The Reemergence of Tribal Society and Traditional Justice Systems

In their efforts to establish tribal culture, Indian tribes are relying on the restoration of traditional forms of adjudication.

by Carey N. Vicenti

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For many years now, I have been very close in friendship to my medicine man. When we see each other on the streets we will often wave. On occasion he has come to me for my advice. During one of our cordial discussions, he complemented me on my wisdom, my patience, and my perseverance. He then pointed out to me that our roles within our society were very much the same, except that he dealt with the good side and I dealt with the bad side.

What I did, as a judge within our tribal court system, was never characterized to me in that manner. And for several days, I had to sort through my metaphysics in order to live-in a good way with his esteemed observation. I am sure that, to him, there is a kinship regarding our stature within our tribal society; as well, he must have noticed that both of us perform functions of ceremony, consultation, and curing. And because of my knowledge of the man, I am without doubt that his observation was not intended as a criticism, nor to vex me with some existential curse.

The medicine man was making a simple observation as to how we Jicarilla Apache people are. He described his role. Then he described my role. One might say that he made a karmic observation.

Whenever a person makes reference to good and bad in American society, one assumes a basic dichotomy or conflict. This was not what my medicine man intended. The medicine man merely pointed out that I have been charged by my destiny to perform those ceremonies, consultations, and cures in order to overcome the bad side of people's lives. It is my place in Jicarilla Apache society. And, as is often the case, I then send the individual to the medicine man in order for the medicine man to bless or baptize the individual towards complete cure of the calamity which has befallen him. We work together. For us, the rectification-or, if you prefer, the adjudication-of a problem spans a broad continuum from bad to good, and as good is accomplished, so too is the full restoration of the individual. While, on occasion, during the handling of problems within a court setting, the court may embark upon a determination of the mens rea of an individual, such a determination has limited usefulness and we must then return to our concern for the fate of the individual and the restoration of his spirit.

When Americans and Indians talk about "culture," they mean two different things. To the Native American, culture is pervasive, encircling, all-inclusive. To the mainstream American, culture consists of an elective identity added to the essential American character.
It is not surprising, therefore, that in American society the question of justice is relegated to one institution, and all other things are left to a marketplace of religion and culture that prospers or fails depending upon how individuals choose to exercise the liberty given to them under American law. By stark contrast, the Indian concept of the human being is one in which all aspects of the person and his or her society are integrated. Every action in daily life is read to have meaning and implication to the individual and guides how he or she interacts with tribal society or fulfills obligations imposed by society, law, and religion.

This helps explain why tribal courts do and should differ substantially from courts of the non-Indian world. Mainstream Americans do not consider that the very viability of the systems of tribal governance depend on the degree to which such governments are allowed to develop their institutions free from any outside interference. They assume that culture is a modular element to be merely added to one's life at one's election. Americans do not seem to understand that their system of government, that the institution of the courts and the workings of an adversarial system of justice, all amount to a large portion of American culture. Thus, America, in its attempts to correct what it perceives as a rampant injustice in Indian America, creates a greater injustice by forcing its culture upon Indian peoples.

Against the large tide of American culture that sweeps across Indian America with daily relentlessness, tribal cultures must struggle. Indian tribal culture is in crisis. We no longer possess the cultural objects that may stimulate our collective memory to recall many lost customs, traditions, and values. And yet, every reservation is experiencing the return of educated Indian people who are capable of discerning the invasion of non-Indian values into the Indian world. These new Indians, who have equal footing in both the Indian and the non-Indian world, are capable of articulating the effects America has had on the development of tribal society. Over the past two decades they have been successful in litigating and in gaining passage of federal legislation ultimately to create a wide enough path for the distinct culture in Indian society to re-emerge. For the tribal courts, this means the restoration of traditional forms of adjudication.

The reader will notice that the parts to the rest of this essay appear to have been placed in reverse chronological order, going from "Death" to "Birth." But it could not have been written any other way. It was specifically organized so as to illustrate that not every American presumption has implicit validity. Some peoples have a different frame of reference. I will always be an Apache man advancing the beliefs of my grandfather and his father, and all our predecessors. I am not unlike most other Indians, whether educated or not. I am willing to challenge the ineluctable death of our culture and bring it to a new life. With this essay I hope to take care of one portion of the bad side and I will leave to my medicine man his blessing for the good side.

