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Tribal Courts: Custom and Innovative Law

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INTRODUCTION

Law and jurisprudence in the United States have always included a third sovereign, the American Indian tribes.¹ The federal government and the states, the other two sovereigns, and their relations with the indigenous nations do not comprise the content of the legal dialogue. The law and jurisprudence developed by the Indian nations to serve their needs as self-governing political states continues the evolution which predated the European invasion of the Americas. The multiplying interactions among the sovereigns and the increasing exercise of sovereign power by the American Indian nations have intensified the need for non-Indians to learn and appreciate tribal customary law.

¹ The term “American Indian” includes American Indians and Alaskan Natives for the purposes of this paper. Alaskan Natives, Aleuts, Inuits, and others maintain distinct cultural identities. These distinctions are not pursued in this discussion of American Indian law and law school practices. The term “tribe” is also used for general discussion though the indigenous nations use varied terms for their collective identity, e.g., nation, pueblo, band, community, rancheria, colony, and village. The most recent listing of “entities” that are federally recognized demonstrates the variety of self-designations used by the indigenous nations. See Notice, 58 Fed. Reg. 54364 (1993). Also, Native Hawaiians comprise an indigenous people whose status evokes issues and doctrines from American Indian jurisprudence. See Hawaiian Homes Commission Act, Pub. L. No. 34, 42 Stat. 108 (1921), which established a land trust for the rehabilitation of Hawaiian Natives, subsequently amended and incorporated into the constitution of the state of Hawaii; see also FELIX S. COHEN, FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 797-810 (1982 ed.) [hereinafter COHEN’S HANDBOOK].
The focus of this paper is the development of American Indian law derived from custom, especially common law, among the indigenous nations. Three major areas will be addressed.

First, the American Indian tribes, as the third sovereign, present a legal need and opportunity distinguished from other minority groups. The development of Indian law is tied to the exercise of sovereign power by the Indian nations. Because the concepts and law produced by the Indian nations contribute to American jurisprudence and comparative law, perspectives from Indian law can help resolve doctrinal conflicts of other sovereigns.

Second, the tribal courts are where the tribal government’s legitimacy is challenged and demonstrated. Only the judicial branch can create tribal common law. The tribal courts must evoke respect and obedience from members and nonmembers. Yet, common law is dependent on the customary beliefs and regularized conduct of the tribal community. Anglo-American law also developed from custom, that is, generally held beliefs and conduct in compliance with beliefs. It is the culturally different perspective, not process, that distinguishes the common law created in tribal courts. Whether the similarity of process is a universal or coincidental evolution is collateral to this study of the tribal common law.

A review of selected cases, from various tribal courts, reveals the use of indigenous custom and its complementary use with the knowledge provided by Anglo-American law training. The cases apply concepts of justice and fairness. The tribal cases reveal indigenous concepts and institutions borrowed from tribal systems and then established in Anglo-American law, specifically, alternative dispute resolution. The guiding principles used in the selected cases sometimes result in outcomes similar to those in non-Indian jurisdictions. Conversely, other outcomes will be different because of the Indian cultural viewpoint involved. The reasoning process reveals how the tribal custom and common law, to be understood, require an inquiry without stereotypic expectations.

Third, the development of Indian law based on custom is the engine for innovation. The pervasive ability to change, in order to survive and maintain continuity, is the cultural characteristic of the indigenous people of the Americas. American Indian tribes have retained the capacity to integrate external concepts, technology, and life forms. Through adoption, adaptation, and appropriation the acceptance results in new meaning and value specific to tribal culture. The simultaneous pursuit of conservation and innovation is the historic pattern of native cultures. Twentieth-century
American Indians are not copies of Anglo-Americans; as indigenous people they are engaged in jointly preserving and changing a cultural way of life. Likewise, the product of tribal courts is not a jurisprudential laminate. Tribal courts can be the possible laboratories for new, beneficial concepts in law.

I. THE PERSISTING THIRD SOVEREIGN

A. The Indigenous Third Sovereign

American Indian tribes' status as nations on the North American continent preceded the European invasion and persisted through the resolution of conflicts among the European powers. The successor republic of the United States (U.S.) then continued certain relationships with the tribal nations. How the Europeans and the Euro-Americans treated the indigenous nation states reflect both the practicalities and the jurisprudential theories operating during the encounters.

Since the European invasions of the Americas, the American Indian tribes have been treated, in some form, as sovereigns or nation states within the law of nations or international law. The tribes were recognized as nations in international law before the formation of the republic. The recognition continued in the emerging U.S., in the Constitution and in Supreme Court decisions that continuously uphold this political status.

3. See generally COHEN'S HANDBOOK, supra note 1, at 47-58. Covering the pre-Revolutionary period (1532-1789), the handbook summarizes the basic tenets under the law of nations and argues that American Indian nations are sovereign powers whose governments and ownership of land should be honored. In this period, Francisco de Victoria and others established the recognition of this nation-state status which was not subordinated or obliterated by European powers' claims based on divine rights or discovery. The basic tenets survive in contemporary American Indian law. See also Robert A. Williams Jr., The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought, 57 S. CAL. L. REV. 1 (1983).

4. Constitutional recognition of the tribal nations occurs with the exclusive federal authority empowering Congress "to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The treaty power applies. Id. art. II, § 2, cl. 2. Another provision excludes "Indians not taxed" from those to be counted as part of the United States population for purposes of determining representative districts or apportioning direct taxes. U.S. CONST. art. I, § 2, cl. 3; cf. amend. XIV (restating exclusion of "Indians not taxed" while eliminating the limitation on counting slaves). Other provisions in the Constitution which provide for exclusive federal power include the war power and the power over federal property. U.S. CONST. art. I, § 8, cl. 11; U.S. CONST. art. IV, § 3, cl. 2. See generally COHEN'S HANDBOOK, supra note 1, at 58-74 (covering the nation-to-nation relations and treaties between the Indian tribes and the emerging United States republic in the Revolutionary War period and the early constitutional period).

5. From early Marshall Court decisions through its most recent decisions, the Supreme Court has maintained the status of American Indian tribes as sovereigns within the United States. They are "distinct, independent political communities" whose status as sovereign governments was not lost because of a protectorate relationship with the United States. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557-59 (1832). As nations, the tribes are qualified to exercise powers of self-government because of their original tribal sovereignty, not because of a delegation of power from the federal government. United States v. Wheeler, 435 U.S. 313, 323-24 (1978); see also Oklahoma Tax Comm'n v. Sac, 113 S. Ct. 1985 (1993); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 111 S. Ct. 905 (1991); U.S. v. Wheeler, 435 U.S. 313 (1978); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
The legal history includes federal government policies which cyclically aimed to exterminate the Indian tribes as nations, as identifiable populations, and as cultures. Conversely, the federal government recognized and protected in varying degrees the indigenous nationhood and promoted tribal sovereignty and the power of self-governance. Today, the power of the American Indian nations as the third sovereign remains indeterminate as to its meaning and boundaries. Undeniably, it is a power unlike the federal and state governments.

Unanswered questions abound on how the federal government and the fifty states identify, acknowledge, and respect the boundaries of power of the American Indian nations. These nations persist in asserting a sovereignty whose basis lies outside the foundation of a social contract. The tribal nation's sovereignty is outside the "mutuality of concession" that formed a national union with retained powers for the state units.


7. Approximately 537 tribal government entities are the indigenous nations of concern in this paper. Entities recognized and eligible for benefits and services from the United States, primarily the Bureau of Indian Affairs, include 311 tribal entities in the lower 48 states and 226 Alaskan governmental entities. See Notice, 58 Fed. Reg. 54364 (1993). The Alaskan entities include villages as well as corporations formed through the provisions of the Alaska Native Claims Settlement Act. Consequently, status as a sovereign nation, with the power of self-governance over communally owned territory, does not exist for all the Alaskan entities recognized by the federal government as eligible for government programs. Additionally, there are some 230 extant and functioning tribes which have not been recognized by the federal government. Rachel Paschal, Note, The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process, 66 Wash. L. Rev. 209 (1991). The unrecognized tribes can apply for federal recognition through the "federal acknowledgment process" established through a regulation of the Bureau of Indian Affairs, not by congressional act. Protections For Establishing That an American Indian Group Exists as a Tribe, 25 C.F.R § 85 (1993) (originally codified at 25 C.F.R. § 54). Since the acknowledgment process began in 1978, 120 Indian groups have petitioned for federal recognition; final determinations have been made on only 19 petitions. Pascal, supra, at 215-16. See also William W. Quinn, Jr., Federal Acknowledgement of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83, 17 Am. Indian L. Rev. 37 (1992); William W. Quinn, Jr., Public Ethnohistory? Or, Writing Tribal Histories at the Bureau of Indian Affairs, The Pub. Historian 71 (1988). Because the acknowledgment standards require complex documented information incompatible with oral societies and the duration of the application review, American Indian tribes and organizations have asked Congress to act and expedite the process. Some proposed bills revamp the general procedures while others focus upon specific tribal groups seeking federal recognition. See H.R. 2549, 103d Cong., 1st Sess. (1993) (bill to establish administrative procedures to extend Federal recognition to certain Indian groups and statutory revision of 25 C.F.R. § 83); S. 1078 and H.R. 2366, 103d Cong., 1st Sess. (1993) (bill to confirm the Federal relationship with the Jena Band ofChoctaw Indians ofLouisiana); George Judson, Not 'The Last,' but an Official Tribe, Mohegan Indians Now Want Casino, N.Y. Times, Mar. 24, 1994, at A12 (Mohegan Tribe, popularly known as Mohicans, succeeded in obtaining federal recognition through application filed in 1978); Timothy Egan, Indians Become Foes in Bid for Tribal Rights, N.Y. Times, Sept. 6, 1992, at A8 (reporting that 21 petitions for acknowledgment have been determined, with eight tribes obtaining federal recognition through 25 C.F.R. § 83 procedures).


Indian tribe cases offer more than a chance to display appropriate sensitivity to the experiences of many within this country. Indian cases provide vivid insight into three central themes for federal courts' jurisprudence to explore: 1) whether and
The "involuntary annexation" of tribal nations placed them outside of the state and national polities, resulting in an extraconstitutional relationship that has not produced a coherent theory or guidance for relations among the sovereigns.9

Confusing questions and answers arise when the state and federal governments and commentators seek resolution based on a viewpoint which ignores the uniqueness of American Indian sovereignty. These interjurisdictional encounters in the legal context produce American Indian law and concepts which become part of this nation's jurisprudence. More than a historical or legal misfit occurs in efforts to resolve issues arising in relationships with the indigenous nations. A critically different cultural perspective operates on the Indian side of the encounters.

The development of American Indian law has both denied and included the cultural perspective of the third sovereign. Acknowledging the cultural viewpoint of the indigenous nations is requisite for creating law appropriate for the Indians directly affected. Generally speaking, the indigenous viewpoint is derived from origins as communal societies bound to coexistent relationships with nature. In tribal lawmaking this indigenous perspective assumes centrality. Balance and harmony in one's relationships with other community members, all life forms, and the physical universe anchor the tribal values. These values set the goal of reconciliation in the remediation of disputes. As Pommersheim compares the tribal and non-Indian societies, "The traditional law and narrative of many tribes... place emphasis on community, cooperation, and relatedness. However, the dominant legal narrative of majoritarian jurisprudence is often rooted in individualism, competition, and autonomy."10 In the tribal society, past and present are inseparable as the continuation of a story anchored in values enduring in contemporary life.

Accordingly, cultural viewpoint guides when American Indian nations create enacted and common law. In the design and administration of tribal government—the executive, legislative, and judicial branches—the customs of the communal society are deliberately pervasive. In the creation of American Indian common law, in the longstanding and emerging tribal courts, custom serves in conjunction with appropriate principles from federal and state law.
Using custom is essential for the cultural survival of American Indians as a distinct people and as a governing entity. Cultural survival depends on the economic development of tribal resources: land, water, minerals, wildlife, and agricultural and natural resources. In its executive, legislative, and judicial branches, the tribal government must implement policies and laws that make productive the members’ use of the nation’s resources. In selecting the ways to promote personal well-being for members and economic gain for the community, most tribes seek means congruous with tribal values and customs. Yet, the internal choices of tribes unavoidably intersect with external forces, the federal and state governments.

B. Federal and State Relationships

The unique relationship between American Indians and the federal government creates legal interactions extending much further than with other ethnic populations in the United States. This greater degree arises from the numerosness of issues and their complexity. The status of American Indian nations as dependent sovereigns creates continuous disputes before the federal courts as tribal activities intersect with state or federal concerns, for example, gaming, environmental regulation, and custody of children. While tribal sovereignty endures, it remains hostage to whatever limits Congress imposes through plenary power.

Consequently, Congress’s use of plenary power to define the nature and scope of the Indian nations’ sovereignty creates a continuing dialogue, tension, and often, new legislation to address emerging issues.11 Significant federal legislation covers diverse areas, including jurisdiction over children,12 protection of Indian arts and crafts,13 gaming enterprises,14 jurisdiction over and control of environmental regulation,15 and protection of graves and cultural artifacts.16 Indisputably, no other ethnically identifiable population has so complex a relationship with the national gov-

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ernment and its legislature. These relationships range from the most personal matters of family relations, to occupational regulation of the producers of crafts and arts, to the broadest jurisdictional issues among local, state, and federal governments. Only American Indians present such a national legislative range. During the political interactions involved in Congressional lawmaking, tribal advocates are essential if tribal views are to be included in legislative results.

