

## TRIBAL JUSTICE SYSTEMS

Formal tribal justice systems, and especially tribal courts, are relatively new phenomena in Indian country. Indian people have always dealt with antisocial, criminal behavior in accordance with the needs of their communities, and the imposition—and adaptation—of formal tribal courts has all but supplanted customary and traditional justice.

This chapter examines the origins and development of tribal justice systems. It is fair to say that formal justice systems in Indian country are not, for the most part, indigenous to Indian communities. Beginning in the late nineteenth century, the United States federalized criminal law enforcement in Indian territories, and has systematically enforced American-style laws upon Indian people and Indian tribes from that time until the present day.

Nevertheless, modern tribal justice systems—coming under more and more control by Indian tribes—have begun to incorporate customary and traditional jurisprudence.

### A. A HISTORY OF TRIBAL JUSTICE SYSTEMS IN INDIAN COUNTRY

#### 1. THE ORIGINS AND DEVELOPMENT OF TRIBAL COURTS

##### INDIAN COURTS IN HISTORY AND LAW

---

National American Indian Court Judges Association, *Indian Courts and the Future*  
7-13 (David H. Getches ed., 1978)

##### A Brief History

With the exception of a few tribes, reservation judicial systems as they exist today are unable to trace their roots to traditional Indian forums for dispute resolution. Instead, they are descended from an externally imposed Anglo system for keeping “order” among the Indians. Nevertheless, many tribes have been able to influence the character of their courts by utilizing some traditional concepts. If Indian courts have not been terribly destructive of Indian culture, it can be attributed to two facts: (1) most judges historically

have been Indians, and (2) federal funding has been so lean that courts have had little influence, destructive or otherwise. Factors such as removal, war, and confinement on reservations were far more powerful.

Until late in the nineteenth century, Indian reservations were controlled by the military, as the Bureau of Indian Affairs was part of the Department of War. Crude forms of control — principally force — led many persons in and out of government to press for civilian controls of Indian affairs. The civilian bureaucracy, with support from organized religion, prevailed. There was a feel that inculcation of what the non-Indians understood as law and order was a necessary ingredient of the civilizing process which they saw as their mission. In order to Christianize, educate, and eventually assimilate the Indians, the institution of a legal system — not just martial law — was necessary. Some of the traditional power of the chiefs among the Indians remained, and this posed a threat to the dominant authority of the government's Indian agents. Consequently, destruction of the remaining authority of the traditional leaders and the systems they represented became essential to the "civilizing" process.

A system of Indian police and courts controlled by the Indian agent on each reservation was started. In 1883 the Commissioner of Indian Affairs authorized creation of Courts of Indian Offenses to operate under a set of rules and procedures created by the Bureau of Indian Affairs. Previously, the Indian agents summarily sentenced those they believed to be guilty. By 1890 agents on most reservations were appointing Indians to serve as police and judges. As purveyors of favors and patronage, Indian agents were able effectively to control police forces by paying virtually nothing to hand-picked Indians. Thus, the military was supplanted on the reservations. Although courts had functioned on some reservations for several years, no funds were appropriated by Congress for judges until . . . 1888.

One federal court described the early Indian courts as "mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian." Judges would often take account of Indian custom when Indians came before the Indian courts. But this did not translate into leniency — it more likely meant a tougher penalty or subjection to traditional sanctions for a uniquely Indian offense. Nevertheless, several important Indian customs and religious practices such as the sun dance, medicine men, and distribution of property owned by a person on his death were outlawed, and violations were punished by the Indian courts. The Indian courts, however, were not destined to fulfill their promise of assimilation, but they appeared to maintain order relatively well. Another important role of Indian courts was the regulation of the activities of avaricious non-Indians (e.g., trespass, grazing on Indian lands). For them, the Washington originated law applied by the courts was as respectable as any on the frontier.

Indians on many reservations continued to solve serious disputes among themselves outside the Courts of Indian Offenses. Such traditional sanctions as restitution, banishment, payment to a victim or his heirs, and vengeance were common. But, as the famous case of *Ex parte Crow Dog* [109 U.S. 556 (1883)] illustrates, federal authorities attempted to arrest and punish Indians under

federal law when the Indian remedies seemed inadequate. Crow Dog's traditional punishment—payment to relatives—was seen as inappropriate and not fitting with the “civilizing” plan by many neighboring whites. . . .

After the turn of the century, while the Courts of Indian Offenses continued to function under the control of the Indian agents, the primary thrust of law enforcement became liquor suppression. Ripe opportunities for bootleggers, degeneration of tribalism and social structure, and demoralized individuals on the reservation combined to make alcohol abuse a major problem on all reservations. More money was provided for police, but by 1925 appropriations for Indian courts had decreased to . . . almost one-half of the 1892 level. . . . The number of Indian judges declined similarly. Indian courts waned in importance and were little more than tools of the Indian agents who had to approve of all court decisions.

No specific statutory authority ever has existed for Courts of Indian Offenses. In 1921, however, the Snyder Act [25 U.S.C. §13] empowered the Commissioner of Indian Affairs to expend money for a variety of services to Indians, including “the employment of . . . Indian police, Indian judges. . . .” But Congress was inhospitable to later attempts to validate the courts and clarify their jurisdiction. More recently, courts have found that authority for establishing Indian courts exists under the general statutory powers of the Commissioner of Indian Affairs. [25 U.S.C. §2; *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965).]

The New Deal brought the first thoughtful consideration of Indian self-government, including courts. . . . The administration was concerned not only with the lack of tribal influence on the Courts of Indian Offenses, but also the courts' rather blatant disregard for fair procedures and individual rights. The Indian Reorganization Act (IRA) was passed to allow tribes to reestablish and assert their governing powers, and to redress other adverse effects of earlier policies.

Under the IRA, tribes were to draft their own constitutions and laws and set up their own court systems. Most tribes only had a shaky recollection of their traditional systems and were most familiar with the Bureau's regulations and procedures. Consequently, the abrupt reinstitution of traditional law on reservations was not realized. Most tribes either remained under the old system or adopted codes modeled closely after the BIA code[,] revised in 1935. Courts adopting their own codes became known as “tribal courts.” A clear trend since the IRA has been for tribes to develop codes and thereby convert from Courts of Indian Offenses or “CFR Courts” as they are commonly known (rules concerning them are found in 25 C.F.R. pt. 11) to tribal courts which function under the residual sovereignty of the tribes, rather than as agencies of the federal government. But progress has been slow. Antiquated provisions, traceable to the old BIA regulations, including selection of judges by the BIA Commissioner subject to tribal council ratification, remain in a number of cases. Very few tribes—principally, the New Mexico Pueblos—retain judicial systems based on Indian custom. . . .

[The Indian Civil Rights Act] of 1968 was passed. The Act had sweeping provisions dealing with Indian rights. Some were clearly supportive of such self-determining concepts as the requirement that any future state

assumptions of jurisdiction over Indians be only with Indian consent. Others restricted self-government. Until the Act, tribes were not subject to the federal Constitution. Concern over some tribes' abuses led to imposition of most Bill of Rights requirements on all tribes. Clearly, this was a limitation on the latitude of self-government which tribes had enjoyed previously. Many tribes questioned the extension of Bill of Rights protections to individual Indians vis-à-vis tribes because of the inherent clash with Indian custom and traditional values. The Act also limited the penalties which Indian courts could impose to \$500 and six months in jail.

At a time when policy favored maximum self-government, it would seem inconsistent for tribes to have external limits placed on their functions. The Act not only limited Indian courts in their disposition of cases, but it imposed requirements of due process upon them. And the provision in the Indian Civil Rights Act (ICRA) for federal court habeas corpus review of tribal orders [25 U.S.C. §1303] created a specter of reviews of Indian court procedures by the exacting standards of the well-developed Anglo legal system. Nevertheless, the current policy has enabled Indian courts to flourish more than ever before. The ICRA necessarily has drawn greater attention to the Indian court system, and the policy of federal support for Indian self-government has included strengthening Indian court. It has not been until the last few years, however, that this has been reflected significantly in BIA programs and funding. . . .

Overall, Indian courts have been retarded by their history. They originally were vehicles of an outside force. Later, their intended growth as integral parts of an Indian government was stunted by a lack of effective programs or funding, as well as policy vacillations. . . .

---

#### THE DEVELOPMENT OF THE INDIAN COURT SYSTEM

---

Vine Deloria, Jr. & Clifford M. Lytle, *American Indians*,  
American Justice 111-16 (1983)

#### The Traditional Courts

. . . [O]ne of the most important powers exercised by tribal governments involved the resolution of disputes among tribal members. The mechanism charged with performing this was not always a body of appointed or elected judges as we use today; rather, it often fell within the authority of the tribal chief, the council of elders or chiefs, the council of warrior society leaders, or the religious leaders. Whatever the mechanism used by the tribe, the adjudicatory function was somewhat different from that to which we are most accustomed. The primary goal was simply to mediate the case to everyone's satisfaction. It was not to ascertain guilt and then bestow punishment upon the offender. Under Anglo-American notions of criminal jurisprudence, the objectives are to establish fault or guilt and then to punish. The sentencing goals of retribution, revenge, and deterrence and isolation of the offender are extremely important. . . . Under the traditional Indian system the major objective was more to ensure restitution and compensation than retribution. The idea, therefore, that tribal laws involved some Old Testament eye-for-an-eye mechanism that worked independently of human personality stems mere

from inadequate observations of what really occurred in tribal societies. In most instances the system attempted to compensate the victim and his or her family and to solve the problem in such a manner that all could forgive and forget and continue to live within the tribal society in harmony with one another.

Under the traditional tribal system of justice, the ultimate decision was seldom made by a judge. Rather, the job of the mediator or reconciling chief was to create an atmosphere for participant decision-making. The two conflicting parties would call upon a chief, elder, medicine man, or religious leader more for his assistance in keeping the situation within the bounds of tribal customs than for his decision as to who was "right" and who was "wrong" in a given situation. The role of this tribal figure was to help the parties discuss the problem until a satisfactory compromise or solution could be agreed upon. Each of the parties recognized that a proper settlement required some restitution to the injured party, but restitution that permitted the offending party to continue to live within the tribal community. Banishment was extremely rare in most tribes and represented a very serious breach of fundamental folkways that bound the tribe together. . . .

### Courts of Indian Offenses

. . . Courts of Indian Offenses most probably began with the appeal by disputing chiefs to the agent as arbiter of problems that could not be resolved in the traditional manner. . . . [A]gents handled some of the political problems that reservation life entailed and . . . their conception of their job, predicated upon the need to keep an orderly community and to prevent intrusions by the whites, gave a quasi-judicial aspect to early reservation institutions. On some reservations the early councils were both judicial and legislative and exercised, after the influence of the chiefs had declined, executive powers also. Courts of Indian Offenses mark the first evolution away from one body holding all three political powers in its hands to the tripartite arrangement we see on many reservations today.

The development of the Indian police also played a critical role in this movement toward independent institutions. Unable to rely upon the traditional chiefs to carry out their instructions, many of which were anathema to the old people, the agents early began to enroll Indians as agency policemen. This new group enabled the agent to control the Indians without having to rely upon the presences of federal troops, which in many cases might have created an unpleasant incident or war. Although the rise of Courts of Indian Offenses certainly indicated the increasing application of the white laws over the Indians, they were not wholly without respect among the Indians. Manuelito, one of the most respected and beloved of the Navajo war chiefs, served for a time as an Indian policeman and performed duties in a Court of Indian Offenses.

The allotment policy considerably increased the need for Courts of Indian Offenses. In order to break up the traditional family groupings on many reservations, allotments were deliberately mixed so that family members might have their lands scattered all over the reservations. The idea behind this bureaucratic hodgepodge was to encourage the younger generation to move

away from the elders and to begin farming on their own. The result of the application of the idea was that it became difficult if not impossible for communities that were dependent on tribal customs to conduct some of their ceremonies because the clan or family was so dispersed. The Courts of Indian Offenses then served to provide them with some forum in which a modicum of justice could be realized. Subsequent sale of allotments and the settling of white purchasers within the reservation borders made it virtually impossible to do anything except rely upon these courts for redress.

In 1883 the Courts of Indian Offenses were made a regular part of the Bureau of Indian Affairs activities on the reservations. . . .

These courts have become known as CFR courts since they operated under the written guidelines as set down in the Code of Federal Regulations. But . . . it is difficult to determine whether they were really courts in the traditional jurisprudential sense of either the Indian or the Anglo-American culture or whether they were not simply instruments of cultural oppression since some of the offenses that were tried in these courts had more to do with suppressing religious dances and certain kinds of ceremonials than with keeping law and order. The sacred Sioux ceremony of "keeping the soul," . . . which was basically a condolence rite, was banned by these courts on the Dakota reservations to the consternation of the people.

Although the CFR courts were staffed by Indian judges, they served at the pleasure of the agent, not the community. The Indian agent appointed his judges as a patronage exercise, which rewarded the Indians who seemed to be assimilating while depriving the traditional people of the opportunity to participate in this vital function of the community. Even though the judges invested a good deal of energy and prestige in serving on these courts, too frequently the ultimate decision rested with the Indian agent, who often acted as though the people had no right to understand the reasoning behind his arbitrary decisions. . . . At its zenith, the CFR court system was operating on about two-thirds of all reservations. With the authorization of the IRA corporate form of tribal government, all but a few tribes assumed judicial functions as a manifestation of tribal government and rid themselves of this hated institution. Since these courts did not have the sanction of the whole tribal community, even the most beneficial parts of their operations have been eyed with suspicion by Indians and historians alike.

### Modern Tribal Courts

As with tribal governments, the Indian Reorganization Act of 1934 heralded the beginning of the modern tribal court system. . . . This opportunity afforded the Indians a chance to abandon the already disintegrating CFR court system and replace it with a legal system more responsive to tribal needs and under tribal control. More important, it provided an opportunity to resurrect the traditions and customs that had been so important to Indian culture before being dissipated by the bureaucratic controls from Washington.

The years of assimilation that Washington had thrust upon Indian Country, however, had taken their toll. Most tribes were not in a position to re-create the old traditional courts of justice that had functioned prior to the CFR era. Instead, tribal governments established legal systems closely fashioned after a BIA model. A few tribes simply retained their CFR court system



slightly modified to eliminate the objectionable features that had hampered it and made it seem like a foreign institution.

## NOTES

1. Federal courts affixed their stamp of approval on the reservation justice systems established by the Bureau of Indian Affairs. One important case, *United States v. Clapox*, 35 F. 575 (D. Or. 1888), rejected claims that the government had no authority to create these courts and police by federal regulation:

These "courts of Indian offenses" are not the constitutional courts provided for in section 1, art. 3, Const., which congress only has the power to "ordain and establish," but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man. . . .

There is no doubt of the power of the United States to make these rules, nor that the president is authorized by congress to exercise the same. . . .

But, pleasantry aside, and in conclusion, the act with which these defendants are charged is in flagrant opposition to the authority of the United States on this reservation, and directly subversive of this laudable effort to accustom and educate these Indians in the habit and knowledge of self-government. It is therefore appropriate and needful that the power and name of the government of the United States should be invoked to restrain and punish them. The case falls within the letter of the statute (section 5401, Rev. St.) providing for the punishment of persons who are guilty of rescuing any one committed for an offense against the United States, and I see no reason why it should be construed out of it, or the statute held inapplicable to it. . . .

*Clapox*, 35 F. at 577-78.

2. In *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), Indians challenged the authority of the tribal court at Pine Ridge. The Eighth Circuit held that the Oglala Sioux Tribe had established its tribal court using its residual sovereignty:

We accordingly are of the opinion that the plaintiffs cannot prevail on their second point. We hold that Indian tribes, such as the defendant Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota, still possess their inherent sovereignty excepting only where it has been specifically taken from them, either by treaty or by Congressional Act. . . .

Originally, and until 1885, all offenses committed by Indians against Indians within the confines of Indian country were under the jurisdiction of the Tribal Courts. In 1885 Congress passed what is sometimes referred to as the "Seven Major Crimes Act." Therein, . . . Congress brought under federal jurisdiction the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny. Subsequently three additional crimes were included, to-wit: incest, assault with a dangerous weapon and robbery. The clear inference is that Congress left to the Indian Tribal Courts jurisdiction over all crimes not taken by the federal government itself. . . . We

accordingly hold that not only do the Indian Tribal Courts have inherent jurisdiction over all matters not taken over by the federal government, but that federal legislative action and rules promulgated thereunder support the authority of the Tribal Courts.

*Id.* at 94, 96.

3. In *Colliflower v. Garland*, 342 F.3d 368 (9th Cir. 1965), the court held that an Indian convicted under the criminal code of the Fort Belknap Indian community, which had adopted the federal Indian law and order code in 25 C.F.R. Part 11, could petition for a writ of habeas corpus in federal court on grounds that “it is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government. Originally they were created by the federal executive and imposed upon the Indian community, and to this day the federal government still maintains a partial control over them.” *Id.* at 378. However, the court added:

It does not follow from our decision that the tribal court must comply with every constitutional restriction that is applicable to federal or state courts. Nor does it follow that the Fourteenth Amendment applies to tribal courts at all; some of the cases cited above indicate that it does not. And the vestige of “sovereignty” that the tribe retains and exercises through its Tribal Council and Tribal Courts may call for application of [different] principles.

*Id.* at 379.

In 1968, Congress codified a federal right to petition for a writ of habeas corpus from a tribal court conviction. 25 U.S.C. §1303.

4. As this brief survey history of tribal courts indicates, Indian people long have had a complicated relationship with tribal justice systems. Tribal courts often have to work very hard to develop legitimacy in Indian communities.

Law professor and tribal judge Frank Pommersheim is a leader in advocating that tribal courts behave actively in promoting tribal court legitimacy. He offered a blueprint for developing tribal court legitimacy:

The structure and quality of relationships within tribal court systems—especially those between tribal appellate courts and tribal trial courts, and between tribal courts and litigants, the practicing tribal bar, and the rest of tribal government—are critical coordinates in establishing and measuring the health and vitality of tribal judiciaries.

The relationship between tribal appellate courts and tribal trial courts is of particular importance and significance. Because this relationship is relatively new in most tribal court systems, the need for a good working atmosphere, characterized by integrity and mutual respect, is especially acute. . . .

On the personal level, it is advisable, if not absolutely necessary, that appellate judges have some basic acquaintance with the tribal bench, and vice versa, in order to create a link between their respective efforts. . . . There is no room, inside or outside the court, for personal rancor. The occasion for reversal is a judicial fact of life, but both the content and acceptance of such reversal must accord with the highest canons of professional integrity and cultural respect. Tribal judiciaries—despite rapid growth and development—are still often institutionally fragile and must not be put at risk by needless conflict or confrontation within the court itself.



There is also a need to maximize personal respect, though not descending to fawning or favoritism, in order to ensure that trial and appellate judges avoid the pitfalls of having their decisions held up to claims that they are personally motivated or politically driven. Again, professionalism and cultural integrity control. The conduct of hearings, the language and style of decisions, and personal relationships inside and outside the court must all hew to standards that place the trial and appellate bench beyond reproach to each other and the general tribal and non-Indian public. . . .

. . . Tribal appellate courts will, therefore, often be making and articulating “new” law. Much of this law will identify the legal contours of the relationship between the appellate and trial courts in such areas as standards of review, breadth of habeas relief, and interlocutory appeals. In these areas, it is particularly important—because of the structural implications—that such decisions be especially well-crafted not only in matters of legal and cultural principles, but in public policy as well, in order to make the most compelling and comprehensive case for any particular principle or ruling.

. . . In many tribal traditions, such as the Lakota’s at Rosebud and at Cheyenne River, harmony and respect are critical. Tribal judiciaries must recognize these traditions in their working relationships. Without such harmony and respect, the requisite equilibrium and unity of purpose are unlikely to be achieved. . . .

Tribal court litigants are the direct recipients of the “services” and decision-making of tribal courts. Their perceptions of the process and results form the foundation on which reputations are established. Because lawsuits tend to have losing as well as winning sides, they are likely to produce some unhappy parties. This possibility is exacerbated when the results are perceived (correctly or incorrectly) as contrary to traditional cultural expectations or as “inferior” to what might result in state and federal courts. Positive public perception and steady institution-building are often at risk.

Therefore, it is incumbent on tribal courts, at both the trial and appellate levels, to ensure that litigants are treated with dignity and respect. This is especially true at the trial level, where many individuals will not be represented by counsel—particularly in civil matters related to custody, child support, and small claims actions. Explanations by tribal court personnel about completion of forms, the schedule of court hearings, and preparation for hearings are critical to assure individuals that they are being treated fairly. . . .

At the appellate level, the same solicitude is also important because of the unique conduct of appellate hearings where as a general rule neither evidence nor direct testimony is received. . . . Decisions of tribal courts, more so than those of state and federal courts, often have currency and reverberation within the community-at-large beyond the narrow self-interest of the parties. This is especially true, for example, in such areas as jurisdiction and the application of tradition and custom.

