished from at least six other types of legal pluralism: (1) colonial pluralism, asking the question whether newly independent, for example African, states would succeed in becoming unified nations given pre-existing and colonially reinforced ethnic divisions; (2) the way the state acknowledges diverse social fields within society and represents itself ideologically and organizationally in relation to them; (3) the internal diversity of state administration, the multiple directions in which its official subparts struggle and compete for legal authority; (4) the ways in which the state itself competes with other states in larger arenas (such as the EU) and the world beyond; (5) the way in which the state is interdigitated (internally and externally) with non-governmental, semi-autonomous social fields that generate their own (non-legal) obligatory norms to which they can induce or coerce compliance; and (6) the ways in which law may depend on the collaboration of non-state social fields for its implementation. Sally Falk Moore, *Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999*, in *LAW AND ANTHROPOLOGY: A READER* 346, 356 n.4, 356-58 (Sally

that within each level one will find some type of authority, advisement, or decision-making, and the principles underlying such decisions (law).<sup>112</sup> Indeed, contemporary tribal societies are comprised of a variety of kin-based, ceremonial, and secular groups, among others. Each group or subgroup has its own customs and these likely vary from group to group (subgroup to subgroup), even within the same tribe. The exception, of course, would be where either the tribal council or court has legislated or taken judicial notice of standardized customs that will be applicable to all members regardless of their group or subgroup. Such legislation or decision-making is effectively policymaking — taking “a definite course or method of action selected from among alternatives to . . . guide and determine present and future decisions.”<sup>113</sup> The existence of multiple legal levels and systems, from a policymaking perspective, make it important to: (1) identify the relevant groups and subgroups whose members are implicated in proposed legislation or in a given decision; and (2) note any “traditional rules of jurisdiction” that might be applicable and consider deferring to the decision-making authority from that group or subgroup; or (3) if handling things at the tribal level, identify the group’s (subgroup’s) relevant custom and apply it to the group where fair and practical.

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Falk Moore ed., 2004).

112. Pospisil argues that this is due to the Western observer’s tendency to default to their own Western “folk categories of law” (the system of interpretation of a particular group of human beings who participate in social events and then interpret them):

The legal thought that regards abstract rules, embodied within the coded law of civilized peoples . . . as the proper and exclusive manifestation of law, represents the major legal tradition in western Europe . . . . The origin of the emphasis on abstract rules in the legal sphere has a long cultural history and dates back to the Babylonia of Hammurabi and to the origin of the notion of natural law (c. 2,000 B.C.), a conception of law which was considered universally applicable and an abstract divine command to all mankind . . . . [A]nthropologists . . . influenced by Western legalistic tradition in general or by some legal scholars in particular, conceptualized law too narrowly, so the concept was inapplicable to primitive societies. In other words, they concluded that some societies were simply lawless.

POSPISIL, *supra* note 24, at 13, 20.

113. The *Merriam-Webster Dictionary* defines “policy” as “a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions.” MERRIAM-WEBSTER’S ONLINE DICTIONARY (2008), <http://www.merriam-webster.com/dictionary/policy>.

Pospisil also speaks of “de facto centers of legal power.”<sup>114</sup> This is simply that legal level with the most enforcement power. For contemporary tribal purposes, this is the federally recognized governing body, usually the tribal council, court, and police, as opposed to those of subgroups (villages, clans, religious societies, etc.). There are two important issues to focus on with respect to the interaction of de facto centers of legal power and other legal levels: (1) when and how should the council or court enforce the decisions of traditional or local authorities;<sup>115</sup> and (2) what legal remedies should the tribal council or court apply to breaches of legislated or judicially noticed custom?

Using *James v. Smith*, as an example, we can see the implications of the presence of different legal levels.<sup>116</sup> If we were to inventory the multiple legal levels and systems at issue in this case, we would need to include two villages, Oraibi and Hotevilla, the clan of the parties, Tobacco (the parties are all of the same clan here), and any religious societies for which clan members have primary responsibilities.<sup>117</sup> Now we ask the question, whose custom of land

114. “The center of [legal] power” is “that legal level whose authorities pass decisions that prevail in situations of conflict with similar judgments of authorities of groups from other legal levels.” In the long run, the center of power can shift, affecting “the relative amount of power at the various levels within a society, with the result that the center of power . . . may shift its position to another level.” POSPISIL, *supra* note 24, at 115, 118.

115. This has been of special concern in the Hopi tribal courts given that the Hopi Constitution explicitly recognizes the powers of the individual Hopi villages to decide matters within their reserved jurisdiction. *See, e.g., Honie v. Hopi Tribal Hous. Auth.*, No. 96AP000007 (Hopi App. Ct. Nov. 23, 1998), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1998.NAHT.0000002.htm>. *Honie* sets out an elaborate notice and hearing process for the tribal court certification and enforcement of village level decisions: (1) a village or individual may request certification, *id.* ¶ 39; (2) the trial court “must hold an evidentiary hearing” upon such a petition to determine whether notice was provided by the village authority to interested parties at the village level before the village made its decision, *id.* ¶ 36; (3) the burden is on the “petitioner or party who is requesting the trial court’s certification” to establish “by clear and convincing evidence” that the village “provided a fundamentally fair opportunity [to be heard] to all interested parties in the village decision-making process,” *id.* ¶ 43; and (4) notice of the *tribal court certification hearing* must be published in “a publication of general circulation in the Hopi jurisdiction,” be “post[ed] . . . at the village community center,” and “include the names of any known interested parties,” the location of any disputed property, and “the time and date of the tribal court’s certification hearing,” *id.* ¶ 52.

116. *James v. Smith*, No. CIV-019-94, at 2-4 (Hopi Tribal Ct. Apr. 17, 1998).

117. Indeed the Hopi Constitution explicitly recognizes multiple legal levels. *See, e.g.,* HOPi CONST. art. III, § 2 (“The following powers . . . are reserved to the individual villages: . . . (b) To adjust family disputes and regulate family relations of members of the villages. (c) To regulate the inheritance of property of the members of the villages. (d) To assign farming land, subject to the provision of Article VII.”); *see also id.* art. VII (“Assignment of use of farming

tenure are we looking for? Oraibi's? Hotevilla's? The clan's? How does the religious society, if any, factor in? The first hurdle for the trial judge in this case was to determine whether he could take judicial notice of custom reservation-wide. He could not, given that the Hopi Tribe is comprised of twelve different villages and that the judge was not from the same part of the reservation, much less the same village as the parties. Indeed, the judge here opted to hold hearings to find custom at the level of the Village of Hotevilla. All parties in *James* asserted that village level custom was applicable.<sup>118</sup>

However, in reviewing the pleadings and transcripts, I discovered a conflicting assertion. In the nieces' pleadings there is a reference to a potential sub-village level authority — their clan uncle Stephen Albert. The nieces claim they sought his advice on how the property should be distributed:

Petitioners [the nieces] sent a letter to [Aunt Ruth's husband] giving [Aunt Ruth], her husband and their family notice to remove the poles and trees from their land in Hotevilla. The letter further indicated that [the nieces] had gone to their Uncle Stephen (Holetseoma) Albert for advice as far back as in 1985, and he had informed them that [Aunt Ruth] had been "disowned" by her mother, Bolehonga, because [Aunt Ruth] had married outside the Hopi Tribe and had left the Hopi Reservation.<sup>119</sup>

Clearly, the nieces looked to their clan uncle as some sort of clan authority and were arguing, in a roundabout way, that his decision should be noted and enforced by the tribal court. Because of Uncle Stephen's unavailability as a witness due to age and ill health, his act of advisement was not considered or factored into the final decision of the trial judge on the record.<sup>120</sup>

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land within the traditional clan holdings of the villages of . . . and within the established village holdings of . . . Hotevilla . . . shall be made by each village according to its established custom, or such rules as it may lay down under a village Constitution . . .").

118. Petitioners' Memorandum of Points and Authorities, *supra* note 84, at 1-2; Brief in Support of Respondent's Claims of June 26, *supra* note 72, at 2.

119. Verified Petition for Injunctive Relief, *supra* note 52, at 5, ¶ 13. Tribal judges and scholars looking for all relevant legal levels must carefully consider the subtler assertions or the underlying assumptions of the parties, as they may not understand how to fit custom-based arguments into their pleadings in the Western law matrix and process.

120. Minute Entry of Apr. 16, 1996, *supra* note 98, at 2; Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 24-28; Transcript of Hearing of Mar. 27, 1997, at 25-30, 48, 53-56, *James*, No. CIV-019-94.



If *James* had been litigated after the Hopi Appellate Court's opinion in *Sanchez*<sup>121</sup> in 1999, the trial judge would have faced a jurisdictional problem under the Hopi constitutional and common law. In *Sanchez*, the Hopi Appellate Court held that the doctrine of res judicata will bar re-litigation of a matter in tribal court where an appropriate clan relative has already heard and reached a final decision.<sup>122</sup> The Hopi Constitution reserves original jurisdiction to the villages to regulate the inheritance of property and the assignment of farming land with respect to its members, not the tribal court.<sup>123</sup> Further, although the secular village government, the Board of Directors of the Village of Hotevilla, "waived" its original jurisdiction in this case, the appellate court in *Sanchez* interpreted "village" to include the reserved authority of sub-village, traditional authorities such as "appropriate clan relatives."<sup>124</sup> Here Uncle Stephen may have already decided the matter before the tribal court, thus definitively settling the issue and barring the same parties from relitigating it in tribal court. To avoid such an outcome, Aunt Ruth would have had to argue that Stephen Albert did not serve as any type of advising or decision-making authority with respect to the clan or that the scope of his traditional authority did not include the type of dispute at issue here. The "scope of traditional authority" in this sense starts to sound like subject matter jurisdiction and raises important questions concerning the types of disputes and remedies that should remain with the traditional authority and those that should lie exclusively with, or be reinforced by, the tribal court. Should the sorting of subject matter jurisdiction between traditional authorities and the tribal court be achieved legislatively? Should it be left up to the tribal judges to resolve case by case?

It is critical for tribal leaders and judges to acknowledge and accurately identify the existence of operative legal levels within their tribes. It is also critical that they acknowledge where custom is haphazardly being identified, captured, and applied without careful analysis of the impact on effected groups and subgroups. Ignoring the complexity and contradictions of concurrently operative multiple legal levels frustrates litigants, makes life uncertain for all tribal members, and causes inefficiency in secular governance. Additionally, the non-recognition of traditional authority decisions by the tribal court erodes the integrity of the traditional system and

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121. *Sanchez v. Garcia*, No. 98AP000014 (Hopi App. Ct. Nov. 12, 1999), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1999.NAHT.0000001.htm>.

122. *Id.*

123. *Id.*

124. *Id.*

confuses the state of the law at all legal levels. The levels should be made to correspond to each other and to be in agreement about subject matter jurisdiction. They should also be required to notify each other regarding the contours of a given authority's decision and the remedies applied. If a tribal community is committed to its customs, it should inventory its legislation and case law to see how the written law is interacting with the various traditional legal levels and legal systems and decide what the preferred relationship between these levels/systems should be.