Supreme Court decisions have also complicated the previously limited relationship of tribes with state governments through decisions that recognize certain state interests. Since the 1960s, the indigenous nations have increasingly exercised their sovereignty. The growth and scope of that power is most evident in the expanded formation and operations of tribal governments. Where jurisdictional questions arise, in the juncture with state and federal governments, new and nongeneric legal issues serve as litigative fuel. The tribal courts, also increasing, are important as the branch where the native sovereign uses custom to create jurisprudential principles distinct from the state and federal government. The use of customary principles by tribal courts provides an alternative decisional basis for state and federal courts and develops tribal common law.

17. Monroe E. Price, Lawyers on the Reservation: Some Implications for the Legal Profession, 1969 Ariz. L. Rev. 161, 163:

Because the very existence of Indian organizations [and governments] is now dependent on the pleasure of Congress, law has taken on a role in the life of Indians that it has thankfully not assumed over the life of almost any other groups. The [federal] government's power is of life and death dimensions.

See also Felix S. Cohen, Federal Indian Law 457 (1942) (describing the "basic materials of Federal Indian Law" as: 4,264 statutes; 389 treaties; 1,725 reported cases; 523 opinions of the Attorney General, etc.; 838 Interior Department rulings; 629 legal texts and articles; 141 tribal constitutions; 112 tribal charters; and 301 Congressional reports and miscellany. The 50 intervening years have only increased the federal legal complexities through which American Indians must traverse).

18. E.g., Oklahoma State Tax Comm'r v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991) (tribal sovereign immunity precludes state from collecting sales tax on sales to tribal members occurring on trust lands of a federally recognized tribe, though taxes can be imposed on sales to nonmembers); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (pursuant to federal law, the tribe has a protectable interest that permits the tribal government to impose zoning regulations on fee land within the closed area of reservation while this authority does not extend to "open" areas); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (state interest and related services suffice to impose severance tax on oil and gas produced on reservation lands); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (state cannot regulate tribal bingo enterprises because of the compelling federal and tribal interests in Indian sovereignty and self-government, including tribal self-sufficiency and self government); Rice v. Rehner, 463 U.S. 713 (1983) (state's established interest in licensing liquor sales dominates when the tribe has not traditionally regulated).

19. See supra note 7. States also recognize tribes for government-to-government purposes. The purpose and determination of federal and state recognition are independent of each other. Approximately 36 state governments have established state agencies and commissions to promote and manage relations with Indian governments. Governors' Interstate Indian Council Directory (1993); see also Frank Pommersheim, Tribal-State Relations: Hope for the Future? 36 S.D. L. Rev. 239 (1991) (discussing tribal-state relations and agreements on taxation, human services, and water.)
II. TRIBAL COURTS, CUSTOM, AND COMMON LAW

A. Tribal Courts

Tribally operated courts are "the primary tribal institutions charged with carrying the flame of sovereignty and self-government." They implement executive policy decisions and legislative acts. The tribally operated courts are the vanguard for advancing and protecting the right of tribal self-government:

A central focus of the Indian nations today ... is the stabilization of tribal governments as legitimate political entities within the American federal system of government, with paramount control over their own territories, treaty rights, and resources. Tribal legislators and executives must understand that such a stabilization of their authority is impossible without a strong, effective, independent and respected

20. The term "tribal courts" encompasses the courts created through the exercise of sovereign authority by tribes and by the authority of the Bureau of Indian Affairs (BIA), Department of Interior, to establish courts of Indian offenses. "'Indian court' means any Indian tribal court or court of Indian offense." 25 U.S.C. § 1301(3) (1988). This section of the paper focuses on the choice of tribal governments to establish courts designed for their particular and customary needs. A tribe's governmental objectives cannot be met by existing majority courts. In modern tribal nations some tribal objectives can be achieved through tribally-authorized courts or those established through the BIA courts of Indian offenses. The BIA courts are transitional courts which serve until the tribe establishes a court whose authority arises from the inherent sovereignty of the tribal nation. The BIA courts are often called CFR courts after the Code of Federal Regulations under which they operate [hereinafter CIO/CFR courts]. Both forms of courts allow the use of tribally-designed law, though the CIO/CFR courts have civil jurisdictional limits not applicable to tribally-authorized courts. Significant revision of the rules for CIO/CFR courts was published in 58 Fed. Reg. 54,406 (1993). Provisions mandate the use of customs of tribe, 58 Fed. Reg. 54,406 (1993) (to be codified at 25 C.F.R. § 11.100(f) and establish that, if not prohibited by federal law, tribal ordinances, custom, and usage shall be the applicable law, 58 Fed. Reg. 54,506 (1993) (to be codified at 25 C.F.R. § 11.500); cf. BIA regulation: Law and Order on Indian Reservations:

The governing body of each tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction may enact ordinances which, when approved by the Assistant Secretary—Indian Affairs or his or her designee, shall be enforceable in the Court of Indian Offenses having jurisdiction over the Indian country occupied by that tribe, and shall supersede any conflicting regulation in this part. 58 Fed. Reg. 54,406 (1993) (to be codified at 25 C.F.R. § 11.100(e)). A tribe may develop its code prior to establishing a tribally-authorized court; this allows code use in an interim CIO/CFR court. Where distinctions should be made between those courts established through the power and authority of the tribal governments as opposed to the BIA, this will be stated.

21. Frank Pommersheim, The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay, 18 N.M. L. REV. 49, 71 (1988); see also Frederic Brandfon, Tradition and Judicial Review in the American Indian Tribal Court System, 38 UCLA L. REV. 991, 1012 (1991) ("The tribal courts also function to define the social group by at least partially insulating tribal government from the jurisdiction of the federal and state courts. Thus, a significant strengthening of the tribal court system ought to result in increased tribal integrity."); John C. Mohawk, Indian Economic Development: An Evolving Concept of Sovereignty, 39 BUFF. L. REV. 495, 501 (1991) (tribal economic success is tied to the use of political power, first in operating fair forms of government and "perhaps indistinguishable from the first, ... an independent judiciary designed and empowered to render impartial judgments"); UNITED STATES COMMISSION ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 29-70 (1991) [hereinafter Indian Civil Rights Commission Report]. This report emphasizes the development of independent, adequately funded tribal courts as essential to the legitimacy needed for tribal governments to engage in beneficial political and economical relations with nonmembers and other governmental entities.
Indian court system. Without an Indian judiciary, the tribes will always be dependent on foreign, sometimes hostile, state or federal judges to decide crucial questions that arise within the tribal territory.22 Simultaneously, tribal courts must provide reliable and equitable adjudication in ordinary matters such as divorce and business issues critical to the survival of the tribe. Lawyers sensitive to tribal cultural interests are the professional vanguard to protect and advance tribal governments in matters external and internal.

As courts designed and operated by tribal governments have multiplied, when they assert jurisdiction these courts directly contact with non-Indians and nonmember Indians.23 Inevitably, these individuals challenge the tribe’s power over them. While the executive and legislative acts may encompass such parties, the court is where the political entity’s power is ultimately exercised and used for legal determinations. Thus, concerns about the reach of the tribal government’s power become questions about the scope of its court’s authority or jurisdiction.

The scope of a tribally operated court’s responsibilities has provoked continuing attention from other courts, the media, and the public. The non-Indian world reacts, sometimes with alarm, when tribal governments assert rights that legally and economically affect nonmembers and the

22. Michael Taylor, Modern Practice in Indian Courts, 10 U. Puget Sound L. Rev. 231, 274 (1987). The variance in tribal cultures, situations and resources affects the particular governance system and judiciary established by these nations. At the comprehensive end of the range are the Navajo Nation courts, with several divisions and a fully-staffed Supreme Court, which serves a population of over 143,000 living on over 25,000 square miles in Arizona, New Mexico, and Utah. Navajo Nation, We the First Americans, in 7 Bureau of Census (1993) (summary report on American Indians and Alaskan Natives). The Navajo Nation courts processed over 45,000 cases per year by 1987. Taylor, supra, at 236. Recently, Chief Justice Robert Yazzie of the Navajo Supreme Court reported that in 1992 the Navajo Nation’s courts handled 85,000 cases which included 16,000 criminal, 24,000 traffic, and 13,000 family law cases. Chief Justice Robert Yazzie, Address at the University of New Mexico School of Law (March 2, 1993). Other tribes, with smaller populations and different circumstances are part-time operations with limited dockets.

23. In 1978, the National American Indian Court Judges Association, using data supplied by the BIA, reported there were 71 tribal courts, 32 CIO/CFR courts, and 16 traditional courts. Nat’l Am. Indian Court Judges Ass’n, Indian Courts and the Future (1978). In 1988, this number rose to 150 courts, of which CIO/CFR courts were less than 20. Tribal Court Systems and the Indian Civil Rights Act: Hearing Before the Senate Select Committee on Indian Affairs, 100th Cong., 2d Sess. 19 (1988) (statement of Donald D. Dupuis, President, National American Indian Court Judges Association); see also Bureau of Indian Affairs, Native American Tribal Court Profiles (1985). The CIO/CFR courts and their jurisdiction are listed in 58 Fed. Reg. 54,406 (1993) (to be codified at 25 C.F.R. § 11.100) which names 20 courts, some of which serve more than one tribe. Recently new CIO/CFR courts were authorized and opened in Eastern Oklahoma. The most recent listing of the courts can be found at Bureau of Indian Affairs, Tribal Gov’t Servs., Directory of Tribal Judiciaries and Courts of Indian Offenses (1993). The directory includes tribally-authorized and CIO/CFR courts and lists the judges, personnel and appeals structure for 217 courts. The listing includes tribal judiciaries that do not receive funding from the BIA. See also Maria Odum, Money Shortage Seen as Hindering Indian Justice, N.Y. Times, Oct. 4, 1991, at B9 (reporting that “147 Indian tribal courts . . . exercise jurisdiction over nearly two million Indians in the United States”); Charles Aweeka, Tribal Courts: Unique System—Circuit Judges Dispense Justice that is Based on a Different Set of Rules, Seattle Times, Jul. 17, 1991, at F1 (reporting that “There are 130 tribal courts and 250 Native-American court judges for the 260 tribes with federal reservations in the U.S.”).
dominant society. Nonmembers make voluntary contracts with tribal parties or act within the geographical reach of tribal regulatory schemes. In disputes arising from contacts and the reach of tribal government power, the non-Indian parties scrutinize the tribal court's claims of integrity, fairness, and legitimacy.

Usually judicial authority is asserted by two types of *tribally initiated courts*: the courts of Indian offenses and specific tribal courts. The Bureau of Indian Affairs (BIA), through the authority of the Department of the Interior, organizes the court of Indian offenses. Tribal governments, pursuant to their inherent sovereignty, establish and control specific tribal courts. The tribally authorized courts have civil and limited criminal jurisdiction over lands designated as "Indian Country."

The two types of courts differ significantly. Which sovereign, the federal or tribal, exercises the power to design and authorize the court is important. A crazy-quilt of jurisdiction exists in contemporary Indian law. Whether the court operates under federal or tribal authority determines its power over certain actors and acts. However, important commonalities

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> It is the purpose of the regulation in this part to provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of state jurisdiction but where tribal courts have not been established to exercise that jurisdiction.

58 Fed. Reg. 54,406 (1993) (to be codified at 25 C.F.R. § 11.100(b)). Compare with the former purpose in 25 C.F.R. § 11.1(b) (1991): "It is the purpose of the regulations in this part to provide adequate machinery of law enforcement for those Indian tribes in which the traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or state law." The courts are federally funded and administered, but the tribal nation initiates, collaborates, and consents in the contemporary pattern for establishing these courts. Because of limited resources, small numbers of members, and geographical situations, some tribal nations have chosen to establish CIO/CFR courts and intertribal courts instead of separate tribally authorized courts. *E.g.*, the Northwest Intertribal Court System serving 15 tribes, the Northern Plains Intertribal Court of Appeals of South Dakota, and the Southwest Intertribal Court of Appeals.


- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of state,
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

include the concern for the legitimacy and integrity of the decision-making process and the sources of the law used (tribal, federal, and state).

The courts of Indian offenses were established in 1883 as a reform responsive to a perceived need to regulate law and order on reservations. They are often called CFR courts (CIO/CFR courts) after the extensive Code of Federal Regulations which apply. In contrast, some traditional tribal courts operated before and after contact with Europeans and the formation of the U.S. republic. Cohen reported, "[m]ost traditional systems were weakened or overwhelmed" by the changed conditions and the power of the federal government. In response to such a perceived void the Secretary of Interior relied upon his general authority over Indian affairs, not an express statutory authorization, to establish these courts.

Though some tribal nations maintained their own courts, at a peak period in 1900 the CIO/CFR courts operated in about two-thirds of the reservation districts served by BIA agents. The courts did more than enforce law in a manner parallel to that used to prosecute offenses in the dominant society. "Indian" conduct that resisted acculturation and assimilation was punished. The subsequent development of the CIO/CFR courts was part of the New Deal era reform.

The Indian Reorganization Act (IRA) of 1934 reestablished the federal policy of tribal self-determination and rejected the allotment policy aimed at terminating tribal government. Under the IRA, tribes could organize lands within the boundaries of the reservation which have an impact on tribal health, safety, or economic security. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); United States v. Montana, 450 U.S. 544, 564 (1981). Civil jurisdiction over non-Indians can also be asserted where non-Indians enter into consensual relationships with Indians or the tribe, Washington v. Colville Confederated Tribes, 447 U.S. 134, 152 (1980), and when Congress delegates to the tribes power to regulate non-Indian behavior, United States v. Mazurie, 419 U.S. 544, 557 (1975).