All of this connects to the larger issue of legitimacy. What can tribal courts do to ensure their legitimacy in the eyes of the public they serve, and what are they presently doing toward that end? . . . At Rosebud, for example, Chief Tribal Trial Judge Sherman Marshall regularly schedules tribal court “open houses.” Members of the public are invited to visit tribal courts for tours, food, and presentations (including the opportunity to ask questions) about the business and mission of the tribal court. These sessions have been quite successful in establishing a better understanding of the tribal court system.

In addition, Judge Marshall and other members of his staff attend community meetings (as far as a hundred miles away from the tribal courthouse) to make presentations about, and answer questions concerning, tribal court activities.

. . . History and conventional civics have given an imprimatur of propriety, even rectitude, to the dominant legal system, while ignoring, if not actually demeaning, tribal courts. This uneven playing ground must be leveled and overcome for tribal courts to obtain parity and take their rightful place within the national (even international) system of justice. Hard work, cultural pride, and the desire for an enduring justice are the central coordinates of this movement.

Many attorneys, particularly non-Indian attorneys, may not know initially what is expected of them and may even have negative stereotypes about tribal courts. Such ambivalence or even negativity must be readily addressed, implicitly and explicitly, from the outset. For example, in a case before the Rosebud Sioux Tribal Court of Appeals, an attorney telephoned the clerk of courts on the day of oral argument and informed the clerk that, because of a conflict with a hearing in state court, he would not be able to make the hearing. He filed no motion for a continuance, but apparently assumed that his "excuse" would be accepted. It was not. The case was heard without his presence. He was cited for contempt and suspended from practice before the tribal court for three months. The attorney never "missed" another court date.

In addition, tribal court advocates who are not law-trained must be held to the same standards as an attorney and must not be permitted to claim that absence of a law degree entitles them to lax standards. To permit such laxity would imperil the quality of both individual representation and institutional development. This is occasionally a problem at the appellate level, where the requirement of written briefs and tight, focused, oral argument may be beyond the training and capability of some tribal advocates. As a result, very few tribal advocates practice at the appellate level at either Rosebud or at Cheyenne River.

These observations, in turn, raise questions in a second key area: the applicable standards for both tribal advocates and law-trained attorneys who practice before tribal trial and appellate courts. To date, the practice has been to admit law-trained attorneys based on their admission to practice before some state or federal court. Tribal advocates usually are admitted based on tribal membership and rather minimal educational requirements, though neither Rosebud nor Cheyenne River have specific requirements in this regard. Increasingly, tribes are revising these esoteric standards for attorneys and the minimal internal standards for tribal advocates. For example, the Rosebud Sioux Tribe recently completed preparation of the Rosebud Sioux tribal bar examination, which was administered for the first time in the summer of 1995. The function of the examination is to ensure basic competence and understanding of the principles of tribal and federal Indian Law.

The Rosebud Sioux Tribe has also formally inaugurated the establishment of the Sicangu Oyate Bar Association. In addition to regulating admission to practice, this bar association oversees the election of officers and tribal bar commissioners and directly regulates such issues as continuing legal education programs, judicial qualifications, screening, investigating and adjudicating complaints against individual members of the tribal bar, and, more generally, strives to develop a sense of *élan* and *rapprochement* among the members of the practicing tribal bar. . . .

Some decisions of tribal courts inevitably rule against other branches or parts of tribal government and may include injunctive or habeas relief ordering cessation or commencement of specific governmental activities. Obviously, such situations are fraught with possibilities for confrontation and governmental crisis. In such situations, certain practical, structural, political, and cultural concerns arise. Decisions implicating other parts of the tribal government, therefore, need to contain both compelling legal analysis and cultural referents to demonstrate that the decisions comport with both applicable law and cultural standards. In addition, tribal court opinions must reflect respect for, and parity with, the coordinate branches of tribal government. Moreover, to avoid the possibility of misunderstanding, or of circumvention of the court's intent, the orders themselves must be precisely drafted to provide absolute clarity about what is required.

On the structural level, a separation of powers, *de jure* or even *de facto*, obviously minimizes potential clashes. Separation of powers is not, however, a solution that can be imposed from the top down. Rather, it needs to work its way up from the grassroots with cultural support, percolating locally from the inside-out rather than being imposed from the outside. It is also worth noting that the separation of powers doctrine is not necessarily an immediate panacea. Without an underlying commitment to the separation of powers doctrine, a structural separation of powers can be breached because this lack of commitment is what makes for constitutional crisis in the first place. Additionally, the separation of powers doctrine may clearly contravene the current tradition and governmental structure of some tribes. Moreover, the fact that separation of powers is a vaunted piece of dominant constitutionalism does not give it intrinsic merit in tribal systems.

Finally, there should be the political and legal wisdom to recognize that tribal court decisions and ordered relief are not the first, but rather the last, line of resolution to difficult tribal intra-governmental issues. Nevertheless, such decisions must inevitably be made. Accepting this political reality, the presence of respect, compelling legal analysis, sensitivity to culture, and commitment to incremental change will all play central roles in achieving a good working relationship between the tribal judiciary and the other branches of tribal government. Without such local and intra-governmental legitimacy, many of its benefits could not and would not have been realized. In the absence of strong foundational and institutional roots, enduring tribal jurisprudential growth is quite unlikely to occur. . . .

Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot from the Field*, 21 VT. L. REV. 7, 8-16 (1996).

## 2. A MICROCOSM SURVEY OF FOUR MODERN TRIBAL JUSTICE SYSTEMS

### GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS\*

The Grand Traverse Band tribal court began operations in the late 1980s, with Michael D. Petoskey serving as the court's first chief judge. The tribal

---

\*Much of the material in this section appears in slightly different form in Matthew L.M. Fletcher, *A History of the Grand Traverse Band of Ottawa and Chippewa Indians* (forthcoming 2011, Michigan State University Press).

court was the first tribal court in Michigan to be included in the tribal constitution as a separate and independent branch of government, much like the federal judiciary. See Michael D. Petoskey, *Tribal Courts*, 66 MICH. B.J. 366, 367-69 (1988). During the early decades of the tribal court, the court has heard and decided numerous complex and important issues on behalf of the Band, including questions of tribal sovereign immunity, tribal membership, political corruption, tribal election disputes, and many, many other questions. The tribal court also has a robust criminal docket, and an award-winning Peacemaker Court.

A significant part of the Grand Traverse Band's history is captured in cases decided by the tribal court since 1990, when the court's docket began to increase steadily. In 2001, former Chairwoman Ardith (Dodie) Chambers testified before the United States Senate Committee on Indian Affairs to demonstrate the independence, authority, integrity, and competence of the tribal judiciary. See Indian Tribal Good Governance Practices as They Relate to Economic Development, Hearing before the Senate Committee on Indian Affairs, 107th Cong., 1st Sess. at 23-25, 55-95 (July 18, 2001) (Testimony and Prepared Statement of Ardith (Dodie) Chambers, Councilwoman, Grand Traverse Band of Ottawa and Chippewa Indians). She highlighted two tribal court cases, *In re McSauby*, No. 97-02-001-CV-JR, 1997 WL 34691849 (Grand Traverse Tribal Judiciary, July 29, 1997), and *DeVerney v. Grand Traverse Band of Ottawa and Chippewa Indians*, No. 96-10-201 CV, 2000 WL 35749822 (Grand Traverse Band Appellate Court, Nov. 15, 2000), showing that the tribal court had ruled against the tribal government in some key cases. The first case, *In re McSauby*, involved the referral of John McSauby, an elected official of the tribal council, to the tribal court for removal for ethics violations. Over the objection of the tribal government, the tribal court first held that McSauby's attorney was entitled to attorney fees, paid for by the tribal government, on the grounds that the question of how and when a tribal council member could be removed was so important and complex that a defending council member should be entitled to adequate legal representation. On the merits, the tribal court agreed to order the removal of Mr. McSauby, on the grounds that he had admitted to using his authority as a tribal council member to push through the sale of his personally owned land to the Band, a violation of provisions in the tribal constitution prohibiting misconduct and self-dealing.

The second case, *DeVerney*, involved a challenge to a decision by the Band's tribal membership department. The case involved a complicated mix of sovereign immunity, due process, administrative law, and tribal constitutional interpretation. The issue involved the administrative disenrollment of several members of the Band in 1996 when the tribal membership office learned that the members were also enrolled members of the Sault Ste. Marie Tribe of Chippewa Indians, a violation of the dual enrollment prohibition in the tribal constitution. The question was whether the membership office could unilaterally terminate a tribal member's membership or whether the tribe had to hold a hearing first. The tribal court and then the tribal appellate court held that the tribe first had to provide due process to the members before they were disenrolled.

Councilwoman Chambers also testified to Congress about the Band's Peacemaker Court, which won an award in 1999 from the Harvard Project on American Indian Economic Development at the John F. Kennedy School of Government. The Peacemaker Court—Mnaweejeendwin—incorporates nonadversarial and traditional dispute resolution techniques, rather than Western-style, adversarial courtroom procedures and rules. The Mnaweejeendwin is designed to help juvenile offenders avoid jail and to learn and understand the consequences of their actions, to help victims of crime reach an agreement where offenders make amends to them. Peacemaking involves talking and reaching consensus on how these goals might be achieved. Western-style justice is all but rejected. According to former Chief Judge Petoskey:

There is an Indian saying, that the watch is the white man's handcuff. . . . Peacemaking is not time limited. If it takes time, it takes time. Everyone has an opportunity to say what they want to say. They take whatever time necessary to develop a consensus.

The way we typically do things in an adversarial court is really counter-productive. . . . We are saying all the negative things about people instead of working together toward common ground. Things people say about each other can be very hurtful and lasting.

Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 876, 878 (1999).

The Mnaweejeendwin avoids those problems. Instead of a judge looking down at the parties to a dispute, issuing orders and punishments that may or may not reflect the wishes of the parties, the Mnaweejeendwin forces the parties—with the help of their families and other community members—to face and discuss the fundamental causes of the dispute.

Litigation before the Grand Traverse Band tribal court is very similar in process, rules, and statutes to litigation before state and federal courts—with a key difference. Former Chief Judge of the tribal court JoAnne Cook-Gasco speaks about how the written pleadings of a case between tribal members usually is merely the tip of the iceberg of the dispute. See JoAnne Cook-Gasco, Address before the Michigan State University College of Law Indigenous Law and Policy Center, East Lansing, Michigan (Feb. 17, 2009). The tribal court judges will ask the parties to go all the way back to the beginning, maybe as far back as generations, to ascertain and understand the origins of the dispute. Conversely, a state or federal court will do nothing more than look at the pleadings and the arguments made in court. Parties to a state or federal court case know going in that the findings of fact made by the judge or jury will not be a terribly close approximation of the truth, and even the winners walk away with a bad taste in their mouths. Tribal court parties might feel the same way, but tribal court judges at Grand Traverse Band are taught to look beyond the pleadings in order to better craft remedies suitable to the parties.

---

#### HOPI TRIBE

The Hopi Tribal Courts are one of the relatively few courts that have incorporated significant tribal custom and tradition into their jurisprudence. Many

of the issues that arise in these tribal courts involve the governance disputes between the traditional villages and the national Hopi government, as well as unique property rights questions involving tribal members.

Pat Sekaquaptewa summarizes the history of the tribal court:

The Hopi Tribal Courts were established by the Tribal Council in 1972. The courts do not have a separate constitutional dedication of powers from Tribal Council at this time. The trial court is housed in a modern courthouse/police headquarters complex on the Hopi reservation near Keams Canyon, Arizona. The trial court is comprised of three associate lay judges and an attorney who serves as the Chief Judge. All the trial court judges are Hopi.

The trial court has general authority, guided by the Indian Civil Rights Act, to decide nearly every type of case, subject to the limitations of the Hopi Constitution, By-laws, and tribal ordinances. The trial court handles civil matters concerning such issues as marital disputes, commercial contracts, torts, employment rights, property disputes and probate matters. The Tribe has also established a Hopi Children's Court with limited jurisdiction over minors who are shown to be dependent, minors who are in need of emergency care, and minors who are shown to be delinquent. . . .

The Hopi Appellate Court was also established by Ordinance 21 in 1972. The Appellate Court is comprised of a three-judge panel of attorneys, which meets to hear oral arguments and deliberates two to three times per year at the Hopi court facility near Keams Canyon, Arizona. . . .

The Hopi Appellate Court's jurisdiction and mandate extend to the review of final trial court civil decisions, including the review of the trial court certification of decisions made by the nine, constitutionally recognized Hopi villages. The Appellate Court also has jurisdiction to review trial court criminal orders exceeding fifty dollars in fines or thirty days in jail. Finally, the Appellate Court is authorized to issue advisory opinions given certified questions of law from tribal agencies or departments or other judicial forums (including village forums).

Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL'Y 761, 766-67 (2000).

---

#### MISSISSIPPI BAND OF CHOCTAW INDIANS

---

Harvard Project on American Indian Economic Development  
Honoring Nations 2005 Honoree

#### Choctaw Tribal Court System

. . . The Mississippi Band of Choctaw's economic track record is widely viewed as the standard of excellence against which other Native nations measure their success. Over the last thirty years, the Band has deliberately engaged in business development — through partnerships, tribal enterprise, and entrepreneurship — that has transformed the community. In 1994, the already-thriving economy was given a further boost when the Band government entered the gaming market; today the Mississippi Choctaw own two casino-resorts in addition to their many other joint ventures and enterprises.

With this dramatic increase in economic activity, growing pains were inevitable. In particular, increased interactions between the tribal government, on-



and off-reservation businesses, consumers, the Band's several thousand employees, and its 10,000 citizens heightened the demand for robust and capable tribal institutions for dispute resolution. The Mississippi Band of Choctaw has long had a tribal court, but by 1997 it became apparent that changes were needed if the court system was to be able to efficiently and effectively manage its ever-growing caseload (including disputes which ranged from minor traffic infractions to complex commercial litigation). Strain on the system threatened to compromise the integrity of the Band's judicial system and its commitment to Choctaw principles of justice. As a result, tribal leaders decided that the tribal court system needed to grow — but to do so in a way that was consistent with self-determination.

Critically, these changes were initiated from a position of strength. Shortly after the Mississippi Band of Choctaw organized under a constitution in 1974, the tribal council passed a statute establishing the court, creating balanced oversight by both constitutional branches of government (the executive and legislative branches). Specifically, tribal judges must meet the qualifications laid out in the Choctaw Tribal Code. The Band's Chief has authority to nominate candidates for the bench, but the Tribal Council Committee on Judicial Affairs and Law Enforcement approves them, and the entire council must confirm a candidate with a two-thirds vote. Both tribal judges and court personnel are further bound by statutory Rules of Ethics and Conduct. Together, these provisions help ensure the tribal court's independence and make it possible for the court to serve the justice and related economic and social development needs of the nation.

Building on this base, opportunities were identified for improvement across all components of the court system. The goal was to become a full-service court system capable of handling a wide variety of cases effectively, to deepen the system's grounding in Choctaw practices and law, and to grow the pool of prospective court personnel, so that the supply of Choctaw court services could keep pace with rising demand. Specifically, they created a four-branch court system (civil, criminal, peacemaker, and youth divisions), initiated a video history project focusing on Choctaw law, and began a summer internship program.

Prior to the 1997 court reform, the Mississippi Band of Choctaw Tribal Court had three divisions, youth (handling juvenile offender and child welfare issues), civil, and criminal. The heavy caseload, particularly of misdemeanor, youth, and family-related disputes, slowed the process of justice. By creating a new division and adding diversion programs, the Peacemaker Court can streamline operations, better match court personnel and programs from other departments (like Behavioral Health and Victims Services) to case types, and apply Choctaw law in a culturally relevant way for the parties appearing before the court. The Peacemaker Court is available to parties who agree to handle their dispute through a traditional process in accordance with the traditional Choctaw values of cohesion, cooperation, and peace as opposed to the more Western and adversarial process available in the tribe's civil and criminal courts. Teen Court makes it possible for many of the less complicated juvenile offenses and disputes that would normally be

heard in formal Youth Court to be heard by a panel of the defendant's peers, further spreading the caseload and training youth in the practice of Choctaw law.

The Teen Court is a particularly notable aspect of the Choctaw court system, as it not only facilitates smoother Youth Court operations but also results in peer-to-peer community building. For this upcoming generation of tribal citizens (and especially for prior offenders who complete their sentences and join the Teen Court), interactions with peers through court service generates a set of common experiences and a shared sense of accomplishment. In the words of court personnel, having teens that might not otherwise interact come together to decide on appropriate sentencing helps break down walls between youth with different backgrounds, goals, and experiences, heading off divisions that might otherwise persist through adulthood. Youth community building also occurs through mentoring. As new youth join the Teen Court, the more senior members mentor them, stressing the idea that Teen Court proceedings can genuinely affect the lives of the youth offenders (who are also their peers).

Other measures initiated by the Choctaw court system include the Indigenous Law Library and the Summer Internship Program. The library project compiles video-taped interviews with the nation's elders, generating and archiving records of traditional values. The tapes are referenced by the Court and content is applied for judicial direction. In 2003 the internship program provided the opportunity for citizens who are currently enrolled in law school to shadow clerks. In 2004, intern work expanded to all departments, including the judicial branch. The internship program included Teen Court participants in 2005.

Evidence that this multi-part court system is working comes from many quarters. Critically, Choctaw citizens are pleased with their better-functioning court, stressing that the structure leads to the timely adjudication of cases. While it does not speak directly to the rapidity at which cases pass through the system, data on the number of cases heard suggest that Mississippi Band of Choctaw Tribal Court is operating at a very high level: from September 2003 to October 2004, the court (with a staff of 25) heard over 9,400 cases (4,077 criminal cases, 2,831 civil cases, 2,201 juvenile cases, 306 peacemaker resolutions, and 14 Supreme Court cases). The decisions of non-tribal courts provide impressive additional evidence. In 2002 the United States Court of Appeals ruled in favor of tribal jurisdiction in the case *Choctaw Tribe v. Bank One*. More recently, the local county court system referred a proceeding to the Band's Peacemaker Court. Both decisions implicitly acknowledge the Choctaw Tribal Court's capacity and quality. But perhaps most striking is the evidence provided by ongoing economic development. As shown in research conducted by the Harvard Project on American Indian Economic Development and others, a fair, effective, and independent dispute resolution system is critical to economic growth: Mississippi Choctaw's continued economic boom would not be possible without a well-functioning tribal court. . . .

---

 NORTHWEST INTERTRIBAL COURT SYSTEM
 

---

Harvard Project on American Indian Economic Development  
Honoring Nations 2003 Honoree

**Confederated Tribes of the Chehalis Reservation, Jamestown  
S'Klallam Tribe, Muckleshoot Tribe, Port Gamble S'Klallam  
Tribe, Sauk-Suiattle Tribe, Shoalwater Bay Tribe, Skokomish  
Tribe, Stillaguamish Tribe, Tulalip Tribes**

... In 1979, a consortium of thirteen western Washington tribes created the Northwest Intertribal Court System (NICS), an organization that supports tribes in establishing tribal courts. NICS is an innovative, non-profit organization that relies on federal and tribal funding, (72 percent and 28 percent, respectively) and is overseen by a governing board comprised of representatives from each of its seven member tribes. In addition to its member tribes, NICS also serves two affiliate tribes and a handful of tribes that contract NICS' services. Although NICS was established in response to the Boldt decision, it now supports tribal courts in their handling of a full array of civil and criminal matters, including major crimes, misdemeanors, civil suits, infractions, and a host of legal issues related to hunting and fishing offenses, child dependencies, guardianships, adoptions, gambling, zoning and land use, environmental protection, and tribal employment.

NICS is divided into several units that meet these tribal needs. One group of such units serves to provide operational support to their members. For example, the Judicial Unit hires full-time, part-time, and contract judges to preside over tribal courts (currently three staff judges and two contract judges). The NICS Appellate Unit, established in 1987, recruits and trains a roster of appellate judges (currently thirty) who are impaneled on three-member appellate benches that hear roughly thirty cases a year. The Appellate Unit also publishes a compilation of its decisions in the biennial Appellate Reporter. The NICS Prosecutorial Unit consists of prosecutors, paralegals, and assistants who work closely with tribal law enforcement leaders. These services facilitate tribal courts' effective adjudication of tribal law.

Another group of NICS' units provides assistance in the development of tribal law and codes. Its Code Development Unit consists of a code developer, a full-time legal assistant, a law clerk, and several contract code writers. This unit works closely with tribal committees to draft codes and regulations for each member tribe that reflect the unique culture, values, and traditions of the people to whom the law will apply. Without customized codes, courts could not adjudicate tribal policies justly. The Technology Unit has supported the code-developing mandate of NICS since 2001 by converting tribal codes and court forms into electronic documents that are easily accessible to member tribes' judges, prosecutors, attorneys, and staff. This electronic information also helps member tribes' courts work as efficiently as their state and federal counterparts.