Death and burial
The tribal court is a relatively new phenomenon in Indian country. It emerged originally out of the need, as perceived by the non-Indian occupants of Indian territory, to prosecute the "bad" Indian. In the early decades, therefore, the institution was inquisitional and was not intended to provide the constitutional safeguards that are now deemed indispensable. In 1934, Congress passed the Indian Reorganization Act, which was intended to loosen the authoritarian grip the federal government exercised over the management of the internal affairs of Indian reservations. The act allowed a tribe to organize under two vastly different forms of government. Under section 16 of the act a tribe could adopt a constitution that governed the newly organized tribe. Under section 17, a tribe could organize a business committee to manage the tribe's affairs. It is important to recognize that many tribes did not take advantage of either section, choosing blindly to accept what the federal law would allow them to do in the future.

After 1934, much of the inquisitional nature of the tribal court was shed, due primarily to the fact that the constitutions adopted by the various tribes provided sufficient guidance to Indian people regarding the administration of law in Indian country. That is not to say that federal control over the internal affairs of tribes had disappeared altogether. Rather, more elusive mechanisms were employed by federal officials to maintain the degree of
control they deemed necessary. It should also be admitted that in many Indian communities the newly appointed judges were incapable of fulfilling the colonial role that existed prior to 1934, so non-Indian officials were occasionally invited in to "advise."

For many years, passage of the Indian Civil Rights Act signaled certain death to tribal society.

By the mid-1960s, however, the influence of the federal government in the internal affairs of tribes had waned substantially.

As Indians gained greater control over their internal affairs, corruption also crept in. Tribal courts were occasionally manipulated by politically elected leadership. It having been determined that the federal constitution was not applicable to Indian tribes, the tribes freely adjudicated cases without concern for the emerging civil rights expectations of Indian people.

In the mid-1960s Congress recognized that federal Indian law did not require constitutional rights to be afforded to people subject to the powers of tribal government. In an era when civil rights were prominently in the foreground of American politics, such omission was considered to be irreconcilable with the mood of the times. Therefore, in 1968 Congress passed the Indian Civil Rights Act. Under its terms, a list of civil rights, roughly reflecting the Bill of Rights, was imposed upon every tribal government.

Passage of the Indian Civil Rights Act was accomplished over the opposition of many Indian tribes. The relationship between the individual and his or her society was considered by many tribes to be their exclusive prerogative. By legislating civil rights upon Indian country, Congress inserted a portion of American culture into Indian society and attempted to supplant tribal culture, imposing a new order within tribal society that elevated the interests of the individual well above that of the family, the clan, the band, or the entire tribe. For many this signaled certain death to tribal society.

But tribal culture received a reprieve in 1978. In Santa Clara v. Martinez the Supreme Court made it clear that although Congress had the prerogative through its plenary powers to impose a system of civil rights protection upon Indian country, it was nonetheless left to the Indian tribes themselves, through their judicial tribunals, to interpret how these concepts should be applied. The very narrow holding of Martinez was that the federal court was without jurisdiction to hear an alleged civil rights violation given that the only statutory relief into the federal forum was by a writ of habeas corpus. A claimant must therefore be in custody—suggesting that review within the federal court system was available only in criminal cases.

The Martinez decision was sufficient to place a makeshift wall between American culture and the cultures of the various tribes. The intrusion of civil rights philosophy into Indian society, and the commensurate elevation of the status of the individual, were postponed. Many Indian tribes took this opening as an opportunity to return to practices that had evolved since the initial establishment of the inquisitional form of court in the late 1800s. Other tribes took the opportunity to reinstate traditional practices of problem solving. This renaissance of traditional adjudication practices was reinforced by the growing dissatisfaction with Western legal process as a whole. American courts have been experimenting with alternate dispute resolution in its many Western forms, thus validating, in part, the restoration of traditional Indian practice.

In the early 1990s many tribal judges and tribal leaders sought additional funding from Congress. After 212 years, Congress passed the Indian Tribal Justice Act, which was signed into law on December 3, 1993. Although it authorized up to $58 million to reinforce the functioning of tribal courts, to this day the act remains unimplemented and unfunded.