28. See Pommersheim, supra note 21, at 50-53 (historical description); ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 36-37 (3d ed. 1991) regarding CIO/CFR Courts as response to Ex parte Crow Dog, 109 U.S. 556 (1883) (federal court denied authority to try and punish an Indian for the murder of another Indian because tribes retained their "self-government . . . the maintenance of order and peace among their own members" absent explicit renunciation of the power by the tribe or removal of the power by Congress).


30. WILLIAM THOMAS HAGEN, INDIAN POLICE AND JUDGES 109 (1966). The Five Civilized Tribes, the Indians of New York, the Osage, the Pueblos, and the Eastern Cherokees had recognized tribal governments and maintained their courts. See also Arrell M. Gibson, Constitutional Experiences of the Five Civilized Tribes, 2 AM. INDIAN L. REV. 17 (1974); RENNARD STRICKLAND, OF FIRE AND SPIRITS: CHEROKEE LAW FROM CLAN TO COURT xi, xii (1975):

There is a widely held belief that the Cherokees dramatically broke with their ancient law ways and passed from a state of complete 'savage' lawlessness to a highly sophisticated, efficiently operating 'civilized' system of tribal laws and courts . . . the Cherokees did not, as is commonly believed, break all threads of continuity with Cherokee tradition.

31. HAGEN, supra note 30, at 109.

32. Id. at 120. The 1892 CFR revision provided "[t]hat if an Indian refuses or neglects to adopt habits of industry, or to engage in civilized pursuits or employment, but habitually spends his time in idleness and loafing, he shall be deemed a vagrant" and punished accordingly. Other offenses included engaging in "heathenish" dancing, plural marriages, and the interference of medicine men with the programs to civilize Indians. Id. at 110.

their governments, that is, draft their own constitutions, enact their own laws through tribal councils, and institute their own court systems. The BIA drafted most of the tribal constitutions in a generic fashion. The BIA constitutions did not provide for a separation of powers nor a judicial system. The inclusion in IRA tribal constitutions of traditional and independent courts was a subsequent modification.

The IRA did not address the CIO/CFR courts. In fact, Congress has never expressly authorized these courts; their legitimacy derives from congressional acquiescence with the Secretary’s use of his power. The Commissioner of Indian Affairs in 1935 published a revised Code of Indian Tribal Offenses for these courts. The revised CIO/CFR code and the IRA provisions restored a significant measure of self-determination to tribal governments. Recently, new CIO/CFR courts have been established with the expanded growth in tribal governments. They serve as interim courts until tribes authorize and operate their own courts.

Both tribally authorized and CIO/CFR courts are important in the exercise of sovereign power and in building respect for the use of this power. Each forum can use tribal law. Each forum must answer the questions raised about legitimacy which naturally arise from nonmember Indians and non-Indians brought within the court’s jurisdiction. How each tribe designs and operates its tribal courts demonstrates the need for “legal-warriors,” American Indians with law training who have

34. FELIX S. COHEN, FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 149 (1982) (“Tribal constitutions and corporate charters were subject to detailed examination before Secretarial approval was granted. Although some constitutions were individualized, many were standard ‘boilerplate’ constitutions prepared by the Bureau of Indian Affairs and based on federal constitutional and common law notions rather than on tribal customs.”). See also NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, supra note 23, at 7-13; Curtis Berkey, Implementation of the Indian Reorganization Act, 2 AM. INDIAN L. REV. 2, 4 (1976). Frank Pommersheim, A Path Near the Clearing: An Essay of Constitutional Adjudication in Tribal Courts, 27 GONZ. L. REV. at 396 n.14 (1991/92), points out that the omission of a Bill of Rights and a separation of powers from the IRA constitutions “are the ones [omissions] that tribes are most criticized for, when in fact the blame lies elsewhere.”

35. COHEN’S HANDBOOK, supra note 1, at 333 (1982); see U.S. v. Clapox, 35 F. 575 (D. Or. 1888) (The President, acting through the Secretary of the Interior, has the general power under the federal statutes to establish courts of Indian offenses and provide for their jurisdiction.). CIO/CFR courts, while serving a transitional function for tribes, remain under the control of the Department of the Interior. United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 383-84 (8th Cir. 1987).

36. “The Department of the Interior will accord the same weight to decisions of a Court of Indian Offenses that it accords to decisions of a tribal court.” 58 Fed. Reg. 54,406 (1993) (to be codified at 25 C.F.R. § 11.104(d) (eliminates appeal to Department of Interior of CIO/CFR court decisions). Iowa Mut. Ins. v. LaPlante, 480 U.S. 9, 16 (1986) (“Adjudication of such matters [on-reservation tort] by any nontribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.”). The Supreme Court rejected a diversity argument and required the non-Indian insurer to exhaust tribal remedies as required under National Farmers. The suit “should be conducted in the first instance in the tribal court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.” National Farmers Union Ins. v. Crow Tribe, 471 U.S. 845, 856 (1984).

retained their cultural identity and values. The architectural role and implementive work of legal-warriors informed in tribal culture are important in building the legitimacy of the developing court systems.

B. The Legitimacy of Tribal Court

Legitimacy in law formally requires that judges decide cases in accordance with respected principles and not by personal or arbitrary values. The decision reached must logically follow or use reasoning from the legal rules that have been authorized. The court repeatedly uses and refines the authorized rules based upon underlying principles. As Dworkin analyzes law's development, the underlying principles are the important guide to establishing and maintaining the integrity of the legal system. Integrity generally refers to a personal or institutional adherence to a code of moral or artistic values which is incorruptible. In a legal system, integrity is inextricably related to due process, fairness, and the just result an observer or affected party attributes to the court's decisions. The affected persons expect to be protected from partiality, deceit, and other abuses in the process and the decisions that control the lives of community members.

Integrity in a judicial system starts with the political entity or community. Decisions which make integrity manifest are based upon the values that a society has chosen for its moral and political foundation. Principles of political morality must justify the state's use of coercion and societal power over the lives of members and others. The court, over time, should produce decisions that manifest a consistency with guiding principles that evoke respect and obedience. As Dworkin points out, abiding with principles, rather than every past decision, ultimately promotes the acceptance of court decisions and the compliance from community.

When parties and other affected persons refuse to abide by the court's decisions, they have concluded that integrity is lacking. If the court's mandates do not seem to require compliance, then the court does not
have legitimacy. Parties and others may deny legitimacy because the court forum, the actions of judges and personnel, the use of procedures, and substantive law do not command respect. Establishing integrity and legitimacy as a properly authorized forum has been a major concern to the tribal governments and courts, commentators, and to Congress.

40. The tribal governments struggle to establish and operate independent judiciary, staffed with trained judges and personnel, who use tribal code and common law, which do not produce arbitrary and capricious decisions. The scarcity of resources is a constant barrier, e.g., inadequate funding for providing representation for indigent persons. Yet, fundamental principles are incorporated to defend against the pressures of political factions and issues that could undermine legitimacy. See the Indian Civil Rights Commission Report, supra note 21, at 29-70. This section of the report includes testimony and data on the varied forms that tribes have used to establish judicial forums that warrant respect, from the Northwest Intertribal Court System serving 15 small tribes in Washington State to the Navajo Nation Courts and their triumph in establishing judicial independence while serving a nation without a constitution.

In the Navajo Nation, one case, Halona v. MacDonald (1977), has been called the “Marbury v. Madison of Navajo jurisprudence.” Alvin J. Ziontz, After Martinez: Civil Rights Under Tribal Government, 12 U.C. Davis L. Rev. 1, 22 (1979). See Halona v. MacDonald, 1 Navajo Rptr. 341 (Navajo D. Ct. 1978), aff’d, 1 Navajo Rptr. 189, 5 Indian L. Rep. 119 (1978) (Navajo law and custom and federal law mandate judicial review of tribal council actions even though there is no Navajo constitution to provide such judicial power). The Navajos faced a governmental crisis when Chairman Peter MacDonald was prosecuted for 41 criminal offenses. He offensively challenged, inter alia, the authority of the tribe’s courts by terminating judge appointments, appointing and seeking judges who would rule favorably to MacDonald, and challenging the authority of the tribal council to remove him from office. The Navajo Nation appointed a special prosecutor pursuant to legislation, and the non-Navajo prosecutor pursued cases through appeal. The Navajo courts’ independence endured. MacDonald’s protracted attack upon the Navajo branches of government, especially the courts, is documented. See Navajo Nation v. MacDonald, Jr., 19 Indian L. Rep. 6079 (Navajo 1992); Navajo Nation v. MacDonald, Sr., 19 Indian L. Rep. 6053 (Navajo 1991); In re Bowman: Navajo Nation v. MacDonald, Sr., 16 Indian L. Rep. 6085 (Navajo 1989); In re Certified Question II: Navajo Nation v. MacDonald, Sr., 16 Indian L. Rep. 6086 (Navajo 1989); In re Certified Question I, Navajo Nation v. MacDonald, 16 Indian L. Rep. 6098 (Navajo 1989); MacDonald v. Yazzie, 16 Indian L. Rep. 6099 (Navajo 1989); Plummer v. Brown, 16 Indian L. Rep. 6100 (Navajo 1989); Plummer v. Brown, 16 Indian L. Rep. 6101 (Navajo 1989); MacDonald v. Yazzie, 967 F.2d 590 (9th Cir. 1992) (unpublished opinion).


For tribal governments, each session of Congress involves new struggles to obtain funding previously promised while fending off efforts to diminish the jurisdictional power of tribal courts.42

41. Compare Samuel J. Brakel, American Indian Tribal Courts: The Costs of Separate Justice (1978) (criticizing the tribal courts for failing to meet the standards of state and federal courts and, even if such standards were met, questioning whether another court system can be justified) with Nat'l. Am. Indian Court Judges Ass'n, Indian Courts and the Future (1978) (acknowledging the problems of creating independent courts while articulating standards for guiding the existing and new tribal courts). See also Tom Tso, Moral Principles, Traditions, and Fairness in the Navajo National Code of Judicial Conduct, 76 Judicature 15 (1992) (account of development and adoption of new code of judicial conduct based on tribal custom and selective adoption of ABA code); Judith Resnik, Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. Chi. L. Rev. 671, 742-59 (1989) (discussing the value of Indian courts as the "other" courts for the majority society); Richard B. Collins, American Indian Courts and Tribal Self-Government, 63 A.B.A. J. 808 (1977). Sharon O'Brien points out that:

American society historically has proven reluctant to accept and integrate the Indian definition of social justice and culture into its mores . . . . Rawls, as have many other philosophers, questions this basically utilitarian contention—that justice is served if one group experiences a loss of freedom for the sake of the greater good. This is, however, exactly the rationale used by American society to deny tribes justice.


42. Congressional efforts include hearings by the oversight committees, especially the Senate Select Committee on Indian Affairs, and proposed legislation to regulate tribal courts. Incorporating the information from recent Senate hearings as well as its own hearings, the U.S. Civil Rights Commission issued a report on how the Indian Civil Rights Act (ICRA) had affected the tribal courts. The Indian Civil Rights Commission Report, supra note 21. In its investigation the Commission produced data on how tribal courts are functioning in general. The Commission's conclusion is substantively related to the criticism of tribal courts:

The ICRA was imposed on tribal governments by the Federal Government without accompanying support in the form of adequate funding, resources, or guidance as to how the rights guaranteed by the ICRA impact on tribal government. The Commission believes that respect for tribal sovereignty requires that prior to any further intrusion by the Federal Government into tribal justice systems, such as by way of imposing Federal court review, tribal forums be first given the opportunity to institute proper mechanisms that would operate with adequate resources, training, funding, and support from the Federal Government.

Id. at 51.

Providing financial and technical assistance for tribal and CIO/CFR courts is the responsibility of the Judicial Services Branch of the BIA. Lack of funding by Congress has produced the problems outlined in the Commission's Report. See Maria Odum, Money Shortage Seen as Hindering Indian Justice, N.Y. Times, Oct. 4, 1991, at B9 (Chief Justice Tom Tso of the Navajo Nation Supreme Court: "If you cut the funding to other courts in the United States by 50 per cent—and I think that would be equivalent to the situation we're in—would they be able to provide the full array of civil rights?").

As one critical response to tribal courts, Senators Orrin Hatch and Slade Gorton have repeatedly introduced legislation to allow federal review of tribal court decisions, including decisions that may be based on custom. In response to one proposed act which would impose federal review, Hilda Manuel, former Chief Judge of the Tohono O'odham Tribal Court, said at the time she became head of the Judicial Services Branch of the BIA, that the solution is improving tribal courts and laws rather than eroding their power.

[T]he bureau (BIA) has the responsibility to help develop tribal courts, and they've taken that responsibility by annually asking for money, and they've failed at doing that. Now tribal courts are under attack because they don't have systems the dominant society thinks they ought to have. If this legislation passes, it is an
Some indicators of the growing legitimacy of tribal courts include (1) the increase of legally trained Indian people within the many judicial systems; (2) the revisions in tribal constitutions and development of codes; (3) the continued recognition of tribal courts by the U.S. Supreme Court as well as state courts; and (4) the development of customary law. Of these, the development of tribal-specific law presents the strongest case for a judicial system tailored to serve the evolving indigenous sovereigns, although the other elements matter. In the creation of tribal common law the training and skills of the legal-warriors who operate and practice in tribal courts will be tested.