Since 1979, NICS member tribes have experienced great success in reclaiming jurisdiction over civil and criminal matters affecting their communities. The Prosecutorial Unit is currently handling 1,910 cases that might otherwise be in state courts. Through NICS support, the Tulalip Tribes have undertaken a

retrocession of PL 280 criminal jurisdiction from Washington. Since retrocession, the number of criminal complaints filed in Tulalip's tribal court has risen dramatically from 56 in 2001 to 262 in 2002. Without the support of NICS, this major reassertion of tribal sovereignty would not have been possible: the Tribes would simply not have had the capacity to take up this new caseload. Other member tribes are experiencing similar empowerment. In the past year, the caseload for some tribes has increased 100 percent as they have assumed responsibility for increasingly numerous and complex legal issues. . . .

Legitimate concerns have been expressed over the whether a tribe—particularly a small tribe—can pool its talents and resources with others without forfeiting a measure of control. NICS' member tribes' experiences, however, suggests that creating a shared system for their courts is an important, and bold, exercise of their sovereignty. They contend that their decision to pool resources is, in itself, a sovereign choice and, further, that pooling of resources allows them to sustain courts that they would not otherwise have. The administration of justice has a steep learning curve and requires substantial investments in recording precedents, codes, and processes. NICS member tribes share the knowledge, funds, and, most importantly, the human capital necessary to administer justice effectively and efficiently. . . .

Finally, the tribes' experience within the Northwest Intertribal Court System demonstrates that effective tribal courts may emerge out of the consortium form. Several of NICS past member tribes—the Lummi, Suquamish, Nisqually, and Squaxin Island tribes—now have entirely autonomous tribal courts. This independence is consistent with the NICS mission of assisting tribes in the exercise of their sovereignty. So, too, however, is the continuing cooperative pooling of resources that empowers its current member tribes. Choosing to establish a tribal court—autonomous or shared—is a vital step toward enhanced tribal sovereignty.

---

#### ORGANIZED VILLAGE OF KAKE

---

Harvard Project on American Indian Economic Development Honoring Nations  
2003 Honoree

#### Kake Circle Peacemaking

. . . The Organized Village of Kake had long recognized the devastating toll of rampant alcoholism. Unfortunately, one of the means of combating the problem—the justice system—appeared unavailable to Kake's Native citizens. The Alaska State justice system had not successfully addressed these issues in Alaska Native communities for decades. A primary problem was that its resources were stretched thin. The juvenile probation officer assigned to Kake lived on another island that was accessible only by ferryboat or plane. Responding to felony offenses consumed most of his time; therefore, he could pay only limited attention to the seemingly less serious misdemeanors of Kake's youth. Unfortunately, without the consequences that good probation monitoring could provide, the minor infractions of village youth tended to grow into entrenched adult behavior.

By the late 1990s, Kake residents realized that without breaking this cycle, the Village's future looked bleak. Despite the confined jurisdictional space in which they operated (the state of Alaska has authority over most aspects of criminal justice in Native Alaska), they also realized that they could craft a solution that relied on local human and cultural resources. Looking to the philosophy of peacemaking and the process of circle sentencing, Kake village volunteers organized the Healing Heart Council and Circle Peacemaking in 1999. This reconciliation and sentencing process is embedded in Tlingit tradition and works in conjunction with the Alaska State court system.

Circle Peacemaking begins when a Kake juvenile enters a guilty plea with the state court. Then, the state judge, with the concurrence of the prosecutor, the public defender, and the offender, may turn the juvenile's case over to the Healing Heart Council for sentencing. The Council initiates Circle Peacemaking by bringing together a group of village volunteers to formally sentence the young offender(s). Through the close attention, encouragement, and admonishment of this circle of volunteer justices, the juvenile's misdemeanors have a lower probability of leading to more serious adult substance abuse and crime. Circle Peacemaking heals the offender by addressing the underlying causes of the offending behavior and restores the rupture in community life by repairing the relationship between the offender and victim.

More specifically, Circle Peacemaking involves the participation of individuals and groups who rarely come together under Western systems of justice—the offender, the victim, families, friends, church representatives, police, substance abuse counselors, and concerned or affected community members. Participants, who may number from six to sixty, sit in a circle while a Keeper of the Circle facilitates the discussion. Discussions always begin and end with a prayer, and negative comments are strictly forbidden. Circle discussions are kept entirely confidential, and the Keeper encourages participants to speak from their hearts. The meetings typically last two to four hours, but they can only end when forgiveness and healing are apparent and consensus is reached about the offender's sentence. This sentence then becomes public.

But Circle Peacemaking does not conclude with sentencing. The circle participants are themselves responsible for ensuring that offenders adhere to their sentences. A typical sentence for underage alcohol consumption might include a curfew, community service, or a formal apology. It might also require that the offender meet with elders or others who have worked through comparable experiences. Frequently, a sentence requires the offender's participation in other support circles. Importantly, the circle participants play a key role in assessing whether the offender's compliance is satisfactory. It is not uncommon for them to call for additional circles. Non-compliant offenders must return to the Alaska State court for sentencing.

Since its inception, the dedication of volunteers and judicious use of its minimal annual budget—a few thousand dollars in most years—have enabled Circle Peacemaking to expand its jurisdiction from underage alcohol consumption cases to include broader community needs. Today, the Healing Heart Council offers not only sentencing circles for juvenile offenders, but also sentencing circles for adult offenders who request Circle Peacemaking, healing

circles for victims, intervention circles for individuals who seem to be losing control of their lives, celebration circles for offenders who have completed their sentencing requirements, and critical incident circles for individuals involved in an accident or crime who require immediate counseling. Additionally, the Healing Heart Council offers annual Circle Peacemaking Workshops that attract an average of 24 participants from Kake and other villages who are interested in learning how the Alaska State court system and Circle Peacemaking complement each other.

This interest is itself evidence of Circle Peacemaking's success in Kake. Only two offenders out of the eighty sentenced during the program's first four years rejected a circle's outcome and returned to state court for sentencing. All of the twenty-four juveniles who were assigned to circle sentencing for underage drinking successfully completed the terms of their sentences. Circle Peacemaking also reports very low levels of recidivism. Sixty-eight adults participated in circles without repeating their offenses or violating other laws during their probation periods. At the time of writing, approximately thirty village residents are enrolled in substance abuse recovery programs. Circle Peacemaking veterans are moving on with their lives in other ways as well. Several have gone on to trade schools to complete their education; several are enrolled in universities. One adult veteran of a circle is now a juvenile justice associate and working on an alcohol abuse counseling certificate. These successes are reflected in a positive trend in the circles themselves. Over four years, the number of mandated sentencing circles decreased and the number of volunteer support circles increased—initiated by individuals who have not yet committed offenses and are determined to avoid doing so. Unsurprisingly, Kake now sponsors well-attended sobriety marches, and Village residents have begun to comment on the perceptible difference in their community. It is a community in which the intergenerational pattern of substance abuse is being broken, and where youth and adults alike face brighter, healthier futures.

Significantly, Kake Circle Peacemaking's successes are occurring where the Alaska State court system repeatedly failed. Over four years, Circle Peacemaking has experienced a 97.5 percent success rate in sentences fulfillment compared to the Alaskan court system's 22 percent success rate. . . .

This has, of course, been especially significant considering the neglect and even outright hostility that the Alaska state government so frequently displays toward Alaskan tribes. It should be noted, in conclusion, that notwithstanding targeted state efforts to reduce tribal decision-making power, Kake has instituted a system of justice that increases tribal sovereignty. It has done so in a manner that commands the respect of the state judicial system while honoring its own community traditions. Although peacemaking courts are spreading throughout Indian Country, their influence in Alaska has been limited. Other than Kake, the Metlakatla Tribe is the only tribe in Alaska that takes on criminal cases beyond its Indian Child Welfare load. In Alaska, the barriers to constructing tribal courts capable of entering into full faith and comity agreements with the state courts or of raising sentencing controversies to the level of federal court review, as tribal peacemaker courts have done elsewhere, are significant. Still, Kake Circle Peacemaking has, to the great benefit of its village, expertly assumed a state court function that was otherwise executed ineffectively. The Organized Village of Kake intends to make Circle



Peacemaking a permanent fixture of self-governance by enshrining it in their constitution. Circle Peacemaking's success and the village's determination to ensure its perpetuation stand as significant triumphs in the development of a robust tribal judicial system. These are remarkable and desperately needed achievements in Alaska.

## B. CHOICE OF LAW: CUSTOMARY, TRADITIONAL, AMERICAN, OR INTERTRIBAL?<sup>\*</sup>

### 1. THE ROLE OF CUSTOM IN MODERN JURISPRUDENCE

Consider the following hypothetical, based in part on *Malaterre v. Estate of St. Claire*, No. 05-007 (Turtle Mountain Band Ct. App. 2006).<sup>†</sup>

A newly married couple move into a new home on the Lake Matchimanitou Indian Reservation in Michigan. They live on trust land and both are citizens of the Lake Matchimanitou Band of Ottawa Indians. They have two children in the first three years of marriage. The husband's parents, who also live on the reservation but in an older home, become ill. One has a stroke and the other has diabetes. Both are unable to walk and require wheelchairs. Their home is not handicap-accessible, but the newlyweds' home is handicap-accessible. The husband and wife discuss the matter and offer to "trade" homes with his parents until they are able to return to their own home. His parents agree. They "trade" homes, but no contract, lease, or other document is executed memorializing the agreement. The wife is never happy with the new arrangement. The newlyweds' relationship degenerates and the husband moves out, leaving the wife and their two children in the old house. The husband's parents, still living in the newlyweds' home, file suit in Lake Matchimanitou tribal court seeking the wife's eviction from the old home, while maintaining they will not move out of the new home. At trial, the wife alleges that she was coerced into agreeing to the "trade" due to the husband's threat of violence.

The hypothetical presents a difficult but typical choice of law problem. In the absence of tribal statutory or common law, should customary law apply? How do the parties and the tribal court find the customary law? Should they follow the Ottawa First Book, assuming any of its provisions apply?

Customary law still appears in many of the decisions of American state and federal courts. Customary law, part and parcel of the English common law adopted and adapted by the Founders of the United States, appears as the basis of decision less often given that statutory and administrative law dominate the field.

In contrast, the importance of customary law in American Indian tribal courts cannot be understated. Indian tribes now take every measure conceivable to preserve indigenous cultures and restore lost cultural knowledge and

<sup>\*</sup> Author note:—Much of the material in this part is derived from Matthew L. M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57 (2007).

<sup>†</sup> Disclosure: The author of this book participated in the case as a sitting appellate judge, and wrote the opinion.

practices. Tribal court litigation, especially litigation involving tribal members and issues arising out of tribal law, often turns on the ancient customs and traditions of the people.

## 2. THE LEGAL FRAMEWORK FOR THE USE OF CUSTOM IN TRIBAL COURT DECISION MAKING: RULES OF RECOGNITION AND CHANGE

Many tribal constitutions, tribal court codes and ordinances, and tribal court rules require the use of customary law in tribal court decision making. And there are tribal courts that are not required to use customary law or are even precluded from using customary law in certain circumstances. The various statutes and rules offer varying ways and means for the use of customary law.

### a. Tribal Constitutional Provisions

The constitution of the Passamaquoddy Tribe in Maine offers one example of a constitutional mandate for using customary law. The relevant provision reads:

Civil disputes which are within the jurisdiction of the Passamaquoddy Tribal Court shall, to the extent consistent with applicable tribal laws, ordinances, customs, and usages, as well as applicable provisions of federal Indian law, be resolved by the Tribal Court in accordance with any corresponding provisions of the applicable civil laws and remedies of the State of Maine, and such laws and remedies shall to that extent be deemed adopted as the law of the Pleasant Point Reservation of the Passamaquoddy Tribe.

CONST. OF THE SIPAYIK MEMBERS OF THE PASSAMAQUODDY TRIBE art. VIII, §1. This provision allows the tribal court to apply tribal customary law on par with tribal statutes and applicable federal and state law. The provision allows for the tribal court to declare the existence and applicability of customary law as the law of the tribe.

In contrast, the Constitution of the Grand Traverse Band of Ottawa and Chippewa Indians is silent as to customary law. The constitution provides, "This Constitution, ordinances, resolutions, regulations, and judicial decisions of the Band shall govern all people subject to the Grand Traverse Band's jurisdiction." CONST. OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS art. VI. Silence does not preclude the Grand Traverse Band tribal courts from applying customary law in its decisions, but it does limit the persuasive character and applicability of customary law.

### b. Tribal Statutes

#### DINÉ CHOICE-OF-LAW STATUTE

7 Navajo Nation Code §204

A. In all cases the courts of the Navajo Nation shall first apply applicable Navajo Nation statutory laws and regulations to resolve matters in dispute before the courts. The Courts shall utilize Diné bi beenahaz'áanii (Navajo

Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulations. The courts shall also utilize Diné bi beenahaz'áanii whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts.

B. To determine the appropriate utilization and interpretation of Diné bi beenahaz'áanii, the court shall request, as it deems necessary, advice from Navajo individuals widely recognized as being knowledgeable about Diné bi beenahaz'áanii.

C. The courts of the Navajo Nation shall apply federal laws or regulations as may be applicable.

D. Any matters not addressed by Navajo Nation statutory laws and regulations, Diné bi beenahaz'áanii or by applicable federal laws and regulations, may be decided according to comity with reference to the laws of the state in which the matter in dispute may have arisen.

## NOTES

1. Former long-time Associate Justice of the Navajo Nation Supreme Court Raymond D. Austin's book *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (2009) delves into far greater detail about the sources and interpretation of Navajo common law. *See id.* at 37-51. In 2002, the Navajo legislature adopted Resolution No. CN-69-02, recognizing the Fundamental Laws of the Diné. *See* 2 NAVAJO NATION CODE §§201-206.

Justice Austin notes that "Navajo Nation courts do not need statutory authorization to use Navajo common law," but that there has been a choice-of-law statute in the Navajo code books authorizing the use of common law since 1959. *See id.* at 44.

2. On February 23, 2010, the Navajo Nation tribal council attempted to bar the Nation's judiciary from using Fundamental Law, leaving tribal customs and traditions to be resolved by the Nation's peacemaker courts exclusively. *See Navajo Council Overrides Veto of Fundamental Law Bill*, INDIANZ.COM, Feb. 24, 2010, available at <http://64.38.12.138/News/2010/018533.asp>. However, Dr. Austin argued that the Fundamental Law could be applied by the Navajo judiciary without statutory authorization, and so it would seem the Navajo courts could continue to utilize the Fundamental Law. *See Austin, supra*, at 44-45. In fact, it appears the Navajo Supreme Court has repeatedly utilized the Fundamental Law in recent decisions. *E.g., In re Seanez*, No. SC—CV-58-10, slip op. at 4 (Navajo Nation S. Ct., Oct. 22, 2010) (noting that Frank seanez "claimed attorney-client privilege when asked if he ever advised his client about ways in which the branches may communicate according to the Diné fundamental principle of *k'é*, which we have described in our holdings as vital in the way our leaders are to approach each other").
3. Tribal legislatures provide many different hierarchies and procedures in their choice-of-law provisions. The White Earth Band of Chippewa Indians Judicial Code, for example, requires the tribal court to "[reduce] to writing with a historical justification therefor" any tribal "tradition and custom" it chooses to follow. WHITE EARTH BAND OF CHIPPEWA INDIANS JUDICIAL CODE ch. VII,

§6(a). The decisions of the tribal court “shall become a precedential guide for the unwritten tradition, customs or laws so as to allow future Judges and litigants to be guided on the traditional law and custom.” *Id.* Customary law is ranked on par with “other laws” in the choice-of-law hierarchy. §6(b). The tribal court may, if doubt arises, “request the advice and assistance of the panel of elders.” *Id.* This statute provides clearer guidance to the White Earth Band tribal court than many other tribal choice-of-law provisions. The code provides that the tribal court may announce customary law and is not required, unless it chooses, to consult with tribal elders on customary law. Moreover, the code mandates that the tribal court follow any customary law that it announces. Finally, the code requires that the tribal court reduce to writing unwritten customary law that it announces so that it may be used as precedent.

4. The Oglala Sioux Tribe Law and Order Code authorizes the tribal code to use customary law, but only if the custom does not conflict with tribal statutes and federal law. The statute provides, “[T]he Oglala Sioux Tribal Court shall give binding effect to . . . any applicable custom or usage of the Oglala Sioux Tribe not in conflict with any of the Tribe or United States.” OGLALA SIOUX TRIBE LAW AND ORDER CODE ch. II, §20.27(c). As with the White Earth Band statute, “[w]here doubt arises as to such customs and usages, the Court may request the testimony, as witnesses of the Court, of personal [sic] familiar with such customs and usages.” *Id.* The Oglala Sioux legislature made clear that customary law is not on par with tribal law or even federal law. Of course, it is a distinct possibility that the legislature did not or could not act without interference from federal officials, as is often the case where the tribal constitution requires the approval of the Secretary of Interior in the enactment of tribal codes. CONST. AND BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION OF SOUTH DAKOTA art. XI (“[N]o amendment shall become effective until it shall have been approved by the Secretary of the Interior.”).
5. The Stockbridge-Munsee Community of Mohican Indians’ tribal court code is similar in some respect to the White Earth Band’s code, but applies only to the rules of procedure for the tribal court. The code provides:

[The Tribal Court Code] is exempted from the rule of strict construction. It shall be read and understood in a manner that gives full effect to the purposes for which it is enacted. Whenever there is uncertainty or a question as to the interpretation of certain provisions of this code, tribal law or custom shall be controlling and where appropriate may be based on the written or oral testimony of a qualified tribal elder, historian or other representative.

STOCKBRIDGE-MUNSEE TRIBAL LAW TRIBAL COURT CODE ch. I, §1.3(B).

As with other tribal court codes, the Stockbridge-Munsee tribal court can and should seek the advice of a tribal person with relevant knowledge. This particular statute is different in that the tribal legislature has mandated that customary law be used not as substantive law but as a device to be used to interpret the tribal court code.

6. The Bay Mills Indian Community's tribal court code puts customary law on par with tribal statutes and applicable federal law, so long as the custom does not conflict with federal law:

In all civil actions, the Tribal Court shall apply the applicable laws of the United States, any authorized regulations of the Department of Interior which may be applicable, any ordinance of the Bay Mills Indian Community, and any custom of the Chippewa Tribe not prohibited by the laws of the United States.

BAY MILLS INDIAN CMTY. TRIBAL CODE ch. IV, Law Applicable to Civil Actions, §A. The Bay Mills tribal court, however, must "request the advice of persons familiar with these customs and usage's [sic]." §B.

7. Other tribal statutes emphasize the use of customary law in certain types of disputes. The Little River Band of Ottawa Indians' Children's Code provides "because of the vital interest of the Tribe in its children and those children who may become members of the Tribe, this Code, other ordinances, regulations, public policies, recognized customs and common law of the Tribe shall control in any proceeding involving a child who is a member of the Tribe." LITTLE RIVER BAND OF OTTAWA INDIANS CODE ch. 900, §3.08(a). The code adds:

The substantive law and procedures for the state courts shall not be binding upon the Children's Court except where specifically provided for in this Code. In the absence of promulgated rules of procedure, procedural rules of the State of Michigan shall be utilized as a guide. Michigan case law may serve as a guide for the Court but shall not be binding. Any matters not covered by the substantive laws, regulations, customs or common law of the Little River Band of Ottawa, or by applicable federal laws or regulations, may be decided by the Children's Court according to the laws of the State of Michigan.

§3.08(c).

8. Many court codes simply note the existence of possible customary law, but do not regulate its application. For example, the Kenaitze Indian Tribe's code is nonspecific on how customary law can be used:

The purpose of this Code is to honor and acknowledge our prior Customs, History, Traditions, and Experience for the purpose of preserving, strengthening, and continuing the Tribal Court into the future. To ensure the efficient and fair administration of justice, the Tribal Court shall continue to resolve conflicts and disputes and enforce Tribal Laws through the application of Cultural Traditions, Customary and Traditional Values, Written Law, Codes, and Ordinances.

1 KENAITZE TRIBAL CODE §3(b). And:

Issues of Tribal Law, Custom or Procedure on Appeal: If the petition to appeal alleges that the Tribal Court has made an error in applying or interpreting Tribal Law, Custom or Procedure, the Court shall review the applicable law, custom and/or procedure to determine whether the Tribal Court has correctly applied or interpreted the law. If the Appellate Court finds that an

error was made, it can direct the Tribal Court to review its ruling or it can overturn its ruling.