Preparation for death
The brief history outlined above does not fully explain the evolving tribal court. It is hard for many Indian people to believe that the Indian Civil Rights Act did not bring the demise of traditional values and practice.
American society did not realize the genuine sadness felt by traditional Indian people as their way of life became slowly dismantled.

Over the past two decades we have sent young tribal members off to schools and colleges to become educated and gain expertise about the western world. After the return of the first waves of educated Indians, we experienced a brief era of acculturation during which time we accepted the apparent necessity of adopting written laws and refining our western-style institutions of adjudication. But, in our growing sophistication, and as a new wave of educated tribal members returned home questioning the values which we had previously uncritically imported, we now perceive our rights to culture as being part of a larger global more.

The real battle for the preservation of traditional ways of life will be fought for the bold promontory of guiding human values. It is in that battle that tribal courts will become indispensable. It is in the tribal court that the competing concepts regarding social order, and the place of the individual within the family, the clan, the band, and the tribe, will be decided. It has been clear to tribal court judges for the past several decades that the expectations of the litigants in the tribal forum have not wholeheartedly favored an open adoption of American justice values.

Tribal courts will become indispensable in the battle for preservation of Indian traditions.

But in order to fulfill the expectations of the tribal litigant, the courts have found it absolutely necessary to consult tribal custom and traditions and incorporate these values into American-style legal systems.

In the past 50 years, since the passage of the Indian Reorganization Act, Indian country has greatly diversified. Perhaps it would have been possible 200 years ago to give a finite number to all the various settled forms of justice systems existing in North America. Today we can point to more than 535 federally recognized Indian tribes. This does not necessarily mean there are that many different legal systems. Rather, there are more than 535 potentially identifiable discreet systems of adjudication, each of which must account for cultures in their midst that are in volatile transition.

Many contemporary popular movements now operate in Indian country, affecting the development of the tribal courts. For instance, many tribal societies are being affected by the forces of evangelical Christianity. Other communities have seized upon the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act, and the American Indian Religious Freedom Act to assist in the assertion of traditional cultural rights. Those within Indian country are becoming vastly diversified compared to what may have been a more homogenous population 50 years ago. To a lesser degree, but not entirely absent as influences upon Indian society, are the global changes involving the fine tuning of human rights and the global trend toward regional and ethnic independence. Indian people also aspire to greater independence in spite of their long history as Americans.

Given the forces affecting tribal societies, the question must arise as to whether tribal courts can find stability within their own systems of governance, and if so, to what extent will Western notions of justice or traditional Indian notions of justice become prevalent.

Maturity
Before contact with non-Indians ever occurred, every tribe had its own institution for resolving problems. A "court," in many cases, never really existed. But among Indian peoples murders did occur, property was stolen, adultery was committed, and other transgressions against the social order occurred. We Apaches had a context against which the transgression could be read, interpreted, and resolved. We did not centralize all of our remedial powers into one institution. Rather, we would involve different elements of our society—the chief, the warrior societies, the families, the clan, the medicine man, and so on—in the resolution of the problem. Laws were not made by an institution such as a legislative body but by the normative power of the entire society. Each individual knew what was prohibited, where the prohibition came from, who would be empowered to decide
corrective action, who would administer corrective action, and what the
corrective action would be.

Expectations of justice were entirely different. For instance, among the
Apaches the telling of truth is extremely important. It was not because
truthfulness had achieved such a high virtue in our society. Instead, we
view our reputations as being the most important of personal possessions.
Thus, if a person told a lie, the person would fall into disrepute as a liar. The
implications of such values in current legal process have been that few
criminal cases are contested. A person who has committed a wrong freely
confesses it. To a certain degree, the requirement that government prove
guilt beyond a reasonable doubt legitimizes deception. Therefore, a
defendant's rights are not necessarily perceived by Indian culture as
something good.

Apaches rarely seek compensation for injuries. This is because we come to
view injuries as defining moments. A person who loses an eye loses an eye
for a reason—in some way to define himself. It is a teleological view of
human experience. For the most part, this view disposes of all injuries that
occur by mere and gross negligence. Traditionally, if an intentional harm
occurred, the offender would "own up" to the offense and make a
restitutional gesture to the victim. An individual who confessed to having
committed an offense could thus protect his or her good reputation.

