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Banishment as Cultural Justice in Contemporary Tribal Legal Systems

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BANISHMENT AS CULTURAL JUSTICE IN CONTEMPORARY TRIBAL LEGAL SYSTEMS

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One of our chiefs killed a man.

The people talked against him. "We will take him out of his place," they said.

That is what they wanted to do. But the Indian law stopped it. Even so, the chief and his wife and children were banished from the camp....But he was still chief, though all by himself.

One day his wife came poking her way into the main camp to plead with the soldier chiefs. "We're in pretty bad shape out there," she told them. "There is no game, no food. My poor children are starved to skinny bones. Pray have pity on us, you warriors. Take pity on me and my children, I beg you and your children, your mothers and your fathers, all. Forgive and forget! Let us come back!"

The soldier chiefs heard her words. They all called meetings of their troops. The Foxes, the Dogs, the Shields, the Elks, and all the others—each met in their chiefs' lodges to consider this thing....

That next day they had a big meeting of the tribal chiefs, the soldier chiefs, and all the warriors in conclave. Some man...talked for them. He said this thing, "It is enough. They have been away two years now. He is one of our chiefs. Let us permit them to return."

All agreed that he had said the right thing.

...Two days later the people went out with food and clothing to find them. An emissary was sent to the chief from the big council to bid him come in. This chief has been mean and quick-tempered, so the emissary spoke to him in this way, "Now you are coming back. The people ask of you only that you be temperate and good. You may move right in."

He changed his way after that.[1]

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An elected official with the Cheyenne and Arapaho tribe faces banishment after being convicted in tribal court of embezzling more than $55,000 from a Watonga casino.

Roy Dean Bullcoming, 51, also was sentenced to a 4-year jail term and ordered to pay full restitution.

Bullcoming was charged in April [2005] with 15 counts of embezzlement totaling $69,030. The money was taken from the Feather Warrior Casino....

Tribal Judge Charles Tripp found Bullcoming guilty on all but one charge....

Tripp accepted all of Attorney General Charles Morris' recommended punishments except the proposed banishment of 12 to 15 years.

Tripp delayed a decision on that request until an Oct. 21 formal sentencing.

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* Assistant Professor, University of South Dakota School of Law. J.D., University of Colorado. Much of the context of this Article is derived from my personal experiences working with many tribes throughout the country, first as a staff attorney with the Native American Rights Fund and most recently as in-house counsel for the Mashantucket Pequot Tribe, where I had the privilege of working with the Tribe on developing tribal governance and economic institutions and with the Elders Council on banishment matters. The traditions and customs of my mother's and grandfather's family from the Standing Rock Sioux Tribe continue to greatly influence my work.

The author sincerely appreciates the positive encouragement of Professor Frank Pommersheim, the insightful comments of Professors Alex Tallchief Skibine and Matthew Fletcher, and the valuable research assistance provided by Jane Laub.

1. K.N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 80–81 (1941) (quoting a "case" recounted by Calf Woman, a Cheyenne woman).

....

Bullcoming acted as his own attorney. He said he used the money for tribal ceremonies, powwows and emergency assistance payments for his low-income constituents.[2]

I. INTRODUCTION

Although more than 150 years had passed between these two incidents of injury and offense, imbued in both accounts is an abiding sense of tribal justice. The Cheyenne soldier society's decision to banish their chief in 1855 reflected a complex set of social rules based on tribal tradition and custom. The order of banishment and the subsequent reinstatement of the chief and his family into the community reflected that tribe's fundamental sense of justice, of righting a wrong and restoring harmony. The legal formalities involved in bringing criminal charges against the Cheyenne-Arapaho tribal leader in 2005, holding a trial in tribal court and imposing a sentence, demonstrated that tribe's contemporary sense of justice, of enforcing a written code of conduct and adherence to rules of procedure and evidence.

Both decisions, spanning several generations and bridging extraordinary changes in the tribes' cultural character and political structures, reveal core qualities of tribal social and legal values. These qualities include respect for the rights of the individual, the community, and the tribe, as well as the supporting tribal institutions. The individual tribal member is given notice of the offense, he is afforded an opportunity to correct the disruptive or harmful conduct, and he is provided with a hearing before tribal authorities to consider the matter. The traditional values of the tribal community entail collective respect for the tribe's social order, as well as the expectation that offenders of such standards will be accountable to the community. Overarching these dual concerns is the duty of tribal governments to protect tribal lands, maintain peace and harmony within the community, and deliver justice and just punishment.[3]

Banishment is an ancient sanction, used since biblical times as an important form of social control. As a divine punishment, Adam and Eve were expelled from the Garden of Eden for disobeying God's commands, and Cain was driven from the presence of the Lord.[4] In early American society, political disloyalty was officially punishable by banishment, a sentence of permanent exile from the colony, or by

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2. *Tribal Official Faces Banishment: Already Sentenced for Embezzling*, DAKOTA J., Sept. 30–Oct. 7, 2005, at B1.

3. Associate Justice Stephen Breyer of the U.S. Supreme Court has explored the rights and duty of the community to act rightly and justly on behalf of "the whole people" in the context of the theme of "active liberty," which he describes as "the principle of participatory self-government." STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 17, 21 (2005). Justice Breyer's view of democracy calls for judicial restraint when reviewing the will of the people. *Id.* at 17. According to Justice Breyer, "even if a judge knows what the just result should be, that judge is not to substitute even his juster will for that of the people. In a constitutional democracy a deep-seated conviction on the part of the people...is entitled to great respect." *Id.* (alteration in original) (internal quotation marks omitted). This Article will explore similar themes concerning respect for the duty and decisions of tribal people within the context of tribal and federal law, both of which are premised on historical and traditional democratic principles such as those articulated by Justice Breyer.

4. *Genesis* 3:1–24, 4:1–16. "Therefore the Lord God sent him forth from the garden of Eden, to till the ground from which he was taken. So he drove out the man...." *Id.* at 3:23–24. Cain lamented his exile, "My punishment is greater than I can bear. Behold, thou hast driven me out this day...and I shall be a fugitive and a vagabond in the earth...." *Id.* at 4:13–14.

death if the order was disregarded.[5] Rhode Island owes its statehood to Roger Williams, who settled in the neighboring colony when he was exiled from Massachusetts in 1635 for his immoderate political and legal opinions.[6]

Shunning, another form of banishment, is practiced by the Amish and is based upon their religious beliefs.[7] The Amish community strictly adheres to a very old social and religious order.[8] Violators of the order are shunned, ostracized from the community or excommunicated from the church.[9] The doctrine of shunning forbids all social relations and association with members who have offended the church and the community, thus socially and psychologically excluding the offender from the community.[10]

Banishment has also been used as an effective international and municipal sanction. The Singapore national government passed a law authorizing the exile of undesirable people.[11] Pursuant to the Singapore Banishment Act, any person who would not "be conducive to the good of Singapore" may be banished from that country.[12] Within the United States, state and local governments seeking to safeguard their communities from sexual predators and homeless people have enacted laws to prohibit sexual offenders from residing in their neighborhoods[13] and to exclude transients from their city parks.[14] Even in baseball, our country's national

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5. The Massachusetts Banishment Act, enacted in September 1778, was intended "to prevent the Return to this State of certain Persons therein named, and others who have left this State, or either of the United States, and joined the Enemies thereof." 1778 Mass. Acts, ch. 23, *microformed on* Records of the States of the United States of America (Library of Cong. Photoduplication Serv.). Over three hundred names were listed in the Act. *Id.*

6. RUSSELL BOURNE, THE RED KING'S REBELLION: RACIAL POLITICS IN NEW ENGLAND 1675–1678, at 31–33 (1990).

7. JOHN A. HOSTETLER, AMISH SOCIETY 85 (4th ed. 1993). The Amish believe that "to assure the purity and unblemished character of the church the wicked and the obdurate members must be excluded from the group." *Id.* The Amish practice of shunning, called *Meidung*, is exercised "after the offender has been properly warned and remains unwilling to desist from his transgression, divisive teaching, or rebellion." *Id.* (citing *Matthew* 18:15–17). An order of excommunication is for life unless the person is restored back into the community, and the effect of shunning wholly diminishes the person's status in the community, thereby giving "him a status that minimizes the threat to other members of the community." *Id.* at 86–87. Shunning is an effective social control "because the Amish constitute an isolated subculture from which exit is costly." Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369, 376–77 (1999).

8. HOSTETLER, *supra* note 7, at 85.

9. *Id.*

10. *Id.* at 85–87.

11. Singapore Banishment Act, Singapore Stat. ch. 18, §§ 1–23 (1963), *available at* http://statutes.agc.gov.sg (follow "B" hyperlink; then follow "Banishment Act" hyperlink).

12. *Id.* § 3.

13. Premised on its "compelling interest to promote, protect and improve the health, safety and welfare of the citizens of the city," the City of Miami Beach, Florida legislatively created "areas around locations where children regularly congregate in concentrated numbers wherein certain sexual offenders and sexual predators are prohibited from establishing temporary or permanent residence." MIAMI BEACH, FLA. CODE § 70-400(b) (2005); *see also* John A. Torres, *Offenders Blast "Banishment,"* FLA. TODAY, Sept. 13, 2005, at 1A. The State of Georgia recently enacted a sex offender registry law that seeks to prohibit anyone on the registry from living within 1000 feet of any school bus stop in Georgia. H.R. 1059, 148th Leg. (Ga. 2005). *But see* Jill Young Miller, *GA Sex Offenders Win Court Reprieve; Enforcement of New Law Was to Begin Saturday*, ATLANTA J.-CONST., June 30, 2006, at 1A (explaining that a federal judge has, at least temporarily, prohibited the enforcement of this provision of the Georgia act). *See also* NMSA 1978, § 29-11A-4 to -5.1 (2005) (requiring convicted sex offenders to register with the country sheriff and to provide detailed personal information which the general public has access to under the Sex Offender and Notification Act).

14. Finding that criminal and civil laws "intended to preserve and protect the parks for the benefit of all" were "inadequate," the City of Seattle authorized "the immediate administrative sanction of excluding from a park

pastime, banishment was used as the "ultimate sanction" to exclude Pete Rose, one of baseball's most accomplished players, from the game for life.[15] Each of these unique systems of governance abounds with its own sense of justice, and each governing body fervently believes that its respective decisions to banish, expel, exile, or shun are just and necessary according to the particular social, political, and legal standards of that group.

Indian tribes[16] have historically used banishment as a means of social control and punishment.[17] The custom has been recently revived to help tribes cope with a host of socially deviant and criminally dangerous activities within their respective communities. Hindered by their limited civil and criminal jurisdiction,[18] frustrated with their inability to impose meaningful sanctions, and fearful of further disruption, harm, and violence to their communities, tribal governments recognize that the old customs of banishment and exclusion are powerful and effective means of reestablishing order and safety in their communities.[19]

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those who violate the law." SEATTLE, WASH., MUNICIPAL CODE § 18.12.025 (2006).

15. Citing his duty to protect "the game from blemish or stain or disgrace," Major League Baseball Commissioner A. Bartlett Giamatti stated,

> The banishment for life of Pete Rose from baseball is the sad end of a sorry episode. One of the game's greatest players has engaged in a variety of acts which have stained the game, and he must now live with the consequences of those acts. By choosing not to come to a hearing before me, and by choosing not to proffer any testimony or evidence contrary to the evidence and information contained in the report of the Special Counsel to the Commissioner, Mr. Rose has accepted baseball's ultimate sanction, lifetime ineligibility.

Press Release, Office of the Comm'r of Major League Baseball, Statement of Comm'r A. Bartlett Giamatti (Aug. 24, 1989), *available at* http://www.baseball-almanac.com/players/p_roseb.shtml.

16. My use of the word "tribe" reflects the generally accepted definition: "a group of Indians that is recognized as constituting a distinct and historically continuous political entity for at least some governmental purposes." WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 4 (4th ed. 2004). It also is important to note that each tribe possesses its own language, culture, kinship traditions, and form of government. FELIX S. COHEN ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[2], at 136 (Nell Jessup Newton et al. eds., rev. ed. 2005).

17. *See infra* Part II. Tribes exercise inherent power to exclude persons from tribal lands; this authority is not derived from the federal government. *See* Worcester v. Georgia, 31 U.S. 515 (1832). Banishment customarily refers to the removal of a tribal member from tribal lands, while exclusion refers to the removal of a non-member from tribal lands. The words often are used interchangeably. For a discussion of the use of "banishment" and "exclusion" in tribal laws and constitutions, see *infra* Part III.

18. The contours of tribal jurisdiction are notably complicated. *See generally* Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976). For example, Indian tribes no longer have inherent jurisdiction to try and punish non-Indians for their criminal acts within the tribe's territory. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). However, tribes retain inherent sovereignty to exercise "some forms of civil jurisdiction over non-Indians on their reservations." Montana v. United States, 450 U.S. 544, 565 (1981).

19. Banishment and exclusion have recently been used in several different social, criminal, and political situations. *See, e.g.*, *Banishing Is Bad Idea*, MUSKOGEE DAILY PHOENIX, Sept. 3, 2005 (describing the banishment of the former chief of the Cherokee Nation by the United Keetoowah Band of Cherokee Indians for intra-tribal political conflicts) (on file with the New Mexico Law Review); Chet Barfield, *3 Could Face Banishment by Fledgling Viejas Court*, SAN DIEGO UNION-TRIB., Sept. 16, 2005, at A1 (describing how the Viejas Band invoked banishment authority over three tribal members in response to the attempted murder of another tribal member); Scott Brand, *Payment Bans Bouschor from Sault Tribe Lands*, SOO EVENING NEWS, July 12, 2004, *available at* http://www.sooeveningnews.com/articles/2004/07/12/news/news07.txt (describing how the former Sault Ste. Marie tribal chairman was banished for misappropriating tribal funds); *Indian Tribes Revive Banishment as Way to Punish Troublemakers*, ST. LOUIS POST-DISPATCH, Jan. 4, 2004, at A2 (describing how tribes use banishment to curb violence and drug trafficking); John Miller, *Indian Teens Face Banishment*, CASPER STAR-TRIB., Mar. 18, 2005, *available at* http://www.trib.com/articles/2005/03/18/news/regional/d82ecb7506eae90087256fc70054ce82.txt (describing how two teenage Indian boys were banished from the Fort Hall Indian Reservation by the Shoshone-

The use of banishment in contemporary tribal society, however, has engendered serious strife and contention because, in effect, it pits traditional values and customs against modern notions of fairness and due process.[20] In traditional Indian societies, banishment or other sanctions were agreed upon through community consensus and thus were abided and respected by all of the people.[21] Traditional communities rarely contested or disobeyed banishment decisions because they understood that such opposition could seriously jeopardize the social and political cohesiveness of the tribe as a whole.[22] In tribal societies today, however, such decisions and actions are being directly challenged and their fairness questioned, particularly with respect to those decisions that banish or disenroll tribal members for political dissension.[23]

Federal courts have become the arbiters of tribal banishment disputes under an array of unique legal theories. The central issue for the federal court is whether the banishment order imposes a sufficiently severe restraint on the individual's liberty interests as to constitute a detention for purposes of habeas corpus review under the Indian Civil Rights Act of 1968 (ICRA).[24] Other challenges under the ICRA have contended that banishment orders violated the Act's due process and equal protection provisions,[25] constituted cruel and unusual punishment,[26] were unlawful

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Bannock Tribe for juvenile delinquent conduct); Paul Snokorsky, *Drug Dealers Face Banishment*, SEATTLE POST-INTELLIGENCER REP., May 19, 2003, at A1 (describing how the Lummi Tribe banished a tribal member convicted of dealing drugs on its reservation); Sheila Toomey, *Judge Upholds Tribal Court's Banishment of Dangerous Villager*, ANCHORAGE DAILY NEWS, Nov. 20, 2003, at A1 (describing how an Alaskan Native Alutiiq village banished a local man for "alcohol-fueled violence against other villagers"); *Tribes, State Work on Plan to Track Sex Offenders*, DULUTH NEWS TRIB., Aug. 2, 2005 (describing how some tribes have considered banishing predatory offenders). An Indian tribe in southwest Minnesota recently passed one of the toughest tribal anti-drug policies in the nation. Anyone convicted of a drug crime on the Upper Sioux Reservation is automatically prohibited from setting foot on the reservation for a certain length of time under the newly enacted banishment law. Mark Steil, Minn. Pub. Radio, *Upper Sioux Banishes Drug Criminals* (Minn. Pub. Radio broadcast May 31, 2006), http://minnesota.publicradio.org/ display/web/2006/05/30/banishment/.

20. *See infra* Part IV (discussing several cases in which tribal banishment decisions under customary tribal law have led to bitter internal conflicts).

21. *See infra* Part II (discussing the cultural and legal underpinnings of banishment).

22. For a discussion of the ways in which the traditional Councils and soldier societies of the Cheyenne settled disputes and imposed punishment, see *infra* notes 82–85 and accompanying text. For a discussion of the Navajo Peacemaker dispute resolution practices, see *infra* notes 91–99 and accompanying text. For a discussion of the Seneca longhouse traditions for peacemaking, see *infra* notes 101–108 and accompanying text.

23. *See infra* Part IV.

24. Through Title I of the ICRA, Congress sought to impose on tribal governments most of the constitutional rights established in the Bill of Rights. *See* 25 U.S.C. §§ 1301–1303 (2000). The habeas corpus provision of the ICRA tests the legality of an individual's detention by order of an Indian tribe. *Id.* § 1303. For a detailed discussion of the ICRA, see *infra* Part II.B.2.

25. *See, e.g.*, Moore v. Nelson, 270 F.3d 789, 792 (9th Cir. 2001) (holding that the imposition of a fine by a tribal court does not constitute "custody" for purposes of habeas corpus review); Shenandoah v. U.S. Dep't of the Interior, 159 F.3d 708, 713–14 (2d Cir. 1998) (holding that allegations of termination from employment, exclusion from certain tribal properties, and removal from membership rolls do not constitute sufficiently severe actual or potential restraints on liberty interests to warrant review under habeas corpus); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 900–01 (2d Cir. 1996) (reasoning that the permanent banishment of tribal members from their reservation by the tribal council for treasonous actions and removal from tribal membership rolls constitute a sufficient restraint on liberty interests to establish habeas corpus jurisdiction); Quair v. Bega, 388 F. Supp. 2d 1145, 1148 (E.D. Cal. 2005) (concluding that tribal sovereign immunity from suit precludes federal court jurisdiction over disenrollment and banishment decisions of the tribal council); Alire v. Jackson, 65 F. Supp. 2d 1124, 1128 (D. Or. 1999) (holding that a tribe's exclusion of non-member was civil in nature and not subject to habeas review).

26. *See generally* Stephanie J. Kim, Note, *Sentencing and Cultural Differences: Banishment of the American Indian Robbers*, 29 J. MARSHALL L. REV. 239, 255–62 (1995) (discussing Eighth Amendment and ICRA concerns

bills of attainder,[27] or were unauthorized or excessive uses of power.[28]

Challenges to banishment decisions also implicate significant issues under tribal constitutions and other tribal laws, such as whether the tribe is constitutionally empowered or otherwise prohibited from taking a certain action.[29] Banishment decisions have the potential to suspend tribal benefits and privileges and even to revoke tribal membership.[30] These disputes raise fundamental jurisdictional issues concerning the amenability of tribal officials to suit, exhaustion of tribal remedies, recognition of tribal banishment decisions, and the enforcement of those decisions.

This Article makes several assertions. First, "[a] tribe's right to define its own membership...[is] central to its existence as an independent political community,"[31] and inherent in the tribe's authority to make its own laws and be governed by them is the authority to banish and exclude persons from tribal lands.[32] Second, there is an innate sense of justice in tribal cultural and legal systems comprised collectively of the historical tribal customs around family and community and the more modern written laws and judicial decisions that are intended to afford fairness and due process protections.[33] Third, respect for tribal sovereignty requires restraint in extra-

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when a state court referred two Indian defendants' sentencing to a tribal court, which resulted in their banishment).

27. *See, e.g.*, Shenandoah v. Halbritter, 366 F.3d 89 (2d Cir. 2004); Santa Ynez Band of Mission Indians v. Torres, 262 F. Supp. 2d 1038 (C.D. Cal. 2002).

28. *See, e.g.*, Penn v. United States, 335 F.3d 786, 790 (8th Cir. 2003) (holding that tribal law enforcement officers involved in making service of a "facially valid" tribal order excluding a non-member Indian from a reservation for threatening and disruptive behavior "were entitled to absolute quasi-judicial immunity for all acts prescribed by the order").

29. *See, e.g.*, Custalow v. Commonwealth, 596 S.E.2d 95, 99 (Va. Ct. App. 2004) (upholding the trespass conviction of a resident of the Mattaponi Indian Reservation and finding that the tribal council was "lawfully in charge" of the reservation and thus had the authority to exclude); *In re* Blueye, 119 N.Y.S.2d 133, 133–35 (App. Div. 1953) (relying on "the ancient law or custom of the Iroquois" regarding "'mother lineage,'" the state court dismissed a trespass claim brought against "the daughter and the wife of Tonawanda Indians," a sixty-year resident of the Tonawanda Reservation, determining that she was not an intruder but rather lived on the reservation "with the tacit approval and acquiescence of the Chief's Council and all others"); Passamaquoddy Tribe v. Francis, No. 00-CA-01 (Passamaquoddy Tribal Ct. App. Div. 2000), *available at* http://www.tribal-institute.org/opinions/2000.NAPA.0000001.htm (holding that tribal member's voluntary agreement not to have contact with the reservation as a condition of probation for domestic violence did not violate tribal constitutional prohibition against banishment).

30. Tribal actions effecting the disenrollment of tribal members are also being contested in both federal and state courts. *See, e.g.*, Lewis v. Norton, 424 F.3d 959 (9th Cir. 2005); *Shenandoah*, 159 F.3d 708; Lamere v. Superior Court, 31 Cal. Rptr. 3d 880 (Ct. App. 2005); Ackerman v. Edwards, 17 Cal. Rptr. 3d 517 (Ct. App. 2004).

31. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978). Principal components of inherent tribal sovereignty and self-government are the relations among tribal members, which include the "power to determine tribal membership." Montana v. United States, 450 U.S. 544, 564 (1981).

32. *See Montana*, 450 U.S. at 564–66. Tribes have the inherent authority to exclude non-Indians from their reservations, particularly when the conduct of non-Indians on their lands "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

33. In setting out a universal foundation for legal behavior based on the conclusion "that the comprehension of the sense of justice which is specific for a certain culture deserves attention and respect," Wolfgang Fikentscher maintains,

> [M]y concept of law for anthropological purposes includes justice not as a material and fixed system of values that could be read from the Bible, from nature, from reason, or from a universal human "sense" for it but, rather, as an inherent aim, a *telos*, to be looked for and to be pursued. For that reason...let us assume that not only all human beings have law but that all law implies justice. This means that all human beings are subject to justice in whatever sense this may be understood.

Wolfgang Fikentscher, *The Sense of Justice and the Concept of Cultural Justice: Views from Law and Anthropology*, 34 AM. BEHAV. SCIENTIST 314, 321 (1991) (citation omitted).

tribal judicial review and oversight of tribal banishment and exclusion decisions.[34] Finally, while there are vast variations in tribal social, legal, and political systems and, for that reason, unique "sense[s] of justice,"[35] tribes must be allowed to define and experience their individual and particular senses of cultural justice.[36]

Part II of this Article explores the cultural and legal underpinnings of these assertions through an examination of three tribes' historical practices of banishment: the Cheyenne, the Navajo, and the Seneca. Part III surveys numerous treaties, tribal constitutions, and tribal laws that establish a tribe's authority to banish and exclude and the procedures for taking such measures. Part IV critically examines some of these tribal processes and decisions through the lens of contemporary tribal justice systems, particularly through the evolving jurisprudence of due process rights under the Indian Civil Rights Act of 1968. Banishment in the context of cultural justice is considered in Part V, which recommends a new judicial construct for reviewing banishment decisions based on principles of comity. Comity recognizes the inherent sense of justice within tribal customs while setting out ascertainable standards of due process to be incorporated into contemporary tribal, legal, and judicial systems.