1 KENAITZE TRIBAL CODE §10(d)(ii).

### c. Tribal Court Rules

#### HOOPA VALLEY TRIBE, TRADITIONAL TRIBAL LAW

---

##### Hoopa Valley Tribal Code §2.1.04

The traditional law of the Hoopa Valley Tribe is the common law of the Tribe tantamount to the written law of the Tribe and will be applied in all situations where it is relevant to the issues raised in an action before the Court. The Court will first look to the laws adopted by the Tribe and to the Constitution and Bylaws of the Hoopa Valley Tribe. If no written Tribal law applies to a cause of action or the issues involved in an action, the Court will look to the Tribe's traditional law and if it finds the traditional law to be applicable in settling the dispute, will base its decision on traditional Tribal law.

(a) The Tribal Court may be used to facilitate a traditional form of dispute resolution, akin to a mediated settlement. The parties may identify a [go-between], to mediate between the parties until a stipulated agreement is reached. The Court will then issue an order containing the stipulated agreement.

(b) Where the parties choose to follow the civil procedures of Title 2, in any dispute, claim, or action, in which a party asserts that traditional Tribal law governs the outcome, the Court must first determine what the traditional law is. If the traditional Tribal law has been acknowledged by a legal writing of the Tribe the Court will apply the written law.

(1) Evidence that a traditional law is written includes written reference to a traditional law, right, or custom in a Tribal resolution, motion, order, ordinance or other document acted upon by the Tribal Council. Anthropological writings or publications, and personal writings are not evidence that the traditional law is written, but may be presented as persuasive or supporting evidence that the traditional law or custom exists.

(c) In any dispute, claim, or action, in which a party asserts that traditional Tribal law governs the outcome, and the Court finds that the traditional law is unwritten, the Court will hold a hearing to determine what the traditional law is.

(1) The parties may stipulate to what the traditional law to be applied is. If the parties stipulate to the traditional Tribal law, the Court will then hold an evidentiary hearing to determine the facts of the case.

(2) If the parties do not stipulate to the traditional Tribal law, the parties may stipulate to a list of neutral Tribal members to act as expert witnesses, whose testimony will be relied upon to determine the traditional Tribal law.



(A) If the parties do not stipulate to such a list, each 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.

(B) Each party shall submit a list of Tribal elders' 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.

(C) Each party shall also submit to the Court a list of Tribal members' names that the party believes 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.

(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.

(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.

(e) After hearing the expert witnesses' testimony the Court will issue a Conclusion of Law in which the Court will state what it has found to be the traditional Tribal law. If either of the parties object to the Court's conclusion, the Court will meet in closed session with all of the expert witnesses. The Court will then call for a discussion of the Conclusion of Law by the expert witnesses. Following this discussion, the Court may re-issue or amend and re-issue the Conclusion of Law, or repeat the process as defined herein, selecting different neutral and impartial witnesses and/or a different set of questions to be asked of the expert witnesses.

(f) Once the Court has determined what the traditional law to be applied is, the Court will set a date for a conference hearing pursuant to Title 3, Rule 12 (b).

## NOTES

1. The most detailed, complicated, ambitious, and (possibly) unworkable tribal rule relating to customary law is Section 2.1.04 of the Hoopa Valley Tribal Code. (Despite being labeled a "code," this portion of the Hoopa tribal code actually was first promulgated by the tribal court as court rules.) First,

the code provides that customary law must be used by the tribal court where tribal statute is silent. §2.1.04. Second, the code provides a detailed procedure for determining what the tribal customs are. §2.1.04(b). The first step in the procedure is to determine if the tribal custom was written: "If the traditional Tribal law has been acknowledged by a legal writing of the Tribe the Court will apply the written law." *Id.* Tribal custom is "written" if the Hoopa tribal council has taken action that amounts to a ratification of the custom. §2.1.04(b)(1).

So, in the case of the Hoopa tribe, the tribal council may announce customary law to the exclusion of the tribal court, but the code still authorizes the tribal court to announce customary law after following a complex procedure that includes the selection of expert witnesses similar to the way litigants sometimes select arbitrators and a hearing (or series of hearings) in which the tribal court may issue a "Conclusion of Law" declaring the customary law of the tribe. §2.1.04(c).

The Hoopa rule is a serious attempt to deal with many of the potential problems relating to discovering, recovering, and applying customary law. Reasonable minds can differ as to the meaning or validity of tribal customs and traditions, and the rule attempts to create a procedure that alleviates these concerns. But the rule's adopting of an arbitration-style hearing involving a battle of tribal elders as expert witnesses has, in the experience of the author as former staff attorney and current appellate judge for the Tribe, prevented the application of any customary law in Hoopa courts.

2. The Winnebago Tribe of Nebraska's court rule is similar to the Oglala Sioux statute noted above. The rule mandates that the tribal court "apply traditional Tribal customs and usages, which shall be called the common law," but only if no tribal statute answers the legal question. WINNEBAGO TRIBAL COURT CODE tit. 1, art. 1, §1-109. The rule also provides that "[w]hen in doubt as to the Tribal common law, the Court may request the advice of counselors and Tribal elders familiar with it." *Id.* Winnebago civil court rules further provide:

1. In all civil cases, the tribal court shall apply:

- A. The constitution, statutes, and common law of the Tribe not prohibited by applicable federal law, and, if none, then
- B. The federal law including federal common law, and, if none, then
- C. The laws of any state or other jurisdiction which the Court finds to be compatible with the public policy and needs of the Tribe.

2. No federal or state law shall be applied to a civil action pursuant to paragraphs (B) and (C) of subsection (1) of this section if such law is inconsistent with the laws of the Tribe or the public policy of the Tribe.

3. Where any doubt arises as to the customs and usages of the Tribe, the Court, either on its own motion or the motion of any party, may subpoena and request the advice of elders and counselors familiar with those customs and usages.

WINNEBAGO TRIBAL COURT CODE tit. 2, art. 1, §2-111.

### 3. THE USE OF CUSTOM IN TRIBAL COURT OPINIONS: APPLICATIONS OF THE RULES OF ADJUDICATION

As would be expected by a student of Professor Hart's theory of primary and secondary rules, tribal courts vary in the ways that they find, analyze, and apply tribal customary law. Most tribal courts cannot rely upon customary law for various reasons. They are unaware of it; or, if they are aware of it, no customary law they are aware of applies to the fact pattern at issue. It is important to discuss instances of tribal courts applying customary law to locate methods of finding, analyzing, and applying customary law in order to discern the strengths and weaknesses of their methods. Tribal courts that cannot or do not apply much custom in their analysis can learn from these courts.

---

#### NAVAJO NATION V. RODRIGUEZ

---

Navajo Nation Supreme Court No. SC-CR-03-04, 8 Navajo Rep. 604, 5 Am.  
Tribal L. 473, 2004.NANN.0000014 (December 16, 2004)

Before FERGUSON, Acting Chief Justice, and HOLGATE, Associate Justice (by designation). . . .

#### I.

The relevant facts are undisputed. The Navajo Nation police arrested Appellant Rafael Rodriguez ("Rodriguez") following a shooting at a trailer park in Kayenta. While in custody, Investigator Kirk Snyder ("Investigator Snyder") of the Kayenta Police District interviewed Rodriguez. Investigator Snyder began the interview by stating to Rodriguez that his alleged actions could put in him in federal prison for up to sixty years and could result in a fine of a million and a half dollars. Investigator Snyder then produced an "advice of rights" form, a document laying out several purported rights, apparently based on the United States Supreme Court's ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966). The form was in English, and there is no evidence that Investigator Snyder explained each of those rights in English or Navajo. Rodriguez signed a waiver on the bottom of the form, and then proceeded to write out a lengthy confession (Confession) implicating himself as the shooter.

. . . The Navajo Nation submitted the advice of rights form and the Confession during the testimony of Investigator Snyder. After hearing objections from Rodriguez, [the Kayenta District Court] admitted both into evidence. After hearing the witnesses and reviewing the evidence the Kayenta District Court found Rodriguez guilty [of aggravated assault], and sentenced him to one year in jail. Rodriguez then filed this appeal. . . .

#### II.

The issues in this case are . . . (2) whether a coerced confession may be used in a criminal proceeding to establish the truth of the allegations in the criminal complaint; and (3) whether the provision of an English language form informing a person in custody of his or her rights, and a signed waiver by that person on the form, without more, is sufficient for a confession to be voluntary. . . .

## IV.

Rodriguez argues that the District Court wrongly allowed the Confession into evidence for the truth of the allegations in the criminal complaint. He contends that Investigator Snyder coerced the statement through threats and other pressure. He also contends that, even if there was no coercion, the “advice of rights form” itself is insufficient, as applied to him, as a waiver of his right not to give a statement to the police. At oral argument the Navajo Nation conceded that there was a “degree of coercion” by Investigator Snyder, but that the confession was nonetheless valid because Rodriguez signed the advice of rights form, thereby waiving his right not to make the statement. . . .

## A.

Section 8 of our Navajo Bill of Rights protects criminal defendants from being “compelled . . . to be a witness against themselves.” 1 N.N.C. §8, This provision is almost identical in language to the equivalent section of the Indian Civil Rights Act, 25 U.S.C. §1302(4) (Indian tribe cannot “compel any person in a criminal case to be a witness against himself”), and the Fifth Amendment to the United States Constitution (no person can be “compelled in any criminal case to be a witness against himself”). In *Navajo Nation v. McDonald*, we recognized that the right against self-incrimination under our Bill of Rights is fundamental. 7 Nav. R. 1, 13 (Nav. Sup. Ct. 1992). A person cannot give information for his or her own punishment unless there is a “knowing and voluntary decision to do so.” *Id.* We interpreted the English words in our Bill of Rights in light of the Navajo principle rejecting coercion. *Id.* We said that “others may ‘talk’ about a Navajo, but that does not mean coercion can be used to make that person admit guilt or the facts leading to a conclusion of guilt.” *Id.*

We reiterate these principles today. Our Navajo Bill of Rights, as informed by the Navajo value of individual freedom, prohibits coerced confessions. We expand upon *McDonald* by applying these principles to a person in police custody. The police department is an arm of the Navajo government, and as such must recognize a person’s rights in much the same ways, and to the same extent, as must our courts. Therefore, in this case, the right against coerced self-incrimination attached not when Rodriguez first appeared before the district court, but when he was placed in police custody and was interviewed by Investigator Snyder.

Based on the Navajo Nation’s concession that the police coerced Rodriguez, we have no choice but to conclude that coercion occurred. The Navajo Nation did not dispute that the investigator threatened Rodriguez by indicating to him the possibility of sixty years of federal jail time and a fine of one and a half million dollars before Rodriguez reviewed and signed the advice of rights form. Though the Navajo Nation referred to a “degree of coercion” without defining “degree,” we do not see how coercion can be measured by degrees. Either the police coerced Rodriguez or it did not. The parties agree that Rodriguez was coerced, and we find that any degree of coercion is in violation of the Navajo Bill of Rights.

## B.

The coercion itself may be enough to vacate Rodriguez's conviction; however we also consider the Navajo Nation's argument that his waiver on the advice of rights form was enough for his confession to be admissible. As discussed above, the right against self-incrimination in the Navajo Nation includes the requirement that a confession be "knowing." *McDonald*, 7 Nav. R. at 13. Even if no coercion occurred, we must decide what rights Rodriguez had when he signed the waiver. The main question is whether the protections recognized in the United States Supreme Court's decision in *Miranda* apply on the Navajo Nation, or whether this Court should apply some other approach.

In giving meaning to the right against self-incrimination, this Court does not have to directly apply federal interpretations of the Bill of Rights. In interpreting the Navajo Bill of Rights and the Indian Civil Rights Act, as with other statutes that contain ambiguous language, we first and foremost make sure that such interpretation is consistent with the Fundamental Laws of the Diné. Navajo Nation Council Resolution No. CN-69-02 (November 1, 2002). That the Navajo Nation Council explicitly adopts language from outside sources, or that a statute contains similar language, does not, without more, mean the Council intended us to ignore fundamental Diné principles in giving meaning to such provisions. *Cf. Fort Defiance Housing Corp. v. Lowe*, No. SCCV-32-03, slip op. at 6 (Nav. Sup. Ct. April 12, 2004) (statute adopted from outside source is not illegitimate, but must be carefully interpreted consistent with Navajo values). Indeed, Navajo understanding of the English words adopted in statutes may differ from the accepted Anglo understanding. . . .

While we are not required to apply federal interpretations, we nonetheless consider them in our analysis. We consider all ways of thinking and possible approaches to a problem, including federal law approaches, and we weigh their underlying values and effects to decide what is best for our people. We have applied federal interpretations, but have augmented them with Navajo values, often providing broader rights than that provided in the equivalent federal provision. *See, e.g., Duncan v. Shiprock District Court*, No. SC-CV-51-04, slip op. at 8, n. 5 (Nav. Sup. Ct. October 28, 2004) (applying federal definition of "equitable proceeding" but declining to apply Seventh Amendment historical test on right to jury trial); *Lowe*, No. SC-CV-32-03, slip op. at 4-5 (recognizing that Navajo Due Process protects a greater scope of "property" than federal due process). Our consideration of outside interpretations is especially important for issues involving our modern Navajo government, which includes institutions such as police, jails, and courts that track state and federal government structures not present in traditional Navajo society. *See, e.g., Mitchell v. Davis*, No. SC-CV-52-03, slip op. at 3-4 (Nav. Sup. Ct. August 16, 2004) (using federal interpretations of civil procedure rules as part of analysis for interpreting Navajo court rules adapted from federal rules).

We hereby interpret the right against self-incrimination to require, at a minimum, clear notice by the police in a custodial situation that the person in custody (1) has the right to remain silent and may request the presence of legal counsel during questioning, (2) that any statements can be used against him or her, (3) the right to an attorney, and (4) the right to have an attorney

appointed if he or she cannot afford an attorney. These are the rights already recognized by the Kayenta Police District in their advice of rights form, and we confirm here that they apply across the Navajo Nation. Essentially, we adopt the minimum requirements from *Miranda* as consistent with our Navajo values. We have previously suggested, without explicitly holding, that this is appropriate *See In re A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1989) (referring to “*Miranda* rights” required to be given in Navajo Children’s Code); *Navajo Nation v. McCabe*, 1 Nav. R. 63, 64-65 (Ct. App. 1971) (indicating *Miranda* rights not necessary without explicitly adopting standard).

However, we add the following: The mere giving of a standardized “advice of rights” form to a person in custody is not enough. The relationship between the Navajo Nation government and its individual citizens requires the same level of respect as the relationship between one person to another. In our Navajo way of thinking we must communicate clearly and concisely to each other so that we may understand the meaning of our words and the effect of our actions based on those words. The responsibility of the government is even stronger when a fundamental right, such as the right against self-incrimination, is involved.

In *Miranda*, the U.S. Supreme Court recounted the source of the constitutional protection against self-incrimination. *Miranda*, at 442-443 (quoting *Brown v. Walker*, 161 U.S. 591 (1896)). Reminiscing about the English criminal procedure, the Court stated that

if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to brow-beat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions . . . made the system so odious as to give rise to a demand for its total abolition.

*Id.* With such inequities impressed upon the minds of American colonists, “a denial of the right to question an accused person became clothed in this country with the impregnability of a constitutional enactment.” *Id.*

We are not guided in our own criminal jurisprudence by a legacy of internal oppression. Nevertheless, the U.S. Supreme Court’s discussion reminds us of our Navajo principle of *hazho’ogo*. *Hazho’ogo* is not a man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals. When discussions become heated, whether in a family setting, in a community meeting or between any people, it’s not uncommon for an elderly person to stand and say “*hazhó’ogo, hazho’ogo sha’alchini*.”<sup>3</sup> The intent is to remind those involved that they are *Nohookaa Diné’é*,<sup>4</sup> dealing with another *Nohookaa Diné’é*, and that therefore patience and respect are due. When faced with important matters, it is inappropriate to rush to conclusion or to push a decision without explanation and consideration to those involved. *Aadd na’nile’dii el dooda*.<sup>5</sup> This is *hazhó’ogo*, and we see that this is an underlying principle in everyday dealings with relatives and other individuals, as well as an underlying principle in our governmental institutions. Modern court

3. “*hazhó’ogo, hazhó’ogo* my children.”

4. Earth-surface-people (human beings).

5. Delicate matters and things of importance must not be approached recklessly, carelessly, or with indifference to consequences.



procedures and our other adopted ways are all intended to be conducted with *hazhó'ógo* in mind.

Considering the means by which Rodriguez's confession was obtained and the use of the advice of rights form, we now stand and say "*hazhó'ógo*." The transaction between Rodriguez and Investigator Snyder, and the way that the advice of rights form was presented to Rodriguez does not conform with the ways that people should interact. We must never forget that the accused is still *Nohookaa Dine'é*, and that he or she is entitled to truthful explanation and respectful relations regardless of the nature of the crime that is alleged. Likewise, a police badge cannot eliminate an officer's duty to act toward others in compliance with the principles of *hazhó'ógo*.

We therefore hold that the police, and other law enforcement entities and agencies, must provide a form for the person in custody to show their voluntary waiver. They must also explain the rights on the form sufficiently for the person in custody to understand them. Merely providing a written English language form is not enough. The sufficiency of the explanation in a Navajo setting means, at a minimum that the rights be explained in Navajo if the police officer or other interviewer has reason to know the person speaks or understands Navajo. If the person does not speak or understand Navajo, the rights should be explained in English so that the person has a minimum understanding of the impact of any waiver. Only then will a signature on a waiver form allow admission of any subsequent statement into evidence.

In this case, there is insufficient evidence that the Navajo Nation police explained each of the rights on the form to Rodriguez. Consequently, even if there was no preceding coercion, there was not a "voluntary" waiver of his rights.

## V.

The remaining question is the effect of the improper admission of the confession on the conviction. We questioned both sides at oral argument whether, despite the inadmissibility of the confession, there still was sufficient evidence to maintain the conviction. In reviewing the order of the District Court, we conclude that the confession was a significant part of the evidence used by the court to reach its ruling. To parse out the confession from the rest of the evidence at this level and speculate on what the District Court would have done if the confession was never admitted at trial would be improper. Given the importance of the fundamental right of the defendant against self-incrimination, and the difficulty, if not impossibility of retroactively reviewing a case as if that evidence never entered into the court's decision, the vacating of the conviction and release of the defendant was proper.

We did not come to this decision lightly. The crime which Rodriguez was accused of committing is a serious one. However, the seriousness of the crime does not excuse the conceded violation of the defendant's rights. Therefore, though we had significant reservations, we decided the only proper remedy was to vacate the conviction and release the defendant.

## VI.

Based on the above, we vacated the conviction and released Rodriguez.

## NOTES

1. In *Rodriguez*, the Navajo Nation Supreme Court determined that the Nation's law enforcement officers must give the Miranda warnings to every suspect in custody. The Court was not making new law in the case, as "these are the rights already recognized by the Kayenta Police District in their advice of rights form, and we confirm here that they apply across the Navajo Nation." The United States Constitution did not require this result because the Constitution does not apply to Indian tribes. The Navajo Nation does not have a written constitution, but the Navajo legislature has enacted a Navajo Bill of Rights. Section 8 of the Navajo Bill of Rights protects suspects from being "compelled . . . to be a witness against themselves." NAVAJO NATION CODE tit. 1, §8. The Court recognized that the Navajo statute tracked the Indian Civil Rights Act and the Fifth Amendment. Navajo statutory law requires that the Navajo courts take the "Fundamental Laws of the Diné" into consideration when interpreting statutory language such as the Navajo Bill of Rights. As such, the Court held that the "[Navajo] Bill of Rights, as informed by the Navajo value of individual freedom, prohibits coerced confessions."
2. The *Rodriguez* decision's result was to extend criminal procedure rights of suspects in the custody of the Navajo Nation's law enforcement officers beyond that which is required by federal or state law. This is not unusual for the Navajo Nation's courts.

More interesting is the reasoning for applying the Miranda warnings in the first instance. The *Miranda* Court focused on the police practices of the day, emphasizing their psychological impacts on the suspect. But the Court had little choice but to acknowledge that law enforcement nationwide had long engaged in physical abuse and coercion to elicit confessions. Aside from physical abuse, the Court noted that law enforcement used psychological coercion on suspects, relying upon police interrogation manuals of the time. The Court concluded that warnings were necessary, in part because of the need to protect "human dignity," but more so because "no statement obtained from the defendant can truly be the product of his free choice." In other words, a more critical purpose for the use of Miranda warnings by state and federal officers is to ensure that confessions will be truthful.

The *Rodriguez* Court was more concerned not with whether the confessions or statements taken by Kayenta District law enforcement were truthful, but with the relationships between members of the Navajo community. While the Court reached a conclusion that the Miranda warnings applied to suspects held in tribal law enforcement custody, the Court expanded those rights to require that officers treat suspects like relatives, with respect and dignity. As the Court wrote, "[A] police badge cannot eliminate an officer's duty to act toward others in compliance with the principles of *hazhó'ógo*."