Increasingly, Indians who serve as the judges, prosecutors, public defenders, and support personnel of the tribal courts are receiving quality training. Specialized Indian related training is combined with programs commonly available to state and federal judges and court officers. The National American Indian Court Judges Association has provided training for judges and staff for approximately twenty years. Some tribal judges attend both the National Indian Justice Center at Petaluma, California and the Judicial College at Reno, Nevada, which is also used to train state judges. Increasing numbers of tribal court judges and officers are attorneys.


Pommersheim, supra note 21, at 61.

Tom Tso, The Process of Decision Making in Tribal Courts, 31 Ariz. L. Rev. 225, 228-29 (1989) (describing selection of Navajo judges with continuing evaluation and training); Michael D. Petoskey, Tribal Courts, 67 Mich. B. J. 366, 369 (1988) (describing the structure, authorizing legislation and training of tribal court of the Grand Traverse Band in Michigan); Michael Taylor, Modern Practice in Indian Courts, 10 U. Puget Sound L. Rev. 231, 236 n.22 (1987) (also lists as judicial training resources the American Indian Lawyer Training Program of Oakland, California; the American Indian Law Center located at the University of New Mexico; the Federal Legal Services Corporation; and the BIA). The American Indian Bar Association, in conjunction with law schools and bar associations, provides training for lawyers and judges.


Oklahoma Indian Bar Association, 1993 Directory of Indian Nations and Tribal Courts (1992). Oklahoma has 34 "tribal" courts, comprised of tribally authorized courts and CIO/CFR courts; some tribes use both types of courts. "The majority of tribal judges in Oklahoma are
The collaborative and valuable work of nonlawyers is congruous with the increased expertise of judges and judicial personnel. Training and certification programs are regularly available for persons who have functioned in traditional dispute resolution through their status and skill as elders, peacemakers, advocates, and community representatives. Codification and common law based on custom and usage have further legitimized the work of these individuals in tribal courts.46

Drafting and revising tribal constitutions and codes is critical work in governmental development; legal-warriors are essential in this work. Revision of generic IRA constitutions to establish an independent judiciary is the first step in making tribal governments responsive to modern needs.47 The codification of civil, regulatory, and criminal authority has increased as indigenous nations strive to allay fears that tribal justice is unstructured and that courts act arbitrarily and capriciously in both procedures and substantive outcomes.48

46. See Tso, supra note 44. Recently, The Native American Bar Association and the Indian Law Support Center operated by the Native American Rights Fund initiated a historical set of conferences, the National Conference on Traditional Peacemaking and Modern Tribal Justice Systems (October 29-30, 1992, Albuquerque, N.M.), and the National Conference on Traditional Peacemaking Remaking Justice (September 20-22, 1993, Arizona State University). The papers from these conferences comprise a unique and creative resource for attorneys, tribal judges, tribal government officials, and those who study tribal courts. See also NATIONAL INDIAN JUSTICE CENTER, ALTERNATIVE DISPUTE RESOLUTION MANUAL (1989).

47. Creating an independent judiciary is a critical task for tribal governments. While the task is achievable in a separation of powers theory, other concepts of government structure suffice, see note 40 regarding tribal courts' independent reviewing power. Modern tribal constitutions break away from the boilerplate IRA models by creating independence for the judiciary and, more importantly, creating independence from the control of the Secretary of Interior. The IRA boilerplate constitutions provided that the Secretary would have to approve tribal ordinances. This power lacks any statutory basis for requiring the Secretary approve or veto ordinances. See ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 362-79 (3d ed. 1991); Summary Report of Hearings and Investigations by the Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, 88th Cong., 2d Sess. 1-4 (1964). For a discussion of the foundational work required in tribal constitutions, see Frank Pommersheim, A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts, 27 GONZ. L. REV. 393 (1991/92). Pommersheim describes the Rosebud Sioux's constitutional revisions which removed the review authority of the Secretary of Interior as a way to increase tribal sovereignty. See also Michael D. Petoskey, Tribal Courts, 67 MICH. B. J. 366 (1988) (stressing the importance of providing for judicial independence in the provisions of revised constitutions, as was done with the Grand Traverse Band Constitution).

48. In Duro v. Reina, 495 U.S. 676 (1990), the Supreme Court refused to make nonmember
Drafting and recording the foundational law of the tribe demands creative and integrative skill from legal architects. It is difficult work to mediate between the customary needs of the tribe and the duties of a modern government. Then, to some degree, the fears of outsiders must be allayed by the formal and operative system. Because of the recency of many tribal courts, "much tribal court litigation involves cases in which there is no controlling authority. This alone suggests the possibility for innovative and creative lawyering, which, as a necessary by-product, can help forge a meaningful and enduring tribal jurisprudence."

As Pommersheim reminds, all attorneys involved in the tribal courts have critical contributory roles. The tribal bar "must now rise to the challenges of both culture and history and individual client representation." When the tribal bar produces code drafting, briefs, decisions, and common law pronouncements with skill, specificity, and fairness, these professionals increase the legitimacy attributed to the tribal courts.

The recognition given to tribal courts by the Supreme Court and state courts affirms the legitimacy of tribal justice systems. In civil cases the Supreme Court has held that non-Indians or nonmember Indians cannot escape adjudication of tribal courts. While the Court denied criminal jurisdiction over nonmember Indians in Duro v. Reina, Congress subsequently passed a statute providing tribal jurisdiction over all Indians who commit minor crimes on tribal territory.

Indians subject to tribal criminal jurisdiction without the individual's consent and participation in the political entity:

While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms."

Id. at 2064 (quoting FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 253, 334-35 (1982)). Tribal courts are conscious of the fears of non-Indians and of nonmember Indians. For example, the Intertribal Court of Appeals has stated:

We in this Indian court understand and must accept the racial fear that would be felt by non-Indians if they were to appear in an Indian tribal court to account for a criminal act. This is the same fear felt by many, many Indians who must face white judges, prosecutors and juries in states often hostile to Indians' presence within their boundaries.

Miller v. Crow Creek Sioux Tribe, 12 Indian L. Rep. 6008, 6009 (Intertribal Ct. App. 1984). In his concurrence in Miller, Judge Gregory urged that tribal codes and decisions be written and reported because "[t]he wasicu (whites) have, with compounded progression, used words or lack of them against Indians . . . . The written word is a tool which must be learned and used as it is the modern day weapon." Id. at 6013. In a case where four jurisdictions had entered five orders, the Sitka Community Association Tribal Court articulated five elements which demonstrate that the tribal court was both competent and most appropriate for a fair resolution. Hepler v. Perkins, 13 Indian L. Rep. 6011, 6018-19 (Sitka Community Ass'n Tribal Ct. 1986).

49. Pommersheim, Liberation, Dreams, and Hard Work, supra note 9, at 454.

50. Id.

51. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (exhaustion of tribal court remedies is required in diversity cases; diversity statute not intended to limit the jurisdiction of the tribal courts nor impair tribal sovereignty in this way); National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (until petitioners have exhausted the remedies available in the tribal court it would be premature for a federal court to consider any relief under 28 U.S.C. § 1331).

52. Duro created "zones of lawlessness" where no government (tribal, state, or federal) had
Under theories of full faith and credit and comity some state courts recognize and enforce tribal court decisions. The constitution and the federalism scheme do not mandate this response to decisions from a nonstate jurisdiction. So the state recognition is derived from statutory policy as well as judicial discretionary authority. However, it is not

criminal jurisdiction over certain criminal acts. Justice Kennedy, for the majority, invited Congress to redress this problem, "If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs." Duro v. Reina, 495 U.S. 676, 698 (1990).


53. Some state statutes provide for full faith and credit, but qualify this recognition process by requiring reciprocity from the tribal courts. E.g., OKLA. STAT. tit. 12, § 728 (1992) (state supreme court authorized to issue standards for extending full faith and credit to tribal court records and proceedings where "tribal courts agree to grant reciprocity of judgments of the courts of the State of Oklahoma in such tribal courts"). See also WIS. STAT. ANN. § 806.245 (West Supp. 1993); N.D. CENT. CODE § 27-01-09 (1991 & 1993 Supp.); S.D. CODIFIED LAWS ANN. § 1-1-25 (1992).

Because this type of statute imports and imposes state law as tribal law, tribal governments are wary of such statutory approaches. Additionally, the insistence on using full faith and credit and comity as the conceptual framework burdens the legislative and judicial dialogue about how to recognize and enforce tribal court decisions. Richard E. Ransom, et. al., Recognizing and Enforcing State and Tribal Jurisdictions: A Roundtable Discussion of Law, Policy, and Practice, 18 AM. INDIAN L. REV. 239 (1993).

54. Some state court decisions offer full faith and credit, comity, and other bases for recognizing and enforcing tribal court judgments. There is no consistent pattern nor consistency among states nor within the same state's decisions. Compare Sheppard v. Sheppard, 655 P.2d 895 (Idaho 1982) (tribal judgments entitled to full faith and credit); Jim v. C.I.T. Fin. Servs. Corp., 87 N.M. 362, 533 P.2d 751 (1975) (tribal laws entitled to full faith and credit); In re Doe, 89 N.M. 606, 555 P.2d 906 (Ct. App. 1976) (state court assumes without deciding Navajo custom granted full faith and credit in state courts); In re Buehl, 555 P.2d 1334 (Wash. 1976) (tribal court orders entitled to full faith and credit); with Leon v. Numkena, 689 P.2d 566 (Ariz. Ct. App. 1984) (Indian court judgments would be recognized under principle of comity); Wippert v. Blackfeet Tribe, 654 P.2d 512 (Mont. 1982) (judgment of Indian courts entitled to comity, with some deference as foreign judgments); In re Limpy, 636 P.2d 266 (Mont. 1981) (exclusive tribal court jurisdiction recognized as matter of comity); Fredericks v. Eide-Kirschmann Ford, 18 Indian L. Rep. 5001 (N.D. 1990) (enforcing the tribal court judgment and rejecting defendant's contention that Three Affiliated Tribes judge guided by a jurisprudence the state should not sanction); and with In re Lynch, 377 P.2d 199 (Ariz. 1962) (proceedings before an Indian court are to be treated as a proceeding of foreign state); Begay v. Miller, 222 P.2d 624 (Ariz. 1950) (enforcing tribal court judgment although full faith and credit or comity inapplicable); People v. Superior Court, Kern County, 18 Indian L. Rep. 5012 (Cal. Ct. App. 1990) (trial court must issue subpoena for California resident to appear in Navajo court because Navajo Nation included within meaning of "state" in Uniform Act to Secure Attendance of Witnesses from Without State in Criminal Proceedings); Wakefield v. Little Light, 347 A.2d 228 (Md. Ct. App. 1975) (recognizing tribal court actions as binding); State ex rel. Steward v. District Ct., 609 P.2d 290 (Mont. 1980) (tribal domestic relations code provides exclusive jurisdiction to tribal courts; Montana courts defer under principle of comity); Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985) (tribal court orders recognized under principle of comity where tribal court adheres to specific standards); Barrick v. Johnson, 7 Indian L. Rep. 4001 (S.D. 1979) (where tribal court has exclusive jurisdiction, state agencies must respect and act on tribal court order).

 Accord Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 n.21 (1978) (judgments of tribal courts entitled to full faith and credit); see also U.S. v. Plainbull, 957 F.2d 724 (9th Cir. 1992) (comity considerations warrant federal court abstention); Smith v. Confederated Tribes of the Warm Springs Reservation, 783 F. 2d 1409, 1411 (9th Cir. 1986) (comity requires deference to tribal court procedures).

But see Desjarlait v. Desjarlait, 379 N.W.2d 139, 144 (Minn. Ct. App. 1985) (full faith and credit and comity do not require recognition of tribal custom though tribal court relinquished jurisdiction in this case); Malaterre v. Malaterre, 293 N.W.2d 139, 144 (N.D. 1980) (full faith and credit clause inapplicable to Indian tribes).
the majority pattern for states to recognize and enforce tribal judgments. Congress has mandated full faith and credit for tribal court judgments in specific subject areas. Under the terms of the Indian Child Welfare Act, state courts must recognize and enforce tribal court judgments regarding children in certain custodial proceedings. Additionally, under the terms of the National Indian Forest Resources Management Act, both state and federal courts must extend full faith and credit to tribal court judgments regarding forced trespass.

Absent a federal or state mandate to recognize and enforce a tribal court order, the nontribal court still judges the law underlying the tribal court opinion. The receiving court considers the underlying principles and any rules used in the tribal decision. Authorizing law that is derived from distinct tribal custom and usage is an unknown for many non-Indian courts. For the tribal order to be fairly considered, non-Indian courts and their officials must seek knowledge about tribal customary law.

C. Custom and Indian Law

The legal principles derived from American Indian custom distinguish the tribal nations' judicial system from non-Indian American jurisprudence. The developmental process of converting custom into common law should not seem alien to non-Indians; a similar process occurred in Anglo-American common law. For tribal courts, the customary underlying beliefs and conduct provide a contemporary foundation, not just an inescapable past. The difference between the Anglo-American courts and the indigenous nations' judicial systems must be more than the ethnic identity of the people who operate the courts, the geographical location, or the physical arrangement of the forum. External sources, other

Full faith and credit to public acts, records, and judicial proceedings of Indian tribes.