II. CULTURAL AND LEGAL UNDERPINNINGS OF BANISHMENT

A. Illuminating the Modern with the Primitive: The Cultural Backdrop

The word "banishment" is derived from the Latin word *bannitio*, which means "[e]xpulsion by a ban or public proclamation."[37] A banished person was referred to as a *bannitus*, meaning "[a] person under a ban; an outlaw."[38] Several other words relate to some form of banishment, such as exclusion, expulsion, ejection, exile,[39] eviction, excommunication,[40] expatriation, and ostracism.[41] Depending on the particular cultural context, banishment can be either a civil sanction or a criminal punishment.[42]

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34. "Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *see also* Fisher v. District Court, 424 U.S. 382, 390 (1976) (finding exclusive tribal jurisdiction over an adoption matter that arose on the reservation).

35. Fikentscher, *supra* note 33, at 328–29.

36. *Id.* at 330; *see also* Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 196 (2001) (explaining that, in contrast to political sovereignty, which "define[s] and defend[s] the boundaries of [tribes'] jurisdictional authority," "cultural sovereignty," which includes the protection of Native peoples' "rights to language, religion, art, tradition, and the distinctive norms and customs that guide [their] societies....may ultimately prove to be [the tribes'] most valuable legal tool").

37. BLACK'S LAW DICTIONARY 157 (8th ed. 2004). A "bann" referred to both "[t]he power of a court to issue an edict," especially "one relating to the public peace," as well as to "[t]he edict itself." *Id.*

38. *Id.*

39. Exile was historically associated with the transportation of criminals to either the American colonies or Australia. Rutherford v. Blankenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979). *See infra* note 42 and accompanying text.

40. The word *Bann* in German means excommunication. HOSTETLER, *supra* note 7, at 85. Amish culture requires shunning persons who have been excommunicated from the community for offenses against church rules. *Id.* at 85–87.

41. WILLIAM P. STATSKY, WEST'S LEGAL THESAURUS/DICTIONARY 82 (1985).

42. The Amish practice of shunning is an established civil social norm, and several domestic and international governments impose banishment or exclusion as a civil administrative sanction as a means of regulating conduct within their communities and territories. *See* HOSTETLER, *supra* note 7, at 85; *see also supra*

Historically, Indian tribes have used banishment sparingly and as a last resort after exhausting customary and traditional methods of social discipline and sanction.[43] In the past, most Indian cultures did not have the formal penal systems that exist in many tribal legal systems today.[44] Rather, tribal communities typically addressed disputes, social transgressions, and serious offenses according to a complex system of social, cultural, and political relationships. These relationships, commonly exemplified by a clan or kinship system, regulated social conduct and transgressions within the extended family or clan unit. Families, kin, and clan were expected to nurture, instruct, discipline, and inculcate young tribal members in the tribe's traditions, beliefs, and customs. Adherence to the tribe's social and cultural standards was reinforced throughout a person's life—from birth through old age—thus ensuring harmony within the community.

In contrast to the adversarial and formally prescribed rules of the Anglo-American legal system, "[t]ribal laws and procedures are often influenced by tribal custom."[45] Under customary law, an individual was held accountable for his or her misconduct and was expected to restore stability and harmony within the family and tribal community by making restitution and amends through compensation and seeking forgiveness. An errant tribal member's misconduct and deviant behavior were therefore of concern to both the family and the entire community. While the individual's family and relatives would impose the initial reprimand, they might be admonished for failing to provide proper care or discipline to a tribal youth who misused or damaged property or for allowing a son or brother to abuse or neglect his wife or children.[46]

Tribes also tend to engage respected community members, such as elders, to peacefully resolve intra-tribal disputes. "Relatives or community elders are asked, as a personal favor, if they will intervene in the situation and seek satisfaction on behalf of the person who seeks redress....Elders do not simply represent themselves

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notes 11–14, 19 and accompanying text. Wm. Garth Snider has written a comprehensive and fascinating history of the criminal use of banishment, dating its formal origins to the Code of Laws promulgated by Hammurabi, King of Babylon in 2285 B.C., "where such punishment was prescribed for incest with one's daughter," through the medieval courts of the Franks, the Danes, and other Germanic peoples. Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 459–60 (1998). In the eighteenth century, "'[b]anishment could [have] easily mean[t] death...when food was short and wilderness filled the spaces between the cities.'" *Id.* at 460–61 (quoting Lee Bowker, *Exile, Banishment and Transportation*, 24 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 67, 67 (1980)). England regularly rid its country of its most menacing criminals and offenders by transporting them to the colonies or to Australia. *Id.* From an international indigenous human rights perspective, Colin Miller's examination of the punitive nature of banishment provides important insights into its history and practice. *See generally* Colin Miller, *Banishment from Within and Without: Analyzing Indigenous Sentencing Under International Human Rights Standards*, 80 N.D. L. REV. 253 (2004).

43. *See infra* Part II.A.1–3.

44. *See, e.g.*, Daniel L. Lowery, Comment, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969–1992*, 18 AM. INDIAN L. REV. 379, 434–35 (1993) (describing the lack of probation, parole, and systematic punishment in Navajo common law). John Ladd has described "the Navajo aversion to punishment" from "an anthropological perspective." *Id.* at 435 n.437 (citing JOHN LADD, THE STRUCTURE OF A MORAL CODE 287–88 (1957)).

45. United States v. Wheeler, 435 U.S. 313, 331–32 (1978). "Traditional tribal justice tends to be informal and consensual rather than adjudicative, and often emphasizes restitution rather than punishment." *Id.* at 332 n.34.

46. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 199 (1983). "Grievances between tribal individuals are not individual matters. Instead, they involve large numbers of people and, if not resolved, can cause bad blood between families for generations." *Id.*

or the aggrieved party but represent large families and lifetime relationships."[47] Some tribal peacemaking customs and traditions involve a "talking to" where a tribal elder or council member speaks to the individual about the tribe's values and beliefs and the consequences of misbehavior or misconduct.[48] The Elder or Councilor would admonish the person against harboring vengeful feelings and encourage the restoration of harmonious relationships within the community.[49]

Banishment was used as a last resort if all other efforts of the family and community failed. A decision to banish a tribal member was arrived at through extensive discussions and testimony about the individual's conduct and character.[50] These discussions usually involved the governing council, the elders' council, or the entire community.[51] In due course, a consensus was arrived at addressing the particular circumstances, the gravity of the offense, and the terms of the banishment.[52] Banishment has had two main focal points—the community and the individual.[53] Serious transgressions have the potential to threaten the cohesiveness of the community, weaken the tribe's authority and political structure, and encourage other deviant or harmful behavior.[54] Through banishment, the tribe fulfills its duty to act justly on behalf of the people as a whole.[55] The banishment order is directed to the individual, addresses the particular conduct that has compromised the community's safety and welfare, and encourages conformity with the tribe's social and cultural standards. As such, banishment is akin to the practice and effect of shunning in Amish communities.[56]

Like historical banishment decisions, modern banishment orders often impose conditions on the individual's exclusion from the tribe. An order may, for example, set a definite time period for the banishment sentence, require restitution for the wrongdoing, or even mandate mental health assistance.[57] If an individual has vandalized or stolen property, an order may require the individual to repair or replace the property or compensate the owner.[58] In the event of a personal injury or insult, an order may restrict the person's presence in the community, similar to a restraining order.[59] If, however, an individual has committed a grievous offense

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47. *Id.* at 199.
48. *See infra* Part II.A.1–3.
49. *See infra* Part II.A.1–4.
50. *See infra* Part II.A.1–4.
51. *See infra* Part II.A.1–4.
52. *See infra* Part II.A.1–4.
53. *See infra* Part II.A.1–4.
54. *See infra* Part II.A.1–4.
55. *Cf.* BREYER, *supra* note 3, at 17. In Justice Breyer's view, active liberty refers to the connections between the people and their government. *Id.* at 16. These connections essentially involve "responsibility, participation, and capacity." *Id.* They embrace "not only the 'rights of the whole people,' but also 'the duties of the whole people.'" *Id.* at 17 (quoting Letter from Thomas Jefferson to William Charles Jarvis (Sept. 20, 1820), *reprinted in* 10 THE WRITINGS OF THOMAS JEFFERSON 1816–1826, at 160 (Paul Leicester Ford ed., 1899)). These principles also describe the core connections within tribal societies and the collective rights and duties of the whole tribe to make decisions that sustain the values, identity, and structure of the tribal community as a whole.
56. For a discussion of the Amish practice of shunning, see HOSTETLER, *supra* note 7.
57. *See infra* Part III.C.4 (providing a survey of tribal banishment laws that define particular sanctions, including banishment, for certain offenses).
58. *See infra* Part III.C.4.
59. *See infra* Part III.C.4. For example, in *Shenandoah v. United States Department of the Interior*, the aggrieved tribal members claimed to have lost health benefits, per capita payments, and other privileges of

against another individual or the tribe, something completely beyond the norms and standards of the tribe (such as dealing drugs, sexual assault, or murder), an order may require his or her complete expulsion from tribal lands as well as prohibit the community from having any contact with the banished person.[60] With the gradual imposition of more severe sanctions, the individual comes to understand that his or her conduct is offensive and adherence to the tribe's social norms is expected. Failing this inducement, the individual faces the dire consequences of living outside of the community.

The histories of three tribes—the Cheyenne, the Navajo, and the Seneca—exemplify this cultural practice of conformity through social pressure and banishment. Under the laws and customs of each of these tribes, banishment is rarely used and is imposed only when all other customary measures fail to protect the community or reform the individual.

1. The Cheyenne Way: *Law-Ways*

The Cheyenne Indians originated from tribes that occupied the Great Plains of the United States.[61] The Cheyenne "law-ways,"[62] defined through rich and elaborate ceremonial practices and customs, were an "effective legal and socio-legal system."[63] Governed primarily by the Great Council with significant collaboration from the military societies,[64] the Cheyenne resolved most of their disputes amenably through consensus.[65] This practice had several remarkable qualities: it promoted "deference to another's judgment," concluded the dispute with firm finality, and established a harmonious relationship among the disputants.[66]

> Moreover—and be this noted—wherever the pipe was called into play, or differences of policy were worked out by the processes of deference to another's judgment, one finds in addition to the *res judicata* type of finality that further and hardly less functionally important outcome which so few systems of *law* have managed to guarantee at all, i.e., a working harmony on into the future.

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association with the tribal community. 159 F.3d 708, 714 (2d Cir. 1998); *see also infra* Part IV.B.

60. *See infra* Part III.C.4; *see also* Colebut v. Mashantucket Pequot Tribal Nation Tribal Elders Council, No. 3:05CV00247(DJS), 2007 WL 174384, at *1, 5 (D. Conn. Jan. 19, 2007) (upholding the adjudication of internal tribal laws when a tribal member was temporarily banished for possession of illegal drugs and lost membership privileges and incentive payments but retained health benefits).

61. "Theirs was a nomadic, semi-pastoral and hunting existence....[I]n its general aspects, Cheyenne culture is Plains." LLEWELLYN & HOEBEL, *supra* note 1, at vii.

62. *Id.* at 15.

63. *Id.* at 16.

64. The Cheyenne warrior societies—the Kit Foxes, Elks, Red Shields, Dog Soldiers, and Bowstrings—were military and semi-religious organizations with special governing status and duties, tracing their origin to some mythical culture hero or medicine man. *See id.* at 99–101; *see also* GEORGE BIRD GRINNELL, THE FIGHTING CHEYENNES 17 (Univ. of Okla. Press 1955) (1915) (discussing the Cheyenne "soldier societies").

65. *See* LLEWELLYN & HOEBEL, *supra* note 1, at 46–47. In their great study of the Cheyenne traditional legal and jurisprudential systems, Llewellyn and Hoebel called this process "the superior Cheyenne technique of chief-and-pipe." *Id.* at 47. They noted that this "law-way," while traditional in nature and thus lacking the structure of a modern legal system, was imbued with tenets of modern due process such as providing a fair hearing, establishing operative facts, proof and a record, rendering a final judgment, and enforcement. *See id.* at 44–46.

66. *Id.* at 46–47.

> Indeed, the Cheyenne cases...show how much more satisfactory the double achievement of settlement plus satisfaction proved than did mere settlement.[67]

The Cheyenne did not distinguish between a civil or private wrong and a criminal or public wrong; any wrongdoing concerned the whole community.[68] A distinction was made, however, in determining the sanction for the particular offense in question.[69] For example, an incorrigible tribal member was severely punished by the soldier society and then rehabilitated back into the tribe by another family or tribal member.[70] In addition, violations of hunting rules were punished by chastisement and ostracism and then resolved through rehabilitation—often with gifts and ceremonies such as the Sun Dance,[71] whereas murder was punished through banishment,[72] adulterous relationships were amended by making a settlement payment to the offended party and by divorce,[73] and domestic violence and disputes resulted in the aggressor being "put out" of the household, ridiculed, and required to make restitution.[74] Other offenses, such as disobedience of the society's orders, abortion, theft, rape, incest, or abuse of power warranted reprimand, restitution, ostracism, banishment, or corporal punishment.[75]

In addition to conventional punitive measures, "positive sanctions were also lavishly used" in shaping the character of tribal members.[76] Successful acts of individual accomplishment and virtue were praised and publicly acclaimed. Commemorative ceremonies were held on occasions of great feats such as a "son's first buffalo kill or war venture"[77] or a young girl's quilling of her first buffalo robe.[78] According to the Cheyenne people, these positive sanctions had several special benefits to both the individual and the tribe as a whole.[79] Hard work and risk-taking endeavors, such as hunting and warring, provided necessary subsistence resources and ensured the survival of the tribe.[80] Sharing and cooperation engendered harmonious relationships and spiritual and cultural beliefs were reinforced.

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67. *Id.* at 47 (footnote omitted).
68. *Id.* at 48.
69. *See id.* at 81–82.
70. *See id.* at 6–9.
71. *See id.* at 9–12, 112–13, 117–18.
72. *See id.* at 12–13, 80–81, 138–39.
73. *See id.* at 13–15, 188–208, 253–57, 260–61. In one account, Big Laughing Woman, who deserted her husband at a young age, was given to his soldier society and put "on the prairie" by her husband. *Id.* at 203. "All the unmarried men of the club who were not related to her had intercourse with her on the prairie." *Id.* She survived her exile but never married again. *Id.* She later "became the favorite storyteller of the tribe." *Id.* Boys of the tribe would sit "quietly the whole night through, listening to her tales of the great days of old. Although her experience made her a woman apart, there is little evidence that she was morally looked down upon because of it." *Id.*
74. *See id.* at 182–86.
75. *See id.* at 95, 118–20, 122–23, 127–28, 179. Incest was regarded as "heinous misconduct, and public disapproval was strong." *Id.* at 180. However, it was considered a private transgression for the family or the family's soldier society to address through social pressure, often resulting in the banishment or exile of the transgressor and the social ostracism of the victim. *See id.* at 178–81.
76. *Id.* at 246. "There were goals of adult glory for the boys who reached the ultimate of Cheyenne good—success in war by reckless individual exploit." *Id.*
77. *Id.* at 247.
78. *Id.* at 247–48.
79. *See id.* at 246–49.
80. *See id.* at 246–47.

> [W]ealth was distributed and parents basked in the pleasures of largess and altruism, as well as of publicity. Reciprocity balanced the relationships. So, too, when young men followed the advice of their fathers in offering a good buffalo-kill to an old shaman, the shaman went to the carcass, and in accepting it performed a short sanctifying ritual in which he blessed the boy and his family. Returning through camp, he called aloud that he had received a buffalo gift and had performed the ceremony. Here too, the youth received public credit.[81]

These positive sanctions reinforced community values among their youth.

The Cheyenne, a nation united around the family, guided in all aspects of tribal life by their traditions and ceremonies, have struggled against powerful forces that would corrode, if not destroy, their identity and cultural practices. Recently, the Dog Soldiers of the Crazy Dog Society and the Kit Fox Society[82] convened a council and decided to banish an Indian Health Services doctor for performing religious ceremonies on tribal lands, actions that the societies considered to be "a sacrilege and desecration to [their] culture."[83] The doctor, a non-Indian, "was driven to the reservation line by the societies and informed he was banished from the reservation."[84] When the banishment was later ruled illegal by the Northern Cheyenne Tribal Court, the doctor returned to work on the reservation.[85] The Tribe's modern formal judicial proceedings prevailed over the old Cheyenne way.

2. The Navajo Way: *beehaz'aanii*

The Navajo, like many other tribes, have been culturally averse to formal systems of punishment.[86] Indeed, "[t]he Navajo Nation Supreme Court has acknowledged that 'actual coercion or punishment were actions of last resort in Navajo common law.'"[87] Traditional Navajo law made no distinction between civil and criminal acts; both "were usually dealt with in the same fashion, by requiring restitution to the victim by the offender."[88] In either case, the main goals of punishment "were to put the victim in the position he or she was [in] before the offense by a money payment, punish in a visible way [by] requiring extra payments to the victim or the victim's family..., and give a visible sign to the community that [the] wrong was punished."[89]

Social order within the Navajo Nation is maintained by time-honored traditions and customs and also by tribal customary law, which have all been incorporated into

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81. *Id.* at 247.

82. The traditional warrior societies are still intact and active.

83. Lynette Two Bulls, *New Age Doctor Banished from Reservation: Tribal Council Lets Traditional Societies Make Decision*, LAKOTA J., Aug. 26–Sept. 2, 2005, at A1 (quoting Rick Wolfname, Vice President of the Northern Cheyenne Tribe).

84. *Id.*

85. Chris McKim, *I.H.S. Doctor Returns to Reservation: Court Rules Banishment Was Illegal*, LAKOTA J., Oct. 21–28, 2005, at A1.

86. *See* Lowery, *supra* note 44, at 434–35.

87. *Id.* at 435 (quoting Navajo Nation v. Platero, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6049, 6050 (Navajo 1991)).

88. *Id.* at 386–87.

89. *Id.* at 434 (alterations in original) (quoting *In re* Interest of D.P., 3 Navajo Rptr. 255, 257 (D. Ct. 1982)).

the Navajo Tribal Code.[90] The Navajo word for law, *beehaz'aanii*, includes "[c]ustoms and traditions that are 'fundamental and basic to Navajo life and society.'"[91] This traditional way of resolving disputes within the Navajo community and conciliating problems among members of the community, "a form of local mediation,"[92] was formally institutionalized into the Navajo Peacemakers Court.[93] Peacemakers, or *naat'aanii*, are selected by parties attempting to resolve their disputes through the Peacemaker Court, and are often "community or religious leader[s] or respected elder[s]."[94] The Peacemaker's role is to elicit discussion among all interested parties, including family members, apply Navajo customs and values, and attempt to reach a settlement agreeable to the parties involved in the dispute.[95]

While restitution was the traditional Navajo remedy for almost all offenses, banishment, also referred to as shunning, was an acceptable sanction under Navajo customary law.[96] "'Shunning,' or the deliberate ostracizing of an offender by the community, was a traditional Navajo method of dealing with 'those who repeatedly offended or flaunted the will of the community.'"[97] "Banishment, therefore, was essentially an extension of a time-honored Navajo practice"[98] reserved for "'a repeat offender, or one who committed a particularly heinous crime.'"[99] Once banished, the individual was culturally excluded from the tribal community. Without significant social and financial support from family and relatives, it would be difficult, if not impossible, to continue living on the reservation.

3. The Seneca Way: *Gayanashagowa*

Peacemaking traditions were also vital to the Seneca Nation of Indians, one of the Six Nations of the Iroquois Confederacy, or *Haudenosaunee*, of New York.[100]

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90. *Id.* at 387–88.

91. *Id.* at 390 (quoting Bennett v. Navajo Bd. of Election Supervisors, 18 Am. Indian L. Rep. (Am. Indian Law. Training Program) 6009, 6011 (Navajo 1990)). Daniel Lowery's comprehensive examination of Navajo customary law draws from the *Bennett* decision of the Navajo Nation Supreme Court, which indicates that *beehaz'aanii* has both a popular meaning, usually "used in the sense of laws enacted by the Navajo Nation Council," and a spiritual meaning referring "to a higher law." *Id.* (quoting *Bennett*, 18 Am. Indian L. Rep. at 6011). "It means something which is 'way at the top'; something written in stone so to speak; something which is absolutely there; and, something like the Anglo concept of natural law." *Id.* (quoting *Bennett*, 18 Am. Indian L. Rep. at 6011).

92. *Id.* at 383. "There is also evidence," noted Lowery, "that such mediation was an ongoing, widespread, ad hoc means of resolving disputes, which persisted unofficially even after courts were first established by the federal government in the Navajo Nation." *Id.* at 383 n.10.

93. *Id.* at 384.

94. *Id.* at 385.

95. *Id.* According to Lowery, "the creation of the Peacemaker Court may have been the single most significant practical step yet taken by the Navajo Nation towards reestablishing traditional Navajo law." *Id.* at 386.

96. *Id.* at 434.

97. *Id.* (quoting Op. Solic. Navajo Tribal Courts, No. 83-3, slip op. at 5 (Jan. 31, 1983)).

98. *Id.*

99. *Id.* at 435 (quoting Navajo Nation v. Platero, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6049, 6050 (Navajo 1991)).

100. Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 242 (1997) [hereinafter Porter, *Strengthening Tribal Sovereignty*]. The Seneca Nation is part of the Six Nations of the *Haudenosaunee*, or Iroquois Confederacy, also comprised of the Mohawk, the Oneida, the Onondaga, the Cayuga, and the Tuscarora nations. *Id.*; *see also* Robert B. Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the* Haudenosaunee, 46 BUFF. L. REV. 805, 807–09 (1998) [hereinafter Porter, *Building a New Longhouse*].

"Pursuing peace was relevant not just to the establishment of the *Haudenosaunee*, but also to its perpetuation."[101] Similar to the Navajo custom of *beehaz'aanii*, the unifying customary law of the Seneca Nation was the *Gayanashagowa*—the Great Law of Peace.[102] "[P]eace was not simply the absence of war, it '*was* the law' and an affirmative government objective."[103] Accordingly, all governmental issues, inter-tribal relations, and private interests were decided in accordance with this law and tradition.[104] Seneca council and community meetings and discussions were held in the traditional longhouses[105] "so that all debate took place 'across the fire.'"[106] "Actions could not be taken unless there was unanimity and its leaders [were] of one mind."[107] Thus, discussion was held until a consensus was reached and that decision "would carry the full support of all the member nations."[108]

The *Haudenosaunee* peacemaking law and tradition was so integrated into the community that the "Seneca society was afflicted with little interpersonal conflict and transgressions of community norms. Individual behavior was governed by a strong unwritten social code that relied upon social and psychological sanctions, such as ridicule and embarrassment, as the primary methods of enforcement."[109] The Seneca social structure and behavioral norms were maintained "by oral tradition supported by a sense of duty, a fear of gossip, and a dread fear of retaliatory witchcraft."[110]

As in the Navajo culture, formal punishment was disfavored in Seneca society; social pressure and mutual consent corrected nearly all deviant behavior and resolved most disputes.[111] However, "extreme violence, such as murder or the practice of witchcraft, were punishable by death or by restitution to the victim's family. If the wrongdoer repented, he could offer goods and services, and the matter would be resolved."[112] Traditionally, banishment (i.e., "complete ostracism") from the Seneca society was rarely needed because public indignation was considered to be a sufficiently severe punishment.[113] Recent events within the community of the

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101. Porter, *Strengthening Tribal Sovereignty*, *supra* note 100, at 242.

102. Porter, *Building a New Longhouse*, *supra* note 100, at 807–09.

103. Porter, *Strengthening Tribal Sovereignty*, *supra* note 100, at 240 (quoting PAUL A.W. WALLACE, THE WHITE ROOTS OF PEACE 7 (1946)).

104. *Id.* at 240–43.

105. Professor Porter has described the longhouse as

> the traditional *Haudenosaunee* dwelling [that] had many fires and was designed to ensure that those residing within it could "live together as one household in peace." This Longhouse structure was borrowed as the symbolic model for the governing process to ensure that the *Haudenosaunee* would "have one mind and live under one law" and to continually reaffirm that "thinking shall replace killing, and [that] there shall be one commonwealth."

Porter, *Building a New Longhouse*, *supra* note 100, at 816 (second alteration in original) (footnote omitted) (quoting WALLACE, *supra* note 103, at 16).

106. Porter, *Strengthening Tribal Sovereignty*, *supra* note 100, at 242–43 (quoting WALLACE, *supra* note 103, at 40).

107. *Id.* at 242 (internal quotation marks omitted).

108. *Id.* at 243.

109. *Id.* at 244–45 (footnote omitted). Professor Porter noted, however, that "[l]iquor usually was the primary source of social discord." *Id.* at 245.

110. *Id.*

111. *See id.* at 252–53.

112. *Id.* at 245 (footnote omitted).