#### *V. The Attribute of Authority*

*I conclude that law (ius) manifests itself in the form of a decision passed by a legal authority (council, chief, headman, judge, and the like), by which a dispute is solved, or a party is advised before any legally relevant behavior takes place, or by which approval is given to a previous solution of a dispute made by the participants before the dispute was brought to the attention of the authority. This form of law has two important aspects: A decision serves not only to resolve a specific dispute, which represents the behavioral part played by the authority while passing the sentence, but it also represents a precedent and an ideal for those who were not party to the specific controversy. They regard the content of the decision as a revelation of the ideally correct behavior. Consequently, a legal decision may be considered a culturally important behavior insofar as the authority's act of passing his verdict (opinion) is concerned and as an ideal in its effect upon the "followers of the authority" . . . if by law is meant a form of institutionalized social control.<sup>125</sup>*

Tribal judges, even member judges, dealing with custom at some point in their work face the question of whether a particular asserted custom was/is considered legal in its natural setting or whether it was some kind of lesser

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125. POSPISIL, *supra* note 24, at 37. Pospisil traces this attribute of law first to Oliver Wendell Holmes who argued that the best way to investigate law was to abstract principles from judicial decisions, and then to Karl N. Llewellyn and E. Adamson Hoebel, who explored the form of Cheyenne law by investigating that society's cases of conflict, identifying law with those principles of social control that were actually upheld in their legal decisions. Pospisil calls this "the case study approach" (in an earlier article I called this "the trouble case method"). *Id.* at 31-32 (citing OLIVER HOLMES & E. ADAMSON HOBEL, *THE CHEYENNE WAY* (1st ed. 1941)).

value or admonishment. Pospisil's "attribute of authority," is helpful in distinguishing the mere values of a group or subgroup from their operative law, especially at the sub-tribal/tribal court level. The "law" ("ius") or "custom law" of a group or subgroup exists and is effective prior to any codification in tribal legislation or in judicial opinions and orders.<sup>126</sup> Thus, in policymaking, it can be important to distinguish between mere group values and officially recognized group law as it sits in the traditional system. Pospisil argues that the difference turns on the presence (past or present) of an authority who acts, by advising, deciding, or approving, in a real dispute. The principle(s) invoked by the authority in the past or present to resolve a real dispute is law. These legal principles should carry greater weight than mere values in tribal legislative and adjudicative considerations.

In *James*, the asserted traditional authority, Uncle Stephen, arguably advised or made a decision at the legal level of "clan". The relevant legal principles are captured in his signed and notarized statement:<sup>127</sup>

I own the land located in the Village of Hotevilla . . . I am granting this property to my sister Mollie Honeyestewa's children: . . .

1. As explained to me by my mother Bolehonga, . . . Ruth Smith [is] not entitled to any family property because [she] married [a] non-Hopi . . . and chose to live off the Hopi Reservation.
2. That Mollie Honeyestewa took our mother's advise [sic] and married a Hopi and devoted her lifetime to them at the Village of Hotevilla.
3. That Mollie Honeyestewa, while she was living, was the only one who took care of our mother Bolehonga, and my stepfather, Sewehongema . . . throughout their lives.

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126. Pospisil distinguishes "ius", or law (the matter that forms the content of the systems of social control of the subgroups), from "leges", abstract rules. He argues that the former is living law and that the latter, while abstracting the principles of the former, can eventually result in "dead law", abstract rules that are no longer applied or enforced by a society, group, or subgroup. Put another way, "ius" means law in terms of the principles implied in precedents or rules (statutes). "Lex" or "leges" means an abstract rule, usually made explicit in a legal code (statute). Pospisil reminds us that, unfortunately, both terms translate into English as "law" but that ius is more fundamental than lex and that this misunderstanding has led some theoreticians to commit errors. *Id.* at 2, 37, 107.

127. See Statement of Stephen Albert, *supra* note 95. This statement was also submitted in Amended Petition to Quiet Title and for Injunctive Relief, *supra* note 52, at Exhibit D.

For these reasons, only Mollie Honeyestewa's children and their heirs and no other person or persons are entitled to this and any family property.<sup>128</sup>

From the wording of the affidavit, we can distill the following principle: the right to use clan property is tied to proper conduct, including marrying within the tribe, residing on the reservation and caring for one's family.

Contrast the principle underlying his advisement/decision with more generally stated Hopi values dealing with the inheritance of land. If one asks most Hopis how they identify themselves, they will reply, "I belong to my mother's clan, from X village." Most Hopis also have a general sense that individual clan members have certain rights to use land associated with their clan. Many would go so far as to argue that land is held and passed only through the clan, which means that it can only be held and passed through the clanswomen and that men cannot hold land. From this we may derive a general Hopi value that only clanswomen may inherit and hold land. Indeed, in *James*, the nieces argued just this. If we compare the generally stated value: "women, not men, inherit and hold land" with the principle distilled from an actual decision by a traditional authority: "the right to use clan property is tied to proper conduct, including marrying within the tribe, residing on the reservation, and caring for one's family," we see that the former may be oversimplified and idealized. Uncle Stephen's legal principle is a better candidate for consideration in tribal legislation and adjudication because it was derived from a live crisis, considered by an actual traditional authority, and that authority was willing to take a stand with respect to the particular principle and outcome.

While the principles derived from traditional authority decisions or advisements may be the better candidates for formulating written custom law standards, they are difficult to find. In *James*, Uncle Stephen's decision took the form of a signed notarized statement, appearing to embody his intent to transfer property. In this statement Uncle Stephen stated that he "owns" the land and that he is "granting" the property to his sister Mollie's children. I looked past the private property language to get at his underlying concerns. One of the many difficulties in navigating the resolution of a dispute through the overlay of tribal courts onto persisting traditional systems is the confusion between Western legal concepts and process and traditional authorities and their dispute resolution powers, processes, and the principles that guide their decisions. Here I suspect that Uncle Stephen and the nieces were seeking to cover their bases by asserting the accepted traditional authority and custom

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128. Statement of Stephen Albert, *supra* note 95.

principles and then by memorializing them with a quasi-Western transfer instrument — the signed, notarized statement invoking private property and transfer terminology. This is a very common dynamic seen in tribal court. The problem, though, is when should a tribal judge take such a statement (in an affidavit, will, or contract) at face value and when are there sufficient indicia that it is merely an attempt to enforce a traditional authority's decision regarding custom? In other words, did the individual signing the document intend for it to act like a transfer instrument, will, or contract, or are they using the instrument to enforce a traditional authority's application of custom at the tribal level?

The implications of the distinction between mere values and legal principles derived from the actual decisions of authorities for policymaking purposes are that it is important to: (1) identify relevant group and subgroup authorities, at least to include them as representatives in the lawmaking processes, or as traditional decision-makers or expert witnesses in the court process; (2) identify past decisions made in relevant dispute topic areas, in whatever form they might take, and the principles underlying these decisions; and (3) decide how and when the legal principles of past decisions should be codified in legislation or adjudication.

#### *VI. The Attribute of Intention of Universal Application*

*In . . . tribal societies . . . , both political decisions and legal judgments are made by the same authority - the headman, the chief, or a council, as the case may be. Therefore there is evidently a need for an additional criterion that would separate the legal and political fields. The need is met by the second attribute of legal decisions, which I have called "the intention of universal application." This attribute . . . demands that the authority, in making a decision, intend it to be applied to all similar or "identical situations in the future."<sup>129</sup>*

How does a tribal judge know whether a traditional authority's decision is a one-time decision, specific to the individuals involved, or whether its legal principle was meant to apply to all clan or village members similarly situated? This matters in cases where the custom law principle is incorporated into written judicial decisions and where it may apply to future parties in similar

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129. POSPISIL, *supra* note 24, at 79.

cases (where *stare decisis* operates). Pospisil was also concerned with separating out those decisions of an authority that are intended to apply only to one set of parties or to a particular event from those decisions where the intent is to apply the principle to similarly situated parties or similar events in general. For example, in *James*, is Uncle Stephen's guiding principle: "the right to use clan property is tied to proper conduct, including marrying within the tribe, residing on the reservation, and caring for family," intended to apply to all similarly situated members of the clan in their land disputes? If not, Pospisil would ask, is the decision legal? Pospisil argues that the authority's intention of universal application is sufficient, whether or not the authority actually consistently follows through. This distinction highlights why there will be cases where an authority's decision will not be principled and thus no "law" will emanate from it. The question to be asked then, would be "was the authority's decision principled (is the principle intended to apply to other people in similar situations) or political?" Of course, principled decisions are useful for the making of (codifying) substantive tribal law; political decisions may not be. But political decisions may be applicable in tribal level, party-specific decisions, arbitrations, or mediations.

#### VII. *The Attribute of Obligatio*

*[Obligatio] refers to that part of a decision which states the rights of one party to a dispute and the duties of the other. It defines the social-legal relations between the two litigants as they supposedly existed at the time of the defendant's violation of the law. It also describes the delict, showing how the relations became unbalanced by the act of the defendant. Thus the concept is a statement about a social relationship and as such it is two directional. One direction originates in the person of the defendant, a person who by his (her, their) illegal act violated an approved relationship, thus creating on his (her, their) part a duty to correct the situation; the other direction emanates from the person who suffered a loss because of the act of the defendant, and who thus possesses the right to have the situation redressed, the right to expect an action or a sufferance on the part of the other party.<sup>130</sup>*

As tribal members, our relationships involve significant reciprocal obligations depending on how we are related to each other. This may also

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130. *Id.* at 81-82.

extend to non-biological or ceremonial relationships. Pospisil's "obligatio" comprises what many tribal members today think of as at the heart of custom law — the rules about our obligations to each other. "Obligatio" is present where an authority officially notices a specific relationship and an incident of duty and breach. In *James*, this occurs at both the clan and tribal legal levels and involves (at least and not necessarily in order) the following relationships: (1) daughter – clan; (2) daughter – father as leader; (3) child – parent; (4) clanswoman – clansmen; (5) clanswoman – husband; (5) Hopi – land; (6) husband – wife/wife's clan; and (7) clan – village.

At the level of clan, Uncle Stephen noticed Aunt Ruth's breaches in a written statement:<sup>131</sup>

Ruth [is not] entitled to any family property because [she] married [a] non-Hopi . . . and chose to live off the Hopi Reservation.<sup>132</sup>

He further noticed duties and obligations met by Ruth's sister Mollie:

For the following reasons I am granting this property to my sister Mollie[']s children . . . : . . . (2) That Mollie . . . took our mother's advise [sic] and married a Hopi and devoted her lifetime to them at the Village of Hotevilla. (3) That Mollie . . . , while she was living, was the only one who took care of our mother Bolehonga, and my stepfather, Sewehongeoma, . . . throughout their lives.<sup>133</sup>

Similarly, at the level of the Hopi Tribe, the trial judge found that the nieces had shown that they had met their duties and obligations where their Aunt Ruth had not:

131. Recall that at the level of the village, the Hotevilla Board of Directors declined to handle the dispute. Amended Petition to Quiet Title and for Injunctive Relief, *supra* note 52, at Exhibit C (Letter from Hotevilla Village Board of Directors) ("Since there are many issues that will need to be addressed by legal advocates, it was recommended that this dispute be handled by the Hopi Courts.").