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Indian tribes which adopt the regulations promulgated by the Secretary pursuant to subsection (a) of this section shall have concurrent civil jurisdiction to enforce the provisions of this section and the regulations promulgated thereunder. The Bureau of Indian Affairs and other agencies of the Federal Government shall, at the request of the tribe, defer to the tribal prosecutions of forest trespass cases. Tribal court judgments regarding forest trespass shall be entitled to full faith and credit in Federal and State courts to the same extent as a Federal court judgment obtained under this section.

57. These elements can distinguish between the two judicial systems. It is valuable that American Indian people attribute legitimacy to forums operated by people with physical similarities, that the court is geographically located in Indian Country regardless of its remoteness from the major population centers of American power, or that the court allows informal or dual language forms of testimony. These characteristics build the acceptability of the court as a regular part of the tribal community and as an institution with a designated role in self-governance. The decisions from courts with these characteristics still must be scrutinized to determine whether the legal principles used render fairness and justice.
governments and their citizens, require from tribal courts a justification beyond cultural and idiosyncratic elements. There must be guiding principles which promote integrity. Likewise, tribal courts cannot be measured or justified solely by the degree to which they imitate state and federal courts.

The tribal courts creatively use indigenous customs and usages that survived the five-hundred-year encounter and struggle with Euro-American cultures. Despite the repeated efforts to destroy the cultural foundation of American Indian tribes, important customary principles persisted. Custom and usage identify different parts of the cultural system. Custom is the belief component. Usage identifies the conduct or behavior in conformance to specific customary beliefs.

When custom and usage underlie the tribal codified and common law, the created tribal jurisprudence is appropriate for the indigenous people governed by it.

It is . . . integral to the idea of a custom that the past practice of conformity is conceived as providing at least part of the reason why the practice is thought to be proper and the right thing to do. Clearly the common law is an institution that is in part customary in this sense.58

Custom as a concept must be separated from other cultural elements that imply nonformalized ideas and codes of conduct.59 To become "enforceable at common law a custom had to be: (1) legal, (2) notorious, (3) ancient or immemorial and continuous, (4) reasonable, (5) certain, (6) universal and obligatory . . . a creature of its history."60 Custom is distinctively a pattern of thought or way of perceiving and feeling about the elements of life. When conduct is affected by this thought process, then usage occurs through the practice or regularity of behavior.

59. James W. Zion, Harmony Among the People: Torts and Indian Courts, 45 MONT. L. REV. 265, 275 (1984) [hereinafter Zion, Harmony]. "Tradition," "custom," and "usage" are not synonymous, though they are often used interchangeably. "It is possible for a tradition not to be a custom or usage, and many customs and usages are not traditional. Some traditions may be a custom." Custom is more than opinion; it is a common belief which results in practice or regularity of conduct. Id.; see also James W. Zion, The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New, 11 AM. INDIAN L. REV. 89 (1983) [hereinafter Zion, Navajo Peacemaker] (describing the search for and ascertainment of custom resulting in the formal establishment of the Peacemaker Court as an alternative dispute resolution forum within the Navajo Supreme Court); Frederic Brandfon, Tradition and Judicial Review in the American Indian Tribal Court System, 38 UCLA L. REV. 991 (1991).
For judges in the tribal courts, the thought and conduct must be "known, accepted, and used by the people of the present day."\textsuperscript{61} The tribal litigators and judges must decide when custom and usage, which do evolve and change in some degree, should be determinative in decisions.\textsuperscript{62} This process is similar to the Anglo-American experience, which may be serendipitous. This writer proposes only that the similarity should facilitate the understanding and acceptance of tribal common law. The legitimacy of the tribal common law, however, is not dependent upon a shared process with Anglo-American common law.

In common law, "the starting-point is in customs, not the customs of individuals but the customs of courts governing communities. Those courts, in England essentially community meetings, had to make all kinds of decisions."\textsuperscript{63} As Milsom describes these community meetings, they made decisions about the legal future concerning allocation of resources and the settlement of disputes.\textsuperscript{64} The common law, as described by Blackstone, consisted of customs, used throughout a country, or of

\begin{footnotesize}
61. Zion, \textit{Harmony}, supra note 59, at 275. The tribal courts have addressed this ascertainment process, \textit{e.g.}, in the Navajo courts:

There may be a dispute as to what the custom is and how it is applied; or, a tradition of the Navajo may have so fallen out of use that it cannot any longer be considered a "custom." The courts should see whether a particular custom or tradition is generally accepted and applicable to the parties before the Court.

Hood v. Bordy, 18 Indian L. Rep. 6061, 6063 (Navajo 1991); In the Northern Plains Intertribal Court of Appeals:

If there are standards, traditional values, and cultural traditions which a party in an action in a tribal court believes are of great importance and that are required for proper interpretation of the tribal code, then it is the duty, obligation, and responsibility of trial counsel to bring forth testimony to establish facts which would show such traditional values and Indian standards.


62. In developing tribal courts some tribes have engaged in pre-establishment research to ascertain what customs have been retained as "survivals" and are appropriate for a contemporary tribal system of law. In undertaking such cultural continuity projects, tribes have used modern devices, \textit{e.g.}, research grants from public and private sources, recorded interviews, \textit{etc.} \textit{See Northwest Intertribal Court System and the Sauk-Suiattle, Skokomish and Swinomish Tribes, Traditional and Informal Dispute Resolution Process in the Tribes of the Puget Sound and Olympic Peninsula Region (1991)} [hereinafter \textit{Northwest Intertribal}], a report on how these tribes ascertained the customary principles through interviewing elders, knowledgeable persons, and community members as the requisite to structuring the Northwest Intertribal Court System that serves 15 tribes.


64. \textit{Id.} at 1-2. \textit{Compare} Dworkin's discussion of the role of communities as moral actors and decision makers and the difference between "bare" and "true" communities where the latter can engage in decisions about moral and political principles that provide equality and duties among members. Dworkin, \textit{supra} note 38, at 195-216.

See also Levi, \textit{supra} note 60, at 1107, on the use of custom which resulted in the U.C.C., \textit{e.g.}, U.C.C. \textsection 1-205 (2): "A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." The U.C.C. drafters chose not to require that a custom must be ancient to be recognized and deliberately preferred the term "usage of trade." According to Ronald A. Anderson, \textit{1 Uniform Commercial Code, Text, Cases, Commentary} \textsection 1-205:18 (3d ed. 1981), "\{t\}he term 'usage of trade' and 'custom' have the same meaning. . . . Customs develop through necessity and mutual trust between responsible business persons."
customs specific to a geographically identified people. As Milsom describes the development of common law it arose from different governmental authorities or jurisdictions using varied customary foundations. The descriptions of Anglo-American common law do not present a generative community different in capacity from that found in tribal common law. The variance is among the over 500 tribal nation-communities and differences with the non-Indian common law. Time and generational distance from earlier Anglo-American customs, as well as skepticism, may prompt those who question the similar use of custom by American Indian courts. Yet, indigenous jurisprudence, like its Anglo-American counterpart, is capable of producing cognizable fairness and justice.

65. 1 WILLIAM BLACKSTONE, COMMENTARIES *67. Zion, Harmony, supra note 59, at 269-73, provides a persuasive treatment on the use of Anglo-American custom in U.S. courts which is not dissimilar from what tribal courts are doing. See 21A AM. JUR. 2D Customs and Usages § 1 (1981) (customary law recognized and established in Anglo-American jurisprudence); see also Tso, supra note 44, at 230:

When we speak of Navajo customary law, however, many people become uneasy and think it must be something strange. Customary law will sound less strange if I tell you it is also called 'common law.' Our common law is comprised of customs and long-used ways of doing things. It also includes court decisions recognizing and enforcing the customs or filling in the gaps in the written law. See also In re Estate of Belone, 5 Navajo Rptr. 161, 165 (1987) (The Navajo Nation Supreme Court announced its 'preference for the term 'Navajo Common Law' rather than 'custom,' as that term properly emphasizes the fact that Navajo custom and tradition is law, and more accurately reflects the similarity in the treatment of custom between Navajo and English common law.').

66. Milsom, supra note 63, at 12; see also KATHERINE S. NEWMAN, LAW AND ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PREINDUSTRIAL SOCIETIES 51-103 (1983). Newman presents a conceptual framework and empirical study on sixty preindustrial societies which are analyzed according to a typology of legal systems. The eight types range from a self-redress kinship system without external institutions or third-party roles to formalized, institutionalized systems where third persons make decisions that are enforceable. Newman's eight categories depend upon community concurrence on the principles underlying the law and the role of the decision maker. Simpson, supra note 58, at 22, stated that:

Settled doctrines, principles and rules of the common law are settled, because for complex reasons, they happen to be matters upon which agreement exists, not, I suspect, because they satisfy tests. The tests are attempts to explain the consensus, not the reasons for it . . . . What is involved is basically an oral tradition, still only imperfectly reduced to published writing.

67. The contemporaneous use of custom by the United States Supreme Court also arouses controversy because of the absence of an explicit or implied constitutional source for the right at issue, e.g., the fundamental right of privacy and whether this right in intimate relations can be limited by states because of certain state interests, including customary beliefs about heterosexuality and homosexuality. See Webster v. Casey, 492 U.S. 490 (1989); Bowers v. Hardwick, 478 U.S. 186 (1986); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

68. Tom Tso, The Process of Decision Making in Tribal Courts, supra note 44. Chief Justice Tso of the Navajo Supreme Court states:

Both our language and our traditions make Anglo court systems strange to us. In traditional Navajo culture the concept of a disinterested, unbiased decisionmaker was unknown. Concepts of fairness and social harmony are basic to us; however, we achieve fairness and harmony in a manner different from the Anglo world. For
Federal Indian law recognizes Indian customs as decisional principles. Besides the tribes’ inherent sovereignty, federal policy aims to promote tribal self-determination; under both sources tribal nations authorize their courts to use custom. The CIO/CFR courts are also permitted to apply tribal customs in civil cases.69 One process to establish the existence of custom is addressed in the code for the CIO/CFR courts, “[w]here any doubt arises as to the customs and usages of the tribe the court may request the advice of counselors familiar with these customs and usages.”70 Tribal courts use similar directives.71 A significant legitimizing of custom occurs in the federal and state court decisions that recognize and affirm tribal custom in decisions.72

The advocates are nonlawyer members of the Navajo Nation Bar Association who have completed training or certification and who can represent parties. See also statement by Oglala Sioux Supreme Court:

It should not have to be for the Congress of the United States or the Federal Court of Appeals to tell us when to give due process. Due process is a concept that has always been with us. Although it is a legal phrase and has legal meaning, due process means nothing more than being fair and honest in our dealings with each other.

Bloomberg v. Dreamer, No. 90-348, slip. op. at 5-6 (Oglala Sioux Civ. App. 1990), cited in Thorstenson v. Cudmore, 18 Indian L. Rep. 6051, 6054 (Cheyenne River Sioux Ct. App. 1991); see also Indian Civil Rights Commission Report, supra note 21, at 11-12 nn.36-43, listing tribal court opinions pertaining to the right to a trial by jury, to a fair and speedy trial, to adequate jail conditions, to the right to counsel, to due process in the administration of justice, to equal protection under the law, to reasonable search and seizure, and to freedom from fines.

69. “In all civil cases the Court of Indian Offenses shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the tribe occupying the area of Indian country over which the court has jurisdiction not prohibited by Federal laws.” 58 Fed. Reg. 54,406 (1993) (to be codified at 28 C.F.R. § 11.500(a)).

70. 58 Fed. Reg. 54,406 (1993) (to be codified at 28 C.F.R. § 11.500(b)); see also 58 Fed. Reg. 54,406 (1993) (to be codified at 28 C.F.R. § 11.500(c)): “Any matters that are not covered by the traditional customs and usages of the tribe, or by applicable Federal laws and regulations, shall be decided by the Court of Indian Offenses according to the laws of the State in which the matter in dispute lies.”

71. Zion, Navajo Peacemaker, supra note 59, at 92-97 (The Navajos consulted with elders and counselors to determine the custom which resulted in the formal establishment of the Peacemaker Court within the judicial system with specific rules for its jurisdiction.). See also Hepler v. Perkins, 13 Indian L. Rep. 6001, 6013-16 (Sitka Community Ass'n Tribal Ct. 1986) (question of tribal custom certified to Sitka Court of Elders); Miller v. Crow Creek Sioux Tribe, 12 Indian L. Rep. 6008, 6011 (Intertribal Ct. App. 1984) (tribal code mandates tribal judges “shall take judicial notice of tribal custom and usage” which may require the use of expert witnesses). See also Northwest Intertribal, supra note 62, regarding ascertainment of custom as prerequisite to establishing individual tribal courts for fifteen tribes and an intertribal court of appeals. Appellate court opinions from 1987 through 1990, using tribal custom, codified law, and common law decisions, are reported in Appellate Court Opinions, Northwest Regional Appellate Courts.

72. E.g., Chilkat Indian Village v. Johnson, 870 F.2d 1469 (9th Cir. 1989) (property interests
Tribal courts and commentators point out that custom does not necessarily mean unwritten, irregular, or inconsistent rules of law. Customary principles may be codified or established when the court takes judicial notice of custom, uses it for the decision, and then publishes the opinion. Increasingly, the need to codify, document, and publish is recognized because the development of a law system provides the benefits of precedent, predictability, and notice to those subject to the law. Codification and publication are largely noncustomary parts of Indian law that require tribes to appreciate this practice of Anglo-American law.