113. *See id.*

Tonawanda Band of Seneca Indians, however, have caused a total reexamination of tribal authority to banish tribal members and a thorough reassessment of individual rights within traditional tribal practices.[114]

In 1996, five members of the Tonawanda Band were permanently banished from Seneca territory and disenrolled from the Band by the Council of Chiefs for treasonous activities.[115] The banished tribal members challenged the Council's actions in federal court through a writ of habeas corpus pursuant to the Indian Civil Rights Act of 1968.[116] The Second Circuit Court of Appeals construed the Council's actions as a severe punishment and restraint on the members' liberty interests and equivalent to a detention-triggering habeas corpus review.[117] As discussed in Part III of this Article, this case raises serious and fundamental issues concerning inherent tribal authority to govern according to customary practices. The decision has triggered a spate of legal controversies that pit traditional methods of dispute resolution against modern notions of due process.[118]

4. Common Themes Across Tribal Boundaries

The historical traditions and customs of the Cheyenne, the Navajo, and the Seneca share several common themes. These tribes were markedly cohesive societies, unified around their families and dependent on one another for their sustenance and survival. Families and relatives shared mutual responsibility for instructing their youth, observing ceremonies, and inculcating respect for the tribe's culture and values. Deviant or defiant behavior within their communities, outside the bounds of customarily accepted conduct, could potentially threaten the tribe's unity and ultimately its ability to survive. Tribal customs prescribed the structure

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114. *See infra* notes 115–117 and accompanying text; *see also infra* Part IV.A.

115. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996); *see also infra* Part IV.A. Professor Porter reported the sad demise of the old Seneca social order and noted that tremendous social and economic development, "crippling political division and infighting," and divisive internal strife within the nations of the Iroquois Confederacy, particularly in the past thirty years, have "threaten[ed] the very existence of the *Haudenosaunee* nations." Porter, *Building a New Longhouse*, *supra* note 100, at 812.

116. *Poodry*, 85 F.3d at 876; *see also* 25 U.S.C. § 1303 (2000). A writ of habeas corpus tests the lawfulness of a detention and is served upon the person's custodian (i.e., the person responsible for holding the individual). For a review of the constitutional and statutory origins of habeas corpus, as well as a contemporary analysis of habeas corpus jurisprudence, including the Supreme Court's recent reaffirmation of the rights of habeas corpus in the "War on Terrorism," see CARY FEDERMAN, THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE (2006). Banishment is, however, by its very nature the opposite of a detention—it seeks physical removal and separation from the tribe rather than custody. For a more complete discussion of habeas corpus relief from tribal detentions under the Indian Civil Rights Act of 1968, see *infra* Part II.B.2–3.

117. *Poodry*, 85 F.3d at 895. The Second Circuit Court of Appeals concluded that

> the existence of the orders of permanent banishment alone—even absent attempts to enforce them—would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus. We deal here not with a modest fine or a short suspension of a privilege—found not to satisfy the custody requirement for habeas relief—but with the coerced and peremptory deprivation of the petitioners' membership in the tribe and their social and cultural affiliation. To determine the severity of the sanction, we need only look to the orders of banishment themselves, which suggest that banishment is imposed (without notice) only for the most severe of crimes: murder, rape, and treason....We believe that Congress could not have intended to permit a tribe to circumvent ICRA's habeas provision by permanently banishing, rather than imprisoning, members "convicted" of the offense of treason.

Id.; *see also infra* Part IV.A.

118. *See infra* Part III.

and means to deal with such deviant conduct, ranging in scope from simple social pressure applied by family and the community to eventual banishment from the tribal community. Decisions to banish or ostracize a member of the tribal community were made by a consensus of the community as a whole or by the tribal governing or spiritual body, which guarded against personal or political ill-motives. Furthermore, decisions of the group were generally accepted with little dissension or conflict.

The sanction imposed corresponded both to the offense and the transgressor. Even with the most severe punishment, such as banishment, the goal was to restore peace and unity within the tribe and to eventually reinstate the member into the community. Banishments were usually limited in duration and rarely lasted for life. There was always the hope that the member, shamed and forced away from his or her family and community, would become remorseful, reform, and return to the tribe. While serious deviations could not be tolerated or excused, they were addressed justly. Banishment was just one strand in the cultural fiber of the tribe that, when interwoven with other strands, formed the rope that bound the tribe's socio-legal jurisprudence and secured its physical and cultural survival.

B. Illuminating the Primitive with the Modern: The Legal Foundations

As demonstrated by the brief cultural histories of the Cheyenne, the Navajo, and the Seneca, social integrity and political survival of Indian tribes as sovereign entities required fervent adherence to tribal laws and customs.[119] Integral to tribal cultural and legal sovereignty is a tribe's inherent authority to remove a person from tribal lands.[120] "A tribe needs no grant of authority from the federal government to exercise the inherent power of exclusion from tribal territory...."[121] Tribal authority has, however, been limited in significant ways over time.[122] Most notably, for the purposes of this Article, it has been limited by the Indian Civil Rights Act of 1968.[123] This evolution of the fundamental principles of federal Indian law instructs and informs modern precepts of fairness and due process applicable in legal challenges to tribal banishment and exclusion decisions.

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119. Charles Wilkinson, a preeminent scholar and teacher of federal Indian law, expressed this principle as follows: "While sovereignty now, as then, presupposes a culturally distinct people within defined territorial limits, it connotes legal competence rather than absolute power. It is used in the narrow sense of the power of a people to make governmental arrangements to protect and limit personal liberty by social control." CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 54–55 (1987).

120. Felix S. Cohen, an early scholar of federal Indian law and primary architect of the Indian Reorganization Act of 1934, stated, "Perhaps the most basic principle of all Indian law...is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty which has never been extinguished.'" COHEN ET AL., *supra* note 16, § 4.01[1][a], at 206 (quoting United States v. Wheeler, 435 U.S. 313, 322–23 (1978)).

121. *Id.* § 4.01[2][e], at 219.

122. *Id.* § 4.01[1][a], at 206 ("Federal treaties and congressional enactments have imposed certain limitations on tribal governments, especially on their external political relations, and the Supreme Court has issued some common law rulings that introduce further limitations as a matter of federal common law.").

123. *See infra* Part II.B.2.

1. The Foundational Decisions

The foundational principles of tribal sovereignty were laid out in three early U.S. Supreme Court decisions authored by Chief Justice John Marshall.[124] Known as the "Marshall Trilogy,"[125] these opinions recognized the strength and influence of the sovereign rights of Indian tribes, such as the inherent rights to self-government, to occupy aboriginal lands,[126] and to protect against the external intrusion and imposition of state law.[127] These principles remain the underpinnings of modern federal Indian law jurisprudence.[128]

However, the scope of tribal sovereignty—a tribe's authority to determine its own form of government and to govern its affairs—has not been precisely defined and has been continually qualified, often with much confusion and contradiction.[129] After the Marshall Trilogy, tribes were no longer thought to possess "'the full attributes of sovereignty.'"[130] According to the U.S. Supreme Court, complete and unconditional tribal sovereignty was divested through "[a tribe's] incorporation within the territory of the United States, and their acceptance of its protection."[131] Nonetheless, however forceful the historical and political pressures were that progressively engulfed tribal external rights and powers, the U.S. Supreme Court has

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124. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

125. *See, e.g.*, Kristina L. McCulley, Comment, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs?*, 30 AM. INDIAN L. REV. 401, 402 n.4 (2006).

126. *Cherokee Nation*, 30 U.S. (5 Pet.) at 18.

127. *Worcester*, 31 U.S. (6 Pet.) 515. In *Worcester*, Chief Justice Marshall concluded that "[t]he Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force." *Id.* at 561.

128. As suggested by Vine Deloria, Jr. and Clifford M. Lytle,

> Marshall seized on this occasion [his decision in *Cherokee Nation*] not only to clarify the relationship of Indian tribes to the government but also to spell out a basis for the federal government's responsibility over Indian affairs. Whether he succeeded in establishing a workable theory or not remains a topic of intense discussion among legal minds since he offered a dualistic interpretation that can be seen as both pro-Indian and anti-Indian.

DELORIA & LYTLE, *supra* note 46, at 29–30.

129. Several scholars have noted the U.S. Supreme Court's confused approach to Indian law. Vine Deloria, Jr. and Clifford M. Lytle describe the theoretical underpinnings of the "*Cherokee Nation Cases*" as "contradictory in the extreme: tribes are domestic dependent nations and the relationship between tribes and the federal government resembles that of a ward to a guardian." DELORIA & LYTLE, *supra* note 46, at 33. Professor Philip P. Frickey characterizes the field of federal Indian law as "remarkably incoherent." Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 434 (2005).

130. Alex Tallchief Skibine, *Dualism and the Dialogic of Incorporation in Federal Indian Law*, 119 HARV. L. REV. F. 28, 32 (2006), http://www.harvardlawreview.org/forum/issues/119/dec05/skibine.pdf (quoting United States v. Kagama, 118 U.S. 375, 381 (1886)).

131. United States v. Wheeler, 435 U.S. 313, 323 (1978). Tribes' voluntary "acceptance" of the federal government's authority is a semantic and historical perversion. *See, e.g.*, FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 48–50 (1995). Pommersheim noted that

> [o]ne of the legacies of the colonization process is the fact that Indian tribes, which began their interaction with the federal government largely *outside* the republic, became absorbed more and more into the republic, eventually becoming internal sovereigns of a *limited kind*. This process is most accurately characterized as one of involuntary annexation....Their incorporation was not justified by any coherent legal theory and is, arguably, directly at odds with several key legal and political premises embedded in the U.S. Constitution. These premises...include the principles of limited governmental sovereignty and the consent of the governed.

Id. at 48.

held steadfast to protecting inherent tribal sovereignty over internal affairs such as the powers to determine tribal membership, regulate domestic relations, and prescribe rules of inheritance.[132]

2. The Indian Civil Rights Acts of 1968: A New Foundation Under *Santa Clara Pueblo v. Martinez*[133]

The contours of tribal sovereignty established in the Marshall Trilogy supported the U.S. Supreme Court's late nineteenth century determination that the Bill of Rights of the U.S. Constitution was not applicable to tribes because tribes pre-dated the Federal Constitution and were not contemplated in its federal-state governmental structure.[134] Thus, the standards, rights, and protections imposed on federal and state governments by the Constitution simply did not apply to tribes.

For the greater part of the next century, Indian tribes governed themselves with little interference from the federal government. Internal tribal matters remained within the purview of inherent tribal self-government, and community disputes were resolved according to tribal laws and customs. Influenced by the strong social justice sentiments of the civil rights period in the 1960s and following congressional hearings on the administration of justice by tribal governments,[135] Congress passed the Indian Civil Rights Act of 1968.[136] The two principal purposes of the ICRA were to "'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments,'"[137] and "to promote the well-established federal 'policy of furthering Indian self-government.'"[138]

While conferring rights on individuals subject to the tribe's jurisdiction, the ICRA also imposes restraints on tribal government powers "similar, but not identical, to

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132. Montana v. United States, 450 U.S. 544, 564 (1981) ("Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.").

133. 436 U.S. 49 (1978).

134. Talton v. Mayes, 163 U.S. 376, 384–85 (1896); *see also Santa Clara Pueblo*, 436 U.S. at 56 ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."). While the holding in *Talton* has been extended to other provisions of the Bill of Rights, on a cautious note the U.S. Supreme Court has stated that "[t]he line of authority growing out of *Talton*, while exempting Indian tribes from constitutional provisions addressed specifically to State or Federal Governments, of course, does not relieve State and Federal Governments of their obligations to *individual Indians* under these provisions." *Santa Clara Pueblo*, 436 U.S. at 56 n.7 (emphasis added). The Court's responsibility to individual Indians under the Constitution appears to be the crux of the dilemma in banishment cases as well as the unanswered issue in *Santa Clara Pueblo*.

135. The specific question explored by the Senate Committee was "'whether a tribal Indian can successfully challenge on constitutional grounds specific acts or practices of the Indian tribe.'" *Santa Clara Pueblo*, 436 U.S. at 81 n.5 (White, J., dissenting) (quoting S. REP. NO. 90-841, at 9 (1967)).

136. 25 U.S.C. §§ 1301–41 (2000). For an extensive discussion of the ICRA, see generally *Santa Clara Pueblo*, 436 U.S. 49; THE INDIAN CIVIL RIGHTS ACT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS (1991) [hereinafter CIVIL RIGHTS REPORT]; NATIVE AMERICANS AND THE LAW: THE INDIAN BILL OF RIGHTS, 1968 (John R. Wunder ed., 1996).

137. *Santa Clara Pueblo*, 436 U.S. at 61 (quoting S. REP. NO. 90-841, at 5–6).

138. *Id.* at 62 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)). The Court cited President Lyndon Johnson's support of the ICRA as part of his administration's policy of advancing tribal self-determination. *Id.* at 62 n.11.

those contained in the Bill of Rights and the Fourteenth Amendment."[139] Among the rights protected by the ICRA are the right to free speech, press, and assembly; protection against unreasonable search and seizure; the right to a speedy trial; the right to hire a lawyer in a criminal case; protection against self-incrimination; protection against cruel and unusual punishment; and the right to equal protection and due process.[140] Although enforcement of these rights under the Act is specifically limited to a writ of habeas corpus in federal court to test the legality of a detention by the tribe, federal courts have assumed broad jurisdiction over tribal civil rights claims in early ICRA cases.[141]

3. Habeas Corpus Relief and Banishment

The first case brought under the ICRA, one year after its enactment, challenged the exclusion of a non-Indian from the Navajo Reservation through a petition for a writ of habeas corpus in federal court. *Dodge v. Nakai* (*Dodge II*)[142] involved a dispute between a non-Indian attorney working on the Navajo Reservation for DNA Legal Services (DNA) and a committee of the Navajo Tribal Council embroiled in a clash between tribal leaders.[143] The exclusion order was the culmination of "a history of difficulty between the DNA attorney and the Navajo Tribe."[144]

The attorney argued that the tribal exclusion order violated his rights under the ICRA. The Tribe countered with two arguments.[145] First, the exclusion order was

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139. *Id.* at 57. Section 1302 of the ICRA begins, "No Indian tribe in exercising powers of self-government shall [do any of the following enumerated things]." 25 U.S.C. § 1302. These "powers" are defined in § 1301(2) as "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." *Id.* § 1301(2).

140. The substantive provisions of the ICRA, which create individual rights for tribal members and create restraints on tribal self-government, are enumerated in section 1302 of the Act. 25 U.S.C. § 1302. Congress selectively applied most of the Bill of Rights to tribes with several notable modifications and omissions. First, there is no restriction on the governmental establishment of religion. *Id.* § 1302(1). Second, there is no right of the accused to secure counsel at the tribal government's expense. *See id.* § 1302(6). Third, a tribe is limited to imposing sentences of no more than one year imprisonment, issuing a $5000 fine, or both. *Id.* § 1302(7). Fourth, the language concerning equal protection guarantees "the equal protection of *its* [the tribe's] laws," rather than the laws. *Compare id.* § 1302(8), *with* U.S. CONST. amend. XIV, § 1. Finally, there is no requirement that tribal criminal prosecutions be initiated by grand jury indictment. *Santa Clara Pueblo*, 436 U.S. at 63 n.14 ("[I]t is interesting to note that § 1302 does not require tribal criminal prosecutions to be initiated by grand jury indictment, which was the requirement of the Fifth Amendment specifically at issue and found inapplicable to tribes in *Talton v. Mayes*."). In making these modifications, Congress recognized the deeply embedded tribal traditional and spiritual beliefs and practices as well as the inability of tribes to bear the financial burden of providing legal counsel to indigent parties. CIVIL RIGHTS REPORT, *supra* note 136, at II-3.

141. 25 U.S.C. § 1303; *see also* CIVIL RIGHTS REPORT, *supra* note 136, at II-11 to II-13.

142. 298 F. Supp. 26 (D. Ariz. 1969).

143. *Id.* Although it would be ten years before the U.S. Supreme Court would render its decision in *Santa Clara Pueblo*, this case illustrates many of the compelling personal and political issues underlying many ICRA-related claims.

144. *Id.* at 31. During a discussion between the tribal government and the DNA administration about the legal services organization's involvement in tribal governmental affairs, the attorney was disrespectful to the Advisory Committee of the Tribal Council. *Id.* at 32. The Committee considered this conduct to be a serious affront to the Navajo government and, after a hearing with the parties, voted to permanently exclude the attorney from the reservation. *Id.* at 29–31. The exclusion order cited the attorney's "'obnoxious conduct'...so obnoxious as to provoke [an] assault." *Id.* at 31.

145. The Tribe's initial motion to dismiss was denied by the federal district court three months earlier, with

made within its authority under Article II of the Treaty of 1868 between the United States and the Navajo Tribe, which reserved to the Tribe the power to exclude non-Navajos from the Reservation.[146] Second, the Tribe argued that the ICRA was inapplicable in this case.[147] The court rejected both of the Tribe's arguments.[148]

The court determined that the Navajo Tribe's treaty rights had been modified by the ICRA, particularly the Act's prohibition against depriving any person of liberty or property without due process of law.[149] Due process, instructed the court, "requires governmental entities to utilize reasonable means in seeking to achieve legitimate ends."[150] Banishment was not a reasonable means, according to the court, but rather "a severe remedial device."[151]

The court further concluded that the Tribe's exclusion order violated several other provisions of the ICRA, namely the guarantee of due process of the law, protection of free speech, and prohibition against bills of attainder.[152] The court particularly rejected the Tribe's arguments that its actions were culturally or otherwise justified under Navajo customary law or the Treaty of 1868 and permanently enjoined the Tribe and its officers from enforcing the exclusion order.[153]

In *Dodge II*, the court fell into the muddy quagmire of internal tribal politics. Unfortunately the decision did little to elucidate the standards applicable in reviewing tribal decisions under the ICRA, but rather created a knotty confusion which was not unraveled until some time later by the Supreme Court in *Santa Clara Pueblo v. Martinez*.[154] The *Dodge II* decision wholly displaced the Tribe's role in resolving these issues or vindicating the plaintiffs' rights. In fact, the court in *Dodge v. Nakai* (*Dodge I*) expressly rejected the Navajo Court's right and obligation to resolve the matter under tribal law and custom,[155] refused to recognize the possibility that the Navajo legal and judicial system would fairly and justly apply its laws, and intentionally ignored long-standing Indian law principles of tribal self-government, exhaustion of tribal remedies and federal abstention, and tribal sovereign immunity from suit.[156] In imposing its own sense of justice, without permitting the Tribe to

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the court finding jurisdiction under the ICRA, a statute it determined arose under the laws of the United States pursuant to 28 U.S.C. § 1331 and § 1343(4) (allowing a claim to enforce civil rights). Dodge v. Nakai (*Dodge I*), 298 F. Supp. 17, 25 (D. Ariz. 1968). The court also expressly rejected the Tribe's contention that the ICRA applied only to Indians, concluding that Congress intended to include non-Indians, such as the attorney, within the ambit of the Act's protections. *Id.* at 24.

146. *Dodge II*, 298 F. Supp. at 28.

147. *Id.*

148. *Id.* at 32.

149. *See id.* at 31–32.

150. *Id.* at 31.

151. *Id.* The court also stated that the use of the exclusion power in this case was a "drastic power...wholly unreasonable." *Id.* at 32.

152. The attorney's due process rights were violated because the particular conduct was not explicitly defined as an offense under Navajo law. *Id.* at 32, 34. His freedom of speech as a lawyer was abridged, as was that of his clients, by the ill motives of the Tribal Council Advisory Committee to remove him as the director of DNA. *Id.* at 33. The Committee's exclusion order constituted an illegal bill of attainder because the committee acted in a legislative capacity and imposed a punishment on a specific individual without a judicial trial. *Id.* at 33–34.

153. *Id.*

154. 436 U.S. 49 (1978).

155. Dodge v. Nakai (*Dodge I*), 298 F. Supp. 17, 25–26 (D. Ariz. 1968). This is contrary to the court's own belief that there was "[n]o doubt many of these cases could be resolved locally [by the tribe]." *Id.* at 25.

156. The court, however, offered this explanation: "This opinion is written in an effort to reveal some of the

examine its own actions, the decision contributed very little to defining the acceptable contours of due process rights and protections under the ICRA.[157] Not surprisingly, the decision was much criticized and, until the Supreme Court's pronouncements in *Santa Clara Pueblo v. Martinez*, "had long-lasting repercussions throughout Indian country."[158]

4. A New Direction: *Santa Clara Pueblo v. Martinez*

The authority of the federal courts to hear and decide ICRA claims that allege discriminatory tribal council practices reached the U.S. Supreme Court ten years after the ICRA's enactment, this time involving a membership decision that raised equal protection and sovereign immunity issues.[159] Julia Martinez, a full-blooded member of the Santa Clara Pueblo, brought an action in federal district court under the equal protection provision of the ICRA against the Pueblo and its governor.[160] Martinez sought to enjoin the enforcement of the Pueblo's membership ordinance that denied membership to children of female members who married outside the tribe but allowed membership to children of male members who married outside the tribe.[161] At the time of her suit, Mrs. Martinez and her Navajo husband had lived on the Santa Clara Pueblo Reservation for over thirty-seven years and had raised their children there.[162]

Because the Act "does not expressly authorize the bringing of civil actions for declaratory or injunctive relief to enforce its substantive provisions,"[163] the threshold jurisdictional issue before the Court was whether Congress had intended to establish a general private cause of action directly against tribes and tribal officers to enforce the Act.[164] This would require the Court to expressly find that Congress had waived

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problems concerning the jurisdiction of the federal courts inherent in the Civil Rights Act of 1968 and the extent to which that statute requires this Court to depart from long established principles and policies." *Id.* at 26.

157. Concerns about the effect of the ICRA on tribal governments were expressed during hearings on the legislation and after its enactment. Among the general concerns raised were that the ICRA was an infringement on tribal rights of self-government, that implementation of the ICRA's requirements would diminish or eliminate tribal customs and traditions, and that the ICRA was unnecessary in light of similar guarantees and traditions in tribal law. *See Amendment to the Indian Bill of Rights: Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969); *Rights of Members of Indian Tribes: Hearing Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. (1968).

158. Alvin J. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 52 (1975) (citing *Dodge I*, 298 F. Supp. 17). John Wunder explained:

> *Dodge v. Nakai* was a massive hemorrhage in the tribal sovereignty of the Navajos and that of all Native American nations. Treaty rights were attacked. Narrow jurisdictional limits placed in the Indian Bill of Rights were expanded significantly. Restrictions placed on banishment as a remedy for tribal governments made it almost impossible to obtain. Due process of law would be applied to tribal courts as if it were a federal rather than a tribal legal concept.

JOHN R. WUNDER, "RETAINED BY THE PEOPLE": A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 144 (1994).

159. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

160. *Id.* at 51.

161. *Id.* at 51–52 & n.2. The Pueblo's membership ordinance was enacted in 1939. *See id.* at 52. Rights and privileges associated with tribal membership included the right to vote, hold tribal office, bring a matter before the tribal council, use the land, and reside on the reservation. *See id.*

162. *See id.*

163. *Id.* at 51–52.

164. *Id.* at 52, 69.

tribal sovereign immunity in federal court from such suits.[165] The Supreme Court emphatically affirmed tribal common-law immunity from suit:

> It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. Moreover, since the respondent in a habeas corpus action is the individual custodian of the prisoner, the provisions of § 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.[166]

Upon an extensive review of the Act's legislative history, the Court concluded that Congress intentionally limited federal review of ICRA claims to habeas corpus relief.[167] Although initial drafts of the Act would have permitted broad de novo review in federal court of *all* tribal court criminal convictions, in the Court's view, the final legislation reflected Congress's concern that such expansive involvement in tribal affairs would constitute undue federal interference in matters of tribal self-governance.[168] Not only would such intrusions dangerously "expos[e] tribal officials to the full array of federal remedies available to redress actions of federal and state officials,"[169] they also would impose "unmanageable financial burdens on tribal governments and needlessly displace tribal courts."[170] Relying on this legislative history, the U.S. Supreme Court concluded that Congress "intended to create only a limited mechanism for such review, namely, that provided expressly in § 1303."[171]

Writing for the majority of the court, Justice Marshall noted the two distinctly important and competing purposes of the ICRA: to strengthen the position of individual tribal members in relation to their tribal governments, and "to promote the well-established federal 'policy of furthering Indian self-government.'"[172] On balance, while making federal courts available to individual suits against tribal governments would benefit the former, it would seriously undermine the latter. Setting aside ten years of judicial oversight, the Court stated that tribal forums, not federal courts, "are available to vindicate rights created by the ICRA, and [25 U.S.C.] § 1302 has the substantial and intended effect of changing the law which

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165. In the years immediately following the enactment of the ICRA, federal courts routinely found that the Act had waived tribal sovereign immunity and conferred federal court jurisdiction to grant injunctive and declaratory relief. *See* WUNDER, *supra* note 158, at 149–53.