In American society, restitution constitutes a very admirable traditional
Indian practice. But our Apache restitutional gesture has little to do with
economic value. The item or items used to provide restitution are symbolic
of the remorse shown by the perpetrator. In the act of offering restitution,
there is a transfer of power from the perpetrator to the victim. In offering
restitution the perpetrator demonstrates the degree of remorse for having
committed the intentional harm. The victim, after witnessing the gesture,
has the power to determine whether the remorse was genuine. That
determination depends on the degree to which the item or items involved in
the restitutional gesture constitute a harm or loss to the perpetrator. If the
offered restitution is without remorse, the victim can reject the restitution,
and, thereafter, the perpetrator is disreputed until he or she comes forward
with true remorse.

For certain problems there were certain known institutions that resolved
those problems. One would not take a problem of one character to an
institution that was not charged by tradition to solve those kinds of
problems. And because we Apaches had placed such a high value upon our
reputations, truthfulness was not a problem.

The Apache concept of restitution involves a
demonstration of remorse by the perpetrator.

Therefore, our institutions were not designed, as in American society, to
discover the truth. Our institutions focused more upon determining the
manner in which a transgression against social order would be remediated.
As a result, in the development of the contemporary Apache courts, we
have had a great deal of trouble developing a fine-tuned sense of legal
process and a philosophy regarding evidence and burdens of proof and
production. But our powers of remediation appear to go well beyond those
employed by the Western world.

In our traditional society capital punishment consisted of exile. I know of no
instances where death was ordered. "Shame" was our principal instrument
of punishment (although "punishment" may not be an appropriate
designation for the principle behind the corrective action). For the offense of
adultery, a person had his or her nose sliced. (Adultery was considered an
offense from which no person could recover and whose disrepute could
show obviously on the perpetrator's face.) In the Apache concept of
transgression, we do not necessarily assign to a person a degree of intent,
be it mere negligence, gross negligence, spur of the moment intent, or
intention backed by planning. Each individual may take actions resulting in
the transgression of tribal norms or mores because of badness that is
operating within his or her life. That badness can be, and often is, a
badness of heart—what Westerners might call sociopathic behavior—but the
badness also may be explained by religious or spiritual reasons that have
caused the state of heart, or by medical reasons that have caused
temporary or periodic changes of behavior. So, in fashioning a remedy,
much more attention has been placed upon determining other facts about
the individual that can illuminate the metaphysical exploration of the
individual undertaken by traditional participants.

The Apache remediator knows quite well that part of the remedy is in
performing the exploration. Family members and friends may be brought in
to discuss the changing world of the individual. We may explore everything
from what he or she eats to which direction he or she faces when going to
sleep at night. We recognize that many of the proscriptions that have been
handed down from generation to generation, although potentially obsolete
or dogmatic, may have their justifications in older times. We cannot
altogether abandon those inherited cautions simply because we have
acculturated to the English language and an American way of life and
cannot fully understand or appreciate the wisdom of our predecessors.

Although restitution, consisting of equivalent economic value, may be an
appropriate remedy under some circumstances, in traditional Apache
society we recognize that dialogue about the transgression may also be the
best remedy as we restore the individual's reputation. Depending on the
nature of the transgression, we may require the restitutional gesture to
involve more than merely a victim but a victim's family, and even the entire
society. We value remorse as a state of mind to be accomplished by a
perpetrator. An act of contrition is often considered necessary to give an
open demonstration to the sense of remorse felt by the perpetrator. But we
consider it essential that the internal and external life of any perpetrator be
examined to determine whether the individual is healthy or whole. And
ultimately, we desire to reintegrate the individual back into tribal society.

What I have described in very simple fashion are the salient points of a
philosophy I consider important to this world. In our society, we see the
importance of accomplishing a state of remorse, in order to humble the
perpetrator, but also to cure the victim. In American society, there is no
remorse. Remorse appears to be left to the victims and their families. A
civil judgment is paid and business goes on; a punishment is meted and the
remorseless criminal ferments his hatred in prison for years. How the
remorselessness and the victimization collectively affect America is
something worthy of exploration.