Achieving regularity through publication and codification of custom helps legitimate the tribal courts and allay the fears of nonmembers about tribal courts. In Kafkaesque nightmare scenarios, Indian and non-Indian members envision a capricious, unfair, and unjust system subject to political abuse. A brief review of how custom functions in tribal court decisions demonstrates the uniqueness, the legitimacy, and fairness of custom-based rules of law.

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created by tribal law or tradition not a federal question); Howlett v. Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976) (firmly established tribal custom should not be impaired in applying equal protection in election case); Johnson v. Chilkat Indian Village, 457 F. Supp. 384 (D. Alaska 1978) (difficult issues of Tlingit custom, tradition and law should be resolved by tribal court); Adoption of Doe, 89 N.M. 606, 555 P.2d 906 (1976) (Navajo custom recognized by state court).

73. Zion, Navajo Peacemaker, supra note 59, at 107; Brandfon, supra note 59, at 1014 n.143; Taylor, supra note 22, at 238-41; Miller v. Crow Creek Sioux Tribe, 12 Indian L. Rep. 6008, 6012-13 (Intertribal Ct. App. 1984) (Gregory, J., concurring) (urging that "true Indian law" should be written and recorded for all time so that it may be used, followed, and remembered).

74. Some tribes established written and published laws. For example, previous Cherokee documentation was affirmatively accelerated with the invention of the Cherokee language syllabary by Sequoyah, and the Cherokee Nation acquired a printing press and type cast in the syllabary in 1828. RENNARD STRICKLAND, FIRE AND SPIRITS: ChEROKEE LAW FROM CLAN TO COURT 107 (1975) (citing LAWS OF THE CHEROKEE NATION §§ 47, 81, 82, 84 & 85 (1852); ALTHEA BASS, CHEROKEE MESSENGER 78-89 (1936); RALPH HENRY GABRIEL, ELIAS BOUDINOT, CHEROKEE AND HIS America 106-19 (1941)).

75. Publication is available to tribal courts through the Indian Law Reporter, published by the American Indian Lawyer Training Program. The Reporter in 1983 subsumed the Tribal Court Reporter which was also published by the same training program. The Navajo Nation appears to have the only tribal reporter which contains all major opinions of the courts of the Navajo Nation since 1969. The Navajo Reporter, Official Reports of Cases Argued and Decided in the Supreme Court and the District Courts in the Navajo Nation, published by Navajo Community College Press, Tsaile, Arizona. To date, regularity of publication is emerging, rather than established as a practice among all tribal courts. The Westlaw and LEXIS systems have not incorporated tribal court decisions into their data bases. Indian law cases are included when these cases are reported by the state and federal courts. The two computerized data systems also do not have a topical database in Indian law as they do for other areas, e.g., civil rights, intellectual property, insurance.

76. Indian law practitioners and scholars strongly argue for tribal responsibility in using the enforcement and judicial power. Abuse in denying fair treatment and access to tribal courts for nonmembers feeds the fears and campaigns to limit tribal sovereignty and tribal court authority, as in the repeated congressional bills introduced to mandate federal review of tribal courts. See Alvin J. Ziontz, After Martinez: Civil Rights Under Tribal Government, 12 U.C. Davis L. Rev. 1, 26 (1979); CLINTON ET AL., supra note 28, at 393-97 (discussing the "exception" to tribal jurisdiction made in Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir.), cert. denied, 449 U.S. 1118 (1981)). In the "Dry Creek exception" non-Indian plaintiffs were denied access to tribal courts and thereby would have been without a forum or remedy, if the federal courts had not accepted jurisdiction. Id.
D. Custom in Indian Law Decisions

1. Selected Tribal Court Decisions

A selective review of tribal court decisions illustrates how custom can be explicitly recognized and used in substantive law. The use of custom and the associated reasoning reveal the integrative task facing tribal courts. Initially, the tribal courts must determine what is validated custom. The question is whether the indigenous people acknowledge, accept, and conform their conduct in accordance with a stated concept. Additionally, the court may look to state and federal law for culturally appropriate models and guidance. Both of these law-seeking tasks call for the skills and sensitivities found among able legal-warriors.

The limits of each type of law become evident when the human situation does not fit within the existing notions of tribal, federal, or state law. In some areas, such as environmental law, the tribal government is subject to the provisions of federal statutes and regulations. Whether by choice or federal requirement, the tribal courts look at federal and state law for principles and rules of law. Whatever is used should make sense for a culture with traditional values to be accommodated in a contemporary tribal society.

The selected tribal court decisions also show how customary alternatives to the adversarial forum can function in contemporary tribal judicial systems. The adversarial win-lose paradigm is not appropriate in customary alternatives. Indigenous custom and law can offer useful models for the majority culture. The adoption of alternative dispute resolution methods in Anglo-American law affirms the usefulness of methods long established in the indigenous nations.

The results of using custom are not necessarily uniform across the different tribal nations holding a commonly stated value. It is possible to hold a deep regard for land, the elderly, or children as the critical future resource of a society and reach similar and dissimilar decisions. The legal reasoning based on custom can also result in outcomes facially indistinguishable from those based on federal or state law. One must distinguish external form from internal substance to appreciate how the outwardly similar is not so. This approach is critical in jurisprudence and other ways of studying human phenomena, including how indigenous people perceive, organize, and explain their world. One must avoid

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77. The concern for external form and internal substance are part of jurisprudential discourse as well as the cultural framework of indigenous peoples. Professor Dworkin states: “Both perspectives on law, the external and the internal, are essential, and each must embrace or take account of the other.” DWORKIN, supra note 38, at 13. As Dworkin describes the internal, it is the participant’s point of view which focuses on the essential principles and foundation for legal claims. He focuses on the internal because ignoring it provides impoverished and defective explanations about law. Compare Clara Sue Kidwell, Systems of Knowledge, in AMERICA IN 1492: THE WORLD OF THE INDIAN PEOPLES BEFORE THE ARRIVAL OF THE COLUMBUS 369, 394-95 (Alvin M. Josephy, Jr. ed., 1992). Kidwell describes “camay,” the act of infusing life spirit into an inanimate object, infusing
stereotypical expectations to appreciate how customary reasoning works. These specific cases are illustrative and instructional.

A prototypic situation in tribal courts is a generational dispute involving child custody or visitation rights. In one case from a CIO/CFR court, the grandchildren were raised during a substantial period by the grandmother. She desired a visitation right when her daughter became able to perform her parental role.\textsuperscript{78} In both the Delaware and Kiowa tribal ordinances governing the respective parties, the court was unable to find codified law. The court recognized a mainly orally transmitted custom and stated: "[T]he court does not hesitate in taking judicial notice of the unique relationship that exists between Indian grandparents and grandchildren, despite the fact there is no written tribal law on the subject."\textsuperscript{79} Moving beyond the indigenous custom, the court then looked to external models.

While the Anglo-American common law historically did not recognize a grandparent's legal right to visit, the CIO/CFR court noted this principle had changed. The court considered the state court cases creating such a right and found that over forty states have enacted statutes providing a grandparent visitation right.\textsuperscript{80} Based on its inquiry, the court recognized and granted the grandmother a visitation right. The court rendered a decision in accord with acknowledged custom that valued the grandparent-grandchild relationship, as well as the wisdom found in the majority of the states' policy. This decision exemplifies the productive use of knowledge of Indian custom and Anglo-American law by legal-warriors who serve as judges.

A similar child-related dispute in the Rosebud Sioux Tribal Court points out the misfit between Anglo-American law and the underlying dispute that arises from a cultural or custom-based conflict. Here a grandmother charged that her daughter failed to pay the grandmother for taking care of the grandchildren.\textsuperscript{81} Though pled as a financial dispute, the underlying offense or "cultural wrong" was the disrespectful removal of the children from the grandmother's care without obtaining her proper consent. As Pommersheim points out, this case cries out for a nonlegal or "culturally consonant way to mediate the conflict."\textsuperscript{82} This type of dispute is what alternative dispute resolution traditionally dealt with and can continue to resolve.

Disputes involving cultural beliefs and a failure to comply with custom are the subject matter for bodies such as the Peacemaker Court in the

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\textsuperscript{78} In re C.D.S. & C.M.H., 17 Indian L. Rep. 6083 (Ct. of Indian Offenses for the Delaware Tribe of Western Okla. 1988).

\textsuperscript{79} Id. at 6084.

\textsuperscript{80} Id.

\textsuperscript{81} Pommersheim, supra note 21, at 62-63.

\textsuperscript{82} Id. at 62.
Navajo and Seneca Nations,\textsuperscript{83} the Court of Elders in the Sitka Community Association and the Northwest Intertribal Court System.\textsuperscript{84} Domestic disputes and interpersonal conflicts are appropriate subject matter even when personal and property damage occurs. Judgments and verdicts must be based on concepts accepted by the constituent community. The traditional retained models of adjudication and alternative dispute resolution focus upon restitution, not punishment.\textsuperscript{85} The models of Anglo-American law focus on determining the guilt of the offender and imposing a punishment. The concepts of guilt and punishment fail to make amends to all the affected parties or entities in some tribal situations.\textsuperscript{86}

In contrast, nonlegal models provide flexibility to the parties and to the judicial system. The indigenous preference for restitution can be accommodated in the remedies and penalties, without restrictions based on the civil or criminal prosecution dichotomy. The Navajo Peacemaker Court is part of the judicial system; when parties consent to or seek its resolution process, the dispute is converted from a criminal matter into a civil case.\textsuperscript{87} Even if the matter remains a criminal action, under Navajo law the court can order punishment for the offender and compensation for the victim.\textsuperscript{88} The criminal code continues the Navajo custom that

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\item\textsuperscript{83} Tom Tso, The Tribal Court Survives in America, 25 Judges J. 22 (1986); Zion, Navajo Peacemaker, supra note 59, at 96; William Bluehouse Johnson, Navajo Peacemaker Court: Impact and Efficacy of Traditional Dispute Resolution in the Modern Setting (unpublished J.D. thesis, University of New Mexico School of Law, 1990). \textit{See generally} Tso, supra note 44. The Peacemaker Courts of the Seneca Nation in New York were traditional dispute resolution institutions which were copied by the Quakers in America. Their jurisdiction was recognized since the mid-19th century and remains so under Section 46 of the New York State law, and their judgments are to be enforced by state courts. The law of New York provides for the jurisdiction of the Seneca Peacemaker courts on three reservations: Allegheny, Cattaraugus and Tonawanda. N.Y. Indian Law art. 4 § 46 (1950).\textsuperscript{84} Hepler v. Perkins, 13 Indian L. Rep. 6011, 6016 (Sitka Tribal Ct. 1986). Sitka Court of Elders determines, under unwritten traditional law of the clans which comprise the Tribe, that children of female members of a clan cannot be removed from the jurisdiction of the court as part of the clan's unchangeable responsibility for its children. \textit{See Northwest Intertribal Court System, supra} note 62.\textsuperscript{85} See \textsc{Katherine Newman, Law and Economic Organization} 12-17 (1983) (discussing the classification of law systems into punishment or restitution models).\textsuperscript{86} Taylor, \textit{supra} note 22, at 256: "A stiff money judgment or injunction may not resolve the issue where the tribal culture puts little value in either. Simply put, Indian judges and juries respond more readily to concepts and solutions that they can agree will work to solve a problem within the reservation society." (citing Othole v. Wesley, 4 Clearinghouse Rev. 5 at 492 (Zuni Tribal Ct. 1980) (For the wrongful arrest of a teenage female, a small money judgment was awarded, the officer responsible was required to publish a public apology and to undergo training in proper arrest procedures.).\textsuperscript{87} Zion, \textit{supra} note 71, at 95; Tso, \textit{supra} note 68, at 227. Once parties consent to the Peacemaker Court it has authority to enforce attendance through subpoena power. As part of the Navajo Nation judicial system the Peacemaker Court can use judicial authority to compel the participation of persons involved in a dispute.\textsuperscript{88} Zion, \textit{supra} note 59, at 273 (citing 17 Navajo Tribal Code § 220, 1191; Ute Mt. Ute Tribe v. Mills, 10 Indian L. Rep. 6047, 6048 (Ute Ct. App. 1981) (restitution requirement in sentence did not violate limitations on punishment stated in Indian Civil Rights Act)); \textit{see also} Tom Tso, The Tribal Court Survives in America, 25 Judges J. 22, 25 (1986) (Navajo Court of Indian Offenses established in 1903 was not accepted because it only punished wrongdoers and failed to provide restitution to the people wronged in the community.).
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required the offender to compensate the victim and the clan of the victim.\textsuperscript{89}

The Sitka Community Association code and the tribal court rules provide that "at the discretion of the Tribal Court, questions of tribal custom may be certified to the Court of Elders."\textsuperscript{90} This certification process follows from other code provisions providing that, absent the prescription by the code,

... any suitable process or mode of proceeding may be adopted by the Court which appears most consistent with the spirit of tribal law. Where the Court deems appropriate it may determine and apply the customary law of the Tribe. The Court may refer to other sources of law for guidance, including the law of other tribes, federal, state or international.\textsuperscript{91}

The Sitka code and rules manifest the importance of the custom of this sovereign.