166. *Santa Clara Pueblo*, 436 U.S. at 58–59 (citations and internal quotation marks omitted).

167. *Id.* at 70.

168. *Id.* at 67, 70 ("In settling on habeas corpus as the exclusive means for federal-court review of tribal criminal proceedings, Congress opted for a less intrusive review mechanism than had been initially proposed.").

169. *Id.* at 71.

170. *Id.* at 67.

171. *Id.* at 70.

172. *Id.* at 62 (quoting Morton v. Mancari, 471 U.S. 535, 551 (1974)).

these forums are obliged to apply."[173] Thus, the exclusive means for federal court review of tribal actions is through the habeas corpus provisions of § 1303.[174]

Some of the most vexing issues arising out of the ICRA's habeas corpus provision concern banishment and exclusion matters.[175] The substantive rights created under the ICRA are particularly relevant to banishment orders, which by their very nature implicate property and liberty interests. These include issues such as whether the banishment, actual or threatened, constitutes a sufficiently severe restraint on an individual's liberty interests;[176] whether banishment sanctions are essentially criminal or civil in nature for habeas corpus jurisdiction;[177] whether tribal customs and traditions can be maintained in contemporary legal systems; what measure of due process and other constitutional rights are to be applied in tribal actions; and whether banishment orders that raise other ICRA issues, such as equal protection, cruel and unusual punishment, and bill of attainder, may be addressed through habeas relief.[178]

III. SOURCES OF TRIBAL POWERS TO BANISH AND EXCLUDE

A. *A Fundamental Attribute of Tribal Sovereignty*

The authority of Indian tribes to exclude individuals from their lands, condition entry, and regulate activity upon their lands derives from two key doctrines. First, tribal exclusionary authority "is a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members, it is an internal matter over which tribes retain sovereignty."[179] This power applies to any person within the tribe's jurisdiction—members, non-

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173. *Id.* at 65. The Court further noted that where tribal constitutions require secretarial approval of tribal laws, "persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior." *Id.* at 66 n.22. The Court also indicated that Congress reserves the right to authorize civil suits for injunctive relief or other remedies to address violations of section 1302 "in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions." *Id.* at 72.

174. Federal courts have been, and continue to be, frustrated with such limited jurisdiction. A few years after the U.S. Supreme Court's decision, the Tenth Circuit Court of Appeals created a judicial exception to the *Santa Clara Pueblo* rule finding that it had jurisdiction to adjudicate a claim involving non-Indians' property rights on reservation lands where there was no tribal court or other forum to hear the matter. Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980) (distinguishing *Santa Clara Pueblo* on three grounds: the suit was brought by non-Indians, the dispute was not intra-tribal in nature, and tribal remedies were not available). Since then, the Tenth Circuit has limited the holding of the *Dry Creek* exception finding that it was based on "absolute necessity." *See* White v. Pueblo of San Juan, 728 F.2d 1307, 1312 (10th Cir. 1984); *see also* Ordinance 59 Ass'n v. U.S. Dep't of the Interior Sec'y, 163 F.3d 1150, 1156 (10th Cir. 1998) (finding the disputed issues concerning validity and enforcement of a tribal enrollment provision clearly matters of internal tribal concern and an available tribal forum); Nero v. Cherokee Nation of Okla., 892 F.2d 1457, 1460 (10th Cir. 1989) (finding the exception inapplicable to the plaintiffs' case for failure to pursue available tribal remedies and because the dispute concerned internal tribal affairs of membership and government).

175. *See generally* Ziontz, *supra* note 158, at 52.

176. *See, e.g.*, Moore v. Nelson, 270 F.3d 789, 791 (9th Cir. 2001) (holding that a civil fine did not constitute a detention for habeas corpus relief); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 884 (2d Cir. 1996); *see also infra* Part IV.A.

177. *See, e.g.*, Quair v. Sisco, 359 F. Supp. 2d 948, 966 (E.D. Cal. 2004); *see also infra* Part IV.C.

178. *See, e.g.*, Shenandoah v. Halbritter, 366 F.3d 89, 91–92 (2d Cir. 2004); Shenandoah v. U. S. Dep't of the Interior, 159 F.3d 708 (2d Cir. 1998); *see also infra* Part IV.B.

179. COHEN ET AL., *supra* note 16, § 4.01[2][e], at 220.

members, and non-Indians alike—as necessary to protect the health, safety, and welfare of the tribal community. Second, tribes as landowners have

> the sovereign [power] of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority.[180]

Although these precepts have been altered to some extent through subsequent court decisions and statutory enactments, they remain essentially intact and relevant.

Tribal powers to exclude persons from tribal territory are "original natural rights" inherently derived from the status of the tribes as "distinct, independent political communities."[181] An early Department of the Interior Solicitor's Opinion addressing the derivation and scope of tribal powers of self-government opined that "[o]ver tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty."[182] Since the Marshall Trilogy, the U.S. Supreme Court has reaffirmed the inherent rights of tribes to regulate "internal and social relations,"[183] to make substantive tribal laws regulating such matters,[184] and to enforce those laws.[185] These rights are an integral part of the tribe's authority to "control their own internal relations, and to preserve their own unique customs and social order."[186]

B. Banishment Under Treaty Rights

In *Dodge v. Nakai*, the Navajo Nation argued that its treaty rights authorized exclusions of non-members from Navajo lands.[187] The Nation relied on Article II of

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180. 1 U.S. DEP'T OF THE INTERIOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 467 (Oct. 25, 1934) [hereinafter OPINIONS OF THE SOLICITOR].

181. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (quoting Worcester v. Georgia, 31 U.S. 515, 559 (1832)).

182. OPINIONS OF THE SOLICITOR, *supra* note 180, at 467. *See also* COHEN ET AL., *supra* note 16, § 4.01[2][e], at 219–20. Soon after the enactment of the Indian Reorganization Act of 1934—a significant piece of legislation seeking to revive tribal government structures devastated under the destructive assimilation and allotment policies—the Solicitor of the Department of the Interior was asked to render an opinion on the scope of the phrase "powers vested in any Indian tribe or tribal council by existing law," as used in the statute. Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–478 (2000)). Solicitor General Nathan R. Margold's detailed opinion concluded that among such tribal powers is the authority "to remove or to exclude" and "to prescribe appropriate rules and regulations governing such removal and exclusion, and governing the conditions under which nonmembers of the tribe may come upon tribal land or have dealings with tribal members." OPINIONS OF THE SOLICITOR, *supra* note 180, at 446.

183. United States v. Kagama, 118 U.S. 375, 381–82 (1886).

184. *Santa Clara Pueblo*, 436 U.S. at 55.

185. *Id.*

186. Duro v. Reina, 495 U.S. 676, 685–86 (1990). Tribal authority in matters considered "external" to tribal self-government has been substantially limited, particularly tribal criminal jurisdiction over non-Indians. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (holding that Indian tribes do not possess criminal jurisdiction over non-Indians); *Duro*, 495 U.S. at 692–93 (holding that retained tribal sovereignty does not include criminal authority over non-member Indians); United States v. Lara, 541 U.S. 193 (2004) (affirming Congress's authority to amend the ICRA to restore tribes' inherent criminal jurisdiction over nonmember Indians and recognizing that *Duro* has been superseded by an amendment to 25 U.S.C. § 1301(2)).

187. For a discussion of *Dodge v. Nakai*, see *supra* Part II.B.3.

the Treaty of 1868[188] between the United States and the Navajo Nation, which provided:

> In return for their promises to keep peace, this treaty "set apart" for "their permanent home" a portion of what had been their native country, and provided that no one, except United States Government personnel, was to enter the reserved area. Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. State of Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.[189]

This provision reserves to the Navajo Nation the power to exclude non-Navajos from its territory with the exception of those persons authorized to be there by virtue of the treaty or by the laws of the United States or the Navajo Nation. The district court in *Dodge II*, however, rejected that argument and instead found that the 1868 Treaty had been modified by the substantive provisions of the ICRA.[190]

Treaty rights nevertheless remain compelling tribal authority to regulate the activity of non-members and non-Indians within tribal territory. As with the 1868 Treaty with the Navajos, many treaties contained general prohibitions against non-Indians settling on tribal lands and authorized tribal sanctions.[191] Common provisions in later treaties set lands apart for the tribes

> for the *absolute and undisturbed use and occupation of the Indians* herein named...and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do...shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians....[192]

This familiar treaty language not only acknowledged the Indians' sole right to use and occupy the reserved land, it also "implicitly [recognized their] power to exclude others from it."[193]

The Lummi Nation, a signatory tribe to the Treaty of 1868, recently enacted an Exclusion Code citing the Treaty of Point Elliot as a source of its authority to

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188. Treaty Between the United States of America and the Navajo Tribe of Indians, U.S.-Navajo, June 1, 1868, 15 Stat. 667; *see also* Means v. Navajo Nation, 432 F.3d 924, 935–37 (9th Cir. 2005) (discussing the 1868 Treaty, particularly the "bad men" clauses); Dodge v. Nakai (*Dodge II*), 298 F. Supp. 26, 29 (D. Ariz. 1969).

189. Williams v. Lee, 358 U.S. 217, 221–22 (1959). Although Congress ceased treaty making with Indian tribes in 1871, "the 1868 Treaty with the Navajos survived this Act." *Id.* at 221 n.7 (citing 16 Stat. 566 (1871)).

190. *Dodge II*, 298 F. Supp. at 29.

191. The Treaty of Fort M'Intosh, for example, provides:

> If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands allotted to the [tribes], except on lands reserved to the United States..., such person shall forfeit the protection of the United States, and the Indians may punish him as they please.

Treaty of Fort M'Intosh, art. V, Jan. 21, 1785, 7 Stat. 16. *See also* Treaty with the Creek Nation, U.S.-Creek, art. VII, Aug. 7, 1790, 7 Stat. 35; Treaty of Hopewell, U.S.-Cherokee, art. V, Nov. 28, 1785, 7 Stat. 18.

192. Treaty of Fort Laramie, U.S.-Crow, art. II, May 7, 1868, 15 Stat. 649 (emphasis added); *see also* Treaty of Medicine Creek, art. 2, Mar. 3, 1893, 10 Stat. 1132, *examined in* Montana v. United States, 450 U.S. 544, 560 (1981); Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165, 174 (1977).

193. *Montana*, 450 U.S. at 554. For another example of a treaty that uses language similar to "exclusive use" of reserved lands for Indians and the condition of settlement or residency of non-Indians with the tribes' permission, see the Treaty of Point Elliot, art. II, Jan. 22, 1855, 12 Stat. 927.

exclude individuals from its territory.[194] The Code goes on to set out detailed substantive rules and procedures concerning exclusion actions. The other sources of the Tribe's exclusionary power are its "inherent right to govern [its] land and territory," and the Lummi Constitution, which "entrusts to the Lummi Indian Business Council (LIBC), as the governing body of the Lummi Nation, the duty and authority to safeguard and promote Lummi culture and identity, as well as the peace, safety, morals and general welfare of the Lummi People."[195]

C. Banishment in Tribal Constitutions

As noted above, a tribe does not need an express grant of authority or explicit treaty right from the federal government to exercise its inherent right to exclude a person from its territory. Spurred by the mandates of the ICRA, many tribes have adopted constitutional provisions and enacted written tribal laws establishing substantive laws and formal procedures for banishment and exclusion actions.

1. The Mashantucket Pequot Tribal Nation Elders Council

According to article XII of the Constitution and By-Laws of the Mashantucket Pequot Tribal Nation, the Elders Council has the express authority to "hear and determine any matter concerning the banishment or exclusion of any person from the Mashantucket (Western) Pequot Reservation and tribal lands as necessary to preserve and protect the safety and well-being of the Tribe and the Tribal Community, and the removal of any Tribal benefits and membership privileges."[196] The Elders Council has issued "Guidelines Governing Banishment, Exclusion, and Suspension or Termination of Related Tribal Benefits and Privileges."[197] Under this system, banishments pertain to tribal members while exclusions concern non-tribal members. The Guidelines are distributed to tribal members to inform them of the types of conduct that may result in banishment, exclusion, or forfeiture of tribal benefits and to inform them of the banishment period for the offense.[198]

The Guidelines require that a hearing be held, with prior notice given to the person whose conduct is subject to banishment, at which evidence may be presented and witnesses may testify.[199] Emergency banishment or exclusion orders may be issued without an initial hearing.[200] No lawyers are allowed at the hearing, although either party may seek legal assistance in preparing for the hearing.[201]

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194. Exclusion Code, LUMMI NATION CODE OF LAWS tit. 12, § 12.01.010(a) (Supp. 2004).

195. *Id.*

196. CONST. & BY-LAWS OF THE MASHANTUCKET (WESTERN) PEQUOT TRIBE art. XII (amended 2004) (on file with author). The Elders Council exercises specific enumerated authority in addition to the broad authority of the Tribal Council, the general governing body of the Tribe according to article X of the Tribe's Constitution. *Id.* art. X.

197. Mashantucket Pequot Tribal Elders Council, Guidelines Governing Banishment, Exclusion and Suspension or Termination of Related Tribal Benefits and Privileges (on file with author and with the New Mexico Law Review).

198. *Id.* § 2.1(A)–(J). The targeted conduct includes the sale and use of illegal drugs, sexual abuse and domestic violence, threatening or violent conduct, major crimes committed off the reservation, and disloyalty. *Id.*

199. *Id.* § 3.

200. *Id.* § 6.

201. *Id.* § 3.2.

After hearing the evidence and testimony from the witnesses, the Council meets privately to consider appropriate sanctions, which may range from restitution, drug or alcohol treatment, or a fine to full banishment and revocation of tribal benefits, including housing, education, and gaming distributions.[202] The Elders Council's decision is recorded and distributed to the individual and to the community.[203] An appeal of the order may be made to the Elders Council but only upon completion of the terms and conditions of the banishment or exclusion order.[204] Banishment and exclusion orders are enforced through trespass actions in tribal and state courts with the cooperation of local law enforcement and through the use of social pressure by subjecting any person who assists another in violating a banishment order to banishment, exclusion, or revocation of tribal benefits.[205]

2. The Constitution of the Sipayik Members of the Passamaquoddy Tribe: Constitutional Prohibition of Banishment

The Constitution of the Sipayik Members of the Passamaquoddy Tribe explicitly prohibits banishment of tribal members: "Notwithstanding any provision of this Constitution, the government of the Pleasant Point Reservation shall have no power of banishment over tribal members."[206] A recent decision from the Passamaquoddy Tribal Court Appellate Division reviewed this constitutional prohibition in a criminal matter involving assault and domestic violence charges where a tribal member, as a condition of his probation, "voluntarily agreed to reside off the Pleasant Point reservation in exchange for freedom from jail."[207] The tribal appellate court distinguished the involuntary nature of banishment from an agreement to voluntarily exclude oneself, finding that the latter, by its own terms, did not constitute banishment.[208] The court further found that "[t]he condition was rationally related to the protection of the tribal community, its members, employees and governmental officials."[209] While the constitutional prohibition addresses only the banishment of tribal members, arguably the tribe could exclude non-Indians under its general inherent sovereign authority.

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202. *Id.* § 4.

203. *Id.* § 5.

204. *Id.* § 7. Tribal law expressly prohibits the tribal court from hearing any matter concerning a decision of the Elders Council, including an appeal from a banishment or exclusion order. MASHANTUCKET PEQUOT TRIBAL LAWS tit. XII, ch. 1, § 2(d)(4) (2005), *available at* http://www.mptnlaw.com/Tribal%20Laws.htm. The Tribe's Civil Rights Code adopts as tribal law the substantive rights of the ICRA and also limits tribal court jurisdiction over matters involving the Tribal Elders Council. *Id.* tit. XX, ch. 1, §§ 1–2.

205. During the time that I worked with the Mashantucket Pequot Tribal Nation, local enforcement offices from nearby towns regularly assisted the Tribe in apprehending trespassers on tribal lands.

206. CONST. OF THE SIPAYIK MEMBERS OF THE PASSAMAQUODDY TRIBE art. IV, § 2, *available at* http://www.narf.org/nill/Constitutions/passconst/passconsttoc.htm; *see also* Passamaquoddy Tribe v. Francis, No. 00-CA-01, ¶ 17 (Passamaquoddy Tribal Ct. App. Div. 2000), *available at* http://www.tribal-institute.org/opinions/2000.NAPA.0000001.htm.

207. *Passamaquoddy Tribe*, No. 00-CA-01, ¶ 28.

208. *Id.*

209. *Id.*

3. Other Tribal Constitutional Provisions

Several other tribes expressly delineate the authority and power to banish or exclude in their constitutions.[210] For example, according to article VII of the Constitution of the Big Lagoon Rancheria, the Tribal Business Council has the express authority to "prescribe conditions under which nonmembers may enter and remain on the reservation and to establish procedures for the exclusion of non-members from any land within the tribe's jurisdiction."[211] Similar provisions are found in the constitutions of the Pit River Tribe, Blue Lake Rancheria, Susanville Indian Rancheria, and the Te-Moak Tribe of Western Shoshone Indians of Nevada.[212] Under the Blue Lake Constitution, "agents of Federal, state or local governments" are exempted from its exclusion laws.[213]

The Ely Shoshone Tribal Constitution authorizes the Tribal Council "[t]o provide for the exclusion and expulsion of non-members from the territory within the jurisdiction of the tribe for good cause."[214] In addition to the enumerated power in its constitution, the Ely Shoshone Law and Order Code expressly grants the tribal court original jurisdiction over "matters which arise and the assumption of jurisdiction over which is consistent with fundamental due process, including enforcement of the provisions of any lawful Resolution or Ordinance of the Ely Shoshone Tribe providing for the exclusion from the Reservation of persons not entitled to be there."[215] The tribal code further specifies that exclusion proceedings are "governed by the specific Resolutions or Ordinances enacted by the Tribal Council,"[216] thus requiring additional legislative enactments to fully implement its banishment authority.

In addition to express statements of tribal authority to banish and exclude, many tribal constitutions establish the procedures for taking such actions. According to the Constitution and Bylaws of the Tule River Indian Tribe of California, removal and exclusion orders must be prescribed in an ordinance enacted by the Tribal Council for the "removal or exclusion from the reservation of any non-members whose

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210. The laws discussed in this section are a representative sampling of tribal banishment provisions and procedures. Many tribes such as the Grand Portage Band, the Lummi Nation, the Mille Lacs Band of Minnesota Chippewa, the Turtle Mountain Chippewa Tribe, and the Upper Sioux Community have recently enacted or revised banishment laws. (Banishment laws on file with author and with the New Mexico Law Review). Numerous tribal constitutions and tribal laws and codes are accessible through the National Indian Law Library Tribal Law Collection website at http://www.narf.org/nill/Codes/.

211. CONST. OF THE BIG LAGOON RANCHERIA art. VII, § 2(p), *available at* http://www.narf.org/nill/Constitutions/lagoonconst/biglagoonconst.htm#art7.

212. CONST. OF THE PIT RIVER TRIBE art. VII, § 1(k), *available at* http://www.narf.org/nill/Constitutions/pitconst/pitriverconst.htm#7; CONST. OF THE BLUE LAKE RANCHERIA art. V, § 6(o), *available at* http://www.narf.org/nill/Constitutions/blueconst/blueconst/htm#5; SUSANVILLE INDIAN RANCHERIA CONST. & BYLAWS art. VI, § 2(n), *available at* http://www.narf.org/nill/Constitutions/susanconst/susanvilleconst.htm#cart6; CONST. OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEV. art. 4, § 3(m), *available at* http://www.narf.org/nill/Constitutions/temoakconst/temconst.htm#4.

213. CONST. OF THE BLUE LAKE RANCHERIA, *supra* note 212, art. V, § 6(o).

214. ELY SHOSHONE TRIBAL CONST. art. VI, § 1(l), *available at* http://www.narf.org/nill/Constitutions/elyconst.elyconst.htm#article6.

215. ELY SHOSHONE TRIBAL LAW & ORDER CODE tit. 1, ch. 1-1, § 1-1-02(c)(8), *available at* http://www.narf.org/nill/Codes/elycode/elycodet1court.htm#chapter1-1.

216. *Id.* tit. 1, ch. 1-1, § 1-1-04(4).

presence may be injurious to the members of the tribe."[217] The Tribal Councils of the Saint Regis Mohawk Tribe and the Yavapai-Apache Nation are vested with general legislative powers and are authorized to enact particular "ordinances providing for the removal or exclusion of any non-member of the Tribe for cause, and to prescribe conditions upon which non-members may remain within the territory of the Tribe, *Provided*, That all actions of exclusion or removal shall be done by filing an action in Tribal Court."[218] While the Constitution and By-Laws of the Cheyenne River Sioux Tribe confer authority on the Tribal Council to enact an "ordinance...for removal or exclusion from the territory of the Cheyenne River Sioux Tribe of any non-members whose presence may be injurious to the members of the tribe morally or criminally," the Council's enactment is "subject to review by the Secretary of the Interior."[219]

4. Banishment in Tribal Laws

When tribal constitutions are silent on banishment or exclusion, many tribal governments have enacted laws delineating the procedure to take such action pursuant to their general powers. Some of these laws define banishment as a civil sanction while others classify it as a criminal penalty.

a. Banishment as a Civil Sanction

Under the Nez Perce Tribal Code, banishment is referred to as "exclusion and removal" and is defined as "the temporary or permanent banishment or expulsion of an individual from within the boundaries of the Nez Perce Reservation."[220] Nez Perce law subjects a broad range of offenses to exclusion or removal, such as "doing or attempting to do any act upon the reservation which unlawfully threatens the peace, health, safety, morals or general welfare of the tribe, its members, or other persons,"[221] as well as "disturbing or excavating items, sites or locations of religious, historic or scientific significance without the authority of the tribe or in violation of tribal or federal law,"[222] and "failing to obey an order of the Tribal Court."[223]

In the Colville Law and Order Code, civil grounds for exclusion and removal are applicable to "all persons, except those authorized by federal law to be present on tribal land"[224] and include conduct that "substantially threatens or has some direct

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217. CONST. & BYLAWS OF THE TULE RIVER INDIAN TRIBE OF CAL. art. VI, § 1(i), *available at* http://www.narf.org/nill/Constitutions/tuleriverconst/constitution.htm#6.

218. CONST. OF THE YAVAPAI-APACHE NATION art. V(t), *available at* http://www.narf.org/nill/Constitutions/YavapaiApache/yavconst.htm#article5; *see also* CONST. OF THE SAINT REGIS MOHAWK TRIBE ON-KWA-IA-NE-REN-SHE-RA (OUR LAWS) art. VIII, § 1(i), *available at* http://www.narf.org/nill/Constitutions/StRegisConst/stregisconst.htm#legislative.

219. CONST. & BY-LAWS OF THE CHEYENNE RIVER SIOUX TRIBE art. IV, § 1(j), *available at* http://www.sioux.org/our_const_by_laws.html; *see also* CONST. & BYLAWS OF THE TULE RIVER INDIAN TRIBE OF CAL., *supra* note 217, art. VI, § 1(i).

220. NEZ PERCE TRIBAL CODE tit. 4 (Offenses), ch. 4-4 (Exclusion & Removal), § 4-4-1(a) (TRIBAL CODE amended 2003), *available at* http://www.narf.org/nill/Codes/nexpcode/npcode4crim.htm.

221. *Id.* § 4-4-3(a).

222. *Id.* § 4-4-3(i).

223. *Id.* § 4-4-3(j).