Youth

In the preceding text I gave what I hoped was sufficient guidance as to the
dynamics which might cause a vast diversification of legal systems
throughout Indian country. Certainly, by force of federal law, many tribes
have had to import non-Indian values into Indian society. Indian people are
influenced on a daily basis to accept western values and to expect legal
process as it is portrayed on television and in the media. At the same time,
many people perceive the early signs of cultural extinction and are fighting
furiously to preserve what little we have of the past.

Indian Justice seeks to reintegrate offenders into tribal
society.

Over the past two decades we have sent young tribal members off to
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As a result of a series of federal laws passed in the last century, and
reflecting the shifting sentiments of America toward Indian people, we also
have further grounds for unique adaptation. Federal law has treated
Oklahoma uniquely thereby placing the tribes of Oklahoma largely without
territory over which to govern, nonetheless distributing Indian people
throughout the state. Public Law 280 deprived Indian tribes in the States of
California, Minnesota, Nebraska, Oregon, and Wisconsin of all criminal jurisdiction except within the Red Lake, Warm Springs, and Menominee reservations. As a result of other provisions of Public Law 280, the States of Arizona, Iowa, Idaho, Montana, North Dakota, South Dakota and Washington assumed a portion of jurisdiction away from Indian tribes. Finally the Alaska Native Claims Settlement Act (ANCSA) established a corporate form of governance for the various regions of Alaska. This system now confuses the efforts of the Alaska natives and the Alaska tribes to organize their own systems of adjudication.

Native American tradition still flourishes in Arizona, New Mexico, Alaska, the Rocky Mountain States and the States of the Northern Plains. This is not to say that there are not communities throughout the United States that maintain a strong tie to the past. The tribes of the Iroquois Confederacy, for instance, have maintained a virtual unbroken tie with the vast complex of values held by their ancestors.

Over the past few years several conferences have brought together many tribes to discuss the emerging movement toward restoration of traditional justice practices. These conferences have also brought in representatives from the Native Hawaiians. In addition, many tribal people have engaged in dialogue within indigenous groups from Central and South America, Polynesia, Papua-New Guinea, and other distant places. Thus, hybridization of tribal justice systems is not only influenced by traditional tribal and American culture, but also by the experiences of other tribes and other indigenous populations.

Among the tribes of the United States, there appear to be five general categories that describe the various developing tribal courts: the American model, the American-traditional hybrid model, the dual model, the traditional model, and the explorative or non-existent model.

The American model essentially follows the lead set by American jurisprudence. These courts generally appear within those tribal governments that have been organized under the Indian Reorganization Act. Under these systems there are distinct separations of powers, and mirror-image adoption of American legal process and jurisprudence. These courts refer to federal and state court decisions in order to formulate and justify the development of their own jurisprudence. Generally, these types of courts serve populations that are largely assimilated or acculturated to an American style of living with a more modular recognition of tribal culture and tradition. Often the courts have evolved in this manner due to the early influence of non-Indians. Either the Indian community found itself in close proximity to populations of non-Indians, individual federal officials exerted a great deal of authority and influence over the development of tribal systems, non-Indian attorneys hired by tribes were given greater freedom to influence the development of tribal legal systems, or Indian tribes employed non-Indians to serve in a judicial capacity during the formative years of the tribal court’s development.

The hybrid American-traditional model far outnumbers all others. These courts fall in two general categories as well: those in proactive development, and those in reactive development. This hybrid group has developed in large part because of the indecision of populations to go with one or another expectation of justice. On the one hand, many tribal populations insist on importing and advancing traditional cultural values into the process of adjudication and urging a greater degree of flexibility and informality within court procedure. But many of the people are also taken by the allure of civil rights and legal process. These hybrid courts serve populations that have a fairly equal mix of traditional native language-speaking people and non-traditional non-native-language speaking people.

The proactive hybrid court is in the minority. Their proactive nature highlights the fact that they are often well-developed, mature courts. The maturity is evidenced by the court’s ability to command substantial attention during the tribal funding process (to gain sufficient annual funding), by having experimented with the use of form orders and petitions, by having experimented with the use of computers (in order to organize dockets and generate necessary court documents), and by consciously examining the incorporation of tradition and custom into the jurisprudence of the tribe. To a degree, the Jicarilla Apache tribal courts fit into this category. The courts
of the Jicarilla Apache tribe, however, have only recently emerged from the reactive category.