132. Statement of Stephen Albert, *supra* note 95; *see also* Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 18-19 (LQ's testimony that shortly after her mother died in 1985 there was a family meeting to discuss who would get her plaza house where her Uncle Stephen "told [Aunt Ruth] that [she] was disowned by [her] mother when [she] married other tribes and [she was] not entitled to anything"); *id.* at 51 (JJ's testimony regarding the same meeting and Uncle Stephen's statements prior to it that "Because [she] married outside the tribe, [she was] to get nothing"); *id.* at 24-25 (LQ's testimony that after her Aunt Ruth put up poles on the disputed property she told her Uncle Stephen and they recorded a discussion of the family history, including a discussion of the disputed land and interests in it).

133. *Id.*

Respondent [Aunt Ruth] has not shown the Court that she has a superior right to use and occupy the disputed land under the applicable custom and tradition of the Village of Hotevilla . . . Petitioners [the nieces] have made such a showing.”<sup>134</sup>

He contrasted the nieces conduct with that of Aunt Ruth:

Petitioners, who always have lived on the Hopi Reservation, have used and cared for the land, tended to the personal needs of their grandmother-Respondent’s mother-until her death, and maintained regular participation in the traditional activities of Hotevilla. . . . For many years, Petitioners have planted beans on the land. . . . Petitioners have made very good use of the land.<sup>135</sup>

Respondent left the Hopi Reservation in 1938. She has maintained a residence since that time on her husband’s reservation. She occasionally has visited the Hopi Reservation but her visits have always been for short periods of time. . . . Although Respondent has planted fruit trees on and fenced in part of the disputed land, these actions are not enough under the applicable custom and tradition to give Respondent a right to use and occupy the land superior to the right of Petitioners. Moreover, Respondent’s husband, since his marriage to Respondent, never has consistently tended to and used the land for farming purposes.<sup>136</sup>

In making these findings the trial judge set out and applied a rule for breach of duty. The rule initially assumes that a person has an interest in village land, but that where such a person (1) fails to notoriously “tend to, use, and properly care for the land on a consistent basis;”<sup>137</sup> or (2) where that person is a woman, the woman’s husband fails “to [notoriously] tend to and use the land for farming purposes on a consistent basis;”<sup>138</sup> or where such a person (3) fails to “regularly participate in the traditional activities of the village,” he or she may lose that interest.<sup>139</sup> If such a person loses his or her interest, any relative may come in and use the land.<sup>140</sup>

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134. *James v. Smith*, No. CIV-019-94, at 5 (Hopi Tribal Ct. Apr. 17, 1998).

135. *Id.* at 4, 5.

136. *Id.* at 4.

137. *Id.* at 3, 5.

138. *Id.*

139. *Id.* at 5.

140. *Id.* at 3.



The trial judge also qualified “proper use or care” and “farming purposes” to include at least the planting of specific types of crops important to the Hopi ceremonial cycle. The judge noted that for many years, the nieces had planted beans on the land:

To the Hopi, the planting of beans is very important, for beans are used for ceremonial purposes as well as for food. ‘Powamuya’ -- the Bean Dance -- is directly tied to the planting of beans. Thus, by planting beans, Petitioners have made very good use of the land.<sup>141</sup>

By crafting the rule in this way and by taking judicial notice of the significance of planting beans and the bean dance, the trial judge formally tied land use rights to a duty of ceremonial participation.

However, while the trial judge here was careful to identify the breach and to construct a rule and remedy for such breach, there was more he could have said about the underlying relationships and their corresponding duties. Why is it important that a Hopi woman (or her husband) support ceremonial undertakings? Does her access to and use of land impact the ceremonies one way or another? Whose interests do the ceremonies serve (the village, the clan (which clan?), and/or the individual)?

A close inspection of a woman’s rights with respect to land, as documented by outside observers, reveals that such rights are tied, at a minimum, to her duties to support the ceremonial functions of her husband and clansmen. Such duties have been noted and commented on by anthropologists since the nineteenth century:

Women . . . participate [in the religious life of the village] by washing and dressing the husband’s hair on all ceremonial occasions and by bringing food to Katsina dancers at the noon rest period. During many observances the women are required to prepare special foods which must be brought to the kiva in prescribed vessels at definite times, and the sacred cornmeal which is used in all rituals must be ground by women.<sup>142</sup>

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141. *Id.*

142. TITIEV, *supra* note 44, at 16. There appears to be a dearth of scholarship capturing the role and duties of women throughout a lifetime in both the life of the clan and the village ceremonial cycle. Another glaring omission is a detailed analysis of the reciprocity between women in support of these happenings, as a form of currency and as the foundation making lifetime and village ceremonials possible. Dare I say that men must have done the bulk of the observing, note-taking, and analysis, probably while they sat happily eating their nōqkwivi

However, equating the duties of women with the mere provision of meals would grossly underestimate the importance of their role in the family, clan, and village, if for no other reason than that, in the early years, a Hopi woman might spend an average of three hours a day grinding corn!<sup>143</sup> Most ceremonies involve the preparation of traditional meals for large groups of people and exchanges of large quantities of food.<sup>144</sup> The preparation of traditional food is expensive, time consuming, and requires years of training. Further, a review of any of the well known Hopi autobiographies would inform the reader of the many critical offices, functions, and skills performed by women from birth (baby naming), initiations (for girls and boys into the *Katcina* and *Powamu* societies and for young men into the *Wuwutsim* society), puberty rites (corn grinding for girls), marriage (hair washing), death (preparation of the body for burial), and of course, ongoing participation in the annual village ceremonial cycle,<sup>145</sup> the women's societies, and for office holders, as officials in any number of major and minor ceremonies.<sup>146</sup> Add to this the fact that women have duties, not only to their own husbands and children, but also to the children of their clanswomen, and to their ceremonial children as well. From the female perspective, without their efforts, clan

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(hominy stew) and *piiki* bread at some Hopi woman's table.

143. For a good description of responsibilities surrounding food at Hopi, see RICHARD MAITLAND BRADFIELD, *A NATURAL HISTORY OF ASSOCIATIONS* 20-25 (1973).

144. For example, in a Hopi wedding, truckloads of homemade bread, traditional foods, and other foods are exchanged.

145. Hopis have an elaborate annual ceremonial cycle. I sometimes describe it as the equivalent of having seven or so full-blown Christmas holidays in a year (in terms of time, labor and significance). There are seven "great" ceremonies held in a theoretical full cycle: (1) *Wuwutcim* (young men's initiation (every four years)); (2) *Soyal* (re-admission of the *Katcinas* (ancestors) to the village (annual)); (3) *Powamuya* (preparation for a successful growing season (annual) and children's initiations into *Katcina* and *Powamu* societies (every four years)); (4) *Niman* (homegoing of the *Katcinas* (annual)); (5) *Snake-Antelope* (every two years) or *Flute* (every two years); (6) *Marau* (women's society); and (7) *Lakon* or *Oaqol* (women's societies). Practically speaking, these involve a series of kiva rites, night dances, day/plaza dances, and other performances and/or visits to shrines in Hopi country. See generally BRADFIELD, *supra* note 143, at 46-63 (describing in detail the Hopi worldview and ceremonial cycle). Dances in the summer involve the whole village with *Katcinas* numbering anywhere from thirty to over one hundred, with spectators from other villages (and from all over the world). Being a Hopi actively engaged in the ceremonial cycle is a great deal of work, and one is obligated to assist those who offered their assistance in the past. *Id.*

146. See generally HELEN SEKAQUAPTEWA, *ME AND MINE: THE LIFE STORY OF HELEN SEKAQUAPTEWA* (Louise Udall ed., 1969); POLINGAYSI QOYAWAYMA (ELIZABETH Q. WHITE) AS TOLD TO VADA F. CARLSON, *NO TURNING BACK* (1964); DON TALAYESVA, *SUN CHIEF: THE AUTOBIOGRAPHY OF A HOPI INDIAN* (Leo W. Simmons ed., 1942).

events and village ceremonies would not be possible.

In the hearing transcripts from *James* below, one of the nieces and two of the nieces' expert witnesses stressed the importance of women's duties with respect to land:

*Transcript Excerpt 1*

Nieces' Counsel: And what was your mother [Mollie] doing in terms of the land?

Niece LQ: I guess basically taking care of her mother and father and doing a lot of things for our grandfather, because he was one of the Mongwis [leaders] in the village. She did all the preparation for the kiva, to take food to the kiva for him. When things were going on. He was an initiated member of the Hopi religion. He was also of the Spider clan, which is considered one of the leader clans in the village. He was also keeper of the kiva there because that belonged to the Spider clan. And so she did all of these things after she came home . . . .<sup>147</sup>

*Transcript Excerpt 2*

Nieces' Counsel: Speaking of taking care of the parents, family members that take care of their parents, what do they get rewarded?"

MS: They are entitled to the things that the other has. The girls, the daughters are entitled to the mother's belongings and the properties, if they stay on the village to take care of their parents.

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147. Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 17.

Nieces' Counsel: So . . . if . . . Ruth married outside and left, Mollie married a Hopi man and remained in the village and the husband came and lived at Hotevilla . . . in your understanding of how things have transpired, would Mollie then have a better right to [her mother's] things?

MS: Yes.

. . . .

Nieces' Counsel: Why?

MS: . . . Because she stayed and married a Hopi the way her mother wanted her to. And she took care of her parents. And their father was . . . chief in one of the kivas that takes on in January. When the father gets into that kiva to do that, she does everything for him. For the father. She takes care of the father, what needs to be done in the kiva. And she cooks for the father. And everything that she's doing, she is entitled to things. 'Cause she stayed there to take care of her parents.<sup>148</sup>

*Transcript Excerpt 3*

A second of the nieces' traditional expert witness concurred upon being questioned by the trial judge:

Judge: Puma sen it a'ni Hopihihta hintsatskyangwu  
They perhaps are active in Hopi things

Pu' pam sen yep...  
Then she perhaps ...

Pam pumuy a'ne tumala'ytangwu  
She works hard at taking care of them

Amungam hihta hintsakngwu sen.  
Perhaps she does things for them.

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148. *Id.* at 39.

Pay naakwayhihta, noovat, hiihihta enang.  
Bringing ceremonial food, and other things.

Pu' pam put aw tumala'ytaqw  
(When) she does this work

sen pi taahamat,  
maybe her uncles,

sinomat angam aw hin wuuwaye'  
(or) other relatives consider this on her behalf

Pu' sen put haalaytote  
Maybe they appreciate

Pu' sen put maqayangwu hihta'a  
Then perhaps they would give her something.

Pu' sen pam wuhti sen naamahin yaapiqw  
sinomu'ytangwu,  
Perhaps this woman has relatives here,

Paavamu'yta,  
Older brothers

Tuupkomu'ytangwu  
Younger brothers/sisters

Timuy . . . .  
Children

Mömu'ytangwu  
grandchildren(maternal)/nieces/nephews

Pu' puma sen it Hopi hihta naat a'ni hintsatskyaqw  
Then they perhaps these Hopi things are they still active  
in them

Pam pumuy qa pa'angwantaniqw,  
If she does not support them,

Pam sen pahsat put tuutskwat himu'ytangwu.  
does she still have ownership of the land.

Turta nu' put umuy piw tuuvingta.  
Let me ask you all again.

HD: Pay pi ayan, ah- antsa ima hiihihta wiiwimkyamnoqw  
Well now in this way — those who are initiated into  
these things

Antsa tavi'ytaqa pi put maqsonlawngwu,  
The one who is caretaker makes a great effort,

Niiqe angam hihta . . .  
It is so, doing things for (him/her)

Me ima hiihihta ang naakwayit hintsatskya  
See they are doing the things for bringing ceremonial  
food

Hiihin ima put tuwi'yungwa.  
The different ways of doing these things.