The *Rodriguez* Court incorporated tribal customary law by relying on the language of the Navajo people as a source of custom and tradition. Unlike many tribal court judges, Navajo judges must be fluent in the language of the people. NAVAJO NATION CODE tit. 7, §354(E) (2005) ("Each [judge] must be able to speak both Navajo and English, and have some knowledge of Navajo

culture and tradition.”). *Rodriguez* is an example where the Court drew upon its understanding of the language to derive important rules of conduct for tribal police officers. For the Navajo people, it is the Navajo language that is the source of the community’s customs and traditions.

3. In *Crow Tribe of Indians v. Big Man*, 2000 Crow 7, 2000.NACT.0000007 (Crow Ct. App. 2000), the court held that “criminal defendants are entitled to *Miranda* [sic] protections when they are prosecuted in the Crow Tribal Court.” *Id.* at ¶33. The *Big Man* Court recognized that *Miranda* does not apply in tribal courts as a matter of American constitutional law, *see id.* at ¶19 (citing *United States v. Wheeler*, 435 U.S. 313 (1978); *Talton v. Mayes*, 163 U.S. 376, 384 (1896)), but it also recognized that the Indian Civil Rights Act might serve to extend Anglo-American criminal procedure protections to tribal court defendants. *See id.*; 25 U.S.C. §§1302(4) (“due process”), (8) (“equal protection”). The Court dipped into the legislative history of the Act and found—like the U.S. Supreme Court did—that interpretation of the Act “will frequently depend on question[s] of tribal tradition and custom. . . .” *Id.* at ¶23 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978)).

But the *Big Man* Court noted that the Crow legislature had adopted a rule of criminal procedure “that appears to parallel the requirement under current federal constitutional law[ i.e., *Miranda*].” *Id.* at ¶27. The Court noted that the *Miranda* warnings are “not grounded in Tribal custom or tradition—nor is the rest of the adversarial criminal prosecution process set out in the Crow Rules of Criminal Procedure.” *Id.* The Court, constricted by the tribal legislature’s decision to adopt the *Miranda* rule, applied federal precedent to decide the case. *See id.* at ¶¶37-50.

## 4. CHOICE OF LAW

### HOPÍ INDIAN CREDIT ASSOCIATION V. THOMAS

---

Hopi Tribe Appellate Court No. 98AC000005, 1 Am. Tribal L. 353,  
1998.NAHT.0000013 (November 23, 1998)

Before Sekaquaptewa, Chief Justice and Lomayesva and Abbey, Justices.

#### I. Factual and Procedural Background

This Court has previously set forth the facts of this case in *Hopi Indian Credit Association v. Thomas*, AP-001-84, (hereinafter *Hopi Indian Credit Association I*) and will do so again only briefly here. This case originally involved a secured chattel mortgage executed on the Hopi Reservation on April 25, 1969, by the Hopi Indian Credit Association, an association organized according to the laws of the Hopi Tribe, to Lee S. Thomas and Mary Inez Thomas, both Hopi citizens, in the amount of \$9,600.00. . . . Mr. and Ms. Thomas defaulted on the loan in 1974 leaving an unpaid loan balance of \$2,900.17. . . . Nearly ten years after the default, Hopi Indian Credit Association sued Mr. Thomas and Ms. Thomas in tribal court to recover the amount owed on the contract. On July 7, 1984, the trial court granted summary judgment in favor of Mr. and Ms. Thomas based on its determination that the claim was barred by the six-year federal statute of limitations.

On July 30, 1984, Hopi Indian Credit Association noticed an appeal to this Court on the ground that the trial court erred by applying federal law before Hopi custom and tradition. This Court held that Resolution H-12-76 required the trial court to consider Hopi custom, tradition and culture before it applied foreign law and remanded the case to the trial court for further consideration. . . .

On remand, Mr. and Mrs. Thomas once again moved for summary judgment based on the statute of limitations. They argued that an analysis of Hopi custom was not necessary because the mortgage contained a choice of law clause expressly selecting foreign law. The trial court found that the parties' contractual choice of foreign law required the application of a foreign statute of limitations and therefore rendered an inquiry into Hopi custom unnecessary. Interpreting the contract, it found the action was barred by Arizona's six-year statute of limitations and granted summary judgment in favor of Mr. and Ms. Thomas. Hopi Indian Credit Association appeals from this final judgment.

. . .

### III. Discussion

#### A. The Parties Choice of Law

We begin our analysis with the observation that while, as a general matter, parties are free to choose foreign law to govern their contracts, this freedom is not without limit. . . .

[A] claim is governed by the statute of limitations of the forum in which it is brought notwithstanding a contrary choice by the parties. . . .

A statute of limitation is a declaration of public policy intended to promote judicial economy and to protect citizens from state claims. . . . Therefore, a jurisdiction has a strong interest in applying its own statute to claims brought in its courts. This rationale is even more compelling where, as here, the contract involves overwhelmingly local contacts. The plaintiff in this case is a Hopi association organized according to Hopi law, the defendants are Hopi citizens, and the contract was executed at Hopi.

We hold that this jurisdiction follows the majority rule that a contractual choice of law provision does not apply to the statute of limitations and that an action on a contract brought in the Hopi jurisdiction is governed by the Hopi statute of limitations, if any. Accordingly, we hold that the trial court erred in applying a foreign statute of limitations rather than the applicable Hopi limitations period.

#### B. Proof of Hopi Custom, Tradition, and Culture

In determining what, if any, limitations period applies under Hopi law, the trial court is instructed to follow the procedure required by H-12-76 section 2 (a), which provides that:

The courts of the Hopi Tribe, in deciding matters of both substance and procedure, in case otherwise properly before the Courts of the Hopi Tribe, shall look to, and give weight as precedent to, the following:

- (1) The Hopi Constitution and Bylaws;
- (2) Ordinances of the Hopi Tribal Council;
- (3) Resolutions of the Hopi Tribal Council;
- (4) Customs, traditions and culture of the Hopi Tribe;

- (5) Law, rules, and regulations of the Federal Government and cases interpreting such. Such laws, rules and regulations may, in circumstances dictated by the Supremacy Clause of the U. S. Constitution, be required to take a higher order or precedence.
- (6) The laws and rules, and cases interpreting such laws and rules, of the State of Arizona. This provision shall not be deemed to be an adoption of such laws or rules as the law of the Hopi Tribe nor as a grant or cession of any right, power or authority by the Hopi Tribe to the State of Arizona.
- (7) The Common Law.

In *Hopi Tribe v. Mahkewa* we held that the first four authorities in this list are mandatory and the last three are persuasive. Under H-12-76, the trial court should first determine as a matter of law whether any mandatory authority exists relevant to the statute of limitations issue. If the trial court finds that there is no relevant Hopi Constitutional provision, ordinance or resolution, it must consider whether there is a relevant Hopi custom or tradition. *Hopi Indian Credit Association I* at 4 (“[T]he customs, traditions and culture of the Hopi Tribe must take precedence in the court’s decision of what law to apply before a court reaches the use of any foreign law, including federal or Arizona state law. . . .”).

In *Hopi Indian Credit Association I*, we observed that “Hopi customs, traditions and culture are often unwritten, and this fact can make them more difficult to define or apply.” *Id.* at 4. In this respect, the use of Hopi custom, tradition, and culture presents problems of notice and proof similar to those raised where a party asserts a claim based on foreign law. Traditionally, a party that wishes to apply foreign law must plead and prove its existence and substance. Similarly, this Court has held that where a party intends to raise an issue of unwritten custom, tradition or culture, it must plead and present clear proof of the existence and relevance of the custom, tradition or culture. *Hopi Indian Credit Association I* at 5-6.

We find the federal rule governing the application of foreign law to be instructive. Federal Rule of Civil Procedure 44.1 provides that the courts may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the rules of evidence. Thus, federal courts have considered as relevant evidence local custom . . . , expert testimony . . . , affidavits by practitioners of the foreign law . . . , scholarly articles . . . , affidavits by law professors . . . , and briefing by the attorneys. . . .

Accordingly, we hold that when a relevant Hopi custom, tradition, or culture is asserted, its existence and substance must be proved with clear evidence and decided by the court as a matter of law. Therefore, on either the trial court’s own motion or on the noticed motion of a party, the court shall hold a hearing at which the parties may present any relevant testimony or evidence.

#### IV. Order of the Court

This case is REMANDED to the trial court with instructions to hold a pre-trial hearing in order to determine whether there is any Hopi custom, tradition, or culture relevant to the statute of limitations consistent with this Opinion and H-12-76.

## NOTES

1. In a previous case, *Hopi Indian Credit Assoc. v. Thomas I*, No. AP-001-84, 1996.NAHT.0000007 (Hopi Ct. App. 1996), the Court held that Hopi law, either customary or statutory, must apply before any “foreign law,” that is, federal or state law. The Hopi Indian Credit Court explained in great detail the procedure later Hopi courts must follow in applying Hopi customary law:

The primary issue raised in this appeal concerns the application of Hopi Resolution H-12-76, which was discussed in *Hopi Tribe v. Mahkewa*, . . . (1995) (AP-002-92). In *Mahkewa*, we said that federal law, Arizona state law and the common law are only “persuasive.” *Id.*, opinion at 4. The customs, traditions and culture of the Hopi Tribe, however, are one of the authorities considered “mandatory.” *Ibid.* The only recognized exception to this precedence is when the U.S. Constitution’s Supremacy Clause applies. See Hopi Res. H-12-76, §§2(a)(5) & 2(b); U.S. Const., art. IV, §2. This case does not involve the Supremacy Clause as it does not involve issues inconsistent with federal law.

The trial court did not explicitly say that federal law should be given precedence over Hopi custom, tradition or culture, but it noted that when the Hopi Constitution, Ordinances or Rules did not speak on a given issue, then “we should refer to the federal rules as well as to Arizona rules and then common law and [Hopi] custom and tradition as a means to aid the Court. . . .” . . . In effect, the trial court would look to authorities listed in H-12-76, section 2(a), in descending order until it reached the resolutions of the Hopi Tribal Council, then it suggested it should skip over customs, traditions and culture of the Hopi Tribe and apply federal and state law. Customs and traditions would be considered last in aiding a court: alongside the common law. This interpretation is incorrect.

The customs, traditions and culture of the Hopi Tribe deserve great respect in tribal courts, for even as the Hopi Tribal Council has merged laws and regulations into a form familiar to American legal scholars, the essence of our Hopi law, as practiced, remains distinctly Hopi. The Hopi Tribe has a constitution, ordinances and resolutions, but those Western forms of law codify the customs, traditions and culture of the Hopi Tribe, which are the essential sources of our jurisprudence.

Therefore, as we held in *Mahkewa*, the customs, traditions and culture of the Hopi Tribe must take precedence in a court’s decision of what law to apply before a court reaches the use of any foreign law, including federal or Arizona state law, with the exceptions as noted above. The trial court erred by applying foreign law before it considered the relevancy of Hopi custom. . . .

Although Hopi customs, traditions and culture are to be considered by a trial court before it considers foreign laws, it is not enough just to say that they are “mandatory” to use as if they could be quickly or easily applied. Hopi customs, traditions and culture are often unwritten, and this fact can make them more difficult to define or apply. While they can and should be used in a court of law, it is much easier to use codified foreign laws. That ease of use may convince a trial court to forego the difficulty and time needed to properly apply our own unwritten customs, traditions and culture. However, the trial court must apply this important source of law when it is relevant.

To make it more likely that parties will plead our own customs, and more likely that courts will properly use them, the following discussion is provided



to guide future trial courts, as related to the present case. The Tribal Council has empowered this court to rule authoritatively on Hopi custom, tradition, and culture. Hopi Ord. 21, §1.2.8. When the legal interpretation of a Hopi custom, tradition or culture is necessary to the resolution of a conflict at the trial court, however, that court shall first resolve the issue at its level. Any decision made by the trial court as to definition or use of custom, culture or tradition may be reviewed by the Court of Appeals de novo on appeal (as if raised for the first time). . . . In all other cases requiring a legal interpretation of a Hopi custom, culture or tradition, the certification shall be made directly to this court.

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 pleading or other reasonable written notice. The intent of this notice is to prevent unfair surprise, which is consistent with Hopi custom and tradition of fairness.

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.

A court may dispense with proof of the existence of a Hopi custom, tradition or culture if it finds the custom, tradition or culture to be generally known and accepted within the Hopi Tribe. In such a case, the judge may take judicial notice of the custom or tradition. This does not dispense with a showing of relevancy.

Just as a trial court must apply Hopi constitutional law when it is applicable, even if neither party pled the Hopi Constitution, so too must a trial court take judicial notice of and then apply Hopi custom, tradition or culture when it is applicable. This requirement is essential for Hopi courts to apply the most authoritative law applicable to the issues, as directed by the Hopi Tribal Council. *See Mahkewa*, Opinion at 5-6. This requirement also ensures Hopi courts will best serve the community properly through the spirit of the law intended.

*Hopi Indian Credit Ass'n I*, at ¶¶22-25, 28-33.

2. In *Rave v. Reynolds*, 23 Indian L. Rep. 6150 (Winnebago Tribe of Neb. Sup. Ct. 1996), the Winnebago Supreme Court held (among many other things) that tribal members and a tribal member organization have standing to challenge the constitutionality of the rules for tribal elections under tribal law. In *Rave*, the tribal government defendants argued that “voters, tribal members, and organizations composed of interested tribal voters . . . lacked the necessary personal stake or interest in the controversy. . . .” *Id.* at 6156. The Court noted that the defendants cited “only federal cases brought under article III of the United States Constitution. . . .” *Id.*

The *Rave* Court’s analysis often relied upon customary law as the Court understood it, but it sometimes relied on federal law as well. The Court first found, however, that the tribal court rules mandated that “[i]n all civil actions the tribal court shall apply . . . [t]he constitution, statutes, and common law of the tribe. . . .” *Id.* at 6156 (quoting WINNEBAGO (NEB.) CODE OF CIVIL PROCEDURE §2-111(1)(A)). The Court interpreted this provision to

mean that “the Winnebago tribal courts prefer tribal law as a rule of decision to any rule afforded by federal and state law. Resort to federal or state law therefore is appropriate to inform the tribal courts of a rule of decision only if tribal law is completely silent on the question.” *Id.* The Court further interpreted “common law of the tribe” to mean two different types of law:

First, the term common law may reference the western style common law derived from English legal roots, i.e., the judge-made law articulated in decided cases through written opinions often reflecting the judicial understanding of the customs and practices of a people in a particular sector of endeavor. Such common law may include both already existing decisions and any new rule of law announced by a tribal court in a case before it.

Second, . . . section 2-111 contemplates that tribal customs and usages, both traditional and evolving, will constitute tribal common law.

*Rave*, 23 Indian L. Rep. at 6157. The Court found that no tribal constitutional or statutory provision applied in the standing analysis. *See id.* (“Neither party cited and this court is unaware of any express provisions in the tribal constitution or statutes that deal with standing or of any decided cases of the Winnebago tribal courts that have previously addressed the issue.”).

The *Rave* Court then announced the tribal customary law as it applied to the standing analysis. The Court held that the strict federal standing requirements do not apply in their fullest extent to tribal court litigants, holding that it would rely upon

the healing approach traditionally taken to resolve tribal disputes. The traditions of most Indian tribes in the United States, including the Ho-Chunk people, part of whom compose the Winnebago Tribe of Nebraska, encouraged participatory and consensual resolution of disputes, maximizing the opportunity for airing grievances (i.e., hearing), participation, and resolution in the interest of healing the participants and preventing friction within the tribal community.

*Id.*

The *Rave* Court buttressed its announcement of tribal customary law with candid pragmatism through an announcement of public policy:

In small, close-knit tribal communities, like the Winnebago tribe of Nebraska, denying an opportunity to air and heal grievances in a neutral forum otherwise possessed of jurisdiction, such as the tribal courts, could have disruptive effects by sowing dissension, hostility and distrust that otherwise could be ameliorated by airing and resolving the dispute. Accordingly, adopting the narrow standing rules employed in federal courts could have a disruptive impact on tribal communities and, accordingly, would not constitute sound public policy.

*Rave*, 23 Indian L. Rep. at 6158.

The tribal government’s attorneys represented to the Court (without citing to any authority) during oral argument that “whatever participatory mechanism might have existed then subsequently devolved participatory dispute resolution traditions on the tribal council, but not the Winnebago courts.”

*Id.* at 6157. This argument appeared to be a weak claim that the tribal courts had no jurisdiction over the case at all. The Court rejected that argument and held that “whatever tribal traditions previously controlled tribal council, clan or family dispute resolution in the mid-nineteenth century must, in the absence of express tribal positive law on standing, affect this court’s resolution of the standing issue.” *Id.*

## 5. THE PROBLEMS IN FINDING AND APPLYING TRIBAL CUSTOMARY LAW

### KEY CONCEPTS IN THE FINDING, DEFINITION, AND CONSIDERATION OF CUSTOM LAW IN TRIBAL LAWMAKING

---

Pat Sekaquaptewa, 32 Am. Indian L. Rev. 319, 375-85 (2007-2008)

...

#### 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 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. From a tribal government perspective, compelling arguments are made for the use of custom. [Christine] 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. 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. 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. [Robert Odawi] Porter echoes Zuni’s concerns but goes farther, arguing that the use of the Western adversarial process itself tends to break down relationships and community, thus compromising both persisting traditional ways and tribal sovereignty.

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. 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. . . .

##### 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 defining custom law be any different? Further, just because not everyone agrees with the definition and application of federal and state laws[, it] 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.

...

### 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.

#### 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. [See, e.g., WHITE MOUNTAIN APACHE JUDICIAL CODE §2.3 (1998). Compare *id.* with HOOPA VALLEY TRIBAL CODE §2.1.03 (2005).] 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. [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.”).] The preferred form of documentation may take the form of a simple written “journal,” or the high-tech “searchable video archive.” 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, or as a decisional body given questions of custom where the parties either agree to submit questions or where a tribal judge certifies a question on her own.

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. 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. Some tribal legislatures have limited the precedential effect of the custom law decisions of such bodies. Others rely on the precedential effect of the tribal court opinions where they incorporate such body’s decision or recommendations concerning custom. 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. . . .

### 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. . . .

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). . . .

### C. Problems and Solutions for the Pleading and Proving of Custom

. . . 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, 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. 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. 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.

### 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. Other tribes require judicial approval of the witnesses selected by the parties. In both situations, there are concerns with 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. 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. 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.

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 to make arguments and present evidence after they know what the applicable custom law standard will be.

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. . . .

## NOTES

1. Tribal choice-of-law provisions that require or encourage the application of tribal custom and tradition tend not to provide a procedure or any guidance at all as to how a tribal court should go about finding, understanding, and applying tribal customary law. Some tribal courts that do make a serious effort to apply customary law are hampered by the lack of guidance. Others assert expansive authority to declare customary law. What tribal choice-of-law provisions should include—or what tribal courts can include in their court rules—is a road map for finding, understanding, and applying customary law.

For tribal judges who are not experts in the culture and traditions of the communities for which they are judges, including those who do not understand the traditional language of the community or those who are not even members of the community, finding customary law is difficult. For judges who do understand their tribal language and do have a strong connection to the communities for which they are judges, the task is made much easier, but it is not obvious.

2. Not every source of customary law is comprehensive or legitimate. Vine Deloria and others have long criticized the work of non-Indian anthropologists and other researchers and scientists. *E.g.*, Vine Deloria, Jr., *Anthropologists and Other Friends*, in *CUSTER DIED FOR YOUR SINS* 83 (1969). There is a very significant bias by Indian people against the work of these academics. This bias, whether reasonable or not, will be a formidable obstacle to any tribal court judge using written academic literature as a basis for finding and understanding the customary law of a tribal community. The legitimacy of a tribal court opinion declaring customary law based on the findings of an academic would be doubted much of the time.

But the fact of the matter remains that, for many tribal communities, the work of non-Indian academics is the only source for tribal histories, legends, political science, religious practices, and even customary laws. For these communities, it could be foolish to ignore this work. The work might be 100 years old or very recent. It might contain commentary that offends every Indian person within 1,000 miles of its unveiling, but tribal judges might be able to see through the academic jargon and bias to learn something significant. Or not.

Another problem—one that this author is very sensitive and careful in discussing—is the legitimacy of the representations made by tribal community “experts.” Reasonable minds may differ on customs and traditions. Classic examples include the differences between practitioners of the Native American Church and the Navajo traditional religion, and the differences between the Midewiwin and other Anishinaabe traditional religions. But there may be fundamental differences in the understanding of the culture and traditions of a community on family or political lines. Of course, such differences occur also among law professors outside tribal communities as they try to understand Anglo-American law. Tribal courts, as in the procedure for identifying Hoopa customary law, would be in the unenviable position of choosing between competing understandings of customary

law—and this would be a choice that tribal courts might not have the institutional capacity to make. Cf. Kristen A. Carpenter, *Considering Individual Religious Freedoms under Tribal Constitutions*, 14 KAN. J.L. & PUB. POL'Y 561, 562-64 (2004) (discussing the difficulty of analyzing tribal religious practices as a scholar).