The larger portion of hybridized courts are reactive. The designation "reactive" actually portrays the court as reacting to the circumstances around it as it evolves into a hybrid type of institution.

Most tribal courts are between formative and youthful stages of development.

Those forces include interference from elected leadership, lack of funding, public expectations, human resources limitations (most notably education and training), and so on. This category easily encompasses a majority of the courts in the Northern Plains, Oregon, Washington, Idaho, and Arizona. Many of these courts are conscious of the option to select and incorporate traditional justice practices into the jurisprudence of the tribe, but there is an absence of meaningful communication with the executive or legislative bodies to enable the court to justify or gain approval for such incorporation. Many of these tribes are postured to emerge from a reactive to a proactive state. In large part, funding stands as the single greatest obstacle toward change.

It is useful to examine parenthetically the effects of funding on the development of tribal courts. Although the number of law-trained Native Americans has increased substantially since the early 1970s, few Indian attorneys look to careers in the judiciary. In part, this has much to do with the fact that the educational process in law school, particularly in the field of federal Indian law, tends to encourage lawyers to aspire to careers in litigation. (The recent successful history of litigation of Indian issues tends to support that predilection.) Indian lawyers who fail to make it into the larger law firms generally look to Indian Legal Services or to solo practice. Recently, the Department of Justice has begun hiring many Native American attorneys in order to offset a deficit in its ranks. Still, the tribal courts are last in line to be considered for career development. Tribal courts have had to bear a reputation for providing little in the way of salary, and being particularly vulnerable to political forces, they tend to offer only short tenures on the bench. The inadequacy of funding also often means that courts do not have sufficient buildings, staffing, equipment, and supplies to do their work. This would not be a problem if there were other courts to resort to, but in many cases the tribal court has exclusive jurisdiction. Furthermore, tribal courts tend to take on other cases such as election disputes and constitutional challenges that test the validity and stability of tribal government. In the absence of a viable court system, tribal government stands consistently at risk of shutdown or failure.

In the absence of funding the courts can never quite attain the personnel who are competent to adequately justify the place and purpose of the court within the democratic structure of tribal government. This, in turn, undermines the remainder of tribal government. Legislative and executive efforts to reinforce their regulatory initiatives, such as resource development, environmental protection, and fire protection, or to stimulate economic development, always fall short by virtue of this fundamental defect.

The dual model exists where a tribe has chosen to employ a traditional and an American justice system model, but by keeping a clear separation between the two and diverting cases based upon subject matter to the different courts. Predictably, the Western-style court tends to be hybridized. The most notable of this class is the Navajo Nation Court. A brief examination of Navajo case law indicates a regular and methodic reference by the justices of the Navajo Nation Supreme Court to tribal traditions and customs in rendering their decisions. Navajo Nation has what appears to be an American model court, but the jurisprudence relies heavily on Navajo tradition and custom. Many domestic relations type of cases are funneled to the Peacemaker Court, which incorporates Navajo religion into the problem-solving process. Increasingly, business-related cases are being submitted to the Peacemaker Court for solutions. The Peacemaker Court best represents traditional adjudication-healing practice. Nonetheless, it was pushed aside by federal authorities in favor of the American model. Eventually, under proactive judicial leadership the Peacemaker Court was re-established.
(although it was never truly gone). Many Pueblo courts have two court systems as well. The Pueblos have been highly successful at preserving traditional practice, but, nonetheless, they have found it necessary to create an American model court to handle an increasing number of commercial claims.

The traditional model court has become rare. Several Pueblos adjudicate transgressions and solve problems in accordance with age-old practices. Many do not allow non-Indian practitioners to participate in the deliberative process. This restriction has brought much criticism and very little sympathy.