Niiqe pam tavi'ytaqa  
Therefore the caretaker

Pu' pam put maqsontangwu.  
She/he puts out a lot of effort.

Hihta wimkyat tavi'ytaqa.  
Someone who cares for an initiated one.

Pam sutsep put maqson-  
They are always putting out this effort

Noqw antsa hiita himu'taqw pay kur hakniqw  
But if there is anything he has

Pay kur hakniqw qa pamni,  
It cannot be anybody else,

Is pi pam maqsontangwu  
Because they put out the effort.

Pu' kya as antsa qööqayta,  
Perhaps there is a sister,

Tuupkoytaqw pam pay put-  
Or younger brother/sister he/she-

Haqam qatu' qa amum put hakiy maqsonlawngu  
They live away in another place they are not there with

them to put forth this effort.

Pam pay qa hihta nanvotningwu  
He/she does not have any knowledge of this thing (the  
effort)

Noqw pu' i' yaapiqw tavi' ytaqa pam . . .  
Therefore this one who is here taking care,

Pam hihta aw pítuqw pu' hakim it angam yahntotingwu . . .  
When something comes up we do these things for  
him . . .

Pàasat pam put it hihta naakwayit angam hintsakngwu.  
Then at that time he/she brings ceremonial food on  
(his/her) behalf.

Nuy noq oovi pay hihta himu' ytaqw  
In my opinion therefore, if this person has something

Pay kur hin qa pam put hihta himuyatningwu  
There is no one else but him/her to get his things.)<sup>149</sup>

It is clear from the combined testimony that, for a woman, the duties of “taking care of” one’s parents and “regularly participating in the traditional activities of the village” are intertwined and involve significantly greater training, skill, and consistent life-long effort. In answer to the question “what was your mother doing in terms of land,” Niece LQ refers to her mother Mollie’s duty to undertake preparations (food and otherwise) for her father who belonged to one of the “leader clans” and who had the responsibility to be “the keeper of the kiva.” The nieces’ traditional expert witness, MS, also referenced this duty when she states that “When the father gets into that kiva . . . she [Mollie] does everything for him . . . . She takes care of the father, what needs to be done in the kiva. And she cooks for the father.” The second of the nieces’ experts, HD, testified in the Hopi language stressing the significant, ongoing nature of the duty: “The one who is caretaker makes a great effort . . . bringing ceremonial food . . . They are always putting out this effort.”<sup>150</sup> A thorough analysis of the obligation in *James* would include identification of the relationship (between Ruth and her father, both daughter-

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149. Transcript of Hearing of Mar. 27, 1997, *supra* note 120, at 15, 17-18.

150. *Id.*

father and Hopi daughter-father as village leader), the duties owed (to support and participate in her father's ceremonial duties to the village) and breached (Ruth's long absence and non-support/participation), and the expected remedy (no right to use family (clan) lands).

Written tribal court opinions and orders should document all aspects of the obligatio that would otherwise be oral in the traditional system. They should also clearly discuss the values underlying deciding principles, both to justify the outcome in that case and to determine whether they are likely to be applied in future, similar cases. In policymaking we should care about the presence of obligatio, if we care about reinforcing certain types of relationships and the duties and obligations that go with them. It is important to identify: (1) relationships that should be fostered and reinforced; (2) the duties owed and by whom; (3) the corresponding rights and who has them; (4) the underlying value(s) at issue; and (5) the losses likely suffered upon breach and how they were (or should be) addressed. For more traditional tribes it may also be important to ask whether these duties and obligations involve primarily the interests of living individuals and whether, in the traditional system, there were secular, in addition to, or instead of, supernatural sanctions. These latter two questions are concerned with whether a tribe wishes to apply man-made remedies or sanctions to back religious custom law.

### *VIII. The Attribute of Sanction*

*[I]t follows that sanction, on one hand, is a necessary criterion of law and, on the other, that it need not consist of corporal punishment or a deprivation of property (physical sanctions). The form of legal sanctions is certainly relative to the particular society or to the particular subgroup in which it is used; it may be physical or social-psychological. I may, then, define legal sanction either as a negative device in withdrawing rewards or favors that otherwise (if the law had not been violated) would have been granted, or as a positive measure in inflicting some painful experience, physical or psychological.<sup>151</sup>*

For Pospisil any kind of sanction, enforced by an authority, by society in some way, or supernaturally, indicates the presence of law, what I am calling custom law. The one caveat is that supernaturally applied sanctions lie in the realm of religious law. Contemporary policymaking takes place in the realm

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151. POSPISIL, *supra* note 24, at 92.



of the secular, and so we are concerned here with identifying traditional, human-applied sanctions, that may have been (or may be) applied in addition to supernatural sanctions. However, the “attribute of sanction” is always the most difficult to characterize in any given culture. This is so because sanction and worldview are intertwined in complex ways. I continue with the Hopi example.

We are fortunate at Hopi that much work has been done to document the experiences, perspectives, and knowledge of Hopis and Tewas from at least the time of our great-great grandparents. Much of this work has been done by anthropologist(s) of both the classical “scientific” bent and, later, ethnographers with a sincere concern to capture Hopi insider understandings. According to Whiteley, before 1906 in Old Oraibi our people were divided into two general classes with respect to access to knowledge. Whiteley has written extensively on the power of the elite “pavansinom” versus the common Hopi kept in the dark, the “sukavungsinom”:

Power is fundamentally equated with elite access to specialized secret knowledge that enables the bearer to induce significant transformations in the world. Ritual knowledge is the ‘strategic resource’; material entities are not the medium of power differentials. The structure of ritual leadership is simultaneously the structure of political leadership. Political actions on the part of the pavansinom is homologous with, and ultimately inseparable from, ritual action: secretive and conspiratorial, and directed towards the planning of society’s future. Ritual has an instrumental mode that transforms the world’s conditions. Coercion mostly takes a supernatural form, and consent to authority is based on fear of supernatural sanctions. Explanation of marked societal events identify deliberate execution of joint elite decisions toward preconceived ends.<sup>152</sup>

Whiteley references “fear of supernatural sanctions” or “maqastutavo” (“fear teaching”) as the primary doctrine prescribing adherence to norms.<sup>153</sup> In this segment Whiteley alludes to the split at Oraibi, and other ancient villages, where leaders (pavansinom) are said to have orchestrated the destruction of villages by inciting internal conflict or by inviting attacks by outsiders, justified as consistent with prophecy.<sup>154</sup> In more mundane matters, villagers

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152. WHITELEY, RETHINKING, *supra* note 50, at 102-03.

153. *Id.* at 95.

154. *Id.* 93-97.

were, and many still are, afraid to transgress norms lest they or a relative should become sick or die.<sup>155</sup> Even so, there were occasions when corporal punishment was threatened or meted out by disciplinary Katcinas who used yucca whips to encourage compliance.<sup>156</sup> But perhaps more frequent today are the public demonstrations and outings of misbehavior that occur in most villages each summer through clowning:

[T]he two-day clown ceremony . . . Clowns represent mankind in a pre-moral state, where basic Hopi values - self-control in eating, decorous and respectful interpersonal relations, nonaggression, nonacquisitiveness, noninquisitiveness, sexual modesty, etc. - are overturned, reversed, and burlesqued in the typical fashion of inversionary ritual. Hopi clowns are gluttonous, uncouth, aggressive, grasping, intrusive, prying, obscene (and extremely funny). This part of their purpose: to stand the world on its head in order to reveal its rules and their necessity against chaos. The Warrior Katcinas, as the clown's adversaries, represent the moralizing influence of prescribed behavioral values and the upholding of these with severe supernatural sanctions. Eventually, the clowns are stripped, doused with gallons of water, whipped with willow branches, and forced to go through what amounts to a public confessional, before reintegration into their everyday social identities.<sup>157</sup>

What Whiteley does not convey here are the changing characters and topics of misbehavior that the clowns enact each year. They often mock real people and re-enact actual events. In years past I recall the re-enactment of the alleged exploits of the tribal treasurer who had been accused of embezzling tribal funds. A clown wearing a name tag designating him "treasurer," with bottles of liquor hanging out of his pockets, drove a car painted with the words "tribal vehicle" into the plaza, escorted by two "ladies of the evening" clowns. Let's just say everyone knew who and what this was about, and we soon had a new treasurer.

At Hopi we have a complex persisting set of traditional sanctions, religious and secular. Maqastutavo persists and influences peoples' actions but equally effective is the making of examples of bad behavior with all the attendant chastisement and public ridicule. Some breaches of norms, such as that one

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155. *Id.* at 95.

156. *Id.* at 96.

157. *Id.* at 98-100.

should be respectful and sober during the ceremonies, are sanctioned by both the traditional and tribal systems. For example, if one is out of line during a ceremony, he or she may be publicly chastised by the disciplinary Katsina; the tribal police may be called to arrest that person for violating the criminal code provision making it a crime to be disrespectful or drunk at the ceremony, and punishable with a fine and/or jail time.<sup>158</sup>

In the area of land use rights and the duties and obligations owed with respect to land, we are still exploring the diverse local understandings. My best guess, without taking traditional expert testimony on the global question, is that our families, clans, and the wider village communities suffer from functional and/or supernatural outcomes (sanctions), where we cannot get along to make our ceremonies go. For example, where we cannot cooperate to plant or harvest at the right intervals to catch the rain or where the rain simply won't come, or even where the corn is plentiful, we might not be able to cooperate to organize and hold the full ceremonial cycle because we are busy fighting over homes and fields. These functional and/or supernatural sanctions are reinforced by our clan uncles when they arbitrate<sup>159</sup> intra-family (clan) home/land disputes and say which dutiful clan member(s) have the superior use rights. Where family members continue to fight and refuse to live with the decision of their clan uncles, or where they do not have a clan uncle who can or will arbitrate, they may go to tribal court to seek formal tribal recognition of superior use rights. As can be seen in the James case, the tribal court under the present state of Hopi law will attempt to stand in the

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158. HOPI LAW & ORDER CODE tit. III, §§ 3.3.91 (1991), available at <http://www.narf.org/nill/Codes/hopicode/title3.htm> ("Any Indian who willfully disturbs . . . any meeting for religious or ceremonial purposes, by any act, gesture or utterance . . . is guilty of an offense"); *id.* § 3.3.92 ("Any Indian who shall enter a kiva, ceremonial building or ceremonial area during the time of a religious or ceremonial activity while under the influence of alcohol . . . is guilty of an offense.").