3. The question of institutional capacity for tribal courts and tribal judges in announcing or declaring tribal customary law is complicated and very important. While many tribal courts are modeled on American common law courts, tribal judges should not have the same notion that they can declare tribal common law. Justice Rehnquist can rely upon English common law decisions issued around the time of the American Revolution as a source of authority for the origins of many American common law doctrines; however, tribal judges do not have the same sources of authority upon which to rely.

Tribal customary law as applied by tribal courts now follows (or is moving in the direction of) a pattern similar to the theory of *opinio necessitatus*, or the theory that “individuals purposely follow a certain rule simply because they believe it be a rule of law.” Alan Watson, *An Approach to Customary Law*, 1984 U. ILL. L. REV. 561, 563. “Under this view, custom becomes law when it is known to be law, is accepted as law, and is practiced as law by persons who share the same legal system.” *Id.* So, tribal courts’ adoption or announcement of tribal customary law is an acknowledgment that a certain custom or tradition remains viable within the community. However, “suppose that once the custom is known to be law and is accepted as law, the practice changes. Does the old law cease to be law, and the new practice become law?” *Id.*

Another issue—again, a very sensitive subject—is whether tribal judges who are not members of the community should be announcing tribal customary law as the law of the tribe. The question is one that each tribal community should face, ask itself, and answer in an official and comprehensive manner.

In *In re D.H.*, No. 2009-1236-CV-CW, 2009 WL 1619635 (Grand Traverse Band Tribal Court, Feb. 2, 2009), the tribal judge was not a tribal citizen, and demonstrated careful reluctance to adopt a rule based on customary law as asserted by one of the parties:

Respondent further argues that fundamental due process rights guaranteed by the Constitution of the Grand Traverse Band of Ottawa and Chippewa Indians, and the United States Constitution dictate that Respondent should be entitled to a jury trial in this matter; While the Court agrees that Respondent is entitled to fundamental due process in this proceeding, the Court is not persuaded that a jury trial is a component of that due process requirement in this type of proceeding. Nor is the Court persuaded that a judge cannot adequately protect Respondent’s due process rights or reach a determination while also recognizing and acknowledging tribal customs and traditions of the Grand Traverse Band regarding child rearing as required under the Children’s Code.

The Court agrees with Respondent that Tribal Council could adopt a provision in the Children’s Code providing for a right to a jury trial, and

that the Tribal Court could adopt a court rule providing for the right to a jury trial in this type of proceeding. However, neither has done so to date. 10 GTBC §107(a) states that “[t]he procedures in the Children’s Court shall be governed by the rules of procedure for the Tribal Court, not in conflict with this Code. In the absence of Tribal Court promulgated rules of procedure, the Michigan Rules of Civil Procedure shall be utilized as a guide.” This Court reads this provision to provide that the Court will look to Michigan law for guidance, but the use of Michigan procedure (including the right to a jury trial) is discretionary, not mandatory. Again, the Court is not persuaded that a jury trial was intended by the Tribal Council in adopting the Children’s Code, nor that the Tribal Judiciary has intended to provide for a jury trial in Children’s Code proceedings.

*In re D.H.*, 2009 WL 1619635, at \* 2.

One somewhat more cynical commentator argued that it is difficult to demonstrate that customary law as identified by tribal judges is sufficiently “Indian”:

When a tribal judge does claim to find applicable custom, is it enough—as some opinions suggest—that the custom is generally “Indian”? In a typical case, *In re C.D.C. and C.M.H.*, the tribal judge for the Delaware Tribe of Western Oklahoma based a child custody decision on the following custom: “[I]t is common knowledge in Indian country that both the maternal and paternal grandmothers traditionally play a very significant role in the Indian family.” [No. PG-87-A50, 1 Okla. Trib. 200, 205 (Oct. 13, 1988).] This invocation of custom suggests that “Indian” here is meant to be a contrast to non-Indian, or Western values: a rather indeterminate category. Surely the many Indian tribes of North America, originally distributed over a vast geographic range, differ to some extent in their cultural practices. Yet the use of “custom” at this general level can be found in many instances. “Indian” traditions in these decisions represent a number of broad values—community, family, reconciliation, healing, and harmony—which suggest as much a nostalgia for “small-town” norms as they do for Indian ones.

Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117 121 (2000-2001).

#### 4. Professor Alexander Tallchief Skibine adds:

One of the most basic interferences with tribal culture that has also had an impact on the evolution of tribal law was the systematic effort to eradicate Native languages. If I remember correctly, when I first visited the Osage reservation as a child in the 1950s, in order to publicly speak at official or social functions such as funerals and weddings, one had to speak in the Osage language. When I came back to the reservation as an adult, this custom had already vanished. Unfortunately for some tribes, the United States’ effort to eradicate Indian languages has mostly been successful. This loss has an important impact on tribal court decisions because as some of the decisions of the Navajo Supreme Court remind us, some native concepts of justice can only be expressed in their native tongue. The Navajo Supreme Court has done a great job in not replacing Navajo words with English ones in the text of their opinions. Instead the Court has kept the native words and takes great care to fully explain what they mean.

Other concessions made to the western ways of thinking include the reliance on the written word at the expense of oral tradition. This does pose a problem for those tribes whose laws are related to their religion and the religion requires some aspects of it to remain secret. A second major cultural interference with tribal justice systems was the attempt to eradicate native religions. . . . Justice Austin of the Navajo Supreme Court . . . explained that one could not separate Navajo customary law or what we would call common law, from some of the Navajo's fundamental religious beliefs because these beliefs formed the foundation and were an integral part of the Navajo customary law.

Alex Tallchief Skibine, *Troublesome Aspects of Western Influences on Tribal Justice Systems and Laws*, 1 TRIBAL L.J. 2 (2000).

5. When tribal courts in written opinions do cite to custom, they often do so in a superficial manner, without reference to specific precedents. Far more often than not, tribal court citation to custom amounts to nothing more than a citation to a broad, vague notion to tribal values. And often these tribal values are pan-tribal values—values that the tribal courts recognize as inherent to many or even most tribes.

Only in extremely rare occasions in tribal court opinions available in the public domain does a tribal court judge apply tribal customary law as the basis of decision, with the important exceptions of the Navajo and Hopi tribal courts. Tribal customary law serves as the controlling law in tribal court cases only where the parties consent to its application or where all of the parties are members of the tribe and understand the law as applied.

Professor Justin Richland's description of one such case out of the Hopi tribal court is instructive. See Justin B. Richland, "What Are You Going to Do with the Village's Knowledge?" *Talking Tradition, Talking Law in Hopi Tribal Court*, 39 LAW & SOC'Y REV. 235 (June 2005). Richland analyzed one hearing in detail, *James v. Smith*, most of which was conducted in the Hopi language.

The dispute of particular interest here emanated from a conflict between three sisters (petitioners) and their aunt (respondent) over their competing claims to an orchard worked by the petitioners' grandfather (also the respondent's father). The petitioners, who still live in the village where the land is located, claimed to have inherited the property from their mother upon her death, because she was the primary caregiver for their grandfather at the time of his death. According to them, Hopi custom and tradition dictate that property left intestate by a decedent should go to the person in the family who showed the most commitment to its maintenance and to the support of its late owner. They claim that this person was their mother, the respondent's younger sister, and that upon their mother's death (also following custom), this property—like all Hopi women's property—should go to them, her daughters.

The respondent, however, claimed that in 1954 she and her husband, an Apache man (and not a Hopi tribal member), were taken by her father to the field in question and told that she was to inherit the property upon his death. The respondent claimed that because this land is an orchard, traditionally worked by the husband, it does not constitute the kind of clan lands that are inherited through the mother. Consequently, she contended that tradition

requires that her father's intent to pass the land to her should prevail. The petitioners countered this, arguing that regardless of the father's prior statements, tradition holds that the respondent had lost her claim to this land when she failed to return to show any commitment to its maintenance and when she married a non-Hopi man and left the reservation to live with him.

*Id.* at 250-51.

Given that these cases are not litigated in English or with a written opinion, it is very difficult to study them universally. Many of these cases are decided informally, without the burden of imposing formal legal rules. That does not mean that there are very few of these cases—likely, there are many hundreds or even thousands a year—but they are not available for easy analysis. Nevertheless, these are the cases in which tribal courts understand and apply traditional law in a manner most reflective of the tribe's customs and traditions. The sole limitation of this way of applying tribal customary law is subject matter. Unlike many tribes that have faced more assimilation or have been subject to more importation of non-Indian people and culture, custom and tradition remains more important in insular tribal communities. The Hopi property disputes, for example, are closely related to the property ownership structure that the Hopi people have used since time immemorial. The property dispute discussed at the beginning of this section arising out of the Turtle Mountain Band reservation has little similarity to the kinds of disputes that Ojibwe and Cree customary law was developed to resolve.

Relatively few tribes or tribal judges have the understanding to apply traditional law in this manner. And relatively few subject matters tackled by tribal courts that appear in the available materials can be decided by resort to customary law. Tribal judges must resort to alternative methods.

6. A still infrequent but more common use of tribal customary law is to apply a custom or tradition as a means to modify an Anglo-American legal rule or an intertribal common law rule. In these instances, the tribal court identifies a rule that does not derive from the tribe's customary law with which to use in deciding the case. However, an aspect of the rule may conflict with an understanding of customary law. The tribal court will often still apply the foreign rule, but modify it as much as possible in order to make it conform to understandings of customary law. Much of the very best applications of intertribal common law follow this pattern.

The application of tribal customary law in this context often has advantages, but is still fraught with peril. The advantages include the potential to discover new applications of customary rules. As Vine Deloria and Clifford Lytle suggested decades ago, tribal courts cannot hope to rely only on customary law, noting that cultures and legal regimes change over time, and that tribal law must also develop to meet the needs of modern tribal societies. An additional advantage is that tribal courts will be more likely to take the time to discover customary law, or require that litigants help them discover it. Tribal court judges that take seriously the charge to discover and apply customary law have an excellent opportunity to develop and



harmonize tribal customs and traditions with the modern needs of Indian people.

The peril includes the careless invocation of intertribal common law or, worse, the invocation of pan-Indian customs. Non-Indian and nonmember Indian tribal judges (and scholars) have a limited means of accessing or understanding the customs and traditions of the tribe for which they work. One trap is to research and apply the customs and traditions of other Indian tribes, such as the Navajo Nation, in particular.

7. Another common use of tribal customary law in tribal court opinions is as a “gut check” or, worse, “sugar coating.” This occurs when a tribal court judge has decided to apply an Anglo-American legal rule from a state or federal court case or an intertribal common law rule as the basis of decision. The judge then compares these rules that will form the basis of decision to an articulation of the judge’s understanding of tribal customary law. If the foreign rule is consistent or does not otherwise conflict with the tribal custom or tradition, then the court is satisfied that the application of the foreign rule is acceptable. No modification of the foreign rule is made. The application of customary law as gut check does little to advance the importance, relevance, and understanding of tribal custom and tradition.

There are some explanations as to why this method of applying tribal customary law is so prevalent. For example, the subject matter of the dispute in question simply may have no antecedent in the tribe’s customs and traditions. Or perhaps the foreign rule to be applied actually is consistent with the tribe’s customs and traditions. Nevertheless, there should be fewer (and hopefully one day, no) cases in which a tribal judge required to apply customary law should ever resort to using the gut check method.

8. Former long-time tribal judge Steven Aycok noted that in at least one major area of law—the so-called *Miranda* criminal procedure rules—tribal custom may be overcome by dependence on the easy rules of American law.

Many Tribes have adopted *Miranda v. Arizona*, 384 U.S. 436 (1966). Again, this is not necessarily wrong but should be done after a process of thinking about what it is we do when adopting it.

When you read *Miranda* and the cases it cites, you get to cases where the Court has to deal with physical beatings, coercive measures and other methods of interrogations that we cannot and do not condone today. . . . For how many Tribes is that their history? Does a particular Tribe that has adopted *Miranda* have a history of Tribal police brutality? Is this a problem that needs this solution?

A Tribe could certainly decide that their police department operates much like an American police force. It may be that the police force applies foreign legal concepts on members. Police and the concept of police itself may be foreign to the Tribe’s history. Brutality may in fact be a part of the Tribal history. All of this may go into deciding that *Miranda* ought to apply at the Tribe.

On the other hand, there may be no history of brutality. The Tribe may have always “policed” themselves. A Tribe may decide that the solution of suppression runs counter to a value that honors accountability for wrong doing on the part of defendants. These and other factors may weigh into a decision not to adopt *Miranda*.

This process of evaluating the reasons for adopting Miranda, not just simply adopting it, is what I believe is called for. Miranda or a rule of law that says that evidence gathered by the police in a certain manner will be suppressed may fit nicely with a Tribes values. But it should be a Tribe by Tribe decision and should be a thoughtful, deliberative one.

Hon. Steve Aycock, Thoughts on Creating a Truly Tribal Jurisprudence, Materials prepared for the Second Annual Indigenous Law Conference, Indigenous Law and Policy Center, Michigan State University College of Law, March 17-18, 2006.

## 7. A NOTE ON INTRATRIBAL COMMON LAW\*

Intratribal common law is the common law applied by tribal courts in cases arising out of an indigenous legal construct. Intratribal common law is tribal custom and traditional law and norms. Intratribal common law also may be the “law” that traditional or non-adversarial tribal courts, such as peacemaker courts, use to resolve disputes. In a practical sense, however, many tribes have not yet recovered their customs and traditions in a manner that is useful to tribal court judges. 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. *See* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 844-47 (2007). The canoe ownership traditions of the Pacific Northwest tribes, handed down from generation to generation, originated from within the community. The inheritance rules of a community, whether they are matrilineal, patrilineal, or neither, tend to originate from within the community. Any legal construct not imposed or imported from the non-Indian political communities should be classified as an indigenous legal construct.

As noted by some, e.g., KEITH BASSO, *WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE* 40 (1996), the customs and traditions of Indian people often are buried within the peoples’ language, stories, and even the geographic terrain of their homelands. One method of teasing out a tribe’s primary rules may be to focus on important and fundamental rules articulated in the tribe’s language.

The method, in a nutshell, involves this process: First, the tribal court identifies an important and fundamental value signified by a word or phrase in the tribal language. In the case of the Navajo Nation courts, the judges often

---

\* *Author note:* Much of the material here and in the next section is derived from Matthew L. M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUSTON L. REV. 701 (2006).

identify the word *hazhó'ógo*. As the court noted in *Rodriguez*, “*Hazhó'ógo* is not a man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals.” *Navajo Nation v. Rodriguez*, No. SC-CR-03-04, at 10 (Navajo 2004). *Hazhó'ógo* is, for lack of a better term, a primary rule. *Rodriguez* involved the application of an Anglo-American legal construct to tribal criminal prosecutions (the Miranda rule), a secondary rule, to borrow once again from Professor Hart. The application of the tribal primary rule to the Anglo-American or intertribal secondary rule is necessary to harmonize these outside rules with the tribe’s customs and traditions. In the words of the *Rodriguez* Court, “Modern court procedures and our other adopted ways are all intended to be conducted with *hazhó'ógo* in mind.” *Id.* As a result, the Navajo court stiffened the Miranda rule far more than the Supreme Court would require state or federal courts to in similar circumstances.

This method may be transferable to other tribal courts as well. For example, many Anishinaabe people from the Great Lakes region are taught how to live in *ni-noo'-do-da-di-win'*, or harmony. See Edward Benton-Banai, *The Mishomis Book: The Voice of the Ojibway* 113 (1988). These Indian people should live what some refer to as the Good Life, or *bimaadiziwin*. *Id.* at 12. A Leech Lake Ojibwe elder defined the *bimaadiziwin* as follows:

Every day you will learn something different, every day a new piece of knowledge. That's the way you live your life [*Mii i'w akeyaa bimaadiziyan*]. Then you approach those things a little more to hear them, to see them. And the Spirit shares. That's how you search for the good things. Nothing bad will come of it.

Hartley White, *This Is a Good Way of Life* [*Onizhishin o'ow Bimaadiziwin*], in *LIVING OUR LANGUAGE: OJIBWE TALES & ORAL HISTORIES*, 216, 219 (Anton Treuer ed., 2001).

“Although the Anishinaabe themselves are loath[e] to establish a limited, set definition of [*bimaadiziwin*], some of the parameters of the Good Life include humility, generosity, and kindness.” Lawrence W. Gross, *Cultural Sovereignty and Native American Hermeneutics in the Interpretation of the Sacred Stories of the Anishinaabe*, 18 *WICAZO SA REV.* 127, 128 (2003). These could be identified by Anishinaabe tribal judges as the primary rules of the Anishinaabe people. They provide the ground rules for behavior in Anishinaabe communities and provide interpretative parameters for Anishinaabe tribal judges. The adjudicative work of tribal judges would follow from these understandings in much the same way as the Navajo judges perform their work.

There may be concerns that many Anishinaabe tribal judges are unqualified to interpret *bimaadiziwin* in the context of a modern dispute that turns into complex litigation. More likely than not, these judges will not speak or read Anishinaabemowin, the language of the Anishinaabe people, but that should not preclude the attempt to apply these primary rules.

Identifying primary rules as the method of identifying customary law offers the advantage of allowing tribal courts to bring customary law into the modern era without creating much additional confusion as to its application. The primary rule of *bimaadiziwin* may serve to affect, perhaps, the

application of state and federal law analogs in a tribal election dispute or a tribal personnel dispute.

## NOTES

1. 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.” 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. For example, although federal Indian law and policy has depleted much of Indian country, a great deal remains undisturbed. 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 that exists parallel to intertribal common law and that tribal courts apply in specific and relevant contexts—I contexts not including nonmembers.

2. The classic example of the use of intratribal common law is when a dispute arises between two members involving tribal lands, a dispute tinged with questions relating to what Dean Nell Jessup Newton calls “spiritual significance to the group.” In some Indian communities, the location of the land may not be disclosed, nor may the law that would decide the dispute. 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, most tribes have not had the benefit of this kind of scholarship. The relevant stories are yet to be discovered.

3. Tribal courts decide family law cases involving members (and even nonmembers who consent) using intratribal common law. *Polingyouma v. Laban*, 25 Indian L. Rep. 6227, 6228 (Hopi Tribe App. Ct. Mar. 28, 1997), is a case that recites customary and traditional law before applying that law to modern Hopi life. 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. 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.” *Id.* at 6228. The court then “tested” the custom “for relevancy . . . in the context of modern Hopi life.” *Id.* 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. 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.

4. Disputes between members over rights to tribal lands are another type of case best decided in accordance with intratribal common law. *Ross v. Sulu*, No. CIV-023-88 (Hopi Tribe App. Ct. July 5, 1991), was a case arising out of a dispute over claims to land within the Hopi reservation by different clans at the First Mesa. The Hopi Constitution provided that the local village there, the Village of First Mesa, had "the power to assign farming land." *Id.* at 4-5. The Hopi intratribal common law provided that each village had the discretion to adopt modern, or Anglo-American, governmental structures, but unless they did so, "they [were] considered as being under the traditional Hopi organization." *Id.* at 5-6. "The Village of First Mesa [had] not adopted a village constitution . . . [and] therefore, remain[ed] under the traditional, [intratribal, law]. . . ." *Id.* at 6. The Hopi appellate court ruled that the lower court could not have exercised jurisdiction in the dispute at issue in *Sulu*. *See id.* (explaining that the tribal court lacked jurisdiction over an "intravillage dispute between clans over a matter reserved for village decision"). Hopi law allows for traditional villages to resolve certain disputes over land exclusive of tribal court jurisdiction. *See id.* at 6-7. *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.
5. 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 or federal government structures. 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. Again, because these cases are wholly tribal, nonmember rights are not implicated.

*In re: Certified Question II: Navajo Nation v. MacDonald*, 16 Indian L. Rep. 6086 (Navajo Sup. Ct. Apr. 13, 1989), exemplifies this adaptation of intertribal common law in a tribal governmental dispute. The key question presented was whether the Navajo Tribal Council had authority to place the tribal chairman on administrative leave pending an investigation into alleged criminal activity. The Nation has no written constitution. The court relied upon the fact that the chairman's authority was derived in all respects from acts and delegations

of the tribal council. 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.” From that holding, the Court concluded the tribal council could place the chairman on administrative leave. 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 the boundaries 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.

The amazing story of Peter MacDonald is captured here:

During early February 1989, a United States Senate Select Subcommittee held a series of highly publicized hearings in which various witnesses testified under oath that the then Navajo Tribal Council Chairman, Peter MacDonald, Sr., solicited and received bribes and kickbacks from contractors doing business with the Navajo Nation and had engaged in other asserted illegal actions. On February 17, 1989, the Navajo Tribal Council adopted a resolution placing the chairman on administrative leave with pay, accompanied by a finding that “a state of emergency exists in the management of the Navajo Tribal Council caused by the unique circumstances and events relating to the office of the chairman and the serious allegations raised personally against Peter MacDonald, Sr.” The Navajo Nation has never adopted a written constitution. Previous Council resolutions spelled out procedures for *removing* a chairman, but prior to the MacDonald allegations, the Council had not enacted any law governing the placing of a chairman on *leave*. In this case, MacDonald challenged the authority of the Council to relieve him and the Vice-Chairman, who had also been implicated in the scandal, of their executive and legislative authority by placing them on leave. . . .

