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DOMINANT-SOCIETY LAW AND TRIBAL COURT ADJUDICATION

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INTRODUCTION

United States v. Wheeler,[1] decided in 1978, is one of American Indian law's most important cases. It established that the Navajo Tribe—and by extension all Indian tribes[2]—is a *government*, and that its power to govern is inherent, neither deriving from nor depending upon the United States. This ability to exercise power over people, not all of whom consent to each individual exercise of that power, is the center about which all of Indian law revolves. As the U.S. Supreme Court wrote in another important case, "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."[3]

The narrow holding of the *Wheeler* case was an interpretation of the double jeopardy clause of the United States Constitution. Wheeler, a Navajo, was alleged to have committed certain consensual acts with a young female member of the tribe. He was prosecuted by the tribe for disorderly conduct and contributing to the delinquency of a minor, all violations of tribal law, and was sentenced to serve concurrent terms of 15 and 60 days in the tribal jail or to pay a fine of $150.[4] Following this conviction, he was indicted in federal court for the crime of statutory

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* Robert A. Leflar Professor of Law, University of Arkansas. During October of 1993, the National Judicial College in Reno, Nevada, held its first-ever program focused on tribal court jurisdiction. The participants in this program were primarily tribal court judges; also in attendance were federal and state appellate and trial judges, as well as a few non-judges, lawyers and law professors. The program was wide-ranging and sophisticated, and the "teachers" learned as much as the "students." The present essay owes it origins to the discussions, questions and challenges of that Reno conference, and the author owes a debt of gratitude both to the participants and to the administrators at the National Judicial College.

1. 435 U.S. 313 (1978).

2. This is not to say that every Indian law principle applies uniformly across all tribes. Indian treaties, of course, are tribe-specific, even if, in certain cases, some are similar to others. Likewise, some statutes and regulations are tribe-specific. *See, e.g.*, Act of June 28, 1906, ch. 3572, 34 Stat. 539 (Osage headrights); 50 C.F.R. § 17.40(1)(ii)(B) (1990) (special rules regarding the taking of grizzly bears by members of the Blackfeet Tribe of Northern Montana). More broadly, Professor Clinton has argued for tribal variations to be taken into account in the application of federal common law principles. *See* Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLINE L. REV. 543 (1985). However, and notwithstanding this on-again, off-again "reservation-specific" nature of federal Indian law, there is little in the *Wheeler* opinion that would appear to limit its reach to the Navajo tribe alone; only one short paragraph of the opinion deals with Navajo-specific treaties, *Wheeler*, 435 U.S. at 323-24.

3. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973).

4. *Wheeler*, 435 U.S. at 315. The record did not show whether Wheeler served the time or paid the fine. *Id.* at n.2.

rape, made criminal when done by an Indian in Indian country by the so-called "Major Crimes Act."[5] He moved to dismiss the indictment under the Fifth Amendment, arguing that jeopardy had attached in the tribal prosecution and that he could not be prosecuted again for the same acts of consensual intercourse with a minor.[6]

The Supreme Court held that the double jeopardy clause of the United States Constitution did not prevent the second prosecution. Using the well-known constitutional principle that dual prosecutions by different sovereign entities do not offend the Fifth Amendment,[7] the Court found that the prosecutions here were independent of each other because of the independent nature of Navajo tribal sovereignty. Justice Marshall wrote for the unanimous Court,

> In sum, the power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.[8]

So Mr. Wheeler went to jail for the second time and Navajo sovereignty was vindicated. The Supreme Court has nibbled away at the grand doctrine of inherent tribal sovereignty over the years, both before and since *Wheeler*, so that Navajo sovereignty is now but a shadow of its pre-Columbian self.[9] But the Court has never gone back on its core holding

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5. 18 U.S.C. § 1153 (1988).

6. *Wheeler*, 435 U.S. at 315-16.

7. *See id.* at 316-17 and n.7. *See also* Bartkus v. Illinois, 359 U.S. 121 (1959) and Abbate v. United States, 359 U.S. 187 (1959), the former holding a state prosecution following a federal prosecution to be proper, and the latter the reverse. Shortly after *Abbate* was decided, the federal Justice Department promulgated the so-called "*Petite* Policy" (after Petite v. United States, 361 U.S. 529 (1960)) whereby the federal government does not ordinarily prosecute following a state conviction. *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE (2d ed. 1992) at 1083-86; STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE (4th ed. 1992) at 1240-43. More particularly, *see* Jon J. Jensen & Kerry S. Rosenquist, *Satisfaction of a Compelling Governmental Interest or Simply Two Convictions for the Price of One?*, 69 N.D. L. REV. 915 (1993), and Stephen D. Easton, *Native American Crime Victims Deserve Justice: A Response to Jensen and Rosenquist*, 69 N.D. L. REV. 939 (1993).

8. *Wheeler*, 435 U.S. at 328.