224. COLVILLE TRIBAL LAW & ORDER CODE tit. 3, ch. 3-2 (Exclusion & Removal), § 3-2-3 (2001), *available at* http://www.narf.org/nill/Codes/colvillecode/cc3.htm#32.

effect on the political integrity, institutional process, economic security or health or welfare of the Colville Confederated Tribes, its member or reservation residents."[225] Conduct subject to exclusion or removal includes unlawful hunting, fishing, and trapping; disturbing or excavating religious, historic, or cultural sites; mining or cutting timber or other vegetation without authorization; or failing to pay taxes, rents, or "charges justly due the Colville Confederated Tribes or any entity of the Tribes."[226]

The Grand Portage Band of Chippewa Indians recently adopted a comprehensive Exclusion Code comprised of four chapters.[227] The Exclusion Code delineates its purpose and applicability, lists persons who may be excluded and the grounds for their exclusion, sets forth hearing procedures, and describes enforcement measures.[228] The preamble of the Code sets out important findings of the Tribal Council and the purpose of the tribal law, declaring the necessity of "establish[ing] procedures and standards for the removal and exclusion...[of] those persons whose conduct or associations [have] become intolerable to the Community and threaten the peace, health, safety and welfare of the Band."[229] The Exclusion Code also mandates that the standards for exclusion or removal must be "appropriate and proportionate to the threat posed by such persons" and that tribal law "shall provide due process for any person who must be removed or excluded."[230] The Code emphasizes that these sanctions are a means of last resort and that exclusion and removal "shall be exacted on all persons only after all reasonable efforts and other means of resolution have been tried but the conduct or associations giving rise to such efforts has remained unabated and continues to threaten the peace, health, safety and welfare of the Band."[231]

The Band's Exclusion Code authorizes the "expulsion of a person from the Territory of the Band pursuant to the requirements of this Title."[232] Any person may be excluded except (1) "Persons authorized by federal law to be present within the territory" may only be excluded with permission of the federal government; (2) "Non-Indian owners of fee lands within the Territory" may "not be excluded from the lands they own"; (3) "Owners of rights-of-way granted by the Secretary of Interior"; and (4) "Lessees of the Band, any of its members, or other residents of the Territory of the Band...unless and until their lease has been terminated in accordance with applicable law."[233] The Grand Portage Band Exclusion Code goes further than other tribes' codes in defining acts and conduct subject to exclusion and removal from its territory. Most significantly, the Code recognizes banishment or exclusion orders issued by other tribes,[234] thus preventing its reservation from

225. *Id.* § 3-2-4(a).
226. *Id.* § 3-2-4(a)(1)–(11).
227. GRAND PORTAGE BAND CODE tit. ___ (Exclusion) (n.d.) (on file with author and with the New Mexico Law Review).
228. *Id.*
229. *Id.* at Findings, Purpose and Scope.
230. *Id.*
231. *Id.*
232. *Id.* ch. 1, § ___-5101(b).
233. *Id.* ch. 2, § ___-5201(a)–(d).
234. *Id.* ch. 2, § ___-5202(b)(2).

becoming a refuge for persons banished from other reservations. It also specifies civil and criminal conduct subject to exclusion. These include "[i]ntentional or knowing disruption or disturbance of any religious ceremony or cultural event"; "[p]ersonal, impertinent, slanderous or profane remarks made to a member of the Tribal Council, its staff or the general public or utterance of loud, threatening, personal or abusive language...during any governmental proceeding and done solely for the purpose of disrupting, disturbing or otherwise impeding the orderly conduct of that proceeding"; "[p]articipation in gang identity or activity"; and "[p]ersuasion of any member of the Band or other resident of the Territory of the Band to enter into an unconscionable, grossly unfair, or illegal contract of any nature."[235]

The tribal court of the Grand Portage Band is authorized to enforce an exclusion or removal order; however, the Tribal Council retains the "exclusive jurisdiction to hear and decide all proposed exclusions."[236] Formal exclusion proceedings are initiated by an "allegation that cause exists" followed by a preliminary investigation and with a unanimous vote of the Tribal Council to proceed with a formal proceeding.[237] The procedures for the exclusion hearing are detailed and extensive, emphasizing fairness in the process, the deliberation, and the decision.

b. Banishment in Criminal Sentencing Procedures

Tribal organic and codified laws establish a host of fundamental rights that protect both tribal communities as a whole as well as the individual tribal members. Among these fundamental rights are defining a rational relationship between the government's responsibility to safeguard the community and the sanction to be imposed; establishing due process rights and protections such as enumerating the offenses leading to banishment or expulsion, instituting hearing procedures, and ensuring that the sanction is proportionate to the offense; and permitting an appeal from an order or sentence imposing banishment or exclusion and encouraging rehabilitation and restoration of the individual to the community.[238]

Many of the tribal laws include a governmental purpose for the sanctions such as safeguarding the tribe's culture and identity and protecting the general health, safety, and welfare of the tribal community. Related to this idea is the desire that, while banishment and exclusion are indeed punishments for offensive conduct, the intended purpose is to motivate the excluded individual to reform his or her conduct and eventually be restored to the community.[239] Due process is a significant element in tribal procedures for determining the claim and imposing a particular sanction.

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235. *Id.* ch. 2, § ___-5202(b)(1)–(18). The Grand Portage Band Exclusion and Removal law is quite similar to the Skokomish Tribe's Civil Exclusion and Removal law which allows exclusion for "[d]efrauding any tribal member of just compensation for his labor or service of any nature done at the request of the non-member." SKOKOMISH TRIBAL CODE § 3.05.006(n) (1998), *available at* http://www.skokomish.org/SkokConstitution&Codes/Codes/STC3-05.htm.

236. GRAND PORTAGE BAND CODE, *supra* note 227, ch. 3, § ___-5301(a).

237. *Id.* ch. 3, § ___-5301(a)–(d).

238. These principles, as articulated in *Santa Clara Pueblo*, are essentially tribal in origin and nature, emanating from each tribe's own unique socio-legal history and structure. *See* 436 U.S. 49, 55–56 (1978).

239. *E.g.*, Exclusion Code, LUMMI NATION CODE OF LAWS, *supra* note 194, tit. 12, § 12.01.010(b). As with other tribal exclusion codes, the fundamental purposes of this law are to protect the safety and welfare of the tribal community and to encourage the excluded individual to seek rehabilitation and eventual restoration back into the community. *Id.*

While several tribes define broad categories of conduct that trigger removal proceedings, many tribal laws enumerate specific conduct and activities that warrant formal review and sanctions. In either case, these laws relate back to the tribe's purpose of protecting the community and duty to enforce tribal laws. As a corollary, many tribal laws provide extensive processes and procedures for conducting hearings, taking testimony and reviewing evidence, and rendering a decision.

Several tribes include banishment in their criminal sentencing guidelines and authorize tribal judges to set the terms and conditions of the banishment. For example, under the Makah Tribe's Domestic Violence Code, banishment is a mandated sentence for a tribal member who

> has been convicted of two or more criminal offenses under this Title, arising out of at least two separate incidents involving the same victim, and the victim is also a Tribal member,...upon a finding by clear and convincing evidence that defendant's acts of domestic violence are likely to continue unless either the defendant or the victim leaves the Reservation. The banishment may be subject to conditions and may be for a period of (1) one-year.[240]

The Cheyenne-Arapaho Tribes of Oklahoma[241] and the Pawnee Tribe of Oklahoma[242] share substantially the same criminal codes in both substantive law and procedures. Both codes apply "to all members of the Tribes...where ever [sic] such violation may occur, if such violation has any actual or intended effect upon the political integrity or political or economic security of the Tribes."[243] Non-Indians also are subject to the Tribal Criminal Code and may be banished in a civil proceeding brought by the tribal prosecutor.[244] A significant procedural prerequisite in the codes requires the Tribes' Attorney General to state in the complaint that banishment is a recommended punishment. Failure to include such a statement forecloses the imposition of banishment in any subsequent sentence.[245]

The Tribes' Criminal Codes further set out an extensive sentencing structure that includes banishment in criminal matters, such as driving while intoxicated (banishment from one to five years for a second or subsequent conviction),[246] burglary (banishment from five years to life if the crime involved death or serious bodily injury),[247] homicide (banishment from ten years to life),[248] mayhem (banishment of one year to life),[249] or improper influence in official matters and

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240. MAKAH LAW & ORDER CODE tit. 11 (Domestic Violence Code), ch. 4 (Criminal Proceedings), § 11.4.09(h), *available at* http://www.narf.org/nill/Codes/makahcode/makahlawt11.htm#11title.

241. CHEYENNE-ARAPAHOE TRIBES OF OKLA. LAW & ORDER CODE tit. II, subpart C (Criminal Procedure), subpart D (Criminal Offenses) (1988), *available at* http://www.narf.org/nill/Codes/cheyaracode/codetoc.htm.

242. PAWNEE TRIBE OF OKLA. LAW & ORDER CODE tit. VI (Criminal Offenses) (2005), *available at* http://www.narf.org/nill/Codes/pawneecode/crimoffense.htm.

243. CHEYENNE-ARAPAHOE TRIBES OF OKLA. LAW & ORDER CODE, *supra* note 241, tit. II, subpart D, § 2(a).

244. *Id.*

245. *Id.* tit. II, subpart C, ch. 2, § 201(b)(7).

246. *Id.* tit. II, subpart D, ch. 6, § 605; PAWNEE TRIBE OF OKLA. LAW & ORDER CODE, *supra* note 242, tit. VI, ch. 6, § 605.

247. CHEYENNE-ARAPAHOE TRIBES LAW & ORDER CODE, *supra* note 241, tit. II, subpart D, ch. 1, § 110; PAWNEE TRIBE OF OKLA. LAW & ORDER CODE, *supra* note 242, tit. VI, ch. 1, § 110.

248. CHEYENNE-ARAPAHOE TRIBES LAW & ORDER CODE, *supra* note 241, tit. II, subpart D, ch. 2, § 211; PAWNEE TRIBE OF OKLA. LAW & ORDER CODE, *supra* note 242, tit. VI, ch. 2, § 211.

249. CHEYENNE-ARAPAHOE TRIBES LAW & ORDER CODE, *supra* note 241, tit. II, subpart D, ch. 2, § 203;

retaliation for past official action (banishment from ten years to life for a second or subsequent conviction).[250] Both Criminal Codes also prescribe banishment as a sentence for "Crimes against Public Justice," such as bribery, improper influence in an official matter, retaliation for a past official action, oppression in office, and misusing public money.[251] In many of these offenses, the sentence of banishment is for a term of five to ten years, and a second offense is punishable by banishment for ten years to life.[252]

The right to appeal a banishment or exclusion decision is provided in most tribal laws, although the appeal may not be made to a different or independent body. Some tribes permit an appeal to the tribal court, such as the Mille Lacs Band of Chippewa Indians,[253] while in other tribal governments recourse remains in the same governmental body that rendered the order, thereby precluding an appeal to an independent body such as the court.[254] Enforcement of tribal banishment and exclusion orders likewise varies from judicial enforcement of criminal sentences (incarceration) and civil sanctions (fines) to the ultimate consequences of forfeiture of membership benefits and status.[255] Many tribes report serious problems in enforcing banishment or exclusion orders, especially when illegal drugs and violence were involved in the underlying case.[256] This problem is further compounded by a dire lack of tribal resources to contain such widespread activity and, due to the inability of tribes to prosecute non-Indians, the appalling lack of assistance or cooperation from federal and state law enforcement agencies.

Thus, these banishment and expulsion laws further serve as a social contract between the community and the individual tribal members. These laws provide notice to the community regarding both the tribe's responsibility to safeguard its people and territory and the tribe's expectations of appropriate conduct of those residing in or having a presence within its community. By delineating the penalties to be imposed for breaching that social contract, the laws put the community on

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PAWNEE TRIBE OF OKLA. LAW & ORDER CODE, *supra* note 242, tit. VI, ch. 2, § 203.

250. CHEYENNE-ARAPAHOE TRIBES LAW & ORDER CODE, *supra* note 241, tit. II, subpart D, ch. 4, §§ 402–03; PAWNEE TRIBE OF OKLA. LAW & ORDER CODE, *supra* note 242, tit. VI, ch. 4, §§ 402–03.

251. CHEYENNE-ARAPAHOE TRIBES LAW & ORDER CODE, *supra* note 241, tit. II, subpart D, ch. 4; PAWNEE TRIBE OF OKLA. LAW & ORDER CODE, *supra* note 242, tit. VI, ch. 4.

252. CHEYENNE-ARAPAHOE TRIBES LAW & ORDER CODE, *supra* note 241, tit. II, subpart D, ch. 4; PAWNEE TRIBE OF OKLA. LAW & ORDER CODE, *supra* note 242, tit. VI, ch. 4.

253. MILLE LACS BAND STAT. ANN. tit. 3, ch. 4, § 3012 (1981), *available at* http://www.narf.org/nill/Codes/mlcode/mltitle2govpow.htm.

254. Under the Fort McDowell Yavapai Nation Exclusion Ordinance, an exclusion proceeding is initiated by a finding of cause by either the Tribal Attorney or the Tribal Council. LAW & ORDER CODE OF THE FORT MCDOWELL YAVAPAI CMTY., ARIZ. ch. 15 (Exclusion Ordinance), § 15-3(A) (1990), *available at* http://www.narf.org/nill/Codes/ftmcode/ftmcodech15exclusion.htm. The Tribal Council then appoints an administrative hearing officer who, after conducting a hearing, submits a sentencing recommendation to the Tribal Council, which then renders a decision based on the administrative record. *Id.* § 15-3(B). The decision of the Tribal Council is final and not subject to appeal. *Id.*

255. *See supra* Part IV (discussing several cases in which tribal members forfeited membership status and privileges in addition to being banished).

256. *See, e.g.*, Sarah Kershaw, *Dizzying Rise and Abrupt Fall for a Reservation Drug Dealer*, N.Y. TIMES, Feb. 20, 2006, at A1 [hereinafter Kershaw, *Dizzying Rise*]; Sarah Kershaw, *Through Indian Lands, Drugs' Shadowy Trail*, N.Y. TIMES, Feb. 19, 2006, § 1, at 1 [hereinafter Kershaw, *Through Indian Lands*]; *see also* Steil, *supra* note 19 ("[A]nyone committing a drug crime on the [Upper Sioux] reservation faces 'immediate banishment from tribal lands.'" (quoting Kevin Jensvold, Chairman, Upper Sioux Governing Board of Trustees)).

notice of the dire consequences for such offensive conduct and serve as a deterrent, hopefully discouraging socially unacceptable behavior. In this manner, every person within that community may justifiably rely on the tribe's affirmation of its duty and responsibility to protect the rights of the community as a whole and the person individually, including tribal members, spouses and children, employees, visitors, and business affiliates.[257]

The controlling character in all of these tribal laws is the expression of tribal self-government through tribal laws and constitutions, which are enforced by tribal governing institutions, such as tribal councils, elders councils, and tribal courts. Tribal communities are also integrally involved in defining the philosophy and laws of their governments, particularly through individual tribal members who exercise their right to vote and elect leaders to govern and protect them and their lands and to fairly and justly uphold their laws. Some tribal actions and decisions will inevitably fall short of these responsibilities and standards, perhaps through misguidance in the process, misapplication of the law, or misplaced reliance on certain tribal customs or traditions as applied to the particular circumstances. The next part of this Article examines several "mismeasures" of justice, by both the federal courts and tribal governments, in recent federal decisions involving tribal banishment and exclusion orders.

IV. A REVIEW OF TRIBAL BANISHMENT DECISIONS UNDER THE ICRA

The sole remedy authorized in the Indian Civil Rights Act of 1968 is habeas corpus review in federal court for "any person...to test the legality of his detention by order of an Indian tribe."[258] Prior to the U.S. Supreme Court's decision in *Santa Clara Pueblo v. Martinez*,[259] federal district courts regularly adjudicated ICRA claims under federal question jurisdiction, often focusing on the Indian Civil Rights Act.[260] After the *Santa Clara Pueblo* decision, federal courts strictly limited the review of remedies for ICRA violations to the Act's habeas corpus provision, which had previously been reserved for criminal detentions.[261] An emerging theory of law casts tribal banishment orders as criminal sanctions. According to this construction, several federal courts have recently found that tribal banishment orders constituted sufficiently severe restraints on the individuals' liberty interests so as to constitute a detention, thus triggering habeas relief.[262] Other federal courts have declined to

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257. *E.g.*, GRAND PORTAGE BAND CODE, *supra* note 227, at Findings, Purpose and Scope ("This Exclusion Law is therefore enacted for the purpose of providing standard criteria to review and identify persons who may pose such threats and to establish standards of removal and exclusion which are appropriate and proportionate to the threat imposed by such persons. This Ordinance shall provide due process for any person who must be removed or excluded.").

258. 25 U.S.C. § 1303 (2000).

259. 436 U.S. 49 (1978).

260. During this period, federal courts heard a variety of claims, frequently involving tribal elections and enrollment disputes. *See* Joseph de Raismes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D. L. REV. 59, 85–90 (1975).

261. "In settling on habeas corpus as the exclusive means for federal-court review of tribal *criminal proceedings, Congress opted for a less intrusive review mechanism....*" *Santa Clara Pueblo*, 436 U.S. at 67 (emphasis added).

262. *See infra* notes 284–286, 355–358 and accompanying text.

review tribal banishment and other remedial-type decisions, finding an insufficient degree of restraint on an individual's liberty interests.[263]

In the first category of cases, in which the court equates banishment to detention, the controlling factor in the court's review is the measure of due process afforded to the individual in the tribe's deliberation and delivery of its decision. The courts in this category often reject tribal customs and traditions as not having any relevance to the process. In the second category of cases, the controlling factor is the basic recognition of tribal self-governance and territorial management, especially over internal tribal matters. Between these two judicial views lay the undefined contours of individual rights vis-à-vis tribal sovereignty under the ICRA. Federal courts now are compelled to analyze the criminal quality of tribal actions against the backdrop of tribal custom and tradition.

A. Poodry v. Tonawanda Band of Seneca Indians*: Questions of Rights and Culture*

Thus far, the most illustrative discussion of the federal courts' authority to review tribal banishment orders is the Second Circuit Court of Appeals' opinion in *Poodry v. Tonawanda Band of Seneca Indians*.[264] In 1996, several members of the Tribe were summarily convicted of treason against the tribal government by the traditional Council of Chiefs; they were permanently banished from tribal lands and their membership in the Band was revoked. The case merits in-depth review as it has become the principal decision on tribal banishment actions under the ICRA.

The Tonawanda Band of Seneca Indians is part of the Seneca Nation, a member of the Haudenosaunee,[265] and is governed by a traditional Council of Chiefs through a consensus decision-making process. The Chiefs are appointed by the Tribe's clan mothers who, in consultation with their respective clans, provide recommendations to the Chiefs on all matters of tribal affairs.[266]

Tremendous internal political conflict had unsettled the Tonawanda community in the early 1990s. The Council of Chiefs characterized this dispute as dissatisfaction with the traditional form of government by political dissenters who advocated an overthrow and establishment of a new tribal government based on an elective form of government.[267] Poodry and the four other petitioners in this matter alleged that the Council had abused its powers and was involved in unauthorized business transactions.[268] Soon after the petitioners formed an Interim General Council, they were summarily informed that they had been banished from the reservation, and attempts were made to physically remove them.[269] The petitioners also maintained that banishment no longer was consistent with the Tonawanda's traditions and

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263. *See infra* notes 301–306, 314–317 and accompanying text.

264. 85 F.3d 874 (2d Cir. 1996).

265. *See supra* Part II.A.3 (discussing the Seneca Tribe).

266. *Poodry*, 85 F.3d at 877. "The clan mothers cannot disregard the views of the clan, nor can the Chiefs disregard the recommendations of the clan mothers." *Id.*

267. Brief for Respondents-Appellees at 6–7, *Poodry*, 85 F.3d 874 (No. 95-7490), 1995 WL 17200251, at *6–7.

268. *Poodry*, 85 F.3d at 878–79; Brief for Petitioners-Appellants at 6–7, *Poodry*, 85 F.3d 874 (No. 95-7490), 1995 WL 17200252, at *6–7.

269. *Poodry*, 85 F.3d at 878.

customs.[270] According the Council of Chiefs, however, the clan mothers made the initial banishment recommendation. The Council and the clan mothers thereafter collectively determined that the petitioners' actions "had placed them outside the circle of protection of the Nation and that banishment was the only appropriate response."[271]

Although the parties asserted different renderings of the facts in this case, the real disparity in their positions is about the role of traditional and modern notions of tribal governance and the legal contours of tribal sovereignty. There is no dispute that the banishment order was issued without a hearing at which the petitioners could address the allegations against them or that it was served on them without prior notice of the action. The banishment orders stated:

> It is with a great deal of sorrow that we inform you that you are now banished from the territories of the Tonawanda Band of the Seneca Nation. You are to leave now and never return.
>
> According to the customs and usage of the Tonawanda Band of the Seneca Nation and the HAUDENOSAUNEE, no warnings are required before banishment for acts of murder, rape, or treason.
>
> Your actions to overthrow, or otherwise bring about the removal of, the traditional government...are considered treason. Therefore, banishment is required.
>
> According to the [Band's] customs and usage...your name is removed from the Tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members.
>
> YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY.[272]

The Council's attempts to physically remove the petitioners from the reservation were unsuccessful. But while the petitioners remained in their homes on tribal lands, they were subject to harassment and physical assault, they were refused health care, and had their electrical service cut off.[273] The Council of Chiefs then distributed notices of the petitioners' "conviction" and banishment to various federal and state officials "requesting recognition of the banishment orders and/or assistance in removing the petitioners from the Tonawanda Reservation."[274]

The five banished tribal members filed petitions for writs of habeas corpus in federal district court claiming numerous violations of their rights as guaranteed under the ICRA, including the right to a trial, the right to be informed of the accusation against them, and the right to assemble peaceably.[275] They also filed claims based on the ICRA's prohibition on cruel and unusual punishment, bills of attainder, and deprivation of liberty and property without due process of law.[276] In

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270. Brief for Petitioners-Appellants, *supra* note 268, at 6–12.
271. Brief for Respondents-Appellees, *supra* note 267, at 7.
272. *Poodry*, 85 F.3d at 877–78.
273. *Id.* at 878–79.
274. *Id.* at 878.
275. *Id.* at 879.
276. *Id.*

response, the Council of Chiefs moved to dismiss the action on the ground that the petitioners' loss of membership was an internal tribal matter over which the court had no jurisdiction. The district court dismissed the petitions for lack of subject matter jurisdiction and held that banishment did not trigger habeas corpus review under the ICRA.[277]

The Second Circuit Court of Appeals reversed the district court's decision and set out a detailed and multi-faceted legal framework under the habeas corpus provision of the ICRA and the U.S. Supreme Court's decision in *Santa Clara Pueblo v. Martinez* to address "an unusual jurisdictional inquiry in a complex area of federal law."[278] The Council of Chiefs' defense on appeal was based primarily on the Band's traditions and culture, both as its authority and justification for such actions. The Council further argued that disenrollment was an internal membership matter wholly within the exclusive civil jurisdiction of the tribe and that under either position habeas relief was improper.[279] The petitioners argued that they were entitled to habeas review because the banishment orders were comparable to criminal convictions and imposed a severe restraint on their liberty rights.[280]

Neither assertion fully persuaded the court. Instead, the court determined that the language in *Santa Clara Pueblo* concerning federal court review of tribal criminal proceedings did not foreclose possible ICRA review of certain civil disputes,[281] although the Council's decisions to banish and disenroll petitioners were indeed made in the context of a treason conviction.[282] The Council's argument that treason was not considered a criminal act under tribal traditions was, in the court's opinion, a disdainful "appeal to cultural relativism" and "such a reading would permit a tribal government to evade the federal court review specifically provided in the Indian

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277. *Id.* Responding to the confused state of governance in the Tonawanda community, the Bureau of Indian Affairs "issued a notice that it continued to recognize the 'traditional Council of Chiefs as the legal governing body of the Tonawanda Band of Seneca Nation.'" *Id.* at 878.

278. *Id.* at 880.

279. The Second Circuit rejected the Council's contention that determinations of membership are within the "complete and absolute authority" of the tribe and concluded that such an assertion "simply goes too far." *Id.* at 888. While Congress may defer membership determinations to tribal governments, the court stated that "there is little question that the power to define membership is subject to limitation by Congress," finding further that *Santa Clara Pueblo* did not address the issue of whether the ICRA imposes any limits on tribal authority over membership matters. *Id.* at 888–89.

280. *Id.* at 884.

281. *Id.* at 888. The Second Circuit closely examined the extensive legislative history of the ICRA on this issue, concluding that "it is not possible to draw from [the ICRA's] legislative history a definitive conclusion as to whether Congress intended that habeas review be restricted to criminal convictions, or whether other circumstances of 'detention' by a tribal court order could trigger habeas review." *Id.*; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 67–69 (1978) (explaining that Congress had actually considered but rejected proposals for de novo review of all tribal convictions because such expansive federal review would be financially onerous and unnecessarily intrusive on tribal governments). Importantly, in *Santa Clara Pueblo*, the U.S. Supreme Court also noted that Congress similarly considered and rejected proposals for federal review of ICRA violations in a *civil* context. *Id.* at 68.