MacDonald was convicted on 41 counts of bribery, conspiracy, and violating tribal ethics standards in Navajo District Court in October 1990 and sentenced to six years in prison. Subsequently, the Nation revamped its governmental organization, creating separate executive, legislative, and judicial branches of government. The executive powers of the Navajo Nation are exercised under a president chosen through direct election.

DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 428, 431 (5th ed. 2005).

## 8. THE RISE OF INTERTRIBAL COMMON LAW?

Tribal courts are not organic or indigenous, 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, *United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888), 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—and perhaps as many as 300—have adopted tribal courts, and the rest have adopted one or more mechanisms of dispute resolution. And many tribal court systems include more than one type of court. Some courts mirror state and federal courts, while more traditional courts are more informal and rely upon traditional and customary procedure and practice. Some of these traditional courts operate under a system that rejects much of the adversarial system of adjudicating disputes.

Though much has been written about tribal courts and tribal law, little is known about them. 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 customary and traditional methods of dispute resolution. 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 section 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.

JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* 27 (2002).

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 its own sake, but a tool to preserve the culture and traditions of Indian people. Tribal sovereignty shields Indian people and Indian tribes from the assimilative effects of non-Indian society imposed through non-Indian governmental control. 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 Indian tribes and the American economic, legal, and political arenas. Substantive tribal common law reflects those two interests.

**RAVE V. REYNOLDS**


---

Winnebago Tribe of Nebraska Supreme Court, No. SC 96-01, 23 Indian L. Rep.  
6150 (July 9, 1996)

Before CLINTON, Chief Justice, BOTSFORD and HUNTER, Associate Justices.  
CLINTON, Chief Justice.

...

This matter comes before the court on cross-appeals in a case contending certain aspects of the tribal election conducted October 4, 1994 in which defendants John Blackhawk, Arthur Reynolds, and Delmar Free were certified as elected and thereafter seated as members of the Winnebago tribal Council for their current terms. . . .

### Facts

Under the amended provisions of article III of the Constitution of the Winnebago Tribe of Nebraska, the governing body of the tribe is a nine-member tribal council elected at large with staggered terms of three years which expire in a fashion such that three members of the tribal council are elected every year. . . . Article V further provides in relevant part:

Section 2. All elections held under and by virtue of this Constitution shall be held under the supervision of the Tribal Council, who shall provide all necessary equipment, appoint election officials, and furnish police protection and all other necessary things that pertain to an election.

...

In order to establish orderly procedures for and regularize the conduct of tribal elections, the Winnebago Tribal Council passed on September 19, 1972 Ordinance Nos. 4 and 5 which have governed the conduct of tribal council elections since that date. The provisions of Ordinance 5 are central to the resolution of this dispute. They provide for a nomination system for tribal council vacancies based on caucuses. Under this system all candidates appearing on the ballot must be nominated by a caucus. . . . The following provision of section 1(E) of Ordinance 5 created most of the dispute in this case, "No person shall attend or vote in more than one Caucus." While Ordinance 5 provides no express sanctions for violation of this so called "one person, one caucus" rule, the record reflects that the long-standing, well known, and evenhandedly applied custom of the tribal Council of the Winnebago Tribe of Nebraska had been to disqualify all candidates nominated from any and all caucuses attended by any caucus participant whose name also appeared on the caucus list from another caucus for the same election. . . .

Pursuant to the announced election schedule, on September 14, 1994, twenty-six tribal members conducted an election caucus at House 146 in Winnebago, Nebraska. The minutes of this reflect that Katherine LaRose was among the twenty-six participants. This September 14, 1994 caucus nominated David Beaver, plaintiff Russell St. Cyr, and Virgil Free as candidates for tribal council.

Also pursuant to the election schedule, another caucus was conducted at the Anna Bess LaRose residence on September 23, 1994. The minutes reflect the

attendance of four tribal members at this caucus, including Kathy LaRose [the same person as Katherine LaRose]. This September 23, 1994 caucus nominated James Louis LaRose . . . as a candidate for tribal council. . . .

Pursuant to the election schedule, the tribal council, pursuant to prior notice published in the *Winnebago Indian News*, conducted an open, public meeting on September 24, 1994 with seven members of the tribal council, more than the requisite quorum, present in order to certify candidates whose names would appear on the ballot for the 1994 election for tribal council. . . . [The tribal council excluded the candidates nominated in the September 14 and September 23 caucuses for violation of the “one person, one caucus” rule.] . . .

On January 30, 1995, almost four months after the 1994 tribal elections, the plaintiffs filed their complaint in this action contesting the seating of [the election winners]. . . .

Defendants later filed a motion to dismiss asserting, among other things, tribal sovereign immunity. . . .

### Discussion

...

#### A. Jurisdiction and Justiciability

...

##### 3. Sovereign Immunity

In their appeal, defendants reassert their defense of sovereign immunity previous[ly] advanced unsuccessfully before the Special Tribal Court. . . .

This court has already joined the virtually unanimous view of tribal, federal, and state courts on tribal sovereign immunity, finding that the Winnebago Tribe of Nebraska, like all Indian tribes, is immune from suit without its consent or an express waiver of sovereign immunity by either the tribal council or the Congress. *Investment Finance Management, Inc. v. Winnebago Tribe of Nebraska*, No. App. 87-01 (Winn. Sup. Ct. 1991), *see also GNS, Inc. v. Winnebago Tribe of Nebraska*, 21 Indian L. Rep. 6104 (Winn. Tr. Ct. 1994); *see generally* Felix S. Cohen’s *Handbook of Federal Indian Law* 324-28 (Rennard Strickland ed., 1982); Robert N. Clinton, Nell Jessup Newton, and Monroe E. Price, *American Indian Law: Cases and Materials* 327-43 (1992). Tribal sovereign immunity therefore constitutes a well established principle of law affecting Indian tribes. This court notes that notions of governmental immunity, such as tribal sovereign immunity, while adopted as tribal law as most tribal governments moved to western style forms of organization, nevertheless constitute distinctly Anglo-American legal doctrines, having no parallels in traditional Indian life where most positions of leadership were the result of earned respect of lineage and leaders ruled by example, wisdom, and respect, rather than coercion. *Moses v. Joseph*, 2 Tribal Court Rptr. A-51, A-53 (Sauk-Suiattle Tr. Ct. 1980). . . . [T]he plaintiffs named as party defendants only certain members of the tribal council including the three elected in disputed 1994 election. This case therefore requires this court to squarely address the *scope* of tribal sovereign immunity defenses applied to tribal officials.

In addressing the scope of tribal sovereign immunity, this court must first decide whether the question is governed by tribal or federal law. Federal common law clearly protects tribal sovereign immunity and governs the scope of that immunity in federal and state courts. . . . In tribal courts, however, the sovereign immunity of the governing tribe is governed primarily by tribal law and, only secondarily, by federal common law. *E.g., Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners*, 23 Indian L. Re. 6045 (Chy. Riv. Sx. Ct. App. 1996); *see generally* Johnson and Madden, *Sovereign Immunity in Indian Tribal Law*, 12 Am. Ind. L. Rev. 153 (1984). . . .

Federal law . . . classically draws a relatively bright line between suits against governments or governmental agencies, which generally are barred by sovereign immunity, and suits against officials, which, if controlled by any immunity at all, usually involve official, rather than sovereign, immunity. The decisions of other tribes on this matter under tribal law, however, sometimes have been less clear on this point. Indian tribes generally are found immune from suit without their consent or an express waiver under tribal law. *E.g., Colville Confederated Tribes of the Colville Reservation v. Stock West*, 21 Indian L. Rep. 6075 (Colv. Tr. Ct. 1994). While tribal agencies are generally held immune from suit under tribal sovereign immunity, at least one tribal court recently ruled as a matter of tribal law that tribal sovereign immunity did not extend to injunctive and declaratory relief actions filed against a tribal agency and involving tribal land, property or contractual obligations. *Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners*, 23 Indian L. Re. 6045 (Chy. Riv. Sx. Ct. App. 1996). The tribal courts, however, appear more divided on the scope of tribal sovereign immunity, if any, for suits brought against tribal officials.

Most of the recent tribal court decisions considering the application of tribal sovereign immunity to suits against tribal officials, including members of a tribal council, have determined that tribal officials cannot assert tribal sovereign immunity as an absolute jurisdictional defense to suit. For example, following the principles of federal immunity law, the Confederated Salish & Kootenai Tribes Court of Appeals ruled in *Moran v. Council of the Confederated Salish & Kootenai Tribes*, 22 Indian L. Rep. 6149 (C.S. & K. T. Ct. App. 1995) that tribal sovereign immunity did not bar suits against members of the tribal council even where those members were acting in their official capacity and *within* their lawful authority. The *Moran* court noted that federal law does not extend tribal sovereign immunity to tribal officials, even when acting within the lawful scope of their authority, and it declined to extend tribal doctrines of sovereign immunity any further. Other tribal courts have taken a similar tack, ruling that tribal sovereign immunity does not extend to injunctive and declaratory relief actions even when taken within the lawful delegated authority of the tribal official. *E.g., Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners*, 23 Indian L. Re. 6045 (Chy. Riv. Sx. Ct. App. 1996); *Clement v. LeCompte*, 22 Indian L. Rep. 6111 (Chy. Riv. Sx. Tr. Ct. 1994); *LeCompte v. Jewett*, 12 Indian L. Rep. 6025 (Chy. Riv. Sx. Tr. Ct. App. 1985); *Bordeaux v. Wilkinson*, 21 Indian L. Rep. 6131 (Ft. Berth. Tr. Ct. 1993). By contrast, some tribal courts hold that tribal sovereign immunity reaches tribal officials, at least where acting within the scope of their authority. *E.g.,*

*Francis v. Wilkinson*, 20 Indian L. Rep. 6015 (N. Plns. Intertr. Ct. App. 1993); *Whitetail v. Chaske*, 20 Indian L. Rep. 6056 (N. Plns. Intertr. Ct. App. 1992); *Hicks v. Harold*, 20 Indian L. Rep. 6091 (Fallon Tr. Ct. 1993); *Satiacum v. Sterud*, 10 Indian L. Rep. 3015 (Puy. Tr. Ct. 1982). Such cases often focus on determining whether a tribe has waived [its] sovereign immunity in its tribal constitution or statutes. Additionally, such courts consider whether the affected official acted outside of his or her official capacity or otherwise in violation of the tribal constitution and therefore not within the scope of his or her legal authority. Either approach is thought by such courts to lift the shield of sovereign immunity. One unfortunate consequence of this approach is that it frequently forces tribal courts to find waivers of sovereign immunity, which ultimately could adversely affect the tribe in unintended ways albeit not in the pending case, merely to adjudicate legitimate claims against misguided tribal officials who seriously harm persons while acting within the scope of their authority. Clearly demarcating and separating the legal question of tribal sovereign immunity from the issue of tribal official immunity avoids this unfortunate consequence. . . .

. . . Two provisions of the Tribal Code appear to this court plainly relevant. Section 1-919 dealing specifically with and entitled “Sovereign immunity” provides:

Except as required by federal law or by the Winnebago Tribal Constitution and By-Laws or as specifically waived by resolution adopted by the Winnebago Tribe of Nebraska specifically referring to such, the tribe shall be immune from any civil actions, *and its officers and employees shall be immune from suit for any liability arising from the performance of their official duties.*

Emphasis supplied. Section 1-916 of the Tribal Code entitled “Judicial review of legislative and executive actions” expressly provides in relevant part:

The tribal courts shall have authority to review any act by the tribal council, or any tribal officer, agent, or employee to determine whether that action, and the procedure or manner of taking that action, is constitutional under the tribal constitution, authorized by tribal law, and not prohibited by the Indian Civil Rights Act.

. . .

The only obvious way to reconcile these two provisions involves recognizing that section 1-919, while entitled “Sovereign immunity,” really addresses two separate types of immunity — the sovereign immunity of the tribe and the official immunity of the tribal officials and employees. . . . Since section 1-916 clearly authorizes the Winnebago tribal courts to review the actions of tribal officials, agencies, and the tribal council through injunctive, declaratory, and other noncompensatory forms of relief, the only way to harmonize that section with the official immunity portion of section 1-919 is to interpret the references in that section to “suit for any liability” to include only liability for damage or other monetary forms of relief. So limited, it is clear that section 1-919 really describes two entirely separate forms of immunity that parallel the federal law distinctions between sovereign immunity and official immunity. The tribe therefore possesses absolute immunity from suit for any type of relief under section 1-919 unless the adjudication is “required by federal law or by

the Winnebago Tribal Constitution and By-Laws or as specifically waived by [a tribal] resolution . . . specifically referring to such [immunity]." By contrast, most tribal officers and employees, including members of the tribal council, only have a qualified immunity from damage and other forms of monetary relief under section 1-919.

. . . Consequently, it is clear that section 1-919, as construed by this court, adopts the emerging consensus of tribal court decisions that tribal sovereign immunity does not extend to suits against tribal officers and employees. . . . Insofar as tribal officials have any immunity under section 1-919, that immunity is an *official* immunity not a derivative sovereign immunity. . . .

As a result of the foregoing discussion, this action clearly is not barred by sovereign immunity, as claimed by the defendants. . . .

## NOTES

1. The *Rave* Court surveyed a series of tribal court decisions from other tribes and reached the conclusion that there was a "consensus of tribal court decisions" supporting its view on tribal official immunity. This is intertribal common law.

Intertribal common law is the substantive common law applied by tribal courts in cases arising out of an Anglo-American legal construct. It is likely 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 Indian Civil Rights Act or a tribal secured transactions code. 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.

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. 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, or an executive agency. Tribal courts modeled on state and federal courts are Anglo-American legal constructs. Tribal constitutions adopted during the period following the Indian Reorganization Act 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. As a function of coexisting within non-Indian American society, some Indian tribes have taken these nonindigenous 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. At this point in history, in which 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, it is not possible or even desirable to expel all Anglo-American legal constructs from Indian country.

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. 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. In *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), 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.” *Id.* at 6135. 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—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 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. Even the tribal police’s actions were modeled upon American law enforcement tactics. There is 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.

2. Tribal courts also decide tort and contract claims brought against Indian tribes, tribal government officials, and tribal entities using intertribal common law. *Sullivan v. Mashantucket Pequot Gaming Enterprises*, 32 Indian L. Rep. 6128 (Mashantucket Pequot Tribal Ct. May 31, 2005), 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. 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. The next generation does the same, but also relies upon the precedents of older generations of tribal courts. 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.
3. 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, it is unusual to find a tribal

court decision that would depart in a radical manner from the way a state or federal court would decide the case.

Taking the doctrine of due process, one of the more subjective legal doctrines in the law, as an example is useful. See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 344 & n.238 (1998). State and federal courts tend to apply a balancing test, reaching results that differ from other courts in often dramatic ways. In California, where the notion of “substantive due process” is incorporated into the state’s constitutional law, a resident and citizen of that state might be subject to a United States Supreme Court still cringing from its own substantive due process jurisprudence. Due process as envisioned by the framers of the Constitution might be nothing like the due process the Court now applies. 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). 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. Due process jurisprudence has built-in expectations of variation.

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. 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.

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 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.

## C. TRIBAL JUDGES

### 1. JUDICIAL INDEPENDENCE

---

#### LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS CONSTITUTION

---

##### Article IX, Section H

**1. Independent Branch of Government.** The Judicial Branch shall be independent from the Legislative and Executive branches of the Tribal government and no person exercising the powers of any of the other two (2)

branches of government shall exercise powers properly belonging to the Judicial Branch of Tribal government.

**2. Funding mandate.** The Judicial Branch shall prepare and present an annual budget directly to the Tribal Council for funding. The proposed budget may include funding for representation of indigent defendants. Funding for the Judiciary shall be based on its need and status as a branch of government.

**3. Court administration.** The Tribal Judiciary shall employ an administrator of the courts and other assistants as may be necessary to aid in the administration of the courts of the Little Traverse Bay Bands of Odawa Indians. The administrator shall perform administrative duties assigned by the Judiciary.

## NOTES

1. Judge Fred Gabourie wrote the following in discussing the modern difficulties of tribes without a clear separation-of-powers rule:

Most tribes are governed by a tribal council, which is comprised of tribal members. As the legislative body of the tribe, it is their duty to enact a law and order code, including the establishment of the judiciary. This procedure may well be a weak link. Instead of "separation of powers" there are tribal councilpersons of the opinion that the tribal council has the power and authority to oversee tribal courts and the judges.

...

Not all Tribes have an effective procedure to evaluate applicants for judicial positions. However, there are tribes that require the judge to be a licensed attorney in good standing. And, there are tribes that have no such requirement. A successful applicant just may be chosen because he or she may have the reputation as a "good guy," or, be an ex-cop, a recent law school graduate, or one who dresses and looks like a judge. This caliber of tribal court judge may well have the feeling that his or her job depends upon keeping the tribal council happy and satisfied. On the other hand, there are some tribal courts judges who are not attorneys but have taken the initiative and desire to be good judges. They attend judges training programs, study and work very hard to become proficient and effective tribal court judges.

The majority of tribes recognize the fact that for a strong judiciary, judges must be free from political pressures, and therefore have enacted sections in their Constitution and Law and Order Code clearly defining judicial independence, therefore, separating the judicial branch from the executive and legislative branches of tribal government. Judges in the state system are either political appointees or elected and states wrestle with the issue of judicial independence, aware that it is necessary their judges be free from political pressures.

Hon. Fred W. Gabourie, *Judicial Independence of Tribal Courts*, 44 ADVOCATE (State Bar of Idaho), October 2001, at 24.

2. Samuel Brackel's 1978 study of tribal courts asserted that a lack of tribal judicial independence was a serious roadblock to the development of tribal court legitimacy. SAMUEL J. BRACKEL, *AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE* 108-09 (1978). William Vetter noted that the perception that tribal politics influences tribal courts is enough to prejudice tribal interests:

The separation of the judicial and political branches is a fundamental feature of legal ideology in the United States. Obviously, some degree of political influence on the Judicial branch does exist in the federal and state governments. The appointment of federal judges is a political process (as amply demonstrated by recent Supreme Court Justice appointment debates), but after appointment those judges are effectively free from political control. Similarly, state judges are usually elected, also a political process, but the other branches of state government normally become involved only when a vacancy exists and they cannot, for political reasons, remove a judge. Despite actual independence of tribal judges and regardless of actual noninterference by other tribal government branches, so long as the potential for political manipulation exists, tribal courts will be perceived as subservient and, therefore, inadequate to protect individual rights. It takes only a few bad examples to establish a perception of general inadequacy.

William V. Vetter, *A New Corridor for the Maze: Tribal Criminal Jurisdiction and Nonmember Indians*, 17 AM. INDIAN L. REV. 349, 455 (1992). Vetter cited to two federal court cases as the "bad examples": *Shortbull v. Looking Elk*, 677 F.2d 645 (8th Cir. 1982); *Little Horn State Bank v. Crow Tribal Court*, 690 F. Supp. 919 (D. Mont. 1988), *vacated on stipulation*, 704 F. Supp. 1561 (D. Mont. 1989).

3. More recent commentators, such as Kirke Kickingbird, note improvement on this front but caution that more work needs to be done:

[The last c]enturies witnessed long periods of the suppression and negation of independent tribal courts, and even today such courts have neither the independence nor self-sufficiency that most Native Americans would prefer. That said, in the last several decades sophisticated tribal justice mechanisms and judiciaries have once again arisen and are expanding. Only in these decades has the development of tribal legal expertise begun to flourish and be applied in a more widespread manner that serves the needs of Indian communities. Nonetheless, tribal judiciaries are still limited in their jurisdiction and decision making, and a fair and impartial tribal judiciary remains largely unrecognized even as we begin the twenty-first century. . . .

What has become clear to tribal government is that development of governmental infrastructure and economic projects requires Indian law expertise because of the complex issues that arise in applying its many doctrines. Concerns expressed by tribal members; by non-Indians visiting Indian Country; and by businessmen, corporations, and lenders who want to do business in Indian Country center around assurances that tribal authority is enforceable. Likewise, tribal governments need an appropriate forum to address the conflicts affecting tribal members, whether the issue is a domestic matter such as child welfare or a dispute involving major business operations and related financing. Yet, the authority of tribal governments has become more controversial as tribes have engaged in more extensive use of their authority.

Kirke Kickingbird, *Striving for the Independence of Native American Tribal Courts*, 36 HUM. RTS., Winter 2009, at 16, 19-20.