159. I use the term "arbitrate" loosely here. I am dissatisfied that what I am seeing where a clan uncle or "taaha" advises disputing family or clan members is anything like mediation. He is not sizing up the respective positions and liabilities of the parties and putting pressure on them to compromise. This also is not a talking out process, like that popularly characterized in peacemaking models. Rather, the process seems to approximate a forceful reiteration of relationships and responsibilities with such strong advisement that it approaches a made decision. The "sanction" element comes from family/clan member and broader village/tribal member recognition of the advisement or decision or an ongoing "retelling of the reasoning of it" to the point where the person in breach pays a social price for persisting in their position (embarrassment, fewer and fewer people will deal with them, no reciprocity when they need provisions or assistance in personal, familial/clan, or village ceremonial events). It is uncommon for persons in breach to stand their ground for long under these circumstances.

shoes of the village or clan uncle, by applying its version of the local custom or by reinforcing the made decision of the clan uncle. In this way, breach of duty with respect to land is sanctioned at the supernatural, clan, and tribal legal levels. This may take the form of bad weather for crops, community recognition and reinforcement of the advisements and decisions of traditional clan authorities — resulting in people talking badly about, or refusing to deal with the person in breach<sup>160</sup> and with the secular state-like enforcement mechanisms of the tribal government. For example, an enforceable court order recognizing that a specific person has superior and exclusive land use rights might result in the authorization of the tribal police to evict future trespassers.<sup>161</sup>

The important considerations for policymaking purposes with respect to sanction include: (1) What were/are the traditional sanctions and when should they apply; (2) Whether the traditional sanctions are sufficient or whether tribal sanctions “backing them up” are desired; (3) Whether innovative tribal sanctions of a nature similar to traditional sanctions are desired, such as outing bad behavior in the tribal newspaper for example; and (4) When and how tribal courts and police should recognize and enforce the decisions, remedies, and/or sanctions issued by traditional authorities?

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160. There are also very likely sanctions meted out by religious societies and/or their traditional authorities. However, this discussion would venture into the realm of religious law, a topic not addressed in this article.

161. I disagree in part with Robert Porter, where he argues that the Western adversarial process amplifies and perpetuates fighting among tribal members, fragmenting relationships, and offering no process for repair of long-term relationships, thus threatening, at some level, tribal sovereignty itself. Porter, *supra* note 8, at 274-76. Rather, I find myself arguing here for Western-styled enforcement mechanisms backing either the decisions of traditional authorities or the decisions of tribal judges standing in their shoes to stop incessant fighting over homes and land on the Hopi reservation. These are very old fights that may have been through multiple rounds (at least in each generation) of traditional dispute resolution and sanction. Hopis have been fighting over property from the beginning and those bucking applicable norms and sanctions have often opted to leave - still a difficult undertaking. Perhaps the Western system offers a way to settle expectations with finality and enforcement. It is my hope that we will be able to initiate legal reforms to better secure property interests, at least for the duration of an individual's lifetime. Even so, I do not argue for a wholesale importation of Western process and property law. It must be thoughtfully tailored by skillful stakeholders to meet Hopi needs and priorities. The ideal Hopi justice system would include both an adversarial process tailored to accommodate our customs and traditions, with an annexed alternative dispute resolution process such as mediation — not a wholesale repudiation of the former for the latter.

*IX. Justice*

*[J]ustice [is] either the conformity of the values of legal principles with basic jural postulates or as a degree of social internalization.*<sup>162</sup>

The central question is whether it is just for tribal governments to reinforce custom law with legislation, court orders, and law enforcement where not everyone subject to the law shares the same values. This may be the case where a number of different culture groups reside on the same reservation, where nonmembers or non-Natives have married in, or where they have children with members. It is also the case that growing numbers of members themselves have acquired Western, individuated, rights-based expectations. In many tribes, female members also seek to change their role and their rights from the traditional or generally accepted ways. The problem then is how tribes may reinforce and promote custom while simultaneously protecting the rights of those who do not share the traditional value system or who seek to change it.

In the opening quote, Pospisil reads “jural postulates” to mean values shared by the group.<sup>163</sup> He would find those principles in decisions made by authorities to be just where such principles conform to the values shared by the majority of people in that group.<sup>164</sup> Contrast this view with that of the United States Congress, which has legislated very specific contours for what it means by justice, for example, that “[n]o Indian tribe in exercising powers of self government shall . . . (1) make or enforce any law prohibiting the free exercise of religion . . . ; (5) take any private property for a public use without just compensation; . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . . .”<sup>165</sup> Pospisil would test the justice of custom law by confirming whether or not a majority of the people governed by it supported it. Under this formulation, there would always be a minority of people who would be subject to the custom law but who did not agree with its underlying principles. The U.S. Congress, on the other hand, through the Indian Civil Rights Act (ICRA), seeks to require that all people governed by a tribe be guaranteed certain specific and equal rights under tribal law. It should be

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162. POSPISIL, *supra* note 24, at 272 (citations omitted).

163. *Id.* at 265.

164. *Id.* at 270.

165. 25 U.S.C. § 1302(1), 1302(5), 1302(8) (2006).

clear that many, if not most, custom law principles would not survive a test for justice based rigidly on free exercise and due process rights or protection of private property and equal protection.<sup>166</sup>

The principles applied in the trial court order in *James* appear to violate the ICRA in at least four different ways. Aunt Ruth could have argued that the principles as set out, or as applied, violated her free exercise rights, resulting in a taking of her private property without due process or just compensation, and that the re-stated custom law principles deny her equal treatment as a married woman with respect to maintaining her property rights. While no federal court review is available under U.S. law to remedy such violations absent a viable petition for a writ of habeas corpus,<sup>167</sup> the tribal legislature, appellate body, and community will have a keen interest in weighing whether potential or actual ICRA violations warrant a modification of the applied custom law principles to meet new understandings of what should be considered “just” in the contemporary tribal community. Alternatively, there may be central traditional principles or values so important to the integrity of the community, its religion, and/or its economy that majority support for them is enough, even when they are applied to dissenting minorities. Even discriminating laws within the U.S. system are legal where there are important or compelling governmental interests that are being pursued. In any case, this is a policy debate to be undertaken by tribal citizens and their leaders.

#### *A. Free Exercise Rights*

In *James*, the trial court’s re-stated custom law principle ties the maintenance of individual property rights (exclusive lifetime use rights) under Hopi law to a requirement that a person “regularly participate in the traditional activities of the village.”<sup>168</sup> Aunt Ruth argues that her father divided the land and gave her and her sister Molly each a half of a parcel of farming land in

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166. See Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 835-48 (2007) (arguing that it is a mistake on the part of contemporary liberals to impose liberalism on indigenous groups, specifically by imposing a one-size-fits all approach to civil liberties via the Indian Civil Rights Act as this would destabilize tribal government and destroy tribal culture and Indian differentness).

167. 25 U.S.C. § 1303; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that federal court civil action against a tribe is barred by the sovereign immunity of the tribe and that the ICRA provision providing for federal habeas corpus relief to test legality of person’s detention by a tribe does not constitute a general waiver of a tribe’s sovereign immunity from suit).

168. *James v. Smith*, No. CIV-019-94, at 2-5 (Hopi Tribal Ct. Apr. 15, 1998).

Hotevilla Village when he was alive.<sup>169</sup> The trial court assumes that she has some interest in this parcel of land but re-states a rule that her interest is subject to divestment where she has married a non-Hopi, moved away for many years, and has failed to return home to regularly participate in the ceremonies.<sup>170</sup> Aunt Ruth could argue that she has an ICRA right to the free exercise of religion in that she chooses not to participate in the village ceremonies. Further, any tribal law that penalizes her liberty and property interests for this choice is unjust and should not be legal or a part of the secularly enforced tribal law.

*B. Right Against the Taking of Private Property without Due Process and Just Compensation*

The trial court's application of the re-stated custom law principles in *James* to the dispute between Aunt Ruth and her nieces results in a finding of exclusive property use rights in the nieces, subjecting Aunt Ruth to potential court-ordered, police enforced eviction should she attempt to occupy or use the disputed parcel. The effect of the trial court order is to divest Aunt Ruth of any property rights in the disputed parcel. She may argue that the way the trial judge came to find, re-state, and then apply custom law principles in her case resulted in a taking of her private property without due process and just compensation under the ICRA. Again, she would be arguing that this result is unjust and that such a process and outcome should not be legal or a part of the secular tribal law or enforced by secular tribal law enforcement.

*C. Right to Equal Protection Under Tribal Law*

Another rationale for finding that Aunt Ruth had lost her exclusive land use rights in the disputed parcel appears to be that her husband had never cultivated the disputed land, particularly in ways that supported her father's participation in the village ceremonies. Recall the trial judge's re-stated rule that: "[i]n the case of a married woman who has or acquires the right to use or occupy village land, custom and tradition requires that the woman's husband tend to and use the land for farming purposes on a consistent basis."<sup>171</sup> Ruth could argue that the trial judge's found, re-stated, and applied custom law principle unfairly burdens married women and makes it harder for married women to preserve their property rights. Why should married women be

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169. Respondent's Answer to Amended Petition, *supra* note 65, at 1-2, 5; *see also* Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 78-80 (testimony of petitioner R.S.).

170. *James*, No. CIV-019-94, at 2-5 (Hopi Tribal Ct. Apr. 17, 1998).

171. *Id.* at 2.

treated differently from single women and married men, and how does a married woman protect her interests if her husband will not cooperate? The special “married woman’s rule,” absent a “married man’s rule,” would appear to violate the ICRA’s equal protection under tribal law requirement. Ruth again could argue that tribal laws discriminating on the basis of sex are inherently unjust absent the furthering of important or compelling government interests.

Both the reinforcement of custom and the pursuit of justice are about accountability of tribal leaders to tribal memberships. Whether the majority of a membership shares and chooses to reinforce a particular traditional value or whether the majority expects Western-styled individual rights is always shifting with respect to any particular topic. Group sentiments should be measured on an ongoing basis. Considerations of justice, with respect to custom, argue for the dedication of time, attention, and funding to carefully determine applicable local custom law principles and the degree of acceptance of such principles within the group to be bound by them. This should include public notice and input by the members of the group to be bound by custom law principles before such principles are incorporated into legislation or as part of an adjudication. This will likely require special processes in tribal law for the drafting and adoption of legislation and for custom law finding in tribal court. In some cases, large policy shifts may require constitutional reform or amendment. The overall goal, in any case, is to be true to the values and priorities of the membership and to fully consider the impacts on, and the arguments of, minorities and reformers.

### *IX. Key Concepts*

Whether tribal leaders are drafting legislation or whether tribal judges are deliberating on a specific case, where custom law is relevant and applicable, it will be necessary to consult the local experts and culture-bearers. This may take the form of a formal or informal committee charged with identifying relevant custom and communicating its findings to the ultimate decision-maker(s), who then must analyze the information, recharacterize the principle, and apply it to the particular policy purpose or litigation at hand. However, when it comes to discussions about custom, committee members and decision-makers can often get bogged down with semantics and find themselves in heated arguments about what is or is not “the custom” or “the tradition.” In my past work with tribes, it has been helpful to begin such meetings with an introduction to key concepts and definitions in order to create a common vocabulary and to avoid lengthy, unproductive fights over meaning. Below I outline the key concepts discussed in the first part of this article. I have also



included a sample discussion outline for working with custom law finding committees (see Appendix A).