282. The court found the harsh consequences of banishment similar to a forfeiture of citizenship, stating that "'forfeiture of citizenship and the related devices of banishment and exile have throughout history been used as punishment....Banishment was a weapon in the English arsenal for centuries, but it was always adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice.'" *Poodry*, 85 F.3d at 889 (alteration in orginal) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 170 n.23 (1963)).

Civil Rights Act simply by characterizing every tribal government action as 'civil' or non-punitive."[283]

Assessing the detention aspect of habeas corpus relative to the Band's banishment decisions, the court compared the language in section 1303 of the ICRA, which permits the federal court to review "the *legality of [the] detention* by order of an Indian tribe," with other federal habeas corpus laws establishing federal jurisdiction over a person held "*in custody*" by a state and "a prisoner *in custody* under sentence" of a federal court.[284] Adopting an interpretation of the term "detention" consistent with, but "no broader than analogous statutory provisions" in federal habeas laws, the Second Circuit concluded that the jurisdictional prerequisite for habeas review under the ICRA entails "'severe restraints on individual liberty'" rather than actual physical custody.[285] The severity of the restraint is measured both temporally and qualitatively—temporary suspension of privileges or a modest fine would not suffice. Here, the court found that the petitioners' permanent banishment, as yet unexecuted but premised on a most serious crime, in conjunction with their loss of membership, constituted a sufficiently severe restraint on their liberty so as to implicate federal subject matter jurisdiction under the habeas corpus provisions of the ICRA.[286]

Having established its requisite jurisdictional grounds, the court then determined that the tribe's common law immunity from suit barred suit against the Tonawanda Band.[287] However, the court permitted the petitions for writs of habeas corpus against the individually named respondents, the members of the Council of Chiefs, as the petitioners' "custodians."[288] Although the petitioners were not actually in the Council's physical custody, the court concluded that the respondents fit the characteristics of a custodian to whom the writ of habeas corpus would apply:

> "The important thing *is not the quest for a mythical custodian, but that the petitioner name as respondent someone (or some institution) who has both an interest in opposing the petition if it lacks merit, and the power to give the petitioner what he seeks if the petition has merit—namely, his unconditional freedom.*"[289]

The final piece of the decision's legal framework dealt specifically with tribal custom and traditions. According to the Second Circuit, the dilemma before the court concerned "*questions of rights and questions of culture*: whether the principles

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283. *Id.*

284. *Id.* at 890 (final emphasis added) (*comparing* 25 U.S.C. § 1303 (2000), *with* 28 U.S.C. §§ 2241(c)(3) (2000), 2254(a), 2255 (2000), and 2241(c)(1) (2000)).

285. *Id.* at 893–94 (citing Jones v. Cunningham, 371 U.S. 236, 243 (1963), and cases following *Jones* that defined "the contours of habeas review for individuals facing restraints on their liberty outside the conventional notions of physical custody" such as certain conditions placed on parolees, a person released on his own recognizance, and probation).

286. *Id.* at 895. The petitioners' constant state of apprehension about being removed from the reservation made the banishment order "all the more pernicious" to the court. Moreover, the permanent banishment orders alone would have satisfied the jurisdictional prerequisites for habeas corpus. "Where, as here, petitioners seek to test the legality of orders of permanent banishment, a federal district court has subject matter jurisdiction to entertain applications for writs of habeas corpus." *Id.* at 897.

287. *Id.* at 899.

288. *Id.*

289. *Id.* (quoting Reimnitz v. State's Attorney of Cook County, 761 F.2d 405, 408–09 (7th Cir. 1985)).

that guide our inquiry...must be 'culturally defined' by the tribe, or whether we can approach these questions guided by general American legal norms or certain universal principles."[290] Reiterating its conclusion that the ICRA did not establish a habeas corpus provision that would accommodate consideration of tribal customary law, the court refused to accept the possibility that the Tonawanda Band's banishment had any traditional or cultural value. Particularly egregious in the court's estimation was the Band's unremitting reliance on tribal traditions and customs as justification for its actions, which the court found to be a deliberate attempt to elude federal court review: "[O]ur recognition of cultural relativism could only create a refuge for repression."[291] Further, intentionally ignoring the historical role and legal status of Indian tribes in the U.S. legal system, the court regarded its higher responsibility under federal law to vindicate the rights of U.S. citizens who are

> subject to tribal authority when that authority imposes criminal sanctions in denial of rights guaranteed by the laws of the United States. In sum, there is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations, even with respect to those communities whose distinctive "sovereignty" our country has long recognized and sustained.[292]

Regardless of whether banishment is a civil or criminal sanction under Anglo-American legal principles or whether it may be viewed as a time-honored tribal tradition and custom, the most troubling issue for the Second Circuit appeared to be the lack of basic process in the Band's decision-making process. There was no notice given to the petitioners of the offense and apparently no meaningful opportunity for them to seek redress of the banishment and disenrollment decision before the Council of Chiefs. These were undisputedly harsh sanctions, and the failure to provide notice and a hearing seriously compromised the petitioners' rights and undermined the Band's decisions.

Moreover, despite the court's insistence that its interpretation of the ICRA habeas corpus provision was no broader than the jurisdictional prerequisites under federal habeas corpus laws, the court's holding concerning the criminal context and consequences of the Council's banishment order extends far beyond federal habeas corpus jurisprudence. For one, it reaches to potential and threatened restraints on an individual's liberty rather than limiting it to actual restraints under the U.S. Supreme Court's detention analysis. For another, the harassment, obstructed utility service, and interference with health care services were harsh and otherwise unnecessary sanctions, but certainly were not the types of restraints included within the realm of habeas corpus review.[293]

Perhaps more problematic is the reach of the court's decision to disenrollment actions. The majority equated the Council's revocation of the petitioners'

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290. *Id.* (emphasis added).

291. *Id.*

292. *Id.* at 900–01.

293. Judge Jacobs' dissent criticizes several of the majority's findings: that tribal banishment is a criminal penalty and should be compared to denaturalization and that the penalties imposed on petitioners sufficiently qualified for habeas review; contrary to the majority opinion, he would find that tribes have retained authority to banish and exclude persons from their territory. *See id.* at 901–05 (Jacobs, J., dissenting).

membership with the loss of U.S. citizenship. In evaluating the Council's actions against the rights statutorily conferred in denaturalization and deportation laws, the court inevitably found great disparities between the Council's summary process and the extensive procedural rights afforded by federal law. Focused narrowly on its general responsibility to vindicate the rights of U.S. citizens under federal law, the court dismissed the history and legacy of federal Indian law principles that have long recognized the tribe's right to define its own membership as being "central to its existence as an independent political community" and "as a culturally and politically distinct entity."[294]

But questions remain, however, as to what process is due and under what circumstances in tribal legal systems, especially for those tribes without written laws or formally established courts. For example, notwithstanding the severity of the sanction, would the orders have been upheld had the petitioners been able to address the Council of Chiefs and the clan mothers, the tribal bodies that imposed the sanctions? Would the Band's traditions have been more favorably regarded had the banishments been imposed for crimes such as murder, sexual assault, or a ravaging drug dealing business[295] rather than for political dissidence? What if a tribal court had issued the orders after a trial according to written laws and formal rules of procedures? Would it have made a difference if the Band were poor, submissive, or politically inept rather than rebellious, defiant, or in a position to "achieve[] unusual opportunities for wealth"?[296] The decision goes too far in rejecting whole-cloth tribal cultural norms as a meaningful source of juridical guidance in the context of an intra-tribal dispute. While refusing to consider any value that tribal customs and traditions may add to the ongoing political dispute, the court unabashedly substituted its own legal and cultural bias for the U.S. legal system and the rights and protections established under federal law.[297] This is the sort of judicial value-imposition that Justice Breyer warned against in his principle of "active liberty."[298] Justice Breyer urged judicial restraint when reviewing decisions reflecting the will

294. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 & n.32 (1978); *see also* United States v. Wheeler, 435 U.S. 313, 322 n.18 (1978).

295. *See, e.g.*, Kershaw, *Through Indian Lands*, *supra* note 256; Kershaw, *Dizzying Rise*, *supra* note 256.

296. *Poodry*, 85 F.3d at 897. The court noted that "the holding of [this] case may have significance in the future. This is especially true at a time when some Indian tribal communities have achieved unusual opportunities for wealth, thereby unavoidably creating incentives for dominant elites to 'banish' irksome dissidents for 'treason.'" *Id.* Gaming on Indian reservations in New York was indeed an emerging political issue during the *Poodry* litigation. The first compact in New York under the Indian Gaming Regulatory Act was signed in 1993 by Governor Cuomo with the Oneida Indian Nation of New York, which operates Turning Stone Casino. That same year, the governor signed a compact with the St. Regis Mohawk Tribe. The Seneca Nation signed a compact with the governor and opened its first casino on December 31, 2002. A second casino opened in May 2004, and there are currently plans to open a third casino. *See* N.Y. State Racing & Wagering Bd., Indian Gaming, www.racing.state.ny.us/indian/indian.html (last visited Dec. 23, 2006). The Seneca also have had a long-standing contentious relationship with the State of New York over land claims, leasing rights, and taxes. *See, e.g.*, Evelyn Nieves, *Our Towns; A Standoff in a City Often in Crisis*, N.Y. TIMES, Apr. 20, 1997, § 1, at 33.

297. *Poodry*, 85 F.3d at 881–90. Although the court rejected tribal customary law as a legal justification for the tribe's banishment decisions, the court nevertheless included several references to the clan mothers' role in tribal affairs, particularly in leadership decisions. For example, the clan mothers removed the Chairman of the Council of Chiefs from his position because he was leading the banishment action against the petitioners. *Id.* at 878–79 & n.5. One wonders whether the internal political problems and the banishment issues eventually would have been resolved according to such tribal custom and tradition.

298. BREYER, *supra* note 3, at 17–20.

of the people, even in situations where the judge knows, or believes that he or she knows, what the right and just result should be.[299] Judges are cautioned "'not to substitute even [their] juster will' for that of 'the people.'"[300] In this respect, the *Poodry* court should have acknowledged some deference to tribal custom and tradition or at least required the Band to more fully establish its tribal customary law foundation.

These criticisms are not to say that the Council's actions were wholly justified or otherwise defensible. However, whether the Council's actions gave rise to a federal cause of action is a serious issue. Whether the court applied the proper standard in its review of the Council's actions is another. The modern embodiment of due process protections does not compel rejection of tribal traditions and customs. Rather, more than mere consideration, there is an obligation to acknowledge the significance of intimately entwined social and cultural tribal relationships and the carefully protected tribal powers that have existed for generations.

B. Shenandoah v. United States Department of the Interior*: Perilous Politics*

The Second Circuit soon had an opportunity to review the parameters of the *Poodry* decision in a matter brought by several members of the Oneida Indian Nation of New York. In *Shenandoah v. United States Department of the Interior* (*Shenandoah I*),[301] the plaintiffs claimed that they were punished for challenging the tribal government's authority.[302] Their sanctions included loss of employment, loss of health care benefits, exclusion from certain tribal properties, rescission of tribal membership and tribal financial benefits, and social exclusion by the community.[303] The plaintiffs claimed that these sanctions constituted severe restraints on their individual liberty interests, which entitled them to habeas corpus relief.[304] The Second Circuit did not agree that the sanctions were sufficiently severe to trigger the application of the ICRA's habeas corpus provision under the *Poodry* test, which requires a "'severe actual or potential restraint on [their] liberty.'"[305] The primary difference between the two cases, noted the court in *Shenandoah I*, was the fact that no banishment had been made or attempted against these tribal members.[306]

Many of the same petitioners brought a subsequent action directly against the Chairman of the Oneida Indian Nation and other Nation government officials, again seeking habeas review under section 1303 of the ICRA. In *Shenandoah v. Halbritter*

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299. *Id.* at 17.

300. *Id.* (quoting LEARNED HAND, THE SPIRIT OF LIBERTY 109 (3d ed. 1960)).

301. 159 F.3d 708 (2d Cir. 1998).

302. *Id.* at 714. As in *Poodry*, *Shenandoah I* is marked by a longstanding intra-tribal leadership dispute and a clash between traditional values and contemporary economic forces such as gaming. Although the Bureau of Indian Affairs recognized Raymond Halbritter as the official legal representative of the Nation, the Second Circuit was skeptical, speculating that Halbritter may have "improperly usurped control over the Nation." *Id.* at 715.

303. *Id.* at 714. The plaintiffs alleged that they "lost their 'voices' within the Nation's governing bodies," because they were prohibited from speaking with a few other Nation members and they were not sent mailings concerning Nation affairs. *Id.*

304. *Id.* at 710.

305. *Id.* at 714 (alteration in original) (quoting Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 880 (2d Cir. 1996)).

306. *Id.*

(*Shenandoah II*),[307] the plaintiffs focused their challenge on a tribal housing ordinance that permitted the seizure and destruction of homes within the Nation's territory.[308] The plaintiffs alleged that the ordinance was an unlawful bill of attainder that was "enacted with the specific intent to punish them" for their political dissension.[309] The background of both of these cases illustrates a history of distressing discord within the Oneida community.

The plaintiffs had previously challenged the tribal housing ordinance in the Oneida Indian Tribal Courts.[310] Both the Oneida Indian Nation Trial Court and the Oneida Indian Nation Appellate Court upheld the ordinance as valid under the ICRA and as a reasonable exercise of self-government.[311] After the plaintiffs resisted the enforcement of the housing ordinance, they sought habeas corpus relief under the ICRA.[312] The district court dismissed the case for lack of subject matter jurisdiction and found that the ordinance was not an unlawful bill of attainder.[313]

On appeal to the Second Circuit, the plaintiffs alleged that the tribal government's actions against them were "the legal equivalent of a banishment, or otherwise qualify as a 'severe actual or potential restraint on [the petitioners'] liberty.'"[314] Affirming the district court's decision, the Second Circuit maintained that *Poodry* limits habeas corpus review to actions that impose a severe actual or potential restraint on liberty. While the court in *Poodry* determined that these restraints are more than actual custody, including, for example, parole, probation, release on one's own recognizance, and tribal banishment,[315] the Second Circuit refused to extend *Poodry* to the "unique severity" of the punishment involved in this case, which it characterized as an economic restraint.[316] "As a general rule," the court stated, "federal habeas jurisdiction does not operate to remedy economic restraints."[317]

Although the Second Circuit affirmed the district court's dismissal of the case for lack of jurisdiction, the *Shendandoah II* court characterized the defendants' actions as "partly inexcusable" (not partly "excusable") and lamented its limited jurisdiction to "control the actions of the tribal governments complained of herein."[318] The court depicted the defendants' actions as dangerous, warning:

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307. 366 F.3d 89 (2d Cir. 2004).

308. *Id.* at 90–91.

309. *Id.*

310. *Id.* at 91.

311. *Id.* The housing ordinance required the Nation's Public Safety Commissioner to inspect reservation homes to determine whether they met tribal building standards, to require rehabilitation of houses not in compliance, and to remove or demolish dilapidated houses. *Id.*

312. *Id.* One of the plaintiffs was arrested and released after she resisted compliance with an inspection of her home. Her house was subsequently demolished. *Id.*

313. *Id.*

314. *Id.* at 92 (quoting Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 880 (2d Cir. 1996)).

315. *Poodry*, 85 F.3d at 894.

316. *Shenandoah II*, 366 F.3d at 92.

317. *Id.* The court specifically found that the imprisonment of one of the plaintiffs was "too tenuously connected to the housing ordinance to provide habeas jurisdiction for an attempt to prevent the enforcement of that ordinance." *Id.* The court also determined that the tribal housing ordinance was not an unlawful bill of attainder, which, by definition and application, is intended to inflict punishment on "'an identifiable individual.'" *Id.* (quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977)). Because the tribal housing ordinance applied to the entire tribal community, not to any particular person, it did not constitute a bill of attainder. *Id.*

318. *Id.*

> "If [a] legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense."[319]

The court's ire is misplaced as its comments indicate a general disrespect of the Oneida Nation's fundamental rules of governance and are dismissive of the Nation's judicial system. The court also shows a mindless indifference to its own jurisprudence on the duty and responsibility of tribal courts to decide matters of tribal law. Unlike the *Poodry* case, the plaintiffs in *Shenandoah II* had a full opportunity to challenge the housing ordinance in the Oneida Indian Nation Tribal Courts, both to the trial court and the court of appeals, the highest court of the Nation. The housing ordinance was found to be valid under the ICRA and to be a reasonable exercise of the Oneida Indian Nation's power of self-government.[320] The trial court's decision was affirmed by the Oneida Indian Nation Appellate Court, which further found that the ordinance was properly enacted "'as part of the Nation's continuing program to eliminate dilapidated and unsafe housing on Territory Road and to further the goal of providing a decent home and suitable living environment for persons residing on Nation land.'"[321]

The case highlighted the experience of one particular plaintiff, Danielle Patterson, who was arrested and released after she "violently resisted compliance with an order of [Tribal Court] Judge Hancock permitting inspection of her home."[322] After finding that Ms. Patterson's trailer, where she lived with her three children, was "'badly deteriorated' and 'in such an overall dilapidated condition that [it was] not fit for human habitation,'" the Oneida Public Safety Commissioner issued an Order of Condemnation, Demolition and Removal.[323] Although Ms. Patterson did not challenge the factual findings of the Order in tribal court, she challenged the legal basis of the Order and then refused to participate in the proceeding.[324] Judge Hancock affirmed the Public Safety Commissioner's administrative Order of Demolition upon finding that it was supported by evidence and was not arbitrary or capricious.[325] These facts were not mentioned in the Second Circuit's decision, nor was the fact that, according to the housing ordinance and following the issuance of the Order of Demolition, the Nation's Housing Director offered Ms. Patterson a

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319. *Id.* at 93 (alteration in original) (quoting United States v. Brown, 381 U.S. 437, 444 (1965)). The court further urged Congress to empower the federal courts to exercise jurisdiction over such tribal disputes. *Id.*

320. *Id.* at 91.

321. Shenandoah v. Halbritter, 275 F. Supp. 2d 279, 281 (N.D. N.Y. 2003) (quoting *In re* Application of Arthur F. Pierce, No. 01-014-CI (Oneida Indian Nation Trial Ct. Aug. 8, 2002)).

322. *Id.*

323. *Id.* (alteration in original) (quoting Oneida Nation Pub. Safety, Notice and Order of Condemnation, Demolition and Removal). According to the district court, the trailer was in very poor condition; it lacked a foundation or a heating system and it had missing and broken doors along with many other defects. *Id.* (citing Notice and Order of Condemnation, *supra*).

324. *Id.* at 282.

325. *Id.*

refurbished four-bedroom home in the vicinity of her condemned trailer with rent prorated according to her income.[326] After Ms. Patterson rejected the offer of substitute housing, she claimed homelessness and alleged that the defendants, "an eclectic group of lawyers, judges, police officers, sheriffs and Oneida Nation officials—have conspired and will continue to conspire to violate [the plaintiffs'] civil rights by implementing the alleged discriminatory housing ordinance."[327]

At the core of the issue concerning the Oneida Nation's housing law was a perception of its unfairness; the Nation characterized its law as an act of responsible governance in furtherance of its duty to provide decent and safe housing to its members and their families, while the petitioners claimed that it was a retaliatory act targeted at them for criticizing the government. The Nation's judiciary reviewed the challenged tribal law and actions of the government and rendered several written decisions on the validity of the housing order and the appropriateness of the condemnation order.[328] Those decisions were made by a constitutionally created branch of the Oneida Nation—a sovereign government recognized by the federal government—according to formally established rules of procedure and evidence. The Second Circuit may not have agreed with the Nation's tactics in this situation, but well-established principles of comity and the Second Circuit's own precedent dictate respect for the decisions of the tribal court and mandate that the tribal court's integrity not be impugned by intimation and prejudicial views.[329]

C. Quair v. Sisco*: Applying Tribal Laws to Determine Federal Rights*

Finding itself similarly situated in the thorny thicket of tribal politics, a federal district court in California is wading through a distressingly familiar account of internal political disputes involving a volley of allegations of fraud, misuse of tribal

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326. *Id.* at 282 n.1.

327. *Id.*

328. For example, the tribal housing ordinance was upheld by the Chief Judge of the Oneida Indian Nation Trial Court as "a reasonable exercise of the [Tribe's] power of self-government" under *Santa Clara Pueblo*, as well as "valid under the ICRA." *Id.* at 281. Judge Hancock's decision was affirmed by the Oneida Nation Appellate Court, which found that the ordinance was enacted "as part of the Nation's continuing program to eliminate dilapidated and unsafe housing on Territory Road and to further the goal of providing a decent home and suitable living environment for persons residing on Nation land." *Id.*

329. In an earlier case, the Second Circuit stated that "[t]he Supreme Court has long recognized the exclusive responsibility of Native American tribes to construe their own law, and with that responsibility comes the parallel responsibility of federal courts to abide by those constructions." Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe, 117 F.3d 61, 66 (2d Cir. 1997) (citations omitted). In *Basil Cook Enterprises*, a case involving a federal challenge to tribal court jurisdiction, the court required the exhaustion of tribal remedies before instituting a federal challenge because "[f]ederal courts, as a general matter, lack competence to decide matters of tribal law and for us to do so offends notions of comity underscored in *National Farmers*." *Id.* More recently, the Second Circuit held that "[t]ribal courts, which 'play a vital role in tribal self-government,' must therefore be permitted to resolve pending cases without federal court interference," further noting that such requirement "promotes tribal autonomy and dignity." Bowen v. Doyle, 230 F.3d 525, 530 (2d Cir. 2000) (quoting Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987)) (enjoining New York state judges from acting on a membership dispute brought by the President of the Seneca Nation pending resolution before the Nation's Peacemaker Council). These statements, made in the context of the exhaustion of tribal remedies doctrine, are equally applicable to matters concerning federal jurisdiction under the ICRA's habeas corpus provision. These statements acknowledge the appreciable measure of deference that the federal courts confer to tribal governance and tribal courts. Undoubtedly, the court's comments in *Shenandoah II* reflected its frustration with persistent tribal leadership disputes and allegations of gross misconduct. However, beyond the Second Circuit's determination that the tribal law did not constitute an unlawful bill of attainder, its subsequent comments served no purpose but to stir the embers of tribal dispute and discontent.

funds, harassment and retaliation, and disloyalty. The court's recent and future decisions in *Quair v. Sisco*[330] will have a significant impact on the jurisprudence of federal habeas review of tribal banishment orders under the ICRA, especially in defining the contours of due process in traditional tribal decision-making practices.

The dispute in *Quair* began in 2000 when Rosalind Quair and Charlotte Berna, two members of the Santa Rosa Rancheria Tachi Indian Tribe, filed petitions for writs of habeas corpus in federal court alleging that they were illegally banished and disenrolled by their General Council (the respondents).[331] Relying on the *Poodry* decision, the petitioners sought relief from these actions under the ICRA.[332]

The petitioners' Tribe occupies a small reservation in California.[333] Revenue from the Tribe's gaming enterprise funds tribal government operations and is distributed to tribal members on a per capita basis.[334] The Tribe is governed by the Articles of Community Organization of the Santa Rosa Indian Community (Articles), which provide for the establishment of a tribal government, delineate the powers of the General Council and the Tribal Business Committee, and describe the qualifications necessary for tribal membership.[335] The entire adult population of the Tribe comprises the General Council which collectively decides matters concerning the welfare of the Tribe.[336] The Tribal Business Committee, also known as the Tribal Council, is an elected body of six tribal members that operates pursuant to a grant of limited authority from the General Council.[337] The General Council's authority is "subject to any limitation imposed by the statutes or the Constitution of the United States" and requires that certain powers be set out in tribal "ordinances or resolutions passed by the General Council and approved by the Commissioner of Indian Affairs."[338] One such power requiring further authorization is the "control [of] future membership, loss of membership and the adoption of members."[339] All other rights and powers of the General Council must "be exercised through the adoption of appropriate bylaws or amendments [to the Articles]."[340]

There was much disagreement between the parties in *Quair* about how General Council meetings should be conducted and how disciplinary actions should be taken. The respondents contended that the Tribe had a formal process for deciding matters such as disenrollment and banishment that involved giving notice to the

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330. 359 F. Supp. 2d 948 (E.D. Cal. 2004) (denying in part and granting in part the parties' cross-motions for summary judgment, leaving only the substantive issue of whether petitioners were denied due process by the General Council's actions when he disenrolled and banished them).

331. *Id.* at 952.

332. *Id.* at 952, 978.