Sitka tribal law is a practical approach for a modern tribal court that integratively use the sources of law serving an indigenous people. Here the code specifies that the duty of judges is to reach for knowledge within and without the tribe.\textsuperscript{92} Expansive and integrative reach requires the knowledge which legal-warriors possess.

The integrative approach can use similar procedures and reach results similar to Anglo-American courts, yet the legal reasoning justifying the result may differ. The legal knowledge and skill of attorneys is important in determining what is indigenously distinguished and what will be adapted from external sources into the tribal common law. For instance, marital privilege as an evidentiary rule and procedure has endured in state and federal courts. Some tribal courts have similar evidentiary rules.

When the Navajo Supreme Court considered the marital privilege rule, it acknowledged borrowing the rule from the federal system. However, the court rejected one of the historical principles for the marital rule: that the wife had no separate legal existence from her husband because a marital unit was one legal party and "the husband was the one."\textsuperscript{93} This justification has no support in custom, which the court called

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\item \textsuperscript{89} Zion, \textit{Harmony}, supra note 59, at 273 (citing Van Valkenburgh, \textit{Navajo Common Law}, 11 \textit{MUSEUM NOTES} 37 (1938)).
\item \textsuperscript{90} Hepler, 13 Indian L. Rep. at 6013.
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Other tribes have similar provisions for external models and adoptions. \textit{E.g.}, Colville Confederated Tribes \textit{v.} Bush, 18 Indian L. Rep. 6123, 6124 (Colville Tribal Ct. 1990) (tribal code allows court to adopt state law offering more protection to criminal defendant than the tribal provision). In the absence of dispositive legislation, courts may look to tribal custom and tradition: Where doubt arises as to the customs and usages of the tribe, the Court shall request the address of Tribal Councilors familiar with Tribal Customs and usages. Where appropriate, the laws of the State of South Dakota may be employed to determine civil matters. The laws of the State of South Dakota shall not be used as a substitute for existing tribal laws.
\item \textsuperscript{93} Pommersheim, \textit{Liberation, Dreams, and Hard Work}, supra note 9, at 453 n.161 (citing \textit{Sisseton-Wahpeton Tribal Code} ch. 3, \textsection 1 (1982)).
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Navajo Nation \textit{v.} Murphy, 15 Indian L. Rep. 6035 (Navajo 1988).
"Navajo tradition and culture." The Navajo world is a matrilineal and matrilocal society in which the woman's role is revered. Important matters in Navajo society, including individual status, identity, and some rights to property and productive sheep herds, derive from the mother and her clan. The Navajo Supreme Court then found cultural accord with the Anglo-American principle to preserve the harmony and sanctity of the marriage relationship and denied the marital privilege in this case.

Sometimes customary tribal law will produce results different from an Anglo-American court's determination because the substantive law arises from a fundamentally different view on the matter at issue. In the use of tribal trust lands and in probate distribution of property there is an important difference. The Anglo-American concept of property as individualized ownership and exploitation is not germane. The American Indian custom of stewardship and practice of common ownership and benefits prevail over individualistic entitlements.

For instance, for agricultural permits and land, Navajo law uses the customary trust. This is "a unique Navajo innovation which requires the appointment of a trustee to hold the productive property for the benefit of the family unit." Custom and the Navajo policy of avoiding unproductive fragmenting of agricultural land on the tribal lands determined the outcome. The customary usage interest in the Navajo nation's land was awarded to the heir in "the best position to make proper and beneficial use of the land." This decision also involved the critical American Indian belief that communal lands cannot be owned. The Navajos and other tribes, through custom and express law, have established possessory interests that are recognized and inherited.

In the Navajo probate system, fairness among the heirs is achieved through custom. In the customary interest case, the heirs were denied an equal portion of the possessory land interest at issue and received other property from the estate. In another probate case, the Navajo Supreme Court relied on the custom that parents should "view" each of their children equally. Each of the children was treated equally in accordance with the common benefit custom which regards family and clan members as one economic unit. The family and clan "camp" keeps the productive goods while the unproductive goods are distributed among the decedent's immediate family and relatives.

A critical difference that distinguishes the custom underlying tribal law from Anglo-American law is the definition of the immediate family and the role of extended family. Issues arising in the context of tribal domestic

94. Id. at 6036. Compare Southern Puget Sound Intertribal Hous. Auth. v. Carl Johnson, Jr., No. SHO-CIV 6/80-434, slip. op. (Shoalwater Bay App. Ct. Sept. 24, 1988) (Parol evidence rule does not apply to proceedings in tribal court because it is fundamental to tribal culture that parties to a conflict have their say without legal doctrines unfairly limiting such a right.).
96. Id. at 6049.
97. Id. at 6051.
99. Id. at 6053.
relations, child custody, and probate cases, include definitions of family and role broader than the definitions in Anglo-American law. Tribal cases uniformly recognize that the extended family is a customary definition with legal consequences for those within the expansive unit of a family or clan. Customary definitions are also evident in law created outside the tribal court.

2. Federal Indian Law and Custom

Federal Indian law already accommodates customary concepts based on indigenous belief and preference for restitution. Different legal standards and burdens upon the litigants accompany the legal definitions in Indian law. For instance, recognition of the substantive difference exists in the tort law standards in the CIO/CFR regulations. While binding on these courts, the tort standard has also been adopted by some tribally authorized courts. The standard for the defendant's conduct is "carelessness" rather than negligence. The standard allows the judge and jury to decide whether the defendant's conduct appeared careless under the circumstances without requiring a focused determination of elements such as duty and the standard of care the defendant owes.

The carelessness standard rule allows the judge and jury to use the expansive viewpoint that is common among American Indians. The intent of the promulgator of the tort regulation is not clear, but the usage is culturally compatible for American Indians. The parties, their environment when the charged misconduct occurred, and other cultural elements come into the consideration of the defendant's conduct. Some tribally authorized courts expressly use custom which precludes Anglo-American tort concepts.

100. E.g., Arizona Pub. Serv. Co. v. Office of Navajo Labor Relations, 17 Indian L. Rep. 6105 (Navajo 1990) (employer nepotism policy denying jobs to "relatives by marriage" but allowing jobs to "blood relations" is discriminatory where marriage is central in Navajo custom of extended family and clan relations); Graybeal v. Alaska, 17 Indian L. Rep. 2206 (9th Cir. 1990) (unpublished opinion) (custom of Athabascan Natives of Native Village of Northway requires relatives to assume responsibility "for the care and nurture of children when the children's natural parents are . . . unavailable"); Wike v. Tarasiewicz, 14 Indian L. Rep. 6020 (Rosebud Sioux Tribal Ct. 1987) (rejecting comity for state court order changing custody when child's welfare and interest of tribe is in maintaining father's custody which provides benefits of extended family network).

101. Compare In re Baby Girl D.S., 600 A.2d 71 (D.C. Ct. App. 1991) (court's consideration of grandparents' relationship with child is improper under statute regarding termination of parental rights). It is inconceivable that a tribally authorized or CIO/CFR court would hear a case such as Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) in which the local government prohibited a grandmother from living with her grandchildren as this violated the zoning ordinance's definition of immediate family. Pommersheim, Liberation, Dreams, and Hard Work, supra note 9, at 438, discusses the relational fabric of tribal life and law, inseparably manifest in "the legal decision whether to grant 'standing' in a custody dispute to a member of the extended family or 'tiyospaye' who is neither the mother nor the father of the child." "Tiyospaye" is the Lakota (Sioux) word for extended family. See Moran v. Rosebud Hous. Auth., 19 Indian L. Rep. 6106 (Rosebud Sioux Ct. App. 1991) (injunction modified so defendant and children could visit grandmother, in accord with "tiyospaye").

102. 58 Fed. Reg. 54,406 (1993) (to be codified at 25 C.F.R. § 11.501(b)) ("Where the injury inflicted was the result of carelessness of the defendant, the judgment shall fairly compensate the injured party for the loss he or she has suffered.").
and defenses such as contributory or comparative negligence.\textsuperscript{103} Precluding these defenses allows a broader view of what occurred and who was injured in the particular instance. A broader view is generally not permitted in Anglo-American law because the tort elements are restrictively defined. However, this expanded universe of the parties or persons with interests at stake befits the shared viewpoint of life held by many native peoples, that humans are in relationships with the earth and all living forms, not just human beings. The permissibility of the American Indian expansive view is confirmed in the federal tort regulation's provision for liability when injury is deliberately inflicted. When such liability is determined, "the judgment shall impose an additional penalty upon the defendant, which additional penalty may run either in favor of the injured party or in favor of the tribe."\textsuperscript{104} The remedies in the tort regulation free the tribal courts to consider community standards of the tribe in the determination of the penalty.\textsuperscript{105}

Judicial freedom in the use of customary law provides the advantages of invention. The tribal courts can be accountable to the community and its customs in a way that is not available in Anglo-American law. The creation of law based on indigenous custom and appropriate Anglo-American law sources ultimately distinguishes the tribal courts of the third sovereign.

\textbf{III. TRIBAL CUSTOMARY LAW: THE ENGINE FOR INNOVATIVE LAW}

The use of custom in tribal jurisprudence, codified and common law, with the appropriate Anglo-American law concepts produces synergistic results, rather than a laminate with discrete layers. While elegant integration of diverse legal concepts is an accomplishment in itself, that is not the primary benefit of tribal law. Of most value is the creative capacity of tribal courts, shown through the work of legal-warriors who use the old to make new and appropriate law. The law produced in tribal codes and courts does not necessarily retain the discrete elements from Anglo-American legal culture with the same meaning and value as in the contributor culture or jurisprudence. In both the tribal law and the concept of the legal-warrior, there is an innovative result that is


However, CIO/CFR courts using the federal code, rather than a tribal code, can similarly treat accidental and contributory causes. See 58 Fed. Reg. 54,406 (1993) (to be codified at 25 C.F.R. § 11.501(d)). "Where the injury was inflicted as the result of accident, or where both the complainant and the defendant were at fault, the judgment may compensate the injured party for a reasonable part of the loss he or she has suffered." \textit{Id.}

\textsuperscript{104} 58 Fed. Reg. 54,406 (1993) (to be codified at 25 C.F.R. § 11.501(c)).

\textsuperscript{105} Zion, \textit{Harmony}, supra note 59, at 278.
consistent with a pervasive characteristic of the indigenous nations: the capacity to change as an evolving culture.

Indeed, adaptation and change are pervasive in the accounts of the indigenous peoples of the Americas, as they were before the Columbian and European invasion and as they have persisted.106 Iverson has described the pattern of living as one which embraced both conservation and innovation.

They had to balance the duty to live in the proper way and conserve the good of the past with the need to incorporate changes that could ensure the continuity of one’s people. If they borrowed certain elements from other societies, they could make such additions their own over time. And over a still more extended period these innovations could become well enough embedded in the culture to be considered traditional.107

For people whose principle beliefs and conduct were attuned to nature, the environment, and seasonal factors, adaptability was key to physical survival and cultural continuity. The introduction of European nations and their political power, technology, animal and plant life also challenged the tribal nations' ability to conserve, yet evolve with the new. The resistance to the European powers' domination was accompanied by adoption, adaptation, and, ultimately, appropriation of some technology, life forms, and governmental concepts. The three “A’s” of adoption, adaptation, and appropriation provided the process used by indigenous peoples to resolve the tension between conservation and innovation.

In the common pattern, adoption occurred because of obvious utilitarian value; yet adaptation followed with the fine tuning for the specific indigenous people’s needs and the environment; and, finally, a state of complete acceptance, appropriation, took place. For example, the Spanish introduced the “civilizing” power of the Catholic Church as well as sheep, goats, horses, and cattle to the Navajos. While rejecting the Catholic Church as a dominant force, the Navajos adopted and used these four life forms to “redefine themselves.”108 The economic benefit of sheep was furthered through adaptation; breeding the type of sheep most productive in the Navajo environment and finding new uses for their products.109 Ultimately, in appropriation, Navajo weaving became a distinct cultural art form with important cultural value. In telling how these life forms reached them, the Navajos make no mention of the

106. See generally Angie Debo, A History of the Indians of the United States (1970); Kidwell, supra note 77, at 369, 374 (comparing European science which focuses on similarities of things and natural order with, the importance native peoples attach to the unusual, the mutable or changeable).


109. See also Kidwell, supra note 77, at 396, on the selective control of the environment by the Indians of the Americas through breeding as well as the use of fire and water.
Spanish origins. Incorporated into the cultural story of the Navajo people, these animals are gifts from the gods.\(^{110}\)

When cultural appropriation occurs, the meaning and value is no longer that of the donor culture. For indigenous peoples, the meaning goes beyond the utilitarian and the factual. The meaning becomes part of the people’s creation story. Empowerment arises from a relationship with the spirits that accompany the animate and inanimate. The Quechua Indians of the Andes engaged in “camay,” an act in which life spirit was infused into an inanimate object.\(^{111}\) Kidwell relates camay to the Navajo concept of “inner forms.”\(^{112}\) Both acts involve using “the power to transform the very essence of material and imbue it with religious significance, giving it an inner form that was more important than the outer one.”\(^{113}\)

Another dramatic example of the innovative and transforming power is provided by the horse. Beyond immediate utilitarian acceptance, Navajo adaptation then allowed individuals to achieve status via the aesthetics and skill of horsemanship. Ultimately, the Navajos embraced the horse as an empowering symbol tied to the critical forces of the four directions of the universe.\(^{114}\) Hence, the turquoise horse of the south, a transformation that added joy and power to the Navajo:

The turquoise horse prances with me.
From where we start the turquoise horse is seen.
The lightening flashes from the turquoise horse.
The turquoise horse is terrifying.
He stands on the upper circle of the rainbow.
The sunbeam is in his mouth for a bridle.
He circles around all the people of the earth
With their goods.
Today he is on my side.
And I shall win with him.\(^{115}\)

Thus, we see the horse in its final appropriation: a turquoise form embodied in myth which empowers the believers beyond their present circumstances. This ability to conserve and innovate through empowering transformation has remained critical to indigenous peoples. As they resisted the dominating power of the Europeans and Euro-Americans, the

\(^{110}\) Peter Iverson, The Navajo Nation 4-5 (1981) (“Since time immemorial our grandfathers and our grandmothers have lived from their herds—from their herds of sheep, horses and cattle, for those things originated with the world itself.”) (quoting Buck Austin, We Have Lived on Livestock a Long Time, in Navajo Historical Selections 62 (Robert W. Young & William Morgan eds., 1954)).