Helpful key concepts for finding custom law include the following:

(1) Recognize that every functioning group or subgroup within a tribe has its own, naturally arising legal system and law, both traditionally and presently. The big question is whether and how the tribal law should recognize and reinforce group and subgroup custom law;

(2) Recognize that there is a difference between "custom law" and "values" and that custom law is discovered by looking at the underlying principles of past and present decisions of persons of authority within a group or subgroup, where he or she has solved, advised, or approved a solution in real disputes. The deciding principle is the custom law. Custom law principles may be more valuable than mere value statements, as they are derived from live conflicts and the actual decisions of group/subgroup authorities;

(3) Recognize that some group or subgroup authority's decisions may not generate custom law if they do not include principles intended to apply to similar situations in the future. Decisions that are applied on a one-time basis to particular parties or events are political and do not necessarily include principles that are useful for integration into the tribal law;

(4) Recognize that many custom law principles are derived from an identification of the relationship of the parties to a dispute, their duties and obligations to each other, the identification of a breach or failure of one party to meet his or her obligations, and a determination of the required remedies to make things right;

(5) Recognize that it is important to identify the traditional sanctions for breaching duties or for violations of custom law. "Sanction" is defined to include either physical or social-psychological experiences, negative (withdrawing rewards or favors) or positive (inflicting pain), and may be man-made or supernatural. The important questions here are if, when, and how the tribe should enforce the decisions of local authorities; whether tribal sanctions should be used to reinforce or replace traditional sanctions; and/or whether traditional sanctions should influence the creation of new, innovative tribal sanctions based on traditional concepts; and

(6) Recognize that it is important to consider whether it is just to adopt a group or subgroup's custom law on a tribe-wide, or other basis. In order to be accountable to those bound by tribal law, it is critical that tribal leaders ensure that they have dedicated the time, attention, and funding to accurately identify and define custom law principles and that the public has notice and a real opportunity to comment upon proposed tribal legislation, including such custom law principles. It is also critical that tribal judges describe custom law

principles and the rationale for their application in a particular case in writing in each judicial decision — and that these decisions be publicly available.

### *X. Debates About Working with Custom Nationwide*

#### *A. Debates over the Use of Custom*

A review of the legal literature reveals two general positions concerning the use of custom. The first position argues that custom *must be* considered as a fundamental part of self-determination<sup>172</sup> and the second argues that the consideration of custom is at best impractical and at worst simply a form of resistance to all that Western legal culture represents.<sup>173</sup> From a tribal government perspective, compelling arguments are made for the use of custom. Zuni, for example, asks us to recall “the heavy hand of the federal government” in the development of our current tribal court systems, which should prompt a critical examination of the present state of our justice systems and the pursuit of future developments by design and not by default.<sup>174</sup> She also reminds us that our inherited systems are embedded in English history, law, and values, including the concepts of private land ownership and patriarchy.<sup>175</sup> Finally, she argues that there is a great danger in the use of exclusively non-Indian approaches, as they will create a gulf between Native people and their law where such law reinforces views that are contrary to accepted local values.<sup>176</sup> Porter echoes Zuni’s concerns but goes farther, arguing that the use of the Western adversarial process itself tends to breakdown relationships and community, thus compromising both persisting traditional ways and tribal sovereignty.<sup>177</sup>

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172. Zuni, *Strengthening*, *supra* note 16, at 18, 23, 27; Barsh, *supra* note 8, at 74, 88-89; Zion, *supra* note 8.

173. Joh, *supra* note 9, at 125.

174. Zuni, *Strengthening*, *supra* note 16, at 19.

175. *Id.* at 22-23.

176. *Id.* at 24.

177. I do not think that Porter is suggesting that tribes do away with their adversarial tribal courts completely. Rather, he clearly argues for the creation of policies and institutions for the righting of relationships (such as peacemaking). Such institutions may be annexed to an adversarial tribal court or be established privately, with encouragement from the tribal legislature to the tribal court to work in tandem with them. Porter, *supra* note 8, at 237-39. Barsh seems to wonder whether the breakdown in family attachments and social relationships was a precursor to our reliance on tribal courts that function like state courts with their deterrent weapons of economic penalties and incarceration.

The persuasive arguments against the use of custom, as opposed to those arguing that "it is simply too hard to use," come from both within and without tribal communities. Some traditional people argue that custom cannot change and should not be manipulated, and certainly should not be written down.<sup>178</sup> Some argue that custom no longer exists, or that even if it does, times have changed and not everyone will agree to its interpretation and application.<sup>179</sup> Finally, Joh argues that letting custom go could free tribal courts to focus their attention on other priorities.<sup>180</sup>

### *B. The Argument That We Should Not Mess with Custom*

Older members can often be heard to insist that we leave the custom alone, particularly that we not try to write it down. The problem is that custom is being tinkered with all the time in a multitude of ways that we are not noticing. If one thinks of custom and tradition as a smooth sandy beach and tribal codes and resolutions as footprints, it is possible to imagine the smooth outlay of custom and tradition being stamped out or disturbed with the passage of each new law, be it intentional or not. The question then becomes, do we want to alter it blindly or consciously with purpose?

Another important point is that there may be things about our tribal governments that don't fit quite right or that don't seem just or fair as they are based upon imported institutions and laws. For example, does it make any sense to treat a child as abandoned and to involve the court and social services simply because he is living with his grandma? In many ways grandma is traditionally a third parent and the tribal children's (dependency) code should reflect that fact. If we can't document and explore our custom, how can we undertake the task of reform with due care and how can we build any tribal institutional history? This is a conversation that we will need to have with our leaders and elders, especially given that our children will have to live with the institutions that we leave them.

### *C. The Argument That We Will Never Agree on the Definition, Interpretation, and Application of Custom*

Of course we will never all agree on what must be the applicable custom. People the world over argue about the definition and meaning of law to further their own interests or politics or simply given diverse viewpoints. Why would

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178. See, for example, the reference to this argument in Zuni Cruz, *Tribal Law*, *supra* note 16.

179. See, e.g., Joh, *supra* note 9, at 122.

180. *Id.* at 131.

defining custom law be any different? Further, just because not everyone agrees with the definition and application of federal and state laws does not make them inapplicable. If custom law is applicable, it is applicable. As tribal members we can control the content of our laws through our political systems, by voicing our positions in the legislative process, or by electing or removing leaders consistent with our priorities or views. While it is true that there will be times when we do not trust our leaders, and perhaps when we cannot remove them, these are problems of politics or problems with the distribution of power within our governments and are not necessarily problems specific to our custom. There may even be times when abusive leaders may justify their positions based upon certain customs. But this argues in favor of discussing and clarifying what custom is.

*D. The Argument That Custom Is Inapplicable to Modern Life and Its Consideration Is Diverting Us from More Important Things*

A frequently voiced argument is that certain customs are dead or that we have simply outgrown them. Perhaps this is true for some tribal communities, but I know that this is not true for many. Custom pervades our lives in ways that we often cannot see or simply don't reflect upon. For example, even though I live in California, I seem to care a great deal about how I am perceived at home on the Hopi Reservation. The Hopi normative structure still operates on me. We often over-estimate what has been lost.

It is suggested that tribes take up too much time and energy in working with their custom and that this effort might be better spent, for example, dealing with more important things like alcoholism or violence or with economic problems. However, I suspect that these "more important things" are intimately linked to and are involved in complex ways with our custom-and-tradition concerns. Recently I was reviewing the 2004 Arizona Youth Survey summarizing findings with respect to the Hopi Junior/Senior High School. The survey was designed to assess school safety, adolescent substance use, anti-social behavior, and the risk and protective factors that predict these adolescent problem behaviors. Interestingly, the study found that one of the few protective factors that Hopi teens benefit from is ceremonial participation.<sup>181</sup> Turning away from our custom may actually make our more important problems worse.<sup>182</sup>

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181. ARIZ. CRIMINAL JUSTICE COMM'N, 2004 ARIZONA YOUTH SURVEY: HOPI JUNIOR-SENIOR HIGH SCHOOL, at app. B (on file with author).

182. See EDUARDO DURAN & BONNIE DURAN, NATIVE AMERICAN POST-COLONIAL PSYCHOLOGY (Richard D. Mann ed., State University of New York Press 1995) (1949); Maria

*E. The Argument That It Is Difficult to Work with Custom Law*

Legal scholars and professionals on both sides of the debate agree that it is difficult to work with custom. Some of these difficulties include: (1) inaccessibility given its oral nature;<sup>183</sup> (2) the need for community participation and tribal government funding of field work (oral interviews, documentation, analysis, and archiving);<sup>184</sup> (3) problems of authenticity where members with knowledge and experience will not participate;<sup>185</sup> (4) problems of accuracy where outside sociological or anthropological studies are colored by prejudice or mistake;<sup>186</sup> (5) problems with attorneys and advocates meeting ethical obligations to discover and plead custom;<sup>187</sup> (6) problems with tribal judges encouraging such pleading or taking judicial notice and documenting its application;<sup>188</sup> (7) problems of essentialism (representations of pre-existing human essences)<sup>189</sup> where it is assumed that there are “general Indian

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Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 60 (1998), available at [http://aianp.uchsc.edu/ncaianmhr/journal\\_online.htm](http://aianp.uchsc.edu/ncaianmhr/journal_online.htm) (discussing the historical unresolved grief of American Indians and its link to current social pathology in Native peoples).

183. Zuni Cruz, *Tribal Law*, *supra* note 16; Zuni, *Strengthening*, *supra* note 16, at 24-25.

184. Zuni Cruz, *Tribal Law*, *supra* note 16; Zuni, *Strengthening*, *supra* note 16, at 25.

185. Joh, *supra* note 9, at 120 n.22.

186. *Id.* at 120.

187. Zuni, *Strengthening*, *supra* note 16, at 25.

188. *Id.* at 26-27.

189. In order to offer further clarification of the concept of essentialism, I cite here at length to the English Department’s webpage at Emory University:

One of the central modes of representation is essentialism. Diana Fuss says that essentialism is most commonly understood as a belief in the real, true essence of things, the invariable and fixed properties which define the “whatness” of a given entity. . . . Importantly, essentialism is typically defined in opposition to difference. . . . The opposition is a helpful one in that it reminds us that a complex system of cultural, social, psychical, and historical differences, and not a set of pre-existent human essences, position and constitute the subject. . . . In a specifically postcolonial context, we find essentialism in the reduction of the indigenous people to an “essential” idea of what it means to be African/Indian/Arabic, thus simplifying the task of colonization. Nationalist and liberationist movements often “write back” and reduce the colonizers to an essence, simultaneously defining themselves in terms of an authentic essence which may deny or invert the values of the ascribed characteristics (see discussions on reclaiming the term “Third World,” particularly in Chandra Mohanty’s “Introduction” to *Third World Women and the Politics of Feminism*, ed. Chandra Mohanty, Ann Russo, and Lourdes Torres [1991] 1-47). Edward Said

customs,” or that a judge, because she is Indian, may take judicial notice of most customs;<sup>190</sup> and finally, (8) difficulties with tribal court practice where there is a lack of key professionals, Western legal training, funding, and where custom may be invoked to justify the relaxation or virtual elimination of procedural rules.<sup>191</sup> I argue here that solutions lie in strengthening our institutional structures, including updated codes and rules, increased and regular training, and consistent funding of custom documenting bodies and projects.

### *XI. Problems & Solutions for Documenting Custom in General*

Problems with the accessibility of custom can be overcome by establishing and adequately funding permanent bodies mandated to document it. Other societies generate self-studies in the form of historical accounts, sociological and anthropological studies, and critical law reviews. They also compile legal encyclopedias condensing — topic by topic — the legal principles applied by their authorities over time (legal treatises). Such accounts, studies, compilations, reviews, and treatises, while they are not enforceable legal provisions like tribal codes or rules, provide a big picture backdrop for the making and application of written laws. They also generate debate about the deeper meaning of legal principles important to historical and contemporary issues and spur innovation to solve current problems. Many tribes situate the responsibility for the documentation of custom with the tribal legislature, which then may further delegate it to a body of elders and/or culture-bearers. This may happen informally or it may be implemented through code provisions or rules that establish such a body, give it a mandate, and authorize the tribal court to work in tandem with it.