333. *Id.* at 953.

334. *Id.*

335. *Id.* at 953–54. In 1962, the Tribe formally reorganized pursuant to the Indian Reorganization Act and, at that time, adopted the Articles of Community Organization. *Id.* at 953; *see also* Articles of Community Organization of the Santa Rosa Indian Community (Jan. 28, 1963) (on file with author and with the New Mexico Law Review) [hereinafter Articles].

336. The adult members of the Tribe also constitute the "qualified voter[s]." Articles, *supra* note 335, art. IV, § 1. Fifty-one percent of the qualified voters are necessary to establish a quorum for the General Council meeting. *Id.* art. IV, § 7. There are approximately 400 adult members of the Tribe. *Quair*, 359 F. Supp. 2d at 953.

337. *Quair*, 359 F. Supp. 2d at 954.

338. Articles, *supra* note 335, art. VI, § 1.

339. *Id.* art. VI, § 1(J).

340. *Id.* § 2.

affected individual either in writing or orally and providing the individual with an opportunity to address the General Council.[341] After a debate on the matter, the General Council voted by a show of hands.[342] The petitioners, however, had a very different perspective, describing the typical General Council meeting as chaotic and disorderly, without written procedures or consistent adherence to any meeting formality.[343]

Following a series of recalls and investigations against several members of the Tribal Business Committee, Berna found herself the subject of a recall proceeding and was removed from office for financial mismanagement.[344] Berna and Quair, independently of one another, consulted the same attorney. This act, it turns out, was most offensive to the Tribe because that particular attorney "had a long and bitter history with the Tribe."[345] The lawyer sent a letter informing the Tribe of his representation of Berna in her claims of "'sexual, racial and medical disability discrimination as well as retaliation against her for properly reporting tribal member fraud and embezzlement,'" and of his representation of Quair in her claims for "'employment discrimination based on race, sex and medical disability.'"[346] Shortly after receiving the attorney's letter, the General Council called a special meeting and voted to disenroll and banish both Berna and Quair.[347] Sometime later, the petitioners received a letter from the Tribe's Membership Department informing them of the General Council's decisions. The letter stated: "We the Membership Department would like to inform you that as of June 1, 2000 you were banned and disenrolled as a tribal member based on majority vote of the General Council. You are no longer entitled to any benefits or royalties of the Santa Rosa Rancheria."[348]

The petitioners appealed to the General Council for reinstatement and submitted written statements indicating that they were no longer pursuing legal action against the Tribe.[349] In a subsequent meeting, however, the General Council voted "to reaffirm the prior determination that the petitioners were not suitable for membership,"[350] and also affirmed the petitioners' exclusion from tribal lands:

> "NOW THEREFORE BE IT RESOLVED: that Charlotte Berna and Rosalinda Quair are permanently excluded and banished from the Santa Rosa Rancheria, as the General Council has found that [their] continued presence on or return to

341. *Quair*, 359 F. Supp. 2d at 954–55.
342. *Id.* at 955.
343. *Id.* at 954–55.
344. *Id.* at 955–56.
345. *Id.* at 956.
346. *Id.* (quoting Letter from Paul Henry Abram to Clarence Atwell, Santa Rosa Tribal Chairman (May 19, 2000)). The plaintiffs' attorney "was seeking to enforce a multi-million dollar judgment against the Tribe, various tribal officials and tribal members." *Id.* In his letter to the Tribe, he threatened a "'full-blown media event,'" which might have created the impression of "'an unstable tribal council,'" and demanded a meeting within forty-eight hours. *Id.* (quoting Letter from Paul Henry Abram, *supra*).
347. *Id.* at 957–58. The court noted the confusion in the tribal records about whether any notice was given of the special meeting of the General Council, whether the banishment and disenrollment matters were properly placed on the agenda, whether the petitioners had a meaningful opportunity to address the Council, and whether any official votes were taken at the meeting. *Id.*
348. *Id.* at 959.
349. *Id.* at 961.
350. *Id.*

> our Rancheria...constitutes a clear, present and extremely serious danger to the health, safety and welfare of the entire Rancheria.
>
> ....
>
> BE IT FURTHER RESOLVED: that Charlotte Berna and Rosalinda Quair are hereby ordered immediately and permanently excluded from entering or remaining within the exterior boundaries of the Santa Rosa Rancheria, and is declared to be a trespasser."[351]

The petitioners were not told the specific reasons for their banishment and disenrollment until the district court action was undertaken. In depositions during litigation, tribal officials indicated that Berna was banished and disenrolled "for privacy violations, misuse of Tribal assets, undermining Tribal government and defaming the Tribe."[352] Quair was banished and disenrolled for similar reasons—"privacy violations, undermining Tribal government and defaming the Tribe."[353]

In evaluating these facts, the district court laid out its jurisdictional basis for adjudicating the petitioners' habeas corpus petitions by employing a three-part test incorporating much of the Second Circuit's *Poodry* analysis: the claim must be predicated on the existence of an underlying criminal proceeding; supported by actions constituting a detention; with all available tribal remedies having been exhausted.[354] As to the first part of the analysis, the district court concluded that the combined imposition of banishment and disenrollment "constitute[d] a punitive sanction irregardless [sic] of the underlying circumstances leading to those decisions" that "render[ed] those proceedings criminal for purposes of habeas corpus relief," despite the absence of any underlying criminal proceedings in the case.[355]

This determination goes well beyond the *Poodry* court's finding that the petitioners' convictions of treason in that case supported its review under a habeas corpus anaylsis.[356] In *Quair*, neither petitioner was subject to any type of criminal proceeding. Berna was removed from office for alleged misuse of tribal funds, but no other action was taken in that matter. Quair's conduct appears completely innocuous, lacking any criminal element or response. Nonetheless, finding the combination of sanctions severe and noting that "banishment historically has been considered a punitive sanction,"[357] the court established a new jurisdictional construct by defining the contemporaneous imposition of banishment and disenrollment as the equivalent of a criminal proceeding.

The court distinguished its determination from several other federal court decisions that found that tribal banishment decisions were civil sanctions, not

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351. *Id.* at 962 (quoting General Council Resolution No. 00-27, Authorizing the Tribal Council to Exclude Charlotte Berna & Rosalinda Quair from the Rancheria (2000)). In discussing the applicable standards of due process in such proceedings, the court again noted uncertainty as to whether petitioners had a fair opportunity to present their appeals and petitions to the General Council. *Id.* at 977–78.

352. *Id.* (internal quotation marks omitted).

353. *Id.* (internal quotation marks omitted).

354. *Id.* at 966–67.

355. *Id.* at 967.

356. As stated by the Second Circuit, "Where, as here, petitioners seek to test the legality of orders of permanent banishment, a federal district court has subject matter jurisdiction to entertain applications for writs of habeas corpus." Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 897 (2d Cir. 1996).

357. *Quair*, 359 F. Supp. 2d at 967.

criminal penalties.[358] The *Quair* court apparently found a significant distinction between banishments of tribal members and exclusions of non-Indians, the former being treated as punitive sanctions for habeas corpus jurisdiction, while the latter were treated as civil matters. This distinction begs the question of whether essentially the same action, made under similar circumstances, can be deemed criminal for one purpose but civil for another. Although tribes may not exercise criminal jurisdiction over non-Indians, there is no question that tribes may exclude non-Indians from their territory pursuant to the tribe's regulatory powers.[359] To the extent that banishment and exclusion constitute the same act and effect the same consequence of physical removal from the community, *Poodry*'s characterization of banishment as a criminal sanction giving rise to federal habeas corpus review arguably would be inapplicable to non-Indians who have been excluded from tribal lands. Similarly, non-Indians cannot be disenrolled. Under the *Quair* court's determination that the combination of banishment and disenrollment constitutes criminal sanctions, neither group could avail itself of section 1303 relief. *Poodry*, however, left open the question of whether certain civil sanctions could constitute sufficiently severe restraints on an individual's liberty interests to warrant habeas corpus review.[360] The notion that banishment is inherently a criminal sanction appears to be an overgeneralization tailor-made for jurisdictional purposes.

In the second part of the analysis, the *Quair* court applied *Poodry*'s "severe restraint on individual liberty" rationale, adopting a comparably broad-spectrum concept of detention that includes "collateral consequences."[361] This includes, for habeas corpus purposes, any condition that "'significantly restrain[s] petitioner's liberty to do those things which in this country free men are entitled to do.'"[362] The

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358. In *Hardin v. White Mountain Apache Tribe*, the Ninth Circuit found the Tribe's exclusion of a non-Indian corresponded to its civil jurisdiction over non-Indians notwithstanding the fact that the exclusion was premised on a federal criminal conviction. 779 F.2d 476, 478–79 (9th Cir. 1985). In *Alire v. Jackson*, a case that involved the exclusion by the Confederated Tribes of the Warm Spring Reservation of a member of the Shoshone Paiute Tribe who earlier pled no contest to child neglect and abuse in tribal court, the district court determined that the exclusion did not have the requisite temporal nexus to the criminal activity to establish it as a criminal proceeding under *Poodry* and, as a civil matter, the court lacked subject matter jurisdiction to consider the petition for habeas relief. 65 F. Supp. 2d 1124, 1129 (D. Or. 1999). The district court in *Quair* also rejected the respondents' reliance on another Ninth Circuit decision where the court found no federal jurisdiction over an exclusion of a non-Indian, which, as determined by the court, was made in a civil context. *Quair*, 359 F. Supp. 2d at 969 (citing Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976)).

359. *See supra* notes 179–195 and accompanying text.

360. Responding to a passage in *Santa Clara Pueblo v. Martinez*, where the Court described habeas corpus review as the exclusive vehicle for "federal-court review of *tribal criminal proceedings*," 436 U.S. 49, 67 (1978) (emphasis added), the Second Circuit stated:

> [T]his language does not suggest that habeas jurisdiction is available *exclusively* as a vehicle for reviewing tribal criminal proceedings. That is, even if the dispute at hand is properly characterized as arising from a "civil" determination by a tribal government, that does not necessarily deprive a district court of subject matter jurisdiction to review tribal action under the substantive provisions of the ICRA if § 1303 would otherwise confer it.

Poodry, 85 F.3d at 887.

361. *Quair*, 359 F. Supp. 2d at 967.

362. *Id.* at 968 (internal quotation marks omitted) (quoting Williamson v. Gregoire, 151 F.3d 1180, 1182–83 (9th Cir. 1998) (holding that a state law requiring a sex offender to register was a collateral consequence of a conviction and not "custody")). The court further noted that "'besides physical imprisonment, there are other restraints on a man's liberty, restraints that are not shared by the public generally...sufficient...to support the issuance of habeas corpus.'" *Id.* at 967 (quoting Jones v. Cunningham, 371 U.S. 236, 240 (4th Cir. 1952)). The

court also adopted *Poodry*'s characterization of banishment as a "detention in the sense of a severe restriction on petitioners' liberty not shared by other members of the Tribe."[363]

The third part of the *Quair* analysis sets out a new and important prerequisite for habeas review—exhaustion of tribal remedies.[364] The district court concluded that the petitioners had exhausted their tribal remedies after they unsuccessfully petitioned the General Council for reinstatement of their tribal membership.[365] The Tribe argued that the petitioners had not exhausted their tribal remedies and indicated several other avenues of appeal and redress, such as an appeal of the disenrollment decision to the Secretary of the Interior, re-application for membership in the tribe with the Membership Committee, and a re-review of the banishment decision by the General Council.[366] The court was not convinced that there was additional meaningful tribal review. Noting the absence of appellate procedures and a tribal court, the court concluded that Quair and Berna had "established the exhaustion of remedies component of habeas relief with respect to the decisions to disenroll and banish them."[367]

Herein lies a crucial determination. While the application of the exhaustion doctrine is wholly appropriate in habeas corpus actions, the court's finding that exhaustion would be futile is troublesome for the following reasons. First, notwithstanding the doubtfulness of the court's jurisdiction over enrollment matters, and conversely disenrollment matters, petitioners validly question whether the Tribe's enrollment ordinance was ever approved by the Secretary of the Interior as required under the Articles of Community Organization.[368] The Articles condition the General Council's authority to "control...loss of membership" by requiring the enactment of an ordinance or resolution that is subsequently approved by the Bureau of Indian Affairs (BIA).[369] If the BIA has not approved the General Council's resolutions, then they would be a nullity and the Tribe's disenrollment actions would

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issues presented in these cases, unlike those present in *Quair*, were premised on actual criminal convictions.

363. *Id.* at 971. The court was careful to explain that its conclusions concerning criminal context and detention did not extend to matters involving removal from tribal office or employment. *Id.*

364. The doctrine of exhaustion of tribal remedies is a prudential rule requiring, as a matter of comity, a "federal court [to] stay[] its hand" so that tribal forums have "the first opportunity to evaluate the factual and legal bases for the challenge" to tribal authority. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985).

365. *Quair*, 359 F. Supp. 2d at 972.

366. *Id.* at 971–72.

367. *Id.* at 972. The district court appears to be following the general rule "that exhaustion of tribal remedies is required prior to the filing of a habeas corpus petition under 25 U.S.C. § 1303." LaVallie v. Turtle Mountain Tribal Court, No. 4-06-CV-9, 2006 WL 1069704 (D.N.D. Apr. 18, 2006); *accord* Donnell v. Red Lake Tribe Court, No. Civ. 04-5086JNEJGL, 2005 WL 2250767 (D. Minn. Sept. 13, 2005) ("'[A]s a matter of comity,...tribal remedies must ordinarily be exhausted before a [habeas corpus] claim is asserted' in federal court under 25 U.S.C. § 1303." (quoting Necklace v. Tribal Court of the Three Affiliated Tribes, 554 F.2d 845, 846 (8th Cir. 1977))). Exhaustion of tribal remedies has not been required in certain circumstances, specifically "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers Union*, 471 U.S. at 857 n.21. Federal courts apply the futility exception only in the total absence of a tribal court system. *See* Comstock Oil & Gas, Inc. v. Ala. & Coushatta Indian Tribes of Tex., 261 F.3d 567, 572–73 (5th Cir. 2001). The court in *Comstock Oil & Gas* noted that, "[b]ecause no tribal court properly existed, exhaustion was imprudent." *Id.* (citing Krempel v. Prairie Island Cmty., 125 F.3d 621, 622 (8th Cir. 1997) (holding that "if there is no functioning tribal court, exhaustion would be futile")).

368. *Quair*, 359 F. Supp. 2d at 980 (citing Articles, *supra* note 335, art. VI).

369. *Id.* (citing Articles, *supra* note 335, art. VI, § 1(J)).

be void. However, even if the BIA has approved the resolutions, a real opportunity to review the validity of the General Council's decisions is available before the Secretary of the Interior-BIA, whose review and approval are specifically mandated by the Articles.[370] Although the district court recognized this express requirement, it nonetheless proceeded to review the claim on its merits.[371]

Second, the Articles do not expressly authorize banishment actions. While a tribe's inherent authority to banish need not be expressly articulated in order to be exercised, here the Tribe is fundamentally bound by its Articles of Community Organization, which unequivocally state, "Any rights and powers heretofore vested in the General Council, but not expressly referred to in this Article, shall not be lost by reason of their omission but may be exercised through the adoption of appropriate bylaws or amendments."[372] Extinguishing a fundamental relationship between a member and the Tribe through banishment appears to be precisely the sort of power that could be exercised only through an amendment of the Articles.

It is counterintuitive to require exhaustion of tribal remedies as a prerequisite to assuming jurisdiction, but then overlook the avenues available that could decisively determine the validity of the underlying claims. These issues concern essential matters of self-governance and self-determination that the doctrine of exhaustion of tribal remedies is intended to promote. The doctrine requires that "tribal legal institutions...be given a 'full opportunity' to consider the issues before them and 'to rectify any errors'" before the merits or any question concerning appropriate relief is addressed in federal court.[373] To give the exhaustion requirement its full value, questions concerning proper approval and validity of the General Council's banishment and disenrollment resolutions should be resolved within the tribal system before proceeding on the merits of the claim. If the requisite federal approvals are absent, other similar actions of the General Council may also be suspect.

Finally, the court, in determining that exhaustion was futile, noted that no tribal court system existed in the Santa Rosa Rancheria governance structure "to which petitioners could have appealed the decision to banish them."[374] Indeed, the General Council, which exercised all tribal governmental powers, was the sole tribal forum available to petitioners, yet the court should not have necessarily dismissed the General Council as a viable tribal forum to resolve these disputes for several reasons. First, in *Santa Clara Pueblo*, the Supreme Court made particular recognition of "[n]onjudicial tribal institutions" as being "competent law-applying

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370. *See supra* notes 338–340 and accompanying text.

371. *Quair*, 359 F. Supp. 2d at 980. After reviewing the Articles, the court stated, "BIA approval of Resolution 00-27 is required because it is a resolution '[t]o control future membership, loss of membership and the adoption of members.'" *Id.* (alteration in original) (quoting Articles *supra* note 335, art. IV, § 7). The court rejected the tribe's arguments that membership matters are within the exclusive control of the tribe, stating, "this general statement does not overcome the specific requirement of the Articles of Community Organization." *Id.* This last statement effectively would apply to the quorum requirement for Council action, although it was not addressed in the arguments or decision. If the requisite quorum was not met, then the General Council would not have authority to take any official action.

372. Articles, *supra* note 335, art. VI, § 2.

373. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987) (quoting Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985)).

374. *Quair*, 359 F. Supp. 2d at 972.

bodies."[375] Second, the Tribe's Articles expressly state that the "General Council shall have the powers and responsibilities hereafter provided, subject to any limitation imposed by the statutes or the Constitution of the United States."[376] One such statute is the ICRA, which subjects all manner of tribal governmental actions to constitutional restraints and protects an individual's liberty interests and property rights.[377] Thus, the Tribe's decisions to disenroll and banish petitioners, while made according to the customary practices of the General Council, must nonetheless comport with the ICRA's provisions concerning due process. Having identified unresolved questions concerning the validity of several salient General Council actions, the Council should be given an opportunity to rectify those issues. At this juncture, the Tribe has all of the necessary cultural knowledge, the institutional tools, and the financial resources to do what remains to be done, and that is to define the proper measure of due process required in such tribal actions. By establishing a process of honoring its traditions and customs, while dispensing justice, it surely will heal and strengthen its community.

V. TOWARD A NEW JUDICIAL CONSTRUCT FOR FEDERAL REVIEW OF TRIBAL BANISHMENT DECISIONS: PRINCIPLES OF FAIRNESS WITH DEFERENCE TO TRIBAL CUSTOMS AND TRADITIONS

A. The Need for a New Construct for Federal Review of Tribal Banishment Decisions

Justice has been elusive for all parties involved in the cases discussed above—including the court. Tribes feel exposed, having had their internal social and political affairs scrutinized, their laws and systems of government examined, and their traditions and customary practices scorned. Individual parties believe they have been legally abandoned by their tribes, which flout the laws and traditions meant to protect their rights, and by the courts, which fail to enforce those laws. Courts are frustrated with their limited jurisdiction to remedy violations of tribal civil rights and confused about how to deal with tribal custom and traditional practices.

Overarching these contentious issues is the recent and dramatic change in tribal economies, primarily with the advent of Indian gaming. Indian gaming has propelled many tribes out of generations of abject poverty to new financial independence and has enabled individual tribal members to garner a modicum of wealth as well.[378] With access to substantial financial resources and by adopting a savvy business-

375. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 (1978).

376. Articles, *supra* note 335, art. VI, § 1.

377. *See supra* notes 135–140 and accompanying text.

378. Pursuant to the Indian Gaming Regulatory Act (IGRA) of 1988, 25 U.S.C. §§ 2701–21 (2000), tribes conduct gaming activities on their tribal lands subject to federal and state regulation. Tribes use their gaming revenue to fund government operations and programs, promote economic development, and make per capita distributions to tribal members. *Id.* § 2710(b)(2)(B), (b)(3); *see also* STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 7–11, 98–100 (2005). According to a recent report from the National Indian Gaming Commission, revenues from over 400 Indian casinos brought in over $22.6 billion in 2005, representing a nearly 400 percent increase in the last ten years. *See* NAT'L INDIAN GAMING COMM'N, REPORT OF THE NATIONAL INDIAN GAMING COMMISSION (July 11, 2006), *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/pressreleases/nigc1gamingrevenues2005.pdf.

oriented attitude, tribal officials are reassessing their government's organizational structures and philosophies and initiating extensive political reforms. They are amending their constitutions and enacting tribal laws that extend the reach and influence of their sovereignty; they are creating and enhancing tribal institutions to address all areas of external and internal affairs, such as tribal courts and regulatory commissions, tribal schools, museums, and community centers; and they are offering generous financial and social-welfare benefits to tribal members, including employment opportunities, health services, educational assistance, and per capita distributions.[379] A direct correlation exists between this economic success and the swell in tribal membership rolls and enrollment applications as members and their families return to the reservation seeking economic opportunities and tribal benefits. This, in turn, has encouraged many tribes to reconsider their membership and benefits eligibility criteria.[380] While restructuring efforts have been intended to strengthen tribal governments and improve their capacity for delivering services and developing their economies, the headiness of new-found wealth and power has triggered a destabilizing tension within tribal communities over the control of tribal resources and the divergence from cultural norms and traditional values.[381]

Emboldened by their personal prosperity, tribal members are demanding more information about tribal business activities, increased accountability from tribal leaders, and recognition of individual rights. They are also insisting on more community participation in decisions about the use and distribution of tribal resources. The competing demands for economic growth and institutional reform, as well as the weighty concerns for preserving traditional systems of tribal governance, have led to fractious internal discord. As illustrated in the cases discussed above, serious internal conflicts have erupted among tribal members who believe that the tribe should exercise its sovereign rights as fully as possible, including participation in lucrative economic opportunities, and those members who challenge their government's authority and decisions risk political reprisal.[382]

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379. LIGHT & RAND, *supra* note 378, at 88, 92–93, 100, 142–43.

380. *Id.* at 100, 143, 215 n.88. Professors Light and Rand also argue that "IGRA's gaming revenue provisions...create a very real incentive for tribes to limit their members....Obviously, the fewer members, the bigger the pot." Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 421 (1997). For a comprehensive study of contemporary tribal membership issues, including the impact of gaming, see Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 465 (2002), in which she contends:

> Gaming success magnifies such potential conflicts, because it presents Indian nations with the choice between per capita distribution of revenues and investment in tribal infrastructure and services, primarily benefiting those living on or near the reservation. Thus, those currently enrolled may have an incentive to exclude potential citizens who are unlikely to live and participate within the reservation community. Furthermore, longtime contributors to reservation life may view more recent applicants for citizenship as securing windfalls, regardless whether these applicants demonstrate willingness to return to the reservation. In the view of existing citizens, the proper solution may seem to be closing the rolls.

Id. (footnote omitted).

381. LIGHT & RAND, *supra* note 378, at 101–04, 130.

382. One estimate is that "more than 1,500 people from 23 tribes have been disenrolled in recent years, often for speaking out." Rachel Dornheim, Tribes' Riches Increase Membership Battles (July 7, 2006), http://marketplace.publicradio.org/shows/2006/07/05/PM200607058.html. "'The core issue...is that tribal officials don't believe they have to provide their members with the rights guaranteed by the United States Constitution or

In the particular areas of banishment and membership, where fundamental political and social relationships between a tribal member and the tribe are implicated, due process protections of individual rights are essential. What is needed, then, is a new paradigm for reviewing tribal banishment and exclusion decisions: a paradigm that recognizes the historical and transcending influence of tradition and custom in tribal life, acknowledges the inherent and distinctive processes of tribal law, and enhances the tribe's capacity to govern justly. The construct this Article proposes is premised on the comity of nations principles and incorporates the above-mentioned requirements.

B. The Comity Construct

Comity is a well-established federal doctrine pursuant to which state and federal courts honor the judgments of foreign nations.[383] The U.S. Supreme Court set out the guiding principles of comity in *Hilton v. Guyot*:

> No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations."[384]

Comity principles necessarily accommodate divergent legal and judicial systems of other nations. By its very nature, however, comity is a discretionary doctrine that requires a balancing of interests between nations.

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[385]

Accordingly, federal and state courts may refuse to honor a foreign judgment on equitable grounds as an exercise of their discretion if such judgment "'would be contrary or prejudicial to the interest of the nation called upon to give [the judgment] effect.'"[386] Circumstances precluding recognition of a foreign order, judgment, or decree generally entail the failure of the foreign forum to provide a full and fair trial before an impartial tribunal of competent jurisdiction, preceded by notice of the proceedings to and voluntary appearance of the defendant, and the presence of prejudice in the court or in the system of governing laws.[387]

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the rights enumerated in the Indian Civil Rights Act.'" *Id.* (quoting John Gomez, Jr.).