4. In one instance demonstrating that at least some tribal judges have no concerns over judicial independence, a judge for the Lac Vieux Desert Band of Lake Superior Chippewa Indians ordered the jailing of the entire

tribal council for failure to comply with a court order in a tribal election dispute. See *Lac Vieux Desert Band of Lake Superior Chippewa Indians Tribal Council v. Lac Vieux Desert Band Tribal Police*, Order Granting Ex Parte Petition for Habeas Corpus (Lac Vieux Desert Band of Lake Superior Chippewa Indians Court of Appeals, Sept. 9, 2010), available at <http://turtletalk.files.wordpress.com/2010/09/order-granting-habeas-corpus.pdf>.

## 2. JUDICIAL CODES

### ONEIDA TRIBE OF INDIANS OF WISCONSIN

#### Judicial Code of Conduct, Judicial Code, Chapter 5

...

#### Article III Who is Bound by this Code

- 3-1 This Code applies to all Judicial Officers, Pro-Tempore and Former Judicial Officers.
- 3-2 The Code of Ethics shall be as set out below; recognizing that the concept of ethical conduct shall encompass action as well as inaction, and represents an area of self regulation. Provided further, that it is the policy of the Oneida Tribal Judicial System to demonstrate the highest standards of personal integrity, truthfulness, honesty, and fortitude in all public activities in order to inspire public confidence and trust in the officials of the Oneida Tribal Judicial System.

#### Article IV Honesty and Independence

- 4-1 An independent and honest judicial system is the mainstay of trust. This goal should be kept in mind at all times, especially if the Oneida Tribal Judicial System intends to earn the proper respect in the community. The Judicial Officers shall always acknowledge and exhibit a good behavior as part of their role in the Oneida traditional system of justice. Serving on the Oneida Tribal Judicial System should be regarded as highly honored and a respected position of the judicial system of the Oneida Nation. The Judicial Officers should establish and maintain a respectful standing in the community and their lifestyle, and shall observe stringent standards of conduct at all times.
- 4-2 The Oneida people expect that those who make decisions about their lives and future will be wise and completely independent, and the Judicial Officers will decide without regard to improper influences. Influences that may arise: family, personal, or business relationships; a personal interest in a case before the Oneida Tribal Judicial System; giving in to or fearing political influence; or any consideration other than the equality of the parties and merits of the case. To that end, all Judicial Officers must remain personally impartial and independent, and act to promote and protect the independence of the Oneida Tribal Judicial System.
- 4-3 Judicial Officers shall adhere to the laws of the tribe.

4-4 Judicial Officers shall be patient, dignified and courteous to constituents, other officials, and others with whom the Judicial Officer deals in any official capacity, and require similar conduct of others in official proceedings and those persons subject to the Oneida Tribal Judicial System's jurisdiction and control.

a. Judicial Officers shall give to every person and party of interest in action time to be heard.

b. Judicial Officers shall not talk to one party without the presence of the other party (ex parte communication).

c. Judicial Officers shall protect the privileged information to which they have access in the course of their duties. Further, they shall not use confidential information for any personal gain.

### **Article V Impropriety and the Appearance of Impropriety**

5-1 Judicial Officers should respect and comply with the laws of Oneida and should at all times act in a manner that promotes public confidence in the integrity and impartiality of the Oneida Tribal Judicial System.

5-2. Judicial Officers should not allow family, social or other personal relationships to influence their judicial conduct. Judicial Officers should not attempt to use the prestige of their position to advance the private interests of themselves, nor convey the impression that anyone has special influence on them.

5-3 A Judicial Officer shall not lobby or advocate any position before a legislative or executive branch for personal gain.

5-4 Once elected to the Oneida Tribal Judicial System, Judicial Officers shall not serve as an Advocate for any party before any hearing body within the jurisdiction of Oneida Tribe of Indians of Wisconsin.

### **Article VI Disqualification/Recusal**

6-1 Judicial Officers shall disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including instances where:

a. A Judicial Officer has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts.

b. A Judicial Officer has served as a lawyer, advocate or personal representative in the matter before the Appeals Commission.

c. A Judicial Officer's spouse, and any reasonably close family member in the Judicial Officer or spouse's family:

1. Is a party to the proceeding or officer, director, or trustee of a party; or

2. Is acting as a lawyer or advocate in the proceeding; or

3. Is known by the Judicial Officer to have an interest that could be substantially affected by the outcome of the proceeding; or



4. Is to the Judicial Officers' knowledge likely to be a material witness in a proceeding before the Oneida Tribal Judicial System.

6-2 Judicial Officers shall recuse themselves in cases where some conflict of interest exists, potentially exists, or may be perceived to exist.

...

### **Article VIII Adjudicative Responsibilities**

8-1 The duties of the Judicial Officer include all official functions of the Oneida Tribal Judicial System as the judiciary of the Oneida Government. In the performance of these duties, the following standards apply:

a. Judicial Officers should not be swayed by partisan interests, public clamor, political pressure, or fear of criticism and should resist influences on the Oneida Tribal Judicial System by administrators or governmental officials or any others attempting to improperly influence the Judicial Officers in their decisions.

b. Judicial Officers should give to every person holding a legal interest in a proceeding, or his/her representative, a full right to be heard. Judicial Officers should avoid all communication with officials, agents, or others concerning a pending proceeding unless all parties to the proceeding are present or represented. Judicial Officers may, however, consult a disinterested expert on federal, state, or tribal law, and traditions. Judicial Officers may review any source of law applicable to a proceeding in the case they have been assigned.

c. Judicial Officers shall maintain order when conducting a hearing.

...

### **Article X Extra Judicial Activities**

10-1 Judicial Officers may engage in activities that do not cast doubt on their capability to decide impartially an issue that may come before the Oneida Tribal Judicial System.

10-2 A Judicial Officer may speak, write, lecture, teach and participate in other activities concerning the legal system of the Oneida Nation.

10-3 A Judicial Officer may appear at a public hearing before the executive, legislative bodies or other officials, but only in matters concerning the general administration of justice.

10-4 A Judicial Officer may serve as a member, officer, or director of an organization or governmental agency outside the Oneida Nation devoted to the improvement of law or the administration of justice. A Judicial Officer may assist such an organization in raising funds and may participate in the management and investment. The Oneida Tribal System may make recommendations to public and private fund granting agencies on projects and programs concerning Oneida law, its legal system and the administration of justice.

- 10-5 A Judicial Officer may not cross over the bounds separating the powers of government to serve as a member of the executive or legislative branches of the Oneida Government.
- 10-6 Judicial Officers may engage in social and recreational activities, if these activities do not interfere with the performance of the Oneida Tribal Judicial System responsibilities.
- 10-7 Judicial Officers may participate in civic, charitable and other activities that do not reflect upon his/her impartiality or interfere with the performance of his/her judicial duties.
- 10-8 Judicial Officers may participate in ceremonies that are educational, connected with traditional, cultural activities or other religious activities.
- 10-9 Judicial Officers shall not participate in an organization if it is likely that the organization will be involved in proceedings which would ordinarily come before the Oneida Tribal Judicial System.
- 10-10 In the event that a Judicial Officer is selected or recommended to serve as a member of a governmental organization or agency, other than the Oneida Nation, devoted to the improvement of law or the administration of justice, the Oneida Tribal Judicial System must approve of the appointment prior to the Judicial Officer commencing his/her position or duties for the new position.
- 10-11 Judicial Officers may accept appointments to external boards, committees, and commissions outside the jurisdiction of the Oneida Nation that are not judicial in nature and whose activities are not likely to come before the Oneida Tribal Judicial System. However, Judicial Officers must disclose all appointments within thirty (30) days of acceptance or commencement of duties for the position.

#### **Article XI Extra Appeals Commission Appointments**

- 11-1 A Judicial Officer shall not accept appointment to any Oneida governmental entity or other position whose interest is contrary to the Oneida Tribal Judicial System.

#### **Article XII Financial Activities**

- 12-1 Judicial Officers should avoid financial and business dealings that tend to reflect adversely on his/her impartiality, interfere with the performance of his/her judicial duties, exploit his/her judicial position.
- 12-2 Except as allowed by customs or tradition of the Oneida, a Judicial Officer shall not accept a gift, bequest, favor, or loan from anyone which would affect or appear to affect his/her impartiality in judicial proceedings or in the Oneida Tribal Judicial System's appearance of fairness.

#### **Article XIII Political Activities**

- 13-1 Judicial Officers shall not engage in any political activity except measures to improve the law or enhance the Oneida Judiciary.

13-2 A candidate, including an incumbent Judicial Officer seeking re-election, who is seeking to fill a vacant position on the Oneida Tribal Judicial System by election of the Oneida Nation shall:

a. Affirm and display the respectful integrity of a person qualified to hold a position on the Oneida Tribal Judicial System, and should refrain from any political activity which might interfere with the performance of his/her duties. Furthermore, a candidate should encourage members of his/her family to adhere to the same standards of political conduct that apply to him/her.

b. Not make pledges or promises of conduct as a Judicial Officer other than the faithful and impartial performance of duties as a Judicial Officer, nor announce his/her views on any disputed legal or political issue.

## NOTES

1. Indian nations often are very insular communities in which tribal judges face significant risks of political influence, personal bias, and conflicts of interest. One commentator argues, however, that judicial codes seeking to limit those risks creates the wrong incentives:

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. . . .

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. 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.

Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL'Y, Winter 1997, at 74, 76-77.

2. The Wisconsin Oneida judicial code is geared toward tribal judges who will be elected to their positions. Not all tribal judges are elected. Many are appointed by the tribal council; for example, the White Earth Ojibwe:

All Judges of the Tribal Court shall be selected by appointment by a majority vote of the White Earth Tribal Council.

WHITE EARTH BAND OF CHIPPEWA INDIANS JUDICIAL CODE, title 1, chapter 3, §2. Others are appointed using a nomination-and-confirmation process involving a tribal executive and a tribal legislature:

1. Appointment to the Tribal Court. The Judges of the Tribal Court and such lower courts as established under Section (A) of this Article shall be appointed by an affirmative vote of six (6) of the nine (9) members of the Tribal Council. Initial appointments shall take place within one hundred twenty (120) days of the swearing in of the first Tribal Council elected under this Constitution.

2. Appointment to the Tribal Appellate Court. Each justice of the Tribal Appellate Court shall be appointed by an affirmative vote of six (6) of the nine (9) members of the Tribal Council.

CONST. OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS art. IX (D).

### 3. THEORIES OF TRIBAL JUDGING

#### COYOTE PARADOX: SOME INDIAN LAW REFLECTIONS FROM THE EDGE OF THE PRAIRIE

---

Frank Pommersheim, 31 Ariz. St. L.J. 439, 455-59 (2002)

...

#### VI. A Model of Tribal Court Jurisprudence

Given the varied challenges that the two “faces” of Indian law as community and resistance pose to tribal institutions, especially tribal courts, it is worthwhile to consider the contours of a workable model of tribal court jurisprudence with which to respond. Such a model suggests idealized aspiration, not an absolute necessity attainable in every case. It also provides a practical checklist of possibilities for tribal court judges who face the exigency of real, often staggering, caseloads, limited legal resources, and usually no law clerks at all. For these reasons tribal court jurisprudence constitutes a pragmatic yet complex art. This model or paradigm (there may well be others) contains the following parts:

- (A) Tribal court jurisprudence as craft;
- (B) Tribal court jurisprudence as culture;
- (C) Tribal court jurisprudence as narrative;
- (D) Tribal court jurisprudence as literacy primer;
- (E) Tribal court jurisprudence as “the extended hand”;
- (F) Tribal court jurisprudence as guide to the standards of review.

Ultimately, these pieces will be stitched together in their unique (tribal) patterns by the hearts and minds of real tribal judges doing their jobs day in and day out with their characteristic hard work and enviable commitment to render justice and fair play to the litigants that come before them.

### A. Craft

The field of law invokes certain sets of practices and ways of thinking and speaking that make it a craft. It also constitutes a unique way of identifying and resolving legal disputes. The end product of such dialogue and “translation” is usually a judicial decision that summarizes, weighs, and resolves the competing arguments or claims. The expectation is that the judicial decision will speak at least in part through the language or craft of law. In order to be credible to the law community both on and off the reservation and the larger society in general, tribal court decision making must be convincingly rendered in the craft and analytical practices of legal reasoning. This does not mean that this requirement is preemptive or exclusive of other concerns but only that it is necessary in a fundamental way. It is the yeast for the bread of legal conversation and discourse.

### B. Culture

The risk of craft standing alone in tribal court jurisprudence is that it will be seen to represent a kind of (dominant) mimicry and it will be perceived as inauthentic and merely imitative. The counterweight to an unhinged craft is the door of culture. Tribal culture provides a context for legal craft to be persuasive because it takes into account tribal history and tradition in the process of legal decision making. Too often legal decision making and the legal system as a whole are seen as a purely formal system of rules and procedures that bear little relationship to the day to day life of people living on the reservation (or elsewhere for that matter). Sensitivity and awareness of (tribal) culture helps to insure that tribal court decision making will not only be analytically sound, but also culturally informed. In many ways, craft and culture are the cornerstones for building a sturdy and enduring tribal court jurisprudence.

### C. Narrative

Tribal court decisions both individually and collectively tell a story about law, values, and culture. It is therefore critical for tribal court judges to be aware of the developing narrative or story their jurisprudence tells. How does it, for example, relate to the ongoing struggle to realize sovereignty and to vindicate particular values in unique human circumstances? Attention to narrative allows one to perceive more fully the meaning of tribal court jurisprudence not simply as the interplay of craft and culture but as something that reveals and explains a people to themselves and others. If law is a field of endeavor primarily for the mind and intellect, narrative is a way to the heart. Narrative is critical to tribal self understanding not only in a cultural but in a legal sense as well. This element of narrative in tribal court jurisprudence also connects pointedly with the “story telling” tradition that is central to many tribal traditions.

### D. Literacy Primer

Tribal court jurisprudence needs also to function, where it can, as a basic Indian law literacy primer in several different ways. First, since tribal court

decisions often generate significant local tribal interest and discourse, it is helpful if such opinions contain background discussion about the nature of basic principles of Indian law and tribal sovereignty. Such descriptions at their best aid local understanding of important legal and cultural matters in the many cases that generate local interest. Since law—for better or worse—plays such an outsized role in reservation life, any background understanding is particularly advantageous to developing an informed and literate citizenry.

Second, most recent United States Supreme Court jurisprudence in Indian law relative to tribal courts reaches back no further than *Montana v. United States*. As a result, current Supreme Court decisions in Indian law are remarkably truncated with little sense of the roots of tribal sovereignty and the sweep of Indian Law history from the colonial era onward. Again, tribal court jurisprudence can provide a valuable corrective to this pernicious historical and doctrinal amnesia. While there is no guarantee that reviewing federal courts—including the United States Supreme Court—will pay attention or even notice, any opportunity to educate and create dialogue needs to be seized.

Third, tribal courts do not have the luxury of assuming that other judges who read and review their decisions are adequately informed about tribal judicial descriptions of tribal law itself. Tribal courts, wherever possible, have to go that extra mile to explain basic tribal law and values. Without such efforts, it becomes all too easy for federal courts to avoid a genuine engagement with tribal court decisions.

Fourth, in a related but somewhat different vein, tribal court jurisprudence provides the opportunity for tribal courts to explain why some decisions of the Supreme Court and Circuit Courts are wrongly decided from the perspective of the federal courts' own precedents and/or from the tribal court's understanding of its own law. None of this is meant to sound arrogant or presumptuous, yet the Supreme Court does seem to be further and further out of touch with its own historical precedents and its understanding of the law and capabilities of tribal courts. Tribal courts, where they can, need to assist the educable within the federal judiciary. . . .

## NOTES

1. Tribal justice system legitimacy is an ongoing concern for Indian nations and the parties that appear in tribal courts. Many tribal courts have the respect of the surrounding jurisdictions; for example, the Mashantucket Pequot tribal courts' judgments are routinely recognized in neighboring state courts. *E.g., Mashantucket Pequot Gaming v. Yau*, No. 11789/2009 (N.Y. Sup. Ct., Feb. 17, 2010), available at <http://turtletalk.files.wordpress.com/2010/02/mashantucket-pequot-v-yau.pdf>. But many other tribal courts are underfunded and do not have the necessary support of the tribal government to develop institutional capacity.

In another article, Professor Pommersheim offered several suggestions:

A primary element in the making of quality legal decisions at both the trial and appellate levels is the capacity to perform the necessary legal research with which to resolve the issues raised by the case. . . .



As a result of these shortcomings, and consonant with the most conventional wisdom, tribal courts need consistent access to the legal research available through the LexisNexis and Westlaw electronic databases. Yet, even here, there are unique Indian law problems because the critical resource of tribal court opinions is not yet consistently available online. . . . It is also true, however, that many other tribal law resources, such as treaties, constitutions, and codes, are not available online and thus, print libraries also must be maintained.

. . . Technology generates the raw material of meaningful research, but it takes a law clerk, a person with some sense of craft, to refine these raw materials into a more usable and malleable form for judges to actually use.

In a related vein, technology and computer programming are necessary ingredients to develop consistently coherent case files and case management systems. . . . Court clerks and administrative personnel are vital cogs in the wheels of justice and meeting their needs is key to enhancing the functioning of this often overlooked and under-appreciated sector of tribal courts. . . .

. . . Given the relative youth of many tribal courts, a considerable number of their decisions involve cases of first impression. The decisions of other tribal courts in similar matters therefore become a crucial ingredient and adjunct in the making of many tribal court decisions.

Currently, much of this jurisprudential base is not available to tribal courts. . . .

The establishment of an effective [tribal court] reporter—both print and electronic—would have the collateral benefits of making such decisions available to others nationally and outside the region. In addition to advancing the legitimacy of the overall program, because of its delivery of important services in a timely and regular manner—just like similar activities in the state and federal judicial systems. Since there is often a paucity of available precedent, such publication efforts will fill a significant void. . . . Such a reporter would also be an invaluable resource to attorneys preparing to appear before these courts. . . .

As discussed above, improved legal research is not the product of a simple technological fix; it requires a law-trained individual not only to assist in doing the research, but also to organize, describe, and synthesize the research for the applicable judge or panel of judges. . . .

Legal research is more than the generation of information. It requires interaction of a trained human with legal intelligence to put that information in a useful and usable context. Regardless of potential cost, the need for law clerks is critical. . . .

. . . [A]ccess to a law clerk to do research is a twofold gift. It is likely to enhance the quality of justice rendered in a particular case and to improve the quality of justice across the entire system because of the greater efficiency that law clerks would create in the administration of justice. . . .

Training is an absolute necessity in order to continue to advance the development of tribal courts. Training is required in all sectors: judges, clerks/administrators, prosecutors/public defenders, and members of the private and tribal bar. . . .

There is also the need for training to assist tribal judges—at both the trial and appellate level—to improve and enhance their ability to write thoughtful and cogent legal opinions to explain and justify their decisions. Such efforts, for example, might reduce the likelihood of appeal in that a fair number of current tribal court appeals are filed simply because there is no

adequate explanation of the trial court's decision. This training also knits together with the availability of law clerks to establish a research base from which tribal judges can craft well-written decisions. . . .

Training of clerks and court administrators is no less essential to the well-being and advancement of tribal courts. . . .

Again, the obvious: any person serving as prosecutor or public defender has a tremendous responsibility in the pursuit of justice within the tribal criminal justice system. . . .

Given the raw fact that personal liberty is at stake in criminal proceedings and that the right to counsel guarantee in the Indian Civil Rights Act of 1968 is not mandatory on the tribes, the utmost in training in this area needs to be made a priority and preference. Prosecution and defense work is labor-intensive; therefore training, both procedural and substantive, as well as case management assistance are central to maintaining due process and respect for individual liberty. . . .

As noted in many areas throughout this article, the practice of Indian law, especially in tribal courts, is both unique and subject to rapid change. This fact points to the necessity of training based on the CLE model in state and federal settings for practitioners who practice regularly in tribal court. . . .

The delivery of these programs is best administered through tribal bar associations, where they exist, but in their absence (which is the norm), they must be provided by the tribal courts themselves. . . .

. . . In complementary fashion, it is worth noting that salary levels are generally low in all tribal court sectors, particularly at the clerk and administrator level. As a result, there needs to be attention focused on salary (and benefits) concerns as critical dimensions relative to improving staffing stability and continuity.

Frank Pommersheim, *Looking Forward and Looking Back: The Promise and Potential of a Sioux Nation Judicial Support Center and Sioux Nation Supreme Court*, 34 ARIZ. ST. L.J. 269, 273-79 (2002)

2. Professor Pommersheim is one of the most influential and experienced tribal court judges in the United States. His recommendations for the development of tribal courts are not entirely new, however, as organizations such as the National American Indian Court Judges Association have been advocating for similar reforms and improvements. *E.g.*, NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, INDIAN COURTS AND THE FUTURE: REPORT OF THE NAICJA LONG RANGE PLANNING PROJECT 146-96 (David H. Getches ed., 1978). But these are terribly important recommendations that should be recognized and repeated until they finally come to fruition.