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argues against this inversion, suggesting that “in Post-colonial national states, the liabilities of such essences as the Celtic spirit, *négritude*, or Islam are clear: they have much to do not only with the native manipulators, who also use them to cover up contemporary faults, corruptions, tyrannies, but also with the embattled imperial contexts out of which they came and in which they were felt to be necessary” (Culture and Imperialism [1994] 16).

Brian Cliff, Postcolonial Studies at Emory: Essentialism (Spring 1996), <http://www.english.emory.edu/Bahri/Essentialism.html>.

190. Joh, *supra* note 9, at 120-21.

191. *Id.* at 123.

### A. Custom Documenting Bodies

It is beyond the scope of this article to undertake a comprehensive review of tribal codes, resolutions, and case law establishing custom documenting bodies. However, there are some generally known tribal provisions that I will analyze here by way of example.<sup>192</sup> Provisions establishing such bodies tend to be found in tribal judicial codes. These bodies are often given a dual mandate. First, they are mandated to document custom in topical areas designated by the tribal legislature.<sup>193</sup> The preferred form of documentation may take the form of a simple written “journal,” or the high-tech “searchable video archive.”<sup>194</sup> Alternatives in between might include audio and video tapes and written transcripts. Second, these bodies are mandated to work with tribal courts, either in a general advising capacity,<sup>195</sup> or as a decisional body given questions of custom where the parties either agree to submit questions<sup>196</sup> or where a tribal judge certifies a question on her own.<sup>197</sup>

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192. See, e.g., WHITE MOUNTAIN APACHE JUDICIAL CODE § 2.3 (1998), available at [http://www.tribalresourcecenter.org/ccfolder/white\\_mtn\\_apache\\_judicial.htm](http://www.tribalresourcecenter.org/ccfolder/white_mtn_apache_judicial.htm). Compare *id.* with HOOPA VALLEY TRIBAL CODE § 2.1.03 (2005), available at <http://www.narf.org/nill/Codes/hoopacode/t2civil.htm>.

193. See, e.g., NATIVE VILLAGE OF BARROW JUDICIAL CODE § 3-7(E) (“The Elders Council shall engage in ongoing documentation of custom in the following areas and in any other areas deemed necessary and funded by Tribal Council: 1. How boys and girls are raised; 2. How property is distributed, transferred, and inherited; and 3. Roles and duties in marriage . . . .”); see also WHITE MOUNTAIN APACHE JUDICIAL CODE § 2.3(A) (“In order that the ancient wisdom, teachings and ways of the White Mountain Apache people may live on and continue to guide the people in their daily lives, there shall be established an Apache Custom Advisory Panel, whose functions it shall be: (1) To meet at the call of, and under the direction of, the Tribal Council to discuss and record in a Journal their knowledge of the custom of the White Mountain Apache people.”).

194. See, e.g., NATIVE VILLAGE OF BARROW JUDICIAL CODE § 3-7(E) (“This documentation shall be preserved in a searchable video archive, where possible and funded by Tribal Council, or on audio tapes and video tapes, and in written transcripts.”); see also WHITE MOUNTAIN APACHE JUDICIAL CODE § 2.3(A) (establishing the Apache Custom Advisory Panel and mandating that it meet to discuss and record its discussions in a journal).

195. See, e.g., WHITE MOUNTAIN APACHE JUDICIAL CODE § 2.3(A) (“[T]here shall be established an Apache Custom Advisory Panel, whose functions it shall be . . . (2) To be available to the Tribal Court as advisors in matters of tribal custom.”).

196. See, e.g., *id.* § 2.3(C)(1) (“If in a particular case there arises a question of custom which has not been addressed in the Journal of the Apache Custom Advisory Panel, the parties may, if they so choose, agree to the appointment of any three members of the Apache Custom Advisory Panel to hear the facts of the case and decide the question.”).

197. See, e.g., NATIVE VILLAGE OF BARROW JUDICIAL CODE § 3-5(E) (“If the judge cannot take judicial notice of custom or tradition or if a question or dispute arises as to the existence

Tribal legislatures vary in the weight and precedential effect they give to custom found by such a body. In some cases, where the parties agree, the body is empowered to decide the whole case, questions of custom and disputed fact included.<sup>198</sup> But in other cases, it appears that the body is empowered only to find and/or decide specific questions concerning custom, which will then be applied as law, if deemed relevant, by the tribal judge in tribal court.<sup>199</sup> Some tribal legislatures have limited the precedential effect of the custom law decisions of such bodies.<sup>200</sup> Others rely on the precedential effect of the tribal court opinions where they incorporate such body's decision or recommendations concerning custom.<sup>201</sup> In the latter case, the judge is likely to modify or even "spin" the characterization or application of custom somewhat to be consistent with the limited powers and remedies of the court. This is a policymaking activity.

While I feel the urge to comment on the pros and cons of these various approaches, I am hesitant to do so absent a review of the tribal court opinions applying such provisions. Tribal statutory schemes can be like tailored suits — a good fit for the particular governmental and cultural shape and appearing in many different styles and sizes. I will say that the successful operation of custom documenting bodies depends upon adequate levels of funding that are consistently maintained. Also, budgets should provide for the funding of technical support staff to do the actual taping, writing, archiving, and records maintenance — lest we work our elders half to death with the bureaucratic burdens of their mandate.

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or substance of custom or tradition, the court shall certify that question to the Elder's Council.").

198. *See, e.g.*, HOOPA VALLEY TRIBAL CODE § 2.1.03(a) ("The parties . . . must agree to abide by the decision rendered by the person or persons that they determine to be the traditional finder or finders of law and fact.")

199. *See, e.g.*, NATIVE VILLAGE OF BARROW JUDICIAL CODE § 3-7(A) ("The Elders Council shall decide [questions about custom] only when certified to them by a Tribal Court judge . . . Questions about customs or traditions shall be reviewed by the Elders Council de novo. The Elders Council shall not decide questions of fact or relevancy . . . ."); *see also* WHITE MOUNTAIN APACHE JUDICIAL CODE § 2.3 C.(1) ("[T]he Court shall apply the custom as determined by the [Apache Custom Advisory] Panel.").

200. *See also* WHITE MOUNTAIN APACHE JUDICIAL CODE § 2.3(C)(2) ("The decision of the Apache Custom Advisory Panel members on a particular question of custom in an individual case shall not be determinative of any case other than the one for which the determination was made . . . .").

201. *See, e.g.*, NATIVE VILLAGE OF BARROW JUDICIAL CODE § 3-7 ("A decision of the Elders Council shall not be binding precedent until it is incorporated into an opinion of the Tribal Court.").



*B. Problems and Solutions for Working with Outside Experts and Studies*

This is one of those areas where it may be helpful to borrow from, and modify, Western law, particularly rules of evidence. A number of tribes authorize their courts to consider outside expert testimony and studies in identifying applicable custom law, sometimes giving the same or greater weight to these sources than to customs found by elders or culture-bearers. As can be seen from the first half of this article, reliable outside studies are extremely useful. The problem for judges is discerning the difference between romantic, racist, or simply erroneous characterizations based upon mere opinion or fantasy, and field work, documentation, analysis, and conclusions based upon reliable methodologies. I would also reiterate that outside studies must focus on the appropriate legal level to be relevant and applicable. For example, characterizations about Indians in general or Hopis in general may be imprecise in a particular case and should not necessarily be relied upon to frame applicable custom law.

A good starting point would be to look at the Federal Rules of Evidence provisions governing professional expert witnesses and expert publications (most state evidence rules are based on the federal rules). It would also be instructive to look at comparative tribal imports and modifications of these same provisions and how they have been applied in real cases.

*C. Problems and Solutions for the Pleading and Proving of Custom*

Many tribes today statutorily mandate the application of custom by tribal courts, generally absent applicable tribal constitutional and statutory provisions and applicable tribal common law.<sup>202</sup> Over the years there has been a good deal of finger pointing between tribal judges, attorneys, advocates, parties, and even elders and culture-bearers over who is ultimately responsible for researching (or knowing) and formally raising questions of custom in tribal court. Tribal judges in the early days argued that they could only address the issues raised by the parties in their written pleadings or in their oral arguments before the court. If a party hired a nonmember attorney or advocate to speak for them in court and that person did not know or understand the local ways,

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202. See, e.g., *id.* 3-11(A) ("The Tribal Court, in deciding matters of both substance and procedure, in cases otherwise properly before the Tribal Court, shall look to and give weight as precedent to the following mandatory authorities in the following order: 1. The Constitution and Bylaws of the NVB Tribe; 2. Agreements with other tribes entered into by the NVB Tribal Council; 3. Statutes of the NVB Tribe; 4. Resolutions of the NVB Tribe; 5. Common law of the NVB Tribal Court; and 6. Custom of the NVB Tribe.").

the party was simply out of luck because the tribal judge was not going to notice custom for them. To be fair to the judges, in the early days, many of them were nonmembers who could not be expected to know or understand local customs.

Today, with the advent of revised codes, rules and further developed case law, many tribes now require the judge to notice relevant, generally known custom.<sup>203</sup> Additionally, a growing number of tribes have provisions or rules setting out attorney and advocate responsibilities for the pleading and proving the applicability of custom.<sup>204</sup> Nevertheless there remain some significant concerns. Primarily, who will pay the attorney or advocate to do the extra work? In the Western system the parties pay. This is troubling, as it has been my experience that it is usually the more traditional parties, particularly elders, that need or want to assert the relevance of custom. They are usually the parties least likely to be able to afford attorneys fees. The problem is a structural one. Our tribal governments by default have put the financial burden on our elders to find and plead custom. Where are our institutionally mandated self-studies? Where are our custom law treatises or archives? Where are our tribal bar study materials and exams requiring attorneys and advocates to have some basic knowledge of our custom law? Tribal leaders, and particularly tribal legislatures, need to give serious attention to shifting the financial burden off of our more traditional and elder parties and onto government where it belongs.

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203. See, e.g., NAVAJO R. EVID. 5 (available at NAVAJO NATION CODE tit. 7, § 204(a) (2005)), cited in *Dawes v. Yazzie*, No. A-CV-01-85 (Navajo Sup. Ct. July 10, 1987) (requiring the court to take judicial notice of Navajo traditional law if it is generally known within the community - and famously restated in tribal law circles as "those facts every damn fool knows"); see also NATIVE VILLAGE OF BARROW JUDICIAL CODE § 3-5(C) ("The court may take judicial notice of Inupiat custom or tradition only if the court finds the custom or tradition to be generally known and accepted within the NVB Tribal community.").

204. See, e.g., *Hopi Indian Credit Ass'n v. Thomas*, No. AP-001-84 (Hopi App. Ct. Mar. 29, 1996), available at <http://www.tribal-institute.org/opinions/1996.NAHT.0000007.htm> ("A party who intends to raise an issue of unwritten custom, tradition or culture shall give notice to the other party and the court through its pleadings or other reasonable notice. The intent of this notice is to prevent unfair surprise . . . . The proponent of Hopi customs, traditions and culture must then (1) plead them to the court with sufficient evidence so as to establish the existence of such a custom, tradition or culture and then (2) show that the recognized custom, tradition or culture is relevant to the issue before the court. The relevancy of Hopi custom, tradition or culture as to any legal matter should not be presumed.") (citations omitted).