383. *See* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

384. *Id.* at 163.

385. *Id.* at 163–64.

386. Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997) (quoting Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3rd Cir. 1971)).

387. *Hilton*, 159 U.S. at 202–03; *see also Wilson*, 127 F.3d at 810 n.4.

Founded on respect for the sovereign status of independent nations, it is appropriate to apply comity principles to Indian nations as domestic, dependent nations, legally existing separate from states and the federal government, unconstrained by the Federal Constitution.[388] As stated by the Ninth Circuit Court of Appeals, "In synthesizing the traditional elements of comity with the special requirements of Indian law, we conclude that, as a general principle, federal courts should recognize and enforce tribal judgments."[389] One such distinctive requirement, noted the court in *Wilson v. Marchington*, is the respect for tribal laws and judicial processes "along with the special customs and practical limitations of tribal court systems. Extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance."[390]

To garner recognition on par with proceedings in foreign nations, tribal court proceedings "must afford the defendant the basic tenets of due process or the judgment will not be recognized by the United States."[391] Comity principles assist a court in assessing the measure of due process to be afforded in such proceedings and call for balancing "'the individual right to fair treatment' against 'the magnitude of the tribal interest.'"[392] With deference to "'settled tribal customs and traditions'"[393] courts must be "careful to construe the term [] 'due process'...with due regard for the historical, governmental and cultural values of an Indian tribe."[394]

Due process in tribal proceedings has both organic and statutory origins. In its most basic form—a fair hearing—due process has historically been an integral part

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388. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."). Thus, the Full Faith and Credit Clause of the Constitution, U.S. CONST. art. IV, § 1, which requires states to recognize one another's laws and judgments, is inapplicable to Indian tribes. *See generally Wilson*, 127 F.3d at 808 ("[T]he Constitution itself does not afford full faith and credit to Indian tribal judgments."). Nor does the legislation implementing the Constitution's Full Faith and Credit Clause, 28 U.S.C. § 1738 (2000), apply, because tribes are not expressly mentioned in that statute. *See Wilson*, 127 F.3d at 808. Additionally, the fact that Congress, in subsequent federal legislation such as the Indian Child Welfare Act, 25 U.S.C. § 1911(d) (2000), explicitly requires full faith and credit be given to certain tribal proceedings indicates congressional intent not to "extend full faith and credit to the tribes under 28 U.S.C. § 1738." *Wilson*, 127 F.3d at 808–09.

389. *Wilson*, 127 F.3d at 810 (applying comity, not full faith and credit, in a federal court proceeding seeking recognition of a judgment from the Blackfeet Tribal Supreme Court).

390. *Id.* at 811.

391. *Id.* While the *Wilson* court articulated the elements of comity applicable to the recognition of tribal judgments, the case was decided on jurisdictional grounds, not on the basis of due process. *Id.* at 812–13; *cf.* Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1141, 1152 (9th Cir. 2001) (finding that racial bias in a tribal court proceeding offended fundamental principles of fairness and thus violated due process, precluding recognition of tribal court judgment under principles of comity).

392. Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988) (quoting Stands Over Bull v. Bureau of Indian Affairs, 442 F. Supp. 360, 375 (D. Mont. 1977)); *see also* Smith v. Confederated Tribes of Warm Springs Reservation of Or., 783 F.2d 1409, 1412 (9th Cir. 1986) ("Federal courts must avoid undue or intrusive interference in reviewing Tribal Court procedures."); *cf.* Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 238 (9th Cir. 1976) (applying balancing test to determine whether tribe's election procedures violated equal protection under the ICRA). In conjunction with the principles of comity, the Ninth Circuit in *Wilson* also found "sound guidance" for assessing tribal court judgments in section 482 of the *Restatement (Third) of Foreign Relations Law*. *Wilson*, 127 F.3d at 810.

393. *Bird*, 255 F.3d at 1143 (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 670 (1982 ed.)).

394. *Randall*, 841 F.2d at 900 (alterations in original) (quoting Tom v. Sutton, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976)).

of tribal law and custom. As impressively stated by the Supreme Court of the Oglala Sioux Nation, notice and a hearing "are the very essence of due process and what due process means."[395] The Oglala Supreme Court elucidated this point further, explaining:

> From time immemorial, this Tribe has set forth laws which govern how its members and outsiders interrelated with each other. If a member violated the laws of the Tribe, punishment was according to custom and tradition. This same law applied equally to outsiders who chose to live among our people.
>
> Many of the old ways and laws have been lost or changed through the years. Yet, one law remains unchanged, and that is the authority of this tribe to exclude non-members.
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> ....
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> ...The law, as it exists today, requires Tribes to afford everyone due process protection. The right to due process does not distinguish between one's affiliation with a Tribe or one's race. Due process is a protection which our Tribe and Courts must provide to everyone....Due process is a concept that has always been with us. Although it has a legal phrase and meaning, due process means nothing more than being fair and honest in our dealings with one another. We are allowed to disagree and exclude those who are posing a threat or committing ground(s) for exclusion [under tribal law]. What must be remembered is that we must allow the other side the opportunity to be heard.[396]

The statutory basis for due process is the Indian Civil Rights Act of 1968, whose purpose is to "'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'"[397] Section 1302(8) of the Act expressly prohibits a tribe from denying due process of law to any person within its jurisdiction. This section, along with the substantive provisions of the Act set out in 25 U.S.C. § 1302, have "the substantial and intended effect of changing the law which [tribal] forums are obliged to apply."[398]

Neither Congress nor the Supreme Court have defined the precise contours of due process for tribal court actions,[399] intrinsically recognizing that setting specific

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395. Bloomberg v. Dreamer, Civ. Appeal No. 90-348, at 5 (Oglala Sioux Nation Sup. Ct. Nov. 29, 1990) (overturning the Tribal Council's decision to exclude a non-Indian from the Pine Ridge Reservation for lack of due process) (on file with author and with the New Mexico Law Review).

396. *Id.* at 3, 5–6.

397. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978) (alteration in original) (quoting S. REP. NO. 90-841, at 5–6 (1967)).

398. *Id.* at 65.

399. The Ninth Circuit recently considered the sufficiency of the ICRA due process rights afforded in a tribal criminal proceeding. In *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005), a habeas corpus action challenging the criminal jurisdiction of the tribal court over a non-member Indian, the court stated:

> Although the U.S. Constitution does not bind the Navajo tribe in the exercise of its own sovereign powers, the Indian Civil Rights Act confers all the criminal protections on Means that he would receive under the Federal Constitution, except for the right to grand jury indictment and the right to appointed counsel if he cannot afford an attorney. The right to grand jury indictment would not pertain regardless, because Means is charged with a misdemeanor. The right to appointed counsel is conferred by the Navajo Bill of Rights to any person within its jurisdiction.

Id. at 935 (footnotes omitted).

standards is complicated by myriad factors such as the vast divergence in tribal legal and judicial systems, the incredible array of tribal customs and traditions, the various expressions of values in tribal cultures, and a wide range of socio-economic influences throughout Indian country. Basic fairness has been an integral part of tribal traditions and customs; it defined their cultures and strengthened their tribal identities. Yet, as demonstrated by the cases discussed above, parsing due process principles in tribal actions is especially difficult when measured against "'particular procedural rights derived from Anglo-American history.'"[400] Though implicating internal, sensitive areas of tribal self-government, the Ninth Circuit Court of Appeals has set out a useful analysis for reviewing due process issues in tribal actions based on the guiding principles of comity.[401] The approach employed in *Randall v. Yakima Nation Tribal Court* confers appropriate deference to tribal laws and customs and balances sovereign and collective rights of the tribe with the specific rights and interests of individuals.[402]

Randall involved a habeas corpus challenge alleging that an order of the Yakima Nation Court of Appeals dismissing an appeal from a criminal conviction violated due process protections under the ICRA.[403] The due process violation stemmed from the tribal trial court's failure to timely rule on the defendant's motion to proceed *in forma pauperis* and the appellate court's subsequent dismissal of the appeal as being untimely and lacking the requisite filing fee.[404] The Ninth Circuit focused its review of the tribal court proceedings on the degree of similarity between the rights and procedures under the tribal system and those commonly found in American legal jurisprudence:

> Where the tribal court procedures under scrutiny differ significantly from those "commonly employed in Anglo-Saxon society," courts weigh "the individual right to fair treatment" against "the magnitude of the tribal interest [in employing those procedures]" to determine whether the procedures pass muster under [the ICRA].
>
> Where the tribal court procedures parallel those found "in Anglo-Saxon society," however, courts need not engage in this complex weighing of interests. Where the rights are the same under either legal system, federal constitutional

400. Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1143 (9th Cir. 2001) (quoting COHEN, *supra* note 393, at 670). One recent suggestion to address the "unchecked federal permissiveness toward tribal citizenship rights abuses"—essentially violations of tribal member due process rights in banishment and exclusion matters—is "congressional abrogation of tribal sovereignty over tribal citizenship power" in either the Indian Civil Rights Act or the Indian Gaming Regulatory Act. Eric Reitman, Note, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power over Membership*, 92 VA. L. REV. 793, 861–62 (June 2006). "While endeavoring to leave primary responsibility for citizenship decisions with the tribe, it is imperative that Congress, at the very least, establish some form of potent remedial mechanism to prevent abuse." *Id.* at 863. Although this suggestion identifies a serious issue and a need for a remedy, as this Article attempts to do, I believe it is misguided in that it disregards the historical and legal status of tribes and their relationship with the federal government, and it fails to take into account Supreme Court precedent that has carefully guarded tribal rights to define their membership, as well as tribes' inherent ability to rectify internal matters according to their customs and laws. The approach I propose respects these qualities.

401. Randall v. Yakima Nation Tribal Court, 841 F.2d 897 (9th Cir. 1988).

402. *Id.*

403. *Id.* at 899.

404. *Id.* at 898–99.

> standards are employed in determining whether the challenged procedure violates [the ICRA].[405]

The first part of the Ninth Circuit's analysis involved a review of the procedural and substantive rights conferred under tribal law, in this case the right to appeal a conviction under the Yakima Nation Tribal Code.[406] Finding that the petitioner's rights under tribal law were comparable to the federal right of appeal, the court determined that federal constitutional standards would apply to its due process analysis.[407] The *Randall* court then concluded that, because the tribal trial court failed to follow its own rules of procedure, the tribal appellate court's dismissal of the defendant's appeal infringed on the defendant's due process rights under tribal law and under the ICRA.[408]

In the second part of the analysis, the court in *Randall* looked at the historical and cultural origins of the tribe's procedures. The court determined that the Yakima Nation's appellate procedures did not "reflect Indian 'historical, governmental...or cultural values,'" and further found that the Yakima Nation's appellate procedures "parallel exactly those employed in United States courts," thereby obviating any need to balance the defendant's due process rights under the ICRA and the Yakima Court of Appeals' actions.[409] The court ultimately concluded that the petitioner was entitled to appeal her criminal conviction under tribal law and remanded the case to the Yakima Court of Appeals to either hear the appeal or hold an evidentiary hearing on the defendant's *in forma pauperis* motion.[410]

The two-step substantive and procedural analysis employed in *Randall* was first enunciated by the Eighth Circuit Court of Appeals in a case pre-dating the Supreme Court's pivotal decision on the ICRA in *Santa Clara Pueblo*. In *White Eagle v. One Feather*,[411] a tribal election dispute alleging violations under the equal protection provision of the ICRA, the Eighth Circuit held that when a tribe had "established voting procedures precisely paralleling those commonly found in [Anglo-Saxon] culture," without anything to the contrary in tribal customs, the dictates of the federal law should be followed.[412] The court concluded, "Here, then, we have no problem of forcing an alien culture, with strange procedures, on this tribe. What plaintiffs seek is merely a fair compliance with the tribe's own voting procedures...and we can find nothing...[in] the tribal customs and culture manifesting the inapplicability of the principle."[413]

This approach was refined by the Ninth Circuit in *Howlett v. Salish & Kootenai Tribes of the Flathead Reservation, Montana*,[414] a case involving another election dispute where the parties asserted a similar claim under the equal protection

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405. *Id.* at 900 (first alteration in original) (citations omitted).
406. *Id.* at 900–01.
407. *Id.* at 901.
408. *Id.*
409. *Id.* at 901–02 (alteration in original) (quoting Tom v. Sutton, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976)).
410. *Id.* at 902.
411. 478 F.2d 1311 (8th Cir. 1973) (per curiam).
412. *Id.* at 1314–15.
413. *Id.* at 1314.
414. 529 F.2d 233 (9th Cir. 1976).

provision of the ICRA.[415] In these early ICRA cases, the court recognized its dual obligations to respect fundamental individual rights as well as tribal customary laws:

> We believe that the [*White Eagle*] approach...promotes both the maintenance of cultural tribal identity and the preservation of fundamental constitutional rights for the individual Indian. Where the strict application of traditional equal protection doctrines would significantly impair a tribal practice or alter a custom firmly embedded in Indian culture, and where the individual injury alleged by the tribal member is, by comparison, not a grievous one, then the equal protection clause at 25 U.S.C. § 1302(8) may be implemented somewhat differently than its constitutional counterpart. Where, however, the Tribes' election and voting procedures are parallel to those commonly employed in Anglo-Saxon society, we then "have no problem of forcing an alien culture, with strange procedures, on [these tribes.]"[416]

A recent Ninth Circuit decision succinctly combined the essential elements of the *White Eagle/Salish and Kootenai Tribes/Randall* line of cases and the two-step *Wilson* comity analysis. In *Bird v. Glacier Electric Cooperative, Inc.*,[417] the court reviewed a tribal court judgment involving a substantial jury award for monetary relief.[418] The due process violation claim arose from racially charged comments made by the plaintiff's counsel to a jury comprised only of tribal members. During the closing argument, the plaintiff's counsel forcefully asserted that the Indian-owned cooperative's loss of business was part of a legacy of injustice and colonialism.[419] In concluding that these statements were prejudicial and violative of the defendant's right to due process of law, the court carefully structured its review of the tribal proceedings around the guiding principles of comity enunciated in the Supreme Court's early *Hilton* decision with deference to tribal customs and practices.[420]

The first part of the Ninth Circuit's review laid out the following elements of due process required under a comity analysis: (1) a full and fair trial or hearing, (2) an impartial tribunal, (3) notice to or voluntary appearance of the defendant, (4) no showing of prejudice in the system of governing law, (5) the ability to obtain counsel and secure documents and attendance of witnesses, and (6) a right to an appeal or review.[421] The second part of the *Bird* court's comity review assessed the degree of similarity between the tribal laws and procedures and those rights and procedures provided under federal and state law, which then defined the measure of deference the court would accord to tribal customs and practices.[422] Noting that comity neither requires a tribe to use judicial procedures identical to those used in the federal courts, nor mandates a rejection of notions of due process that "'diverge[]

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415. *Id.*

416. *Id.* at 238 (second alteration in original) (quoting *White Eagle*, 478 F.2d at 1314).

417. 255 F.3d 1136 (9th Cir. 2001).

418. *Id.* at 1138.

419. *Id.* at 1140, 1149.

420. *Id.* at 1140–41. For a discussion of the Supreme Court's decision in *Hilton*, see *supra* notes 383–387 and accompanying text.

421. *Bird*, 255 F.3d at 1141 (folding the *Restatement (Third) of Foreign Relations Law*'s requirement of an apolitical judiciary into *Hilton*'s impartial judiciary criteria).

422. *Id.* at 1141–42.

from the common-law notions of procedure,'"[423] the court endorsed the following test:

> "Where the tribal court procedures under scrutiny differ significantly from those 'commonly employed in Anglo-Saxon society,' courts weigh 'the individual right to fair treatment against the magnitude of the tribal interest [in employing those procedures]' to determine whether the procedures pass muster under the [Indian Civil Rights] Act. *Where the tribal court procedures parallel those found 'in Anglo-Saxon society,' however, courts need not engage in this complex weighing of interests. Where the rights are the same under either legal system, federal constitutional standards are employed in determining whether the challenged procedure violates the Act.*"[424]

Applying this test to the Blackfeet Tribal Court's procedures in *Bird*, the court found sufficient similarity between the procedures of both jurisdictions such that "[f]or purposes of our comity analysis in this case we see no reason to depart from traditional due process values requiring fundamental fairness."[425]

The final step of the *Bird* court's comity review of the Blackfeet Tribal Court's decision required the court to determine whether the plaintiff's closing argument violated due process under traditional concepts of due process, thereby barring the court from recognizing and enforcing the tribal court judgment. The court concluded that the plaintiff's counsel's racially inflammatory remarks "went well beyond the limits of legitimate advocacy"[426] and "unmistakably had the improper effect of encouraging the all-Blackfeet tribal jury to impose an impassioned sanction against the managers of the Co-op," and therefore "the Co-op was necessarily prejudiced.... [and] deprived of the possibility of a jury verdict and vindication based on a fair proceeding."[427] Because the tribal court proceedings deprived the defendant of due process, the Ninth Circuit had no discretion to give comity to the tribal court judgment.[428]

The comity construct of the Ninth Circuit's analysis in *Bird* is predicated on protecting dual federal interests—the substantive due process rights of individuals conferred under the ICRA and the tribe's fundamental right of self-government and a distinct culture. This construct is equally suitable to reviewing other types of tribal decisions in federal court, and banishment decisions in particular. A full appreciation of such interests requires that all available remedies be exhausted, as delineated in the district court's decision in *Quair v. Sisco*.[429]

This comprehensive comity-exhaustion construct realizes the diverse interests implicated in federal court review of tribal banishment decisions. First, this construct adheres to the Supreme Court's respect for tribal customs as significant

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423. *Id.* at 1142 (quoting Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997)).

424. *Id.* at 1143 (first alteration in original) (quoting Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988)). "*Randall* supports that in a comity analysis concerns for respecting a sovereign's procedures and avoiding paternalism are reduced when tribal court laws and procedures governing trials and appeals track those of our federal courts." *Id.*

425. *Id.* at 1144.

426. *Id.* at 1150.

427. *Id.* at 1152. The court indicated that there was no difference in requisite measure of fairness in civil and criminal proceedings, "both of which require due process." *Id.* at 1151.

428. *See supra* note 391 and accompanying text.

429. *See supra* notes 364–376 and accompanying text.

expressions of tribal sovereignty and self-government and correctly recognizes the vital role of tribal forums in providing due process. This approach dignifies those forums by recognizing their decisions and judgments pursuant to the principles of comity. Second, this approach honors the full import of individual rights established under the ICRA. Finally, this construct sets out ascertainable, yet culturally sensitive, judicial standards to assess due process considerations in tribal decisions. It does not suggest, however, that, by following constitutional law precedents applicable to federal and state governments, federal courts will necessarily apply those standards "jot-for-jot" to tribes.[430] Federal courts must be mindful to respect tribal jurisprudence and to refrain from "'unnecessary judicial paternalism in derogation of tribal self-governance.'"[431]

This approach may be criticized as being too intrusive because it allows federal courts to evaluate the authenticity of tribal traditions. It may also be regarded as marginalizing tribes with more traditional legal systems in favor of individual rights because the weight of federal law supports the application of well-established principles of fundamental fairness. However, application of the well-established comity of nation principles appropriately balances the rights of individuals under federal law and the right of tribes to be self-governing and self-determining. Furthermore, exhaustion of tribal remedies is a sound doctrine that requires the tribe, in the first instance, to apply its own laws, be they traditional and customary laws or formal legal rules and procedures. As such, the tribe's own rule of law establishes the standard against which the tribe will later be judged.

C. The Pursuit of Responsible Tribal Self-Government

The real force of this construct is that it recognizes the authority of tribes to apply the ICRA in light of their own unique tribal needs, values, customs, and traditions, either through tribal laws or in tribal proceedings, whether in tribal courts or more traditional forums. Tribes naturally interpret principles of due process according to their own intrinsic sense of justice.[432] However, how the tribe honors its own

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430. United States v. Doherty, 126 F.3d 769, 779 (6th Cir. 1997) (citing Tom v. Sutton, 533 F.2d 1101, 1104–05 (9th Cir. 1976) (noting that due process and equal protection under the ICRA are not the same as defined under the Fourteenth Amendment)). The court in *Doherty* found that the ICRA did not trigger the Sixth Amendment right to counsel, stating, "'When entering the arena of due process rights in the context of an Indian tribe, courts should not simply rely on ideas of due process rooted in the Anglo-American system and then attempt to apply these concepts to tribal governments as if they were states or the federal government.'" *Id.* at 780 (quoting Ponca Tribal Election Bd. v. Snake, 1 Okla. Trib. 209, 230 (Ct. Ind. App. Ponca Tribe 1988)); *see also* United States v. Wheeler, 435 U.S. 313, 332 n.34 (1978) ("Traditional tribal justice tends to be informal and consensual rather than adjudicative, and often emphasizes restitution rather than punishment."); Smith v. Confederated Tribes of Warm Springs Reservation of Or., 783 F.2d 1409, 1412 (9th Cir. 1986) (holding that the procedures that tribal courts choose to adopt are not necessarily the same procedures that the federal courts follow and comity toward tribal courts requires that deference be given to such procedures). Professor Frank Pommersheim has also questioned how precise federal courts will be in requiring tribal courts to meet the substantive standards of analogous protections in the Bill of Rights under the ICRA, or if, instead, federal courts will maintain some degree of flexibility in assessing these standards. POMMERSHEIM, *supra* note 131, at 96, 99–101. Professor Carole Goldberg has raised concerns that "there is reason to believe that the alien structure of many tribal governments, resulting from the [Indian Reorganization Act] and pressures to conform to non-Indian institutions, undercuts [the] sense of [tribal political] identity." Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1135 (1994).

431. *Bird*, 255 F.3d at 1142 (quoting Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997)).

432. For a comprehensive study of how tribal courts have interpreted due process under the ICRA, see Mark

customs and traditions, respects its own laws and procedures, and values the rights of individuals within its jurisdiction is solely within the power of the tribe. It clearly is in the tribes' interest to take actions consistent with the ICRA and to develop supportive legal systems and judicial forums. Assuming that some accommodation of federal laws and principles must be made when designing such tribal systems, the tribes' absolute right to define their tribal communities' distinctive values must remain intact.

The challenge for tribes then is to respect this sovereign right of self-determination by safeguarding the individual's rights within the community. Uncertainty as to the existence of those rights or unfairness in protecting them can only create fear, contempt, and distrust. A tribal government's legitimacy is jeopardized, both internally and externally, when it purports to make decisions affecting tribal members' rights without respect for tribal laws. Thus, as demonstrated by so many of the tribal laws concerning banishment and exclusion, tribes succeed far beyond any measure of wealth when decisions are made with well-defined standards.

VI. CONCLUSION

Individual tribal members are culturally, politically, socially, and economically entwined within the tribal network of relatedness. Banishment is just one thread in the cultural fiber of the tribe which, when woven together with other strands of the rope, binds the tribe's socio-legal jurisprudence and secures the tribe's political and cultural survival. Tribes must commit to respecting the role of individuals in tribal communities or face subversion of their legal and cultural systems by federal courts.

The stakes are high in these cases: for tribes, it is their sovereign right to define themselves culturally, socially, and legally, without undue interference and in derogation of their rights from the federal courts; for the individual, it is their political and cultural identity, the right to participate in tribal affairs without fear of retribution, and to share the tribe's prosperity; for the courts, it is defining the applicable contours of due process in tribal actions that protects individuals from unjust tribal actions while safeguarding the rights of tribal self-determination.

As banishment becomes the prevalent means of social control and punishment within tribal jurisdictions, imposed through either tribal customary or codified tribal laws, a new judicial construct is needed to address the increasing number of cases seeking review of tribal actions in federal courts. The construct proposed in this Article, based on dual principles of comity of nations and exhaustion of tribal remedies, achieves important tribal objectives of preserving traditional tribal values and practices, strengthening the core connections within tribal societies, and upholding tribal self-government. Whether protecting their communities from the ravages of methamphetamine and predatory sex offenders or containing political dissension that threatens the stability of the government, tribes have the duty and capacity to conscientiously exercise their powers justly and to ensure that tribal justice comports with time honored tribal values.

D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 529–39 (2000). As stated by the Oglala Sioux Supreme Court, "Due process is a concept that has always been with us." Bloomberg v. Dreamer, Civ. Appeal No. 90-348, at 5–6 (Oglala Sioux Nation Sup. Ct. Nov. 29, 1990).