Of the last category, the explorative and the non-existent, there are several important observations. A majority of the Indian tribes and Alaskan Native villages do not have formal recognized systems of justice. This is not to suggest that these different communities do not have some means of adjudicating transgressions or of problem-solving. Rather, these adjudicative institutions generally are not recognized by the organic or positive laws of the tribes. With the passage of the Indian Tribal Justice Act in 1993, many of these tribes were encouraged to explore creation of a court system. Irrespective of the jurisdictional limitations placed upon any of the tribes by either Public Law 280 or the Alaskan Native Claims Settlement Act, it is clear that the tribes have inherent authority to adjudicate matters touching upon the organization of the family and tribal society. Therefore, the issues involving domestic relations and political organization are within their jurisdictional reach.

By this brief and rather rough generalization, it should be clear that most tribal courts are somewhat between formative and youthful stages of development. Few tribes have reached a level of maturity where they can meaningfully make choices between traditional practice and American legal process. We should all admit, though, that the development of the tribal courts has been significant in light of the fact that most of these courts began earnestly under Indian control in the 1950s and 1960s. American jurisprudence, by contrast, has had more than 200 years to develop.

Birth

Whether tribes adopt traditional cultural practices in the long run is not without impact upon the rest of America. Because tribes are exploring variations on American jurisprudence, they are potentially small laboratories that can test new directions for American jurisprudence. On a more tangible level, because the Supreme Court, in the 1980s, took up the cases of National Farmers Union Insurance Companies v. Crow Tribe, and Iowa Mutual Insurance v. LaPlante, federal courts (and to some extent state courts), may be forced to examine the workings of the tribal courts. These two cases, though not confirming the civil jurisdiction of tribal courts over non-Indians, nonetheless require federal courts to stay their hands until non-Indian litigants have exhausted their remedies within the tribal court system. If traditional practice is incorporated into the tribal system to such an extent that it does affect commercial transactions with non-Indians or domestic relations concerning non-Indians, the federal courts may be in a position to place tribal courts under a microscope.

Previously these types of cases may have resulted in one form of balancing test or other, which may have sorted out the legitimate governmental interests of the tribe as compared to those interests and rights possessed by the individual. But this type of cross-cultural scrutiny gives abundant opportunity to the federal judge to engage in a dangerous exercise of ethnocentrism, ignoring the history surrounding the development of the particular court, the cultural forces that have shaped the jurisprudence of the tribe, the stage of development the court may be in, the resource deficit the tribal court may have suffered in its development, and the effects the rights of a non-Indian individual may have upon the human rights possessed by a collective of individuals who have lived here for centuries.

The Iowa Mutual case made reference to the principle of comity. When comity is brought forth as a measure between sovereigns, the courts abandon inquiries into jurisdiction or authority. The courts determine whether good relations between the sovereigns may outweigh any other interests. An enlightened federal court will surely perceive that with every Indian case appealed into the federal district court through the avenues
created by National Farmers Union and Iowa Mutual, the notion of comity can be further refined. In the alternative, federal judges are likely to be faced with a difficult question as to what weight they must give to a tribe’s need and desire to remain independent and unique. Federal courts will have to determine whether or not they are justified to criticize a tribal system where the tribe chooses consciously to avoid written laws, a written record, and other legal positivistic notions. Federal courts will have to develop a standard by which they can cross-culturally measure the validity of tribal process and of Indian expectations of justice. The challenge is whether or not federal and state courts, the American public, and Congress are willing to allow for the birth of a new respect between Indians and non-Indians.

Footnotes
9. Act of Aug. 15, 1953, Ch. 505, 67 Stat. 588-90. Alaska was added to the list of Public Law 280 states by the Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545, as it was admitted to the Union.
10. The Native Hawaiians have been consistently omitted from the operation of federal laws which pertain to Native Americans. Native Hawaiians are Native Americans but, like Alaska Natives, have been pigeonholed into a separate category as suits federal, state, and private interests. Native Hawaiians have been successful in creating a diversion from state prosecution into the traditional process of Ho'oponopono.
14. Iowa Mutual interpreting National Farmers Union said that "considerations of comity" underly the rule of exhaustion of tribal remedies. 480 U.S. 15. The deference prescribed in Iowa Mutual suggests that comity considers the extent to which Federal Court action would "[impair] the [tribe's] authority over reservation affairs" 480 U.S. 16, or "infringe] upon tribal lawmakersing authority."