*D. Problems and Solutions and Tribal Court Hearings to Find Custom*

Assuming that custom is pled by a party and can't be noticed by a tribal judge, there needs to be special rules for holding hearings to find it. Three aspects of Western court process are likely to undermine custom law finding goals. First, the evidence rules governing expert witness testimony are designed for scientific expert testimony and will need to be modified to recognize the expertise of local culture-bearers and elders, except in those cases where it is being applied to outside experts. Second, in the Western adversarial process, parties and their attorneys generally select their own witnesses and the attorneys pose the questions to those witnesses. In a purely adversarial process attorneys prioritize winning their case over accurately identifying and applying custom. They are likely to select traditional experts who will favor their client's positions. Consequently witness selection and the questions to be asked of them will require more judicial supervision if there is a commitment to accurately characterizing relevant custom. Third, court rules of civil and criminal procedure permit aggressive questioning by attorneys of expert witnesses. This discourages traditional experts from participating in the custom law-finding hearings. There is a need to modify the rules for questioning expert witness to balance encouraging knowledgeable testimony on relevant customs with the right of the parties to challenge the reliability of the testimony and applicability of the custom.

Some tribes follow a Western approach and allow for party selected witness, subject to preliminary questioning and challenge for lack of knowledge by the other party.<sup>205</sup> Other tribes require judicial approval of the witnesses selected by the parties.<sup>206</sup> In both situations, there are concerns with

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205. See, e.g., HOOPA VALLEY TRIBAL CODE § 2.1.04(c)(2)(A) (“[E]ach party shall be allowed to call their own expert witnesses. The Court will determine how many expert witnesses each party may call to testify except that each party shall be allowed to call the same number of expert witnesses.”); see also *id.* 2.1.04(c)(2)(B) (“Each party shall submit a list of Tribal elder’s names that they wish to call as expert witnesses. The opposing party will have the right to voir dire the witnesses to determine if they are, in fact, knowledgeable of traditional tribal law.”).

206. See, e.g., *In re Komaquaptewa*, No. 01AP000013, at ¶ 74, n.16 (Hopi App. Ct. Aug. 16, 2002), available at <http://www.tribalresourcecenter.org/opinions/opfolder/2002.NAHT.0000002.htm> (“The Court should notice the village and the parties as to the hearing and its purpose, offer guidance as to the kinds of witnesses it seeks, and explain in detail the narrow purpose of a fact-finding hearing to find customary law. Depending on the specific law sought, the judge should try to provide guidance to the Village and the parties for choosing their witnesses. The parties and the Village should then submit a list of potential witnesses along with explanations of the reason for their inclusion on the list, and the type of testimony they can

hearing from traditional experts who will focus on defining relevant customs and not testifying on the facts of the case. At least two tribes actively seek “neutral” experts.<sup>207</sup> With respect to the questions, some tribes allow the parties to initially frame the questions to be asked but authorize the judge to approve the final list of questions to be asked.<sup>208</sup> Other tribes give more control to the judge by authorizing him to draft initial lists of questions, get party feedback, and then to approve the final list of questions.<sup>209</sup>

Finally, considerations of fairness to the parties will require the holding of multiple hearings, typically three or more including: (1) the initial hearing on the disputed facts; (2) the custom finding hearing(s) where the judge hears from the traditional experts and the outside experts; and (3) the fact-finding hearing where the judge applies the custom law to the facts in dispute. The last hearing is critical to ensuring a fair process as it gives the parties a chance

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offer. Although the trial judge should give deference to the village’s selection of witnesses, the judge should exercise discretion in approving the final list.”).

207. In the case of *Smith v. James*, No. 98AP000011, (Hopi App. Ct., 1999), the Hopi Appellate Court directed the trial court to obtain a list of potential traditional expert witnesses from the village where the dispute arose, in addition to party selected traditional expert witnesses. See also HOOPA VALLEY TRIBAL CODE § 2.1.04(c)(2)(A)(C) (“Each party shall also submit to the Court a list of Tribal member’s names that the parties believe to be neutral and impartial, and knowledgeable of traditional tribal law. The Court shall select from the submitted list names of individuals to act as expert witnesses for the Court.”); *id.* § 2.1.04(c)(3) (“The Court may, but is not required to, accept recommendations of the parties before determining the neutral and impartial expert witnesses that will testify before the Court. The Court will determine how many neutral and impartial witnesses may testify except that the number will not exceed the number of witnesses that each party will be allowed to call as expert witnesses. The parties will have the right to Voir Dire the witnesses to determine if they are, in fact, knowledgeable of traditional Tribal Law.”).

208. See, e.g., HOOPA VALLEY TRIBAL CODE § 2.1.04(d) (“After the expert witnesses have been determined, the parties will submit to each other and the Court a list of questions to be asked of each of the witnesses. A party may object to any question submitted by an opposing party. The Court will then determine which questions will be asked of each of the expert witnesses. The Court shall have the discretion to ask its own questions of the expert witnesses.”).

209. See, e.g., *Komaquaptewa*, No. 01AP000013, ¶ 74, n.16 (“Once the witness list has been assembled, the judge should present an initial list of proposed questions to the parties and permit them to offer suggestions. The judge should be responsible for framing this list because this will ensure that questions do not seek to establish matters, but instead seek to discern general principles of village practice. Answers given in the initial testimony, however, will invariably raise new questions. Therefore, in future hearings the parties should be afforded another opportunity to provide additional questions in response to testimony. The judge can then immediately return and ask these questions of the witnesses. Such a procedure will help eliminate potential gaps in the law.”).

to make arguments and present evidence after they know what the applicable custom law standard will be.<sup>210</sup>

Again, this is an expensive process for the parties. Clearly members would benefit greatly from having the option to avoid litigation and to use traditional or alternative dispute resolution processes such as peacemaking. However, it is important to stress here that larger tribes are likely to require both adjudicative and relationship-righting processes. Modern life has changed member needs and expectations, causing them to forum shop — to seek a decision in whatever process that will let them win. Many of us have witnessed what happens in tribes where there is no tribal court or where the only available dispute resolution forum is traditional or alternative. Tribal members will run to state and federal courts to have their matters handled. Zuni's admonition applies here. Do we want to have some control over the way our people's disputes are handled and the laws, principles, and values that will be applied to them or are we content to sit back and let change happen to us? If we seek to control the direction of our future we will need to adopt or amend court rules and rules of evidence accordingly.

### *Conclusions*

The discussion of key concepts and the highlighted tribal provisions and rules dealing with custom in this article are my attempt to focus the attention of tribal leaders, judges, professionals, and academics inward. We now have the education and expertise among us to reform our institutions and laws to fit who we are and what we need. We should expect more from our governments, including reasoned policymaking, targeted funding, and a commitment to be accountable to the tribal public. The average American expects no less from state and federal government. The process of reform will generate important questions about the nature of law in general and the definition of, and reinforcement of, applicable customs in particular. These questions will need to be debated internally on an ongoing basis. At different points in time consensus or compromise will happen. It is hoped that the theoretical and analytical tools outlined here will assist with this process.

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210. For an illustration of this problem, see *Smith v. James*, No. 98AP000011 (Hopi App. Ct., 1999). This is the appeal of *James v. Smith*, No. CIV-019-94 (Hopi Tribal Ct. Apr. 17, 1998), described in the first half of this article, where the Hopi Appellate (Supreme) Court vacated and remanded the trial court order with instructions to hold a new customary law hearing and trial, specifically giving the parties the opportunity to make new arguments and proofs after the applicable custom law principles were discerned and put in writing by the trial judge.

APPENDIX A

SAMPLE DISCUSSION OUTLINE FOR WORKING WITH CUSTOM LAW FINDING COMMITTEES

I. How do we recognize and incorporate “custom”?

A. What terms and definitions should we use when working with “custom”?

*“Social Norm” vs. “Legal Norm”*

*“Tradition” vs. “Current Practice”*

*“Traditional Authority” vs. “Modern Secular Authority”*

*“Traditional Legal Levels” & “Secular Legal Levels”*

*“Policymaking”*

1. “Social Norm” vs. “Legal Norm”

“Social Norm” – A felt standard of proper behavior

“Legal Norm” – A felt standard of proper behavior backed by official recognition or sanction

Identify a social norm in your community. What is something that everyone says you should or shouldn’t do?

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Identify an unwritten legal norm in your community. What is something that everyone says you should or shouldn't do? What happens to you if you do or omit to do this thing?

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2. "Tradition" vs. "Current Practice"

"Tradition" – Old values or ways of doing things

"Current Practice" – Current, generally accepted ways of doing things

Identify a tradition in your community. What is the old way of doing things? How have things changed? Is there a different current practice for this tradition now?

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3. "Traditional Authority" vs. "Modern Secular Authority"

"Traditional Authority" – The old offices or respected leaders

"Modern Secular Authority" – Constitutionally or statutorily recognized leaders or other leaders elected or appointed by the community

Identify several traditional authorities in your community:

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Identify several tribal secular leaders:

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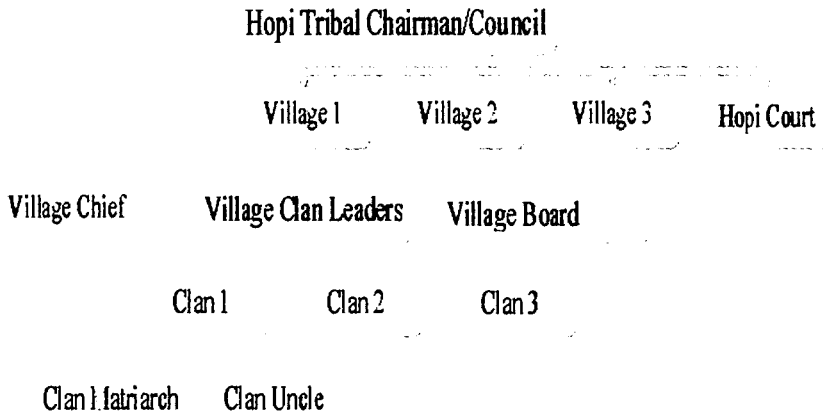


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4. "Traditional Legal Levels" & "Secular Legal Levels"

"Legal Levels" – Legal norms vary within different, traditional and secular legal levels, i.e., the custom law may be different for different villages, clans, bands, etc., within one tribe. The written tribal law (constitution, codes, resolutions, tribal court opinions and orders) may also deal differently with people from different villages, clans, bands, etc.

Example: The Hopi Tribe in Arizona





Identify your community's traditional and secular legal levels. Identify a norm that may be different from one place to the next. Is there written tribal law that recognizes different norms/rules for different groups?

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### 5. "Policymaking," Custom, & Tradition

"Policymaking" – When you formalize custom in your written tribal law (constitution, code, or tribal court opinion), you are engaging in policymaking – that is picking and choosing bits of custom and putting them in your modern written tribal law – for a good reason.

#### *Custom or Tradition*

#### *Tribal Policy*

Mother's Sister = Mother

Mother's Sister has a right to notice of involuntary dependency hearings regarding her sister's children

Can you think of an example where your tribe has done this?

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