\(^{111}\) Kidwell, supra note 77, at 394-395.

\(^{112}\) Id. at 396.

\(^{113}\) Id. at 395.

\(^{114}\) Iverson, The Navajos After 1492, supra note 108, at 4-5.

\(^{115}\) Id. at 5. See generally Laverne Harrel Clark, They Sang for Horses: The Impact of the Horse on Navajo and Apache Folklore (1966) and John C. Ewers, The Horse in Blackfoot Indian Culture (1955) for details and consequences of the transformation of native cultures through the interplay of conservation and innovation. For example, the efficacy of horses freed the time and imagination of native peoples so that arts and crafts flourished and the Horse Medicine beliefs and practices developed.
same ability was used to transform tribal governments and laws with the appropriate use of the concepts of governance. To survive in the United States, the tribal nations struggled to maintain a distinct national identity, operate with economic independence and sufficiency, and retain political self-determination. This ongoing struggle has severely tested the adaptive insights and skills of native peoples. The United States republic changed from its initial nation-to-nation relationship with tribes. The United States embarked on cyclical federal policies to exterminate Indians through warfare and acculturation and policies that in varying degrees respected and protected tribal sovereignty. Using their own governmental concepts and structures and those borrowed from the European cultures, the indigenous nations continuously transformed their governments and their judicial components.

In the period when national and state citizens, greedy for the tribal lands, pushed for removal of the indigenous peoples, numerous tribes realistically recognized the threat to their survival and continuity. For instance, in 1819-1829, the Cherokees deliberately engaged in a renascence of their political and economic power. Their National Council recognized the task to counter the white society's view of them as primitive people, not fit to govern themselves nor entitled to respect for their title and governance of tribal lands.

They [Cherokees] had to keep written records. They had to study the white man's laws—how they were made and how they were interpreted, how they were enforced or not enforced. Then they had to appropriate these lessons to their own needs. In the most critical areas of revitalization the Cherokees were self-taught. The white man's government and practices provided the tools for the Cherokee renascence, but the Cherokees had to learn how to use them for themselves.116

While selectively borrowing from the white man's culture, the Cherokees retained a conservation viewpoint. Underlying their efforts was a refusal to be integrated into the United States republic and the goal to retain a separate national existence with their own laws and government.117

The Cherokees transformed the structure of their government between 1820 and 1830. They produced a centralized government with a bicameral legislature, a distinct and superior court system, an elective system of representation by geographical districts, and a salaried government bu-

116. William G. McLoughlin, Cherokee Renascence in the New Republic 277 (1986). See generally Strickland, supra note 30. The cultural exchange included adoption of societal practices with ultimately destructive force, e.g., the use of Afro-Americans as property and slaves. The post-Civil War land and power losses inflicted upon the Five Civilized Tribes were significantly affected by each tribe’s resistance to fairly treat or provide citizenship to their freed slaves. See id. at 79-102 (covering laws to prevent marriages between Cherokees and “Negro” slaves and denying citizenship and inheritance rights to children of illegal unions). See generally Arrel M. Gibson, Constitutional Experiences of the Five Civilized Tribes, 2 AM. INDIAN L. REV. 17 (1974); Angie Debo, And Still the Waters Run: The Betrayal of the Five Civilized Tribes (1940).

117. McLoughlin, supra note 116, at 308, 325; Strickland, supra note 30, at 183 (“A unique intermingling of newly written laws and the ancient spiritual culture emerged.”).
While the changes were unwelcome by some traditionals within the tribe, at times the governmental structure was recognized as legitimate by the dominant Anglo world and thus insulated against invasions of the Cherokee's sovereignty.

Other tribes experienced the introduction of governmental concepts and selectively used them to transform their governments for self-directed benefit and as a defense against the aggressions of a land acquisitive white society. While accepting some external concepts, certain customary beliefs and usages, particularly the communal ownership of tribal lands, remained as fundamental and unchangeable. In other areas, the innovation produced benefits which the white majority society would later adopt, e.g., the Creek Nation's constitutional and legal reform of 1859 provided Creek women with complete control and ownership of their property.

The Cherokee and Creek constitutions provided eighteen year old males with the right to vote; the Chickasaws provided this right to nineteen year old males. Tribal views of this nature clearly differed with the non-Indian world's with regard to who was competent to enjoy the benefits of full citizenship.

The acceptance and use of nonindigenous legal concepts is part of the continuity upon which tribal people have always focused. The adoption,

118. McLoughlin, supra note 116, at 284. These innovations were not adopted without Cherokee concern for the loss of customary institutions so as to become simply a copy of white society. Among the Cherokee, the conflicts about the degree of innovation eventually erupted into intratribal warfare. After removal to the western lands was ordered and enforced by the federal government through the historical “Trail of Tears,” some distraught resistive “traditionals” killed the assimilationist leaders who tried to bargain with the federal government. See Angie Debo, A History of the Indians of the United States 120-28 (1970).

However, the conserving and innovating power used in the renascence of the Cherokee constitutional and legal system continues in the present day government led by Principal Chief Wilma Mankiller. In Fall, 1991 the Cherokee Nation of Oklahoma reestablished its tribal courts in the historic Cherokee Courthouse after legal decisions established that the tribe's judicial power had not been extinguished through the Allotment Acts and policies.

119. See Talton v. Mayes, 163 U.S. 376 (1896) (Supreme Court affirmed the murder conviction of an Indian where sentence imposed by courts of the Cherokee Nation was sufficiently patterned after Anglo-American models and used a written criminal code.). This decision was made in the same period when the federal government was disassembling tribal governments through the allotment policy and imposing CIO/CFR courts upon tribes.

120. See, e.g., Arrell M. Gibson, Constitutional Experiences of the Five Civilized Tribes, 2 Am. Indian L. Rev. 17 (1974); Angie Debo, And Still the Waters Run (1940); Peter Iverson, The Navajo Nation (1981) (providing an account of the evolution and experiences of Navajo government); Mary Shepardson, Navajo Ways in Government: A Study in Political Process (American Anthropological Ass’n Memoirs No. 96, 1963) (covering the earliest historical periods through 1960 in Navajo government evolution).

121. Angie Debo, The Road to Disappearance 125-26, 305-08 (1984). Debo described the cultural confusion during the forced allotment of tribal lands under the Allotment Act Commission scheme which allocated land 160 acres for male “head of a family,” with smaller amounts to unmarried men and children.

122. Gibson, supra note 30, at 30, 32, & 38.
adaptation, and appropriation process can explain the transformations in tribal law. The Navajo Supreme Court’s decision in Navajo Nation v. Murphy about marital privilege allows a dialogue between that judicial system and other jurisdictions.¹²³ Yet the decision remains anchored in a custom that values the power of matrilineal and matrilocal relationships in a fundamentally different way than other tribal nations,¹²⁴ the states, and the federal law. The inner substance is different from the external form, which appears similar to the decision in a nontribal jurisdiction to deny the use of marital privilege because of an insufficient factual basis.

The undeniable difference of tribal law must be explicitly recognized in any dialogue with federal and state sovereigns which professes to value American Indian jurisprudence.

Tribal courts do not exist solely to reproduce or replicate the dominant cannon appearing in state and federal courts. If they did, the process of colonization would be complete and the unique legal cultures of the tribes fully extirpated. Nevertheless, tribal legal cultures—given even the most benign view of Indian-non-Indian history—also do not reflect pre-Columbian tribal standards and norms. This is because there has always been a unique legal reality created by tribal resistance to the process of colonization and assimilation.¹²⁵

What Pommersheim calls the “riprap” of the historical forces provides opportunity for tribal courts and the legal-warriors to generate a unique jurisprudence.¹²⁶ As the specific concerns and customs of the different tribal nations are addressed in tribal law and courts, the creative capacities of the third sovereign continue to be tested.¹²⁷

That creative capacity makes the American Indian courts the laboratories for new concepts that can benefit the majority judicial system. Tribal court innovation is akin to the American political concept that states are the laboratories for national political change.¹²⁸ Vine Deloria, Jr., in 1965 argued “that tribes are not vestiges of the past, but laboratories of the future.”¹²⁹ Tribal courts are the premier part of the indigenous nation’s laboratory.


¹²⁴. Compare Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (tribal sovereignty and immunity permit ordinance denying tribal membership to children of female members who marry outside the tribe, while providing membership to children of male members who marry outside the tribe).


¹²⁶. Id. at 421.

¹²⁷. The assimilationist approach to American Indian governments and courts remains a continuous force, changed maybe as to form but not intent. See Kirke Kickingbird, “In Our Image ... After Our Likeness:” The Drive for the Assimilation of Indian Court Systems, 13 AM. CRIM. L. REV. 675 (1976).


CONCLUSION

Tribes persist as the third sovereign within the United States' borders, exercising power over individuals as do the state and federal sovereigns. The over 500 tribes are increasingly exercising their power to govern; their executive, legislative, and judicial actions affect subject matter important to members and to nonmembers. In tribal interactions with nonmembers and with state and federal governments, the tribal courts are the key branch where the lawmaking of the indigenous nations is tested.

The use of custom, in code and especially in common law, is the increasing pattern in tribal court decisions. Using customary beliefs and usage to make law is not unique as a process. What does distinguish tribal common law is the cultural perspective underlying those customary beliefs. A world view focused upon collective values, where nature is part of the community, presents different principles upon which to decide the recurring disputes among members. More than individual victims are considered when the restoration of harmony and balance is the objective. The tribal courts affirm and sustain cultural values, thus generating law that is appropriate and that is legitimated by fairness in procedure and result. The legitimacy of the tribal courts and their distinctive law is manifest in more than the structure and operation of the courts by trained

(statement of Vine Deloria, Jr., Executive Director of the National Congress of American Indians): [M]uch has been made of the so-called transitional nature of tribal government. We feel that tribal groups are indeed in transition, but to a new form of social understanding, which if understood by other people, would help solve some of the pressing social problems of today. We suggest that tribes are not vestiges of the past, but laboratories of the future. As we see the larger society beginning to adopt Indian social forms, we feel impelled to suggest that tribes be allowed maximum flexibility, in developing their own economic, political, and human resources so that they might bring the best of the Indian understanding of life to the rest of this country.

See also Resnik, supra note 8, at 757:

An 'other' sovereign serves a valuable purpose for the federal government. The degree of toleration of the 'other' sovereign's decisions enables the federal government to make plain what its own values are. One version of this relationship is the 'laboratory' that Brandeis described—in which the states are places of experimentation. An alternative conception is the dialectic interaction that Robert Cover and Alexander Aleinikoff mapped. If one believes in the utility of that dialogue, then one would be supportive of enabling two voices, of cohabitation rather than domination, of having governments with different 'interests' and 'ideology' thus enabling innovation.


For contemporary views on the states as laboratories, see David Osborne, Laboratories of Democracy: A New Breed of Governor Creates Models for National Growth 3 (1990). "Part of the beauty, as Brandeis pointed out, is that new ideas can be tested on a limited scale—to see if they work, and to see if they sell—before they are imposed on the entire nation." The Indian nations provide a range of limited scale governments, from small Alaskan Villages where population is measured in the hundreds to the larger nations such as the Navajos and the Oklahoma Cherokees whose populations, landbase, and governmental complexity are comparable to many city, county, and state entities.
judges, attorneys, and personnel. Ultimately, the legitimacy of the tribal courts rests on decisions that show concern for justice.

In diverse areas such as family relations, probate, tort, and criminal prosecutions the selected tribal court cases show that customary principles can produce jurisprudence entitled to respect by tribal members and outsiders. From the small tribal courts to the complex system of the Navajos, customary law has the potential to "transform the present by integrating the best of the past with a liberating view of the possibilities of the future." This transformational power, using principles from Anglo-American law where appropriate, is the strength of tribal common law.

This innovative power allows the tribal courts to serve as a laboratory for national jurisprudence in the United States. Certainly this creative power is critical for the continuity of tribal nations as modern governments meeting the needs of their members. It is important that non-Indians learn about the tribal customary law, if for no other reason than to prevent the Anglo-American world from prescribing for tribal societies how their laws should be made. The innovative power of tribal jurisprudence, which long ago discovered alternative dispute resolution methods, can continue to provide direct benefit to non-Indian sovereigns and their citizens. Enriching and reciprocal potential exists; it is only a matter of whether the non-Indian world is ready to learn and appreciate the customary wisdom in tribal common law.

130. Pommersheim, supra note 10, at 393.