9. Many will take issue with the use of the word "nibbled"; the United States nibbles at tribal sovereignty the way *Galeocerdo cuvier* nibbles at its prey. Among the major assaults on tribal sovereignty by the Supreme Court are Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that tribes are without criminal jurisdiction over non-Indians); Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (denying compensation for much Indian land taken without tribal consent); United States v. Kagama, 118 U.S. 375 (1886) (upholding Congress's power to enact a criminal code for Indian country).

In *Kagama*, the Court wrote, "[t]he soil and the people within [the geographical limits of the United States] are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two." *Id.* at 379. This, of course, is a passage that would appear to make nothing of tribal sovereignty. But that was not the *holding* of *Kagama*, as *Wheeler* shows. Modern cases, such as South Dakota v. Bourland, 113 S. Ct. 2309 (1993), and Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), vigorously attacked the existence of tribal civil regulatory power

in *Wheeler* that the tribe is a *government*, and one whose sovereignty—unlike that of a territory, a possession, a city, a county, a school district, whatever—does not flow from any paramount government on or off this continent.

Notwithstanding the essential holding of *Wheeler*, there has always been something a little unsatisfying about the decision. Of all the ways that the Court might have established once and for all the inherent and independent nature of tribal sovereignty, it seems unsettling that the point was made in the context of Wheeler going to jail (albeit the federal jail) to serve more time for a crime for which he had already paid the price (albeit the tribal price). Was it necessary for the individual Indian to suffer dual prosecutions in order for the Indian tribe to have its independent and inherent sovereignty proclaimed?

In a word, "yes," given the principle that prosecutions by independent sovereigns are not forbidden by the double jeopardy clause. For Wheeler to walk free of the federal prosecution would have made the Navajo court an adjunct of the federal one, striking a serious blow at tribal sovereignty. In the company of other such blows, Wheeler's freedom might have killed off one of the few remaining North American vestiges of the days when Europeans, Africans and Asians were content to be managing the affairs of Europe, Africa and Asia. This is a heavy load for one Navajo to carry, but it is a necessary one, and Mr. Wheeler is not alone in having to suffer some individual inconvenience for the sake of the grand doctrine of tribal sovereignty.[10]

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over non-Indians, under what is essentially an *Oliphant* theory. In *Bourland*, the Court very casually found a treaty abrogation and struck at the heart of inherent tribal sovereignty, in an opinion the full ramifications of which are unknown at this writing.

The list could go on; in fact, this footnote could be, and has been, expanded into entire law review articles. *See, e.g.*, Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STANFORD L. REV. 979 (1981); Nell J. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980). The question of whether, and the extent to which, the United States respects the notion of tribal sovereignty is hotly debated and, to some extent at least, is a "is the glass half full or half empty?" debate. Or, more realistically, "is the glass 10% full or 90% empty?" The present writer is identified with the position that, while the extent of federal recognition of tribal sovereignty could surely be greater, it could just as surely be less, *see* Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413 (1988), and he finds the following observation of Xenophanes to be somehow relevant: "If god had not made yellow honey, we would now think the fig to be sweeter than it is." XENOPHANES OF COLOPHON, FRAGMENTS (J.H. Lesher trans. 1992) at 41. Some liberty has been taken with the translation, *see id.* at 180-82.

10. Most clearly, Mr. Wheeler is joined in this paradoxical station by Audrey Martinez, one of the plaintiffs in the well-known case of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). In *Martinez*, the Supreme Court honored tribal sovereignty by giving the Indian Civil Rights Act its most non-intrusive construction, thereby dismissing Ms. Martinez's complaint that her tribe had violated her federal rights. *See id.*

Similarly, Bob Talton was indicted for murder by a Cherokee grand jury which did not meet U.S. constitutional requirements. The Supreme Court let the resulting conviction stand, holding that the Fifth Amendment does not bind the activities of the Cherokee Nation. *See* Talton v. Mayes,

Still, the unsatisfying nature of the *Wheeler* holding remains, emanating from a combination of two related factors. First is the nature of the particular non-Indian legal principle that the Court used to defend Navajo sovereignty: that dual prosecutions do not offend the Fifth Amendment when undertaken by separate and independent sovereigns.

This is a proposition that every lawyer can understand.[11] But intelligent non-lawyers balk at accepting it. For lawyers, it is a tidy solution to a sticky problem incidental to federalism. For non-lawyers, many of them anyway, it elevates formalism over substance. To use a high-profile example, it seems unfair to some that the federal government is permitted to prosecute Rodney King's tormentors, California having tried and failed to convict them.[12]

The impressions of intelligent non-lawyers toward the law deserve study and respect, and in this case they are seen to be correct, up to a point.

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163 U.S. 376 (1896).

And, when Protestant Christians sued the Pueblo of Jemez alleging religious discrimination by the tribe—for example, non-Catholics could not be buried in the tribal cemetery—the federal district court held for the tribe on the grounds that the First Amendment of the U.S. Constitution does not protect against such tribal action. *See* Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D.N.M. 1954).

The list could go on.

11. This is not to say that all dominant-society lawyers or law students agree with the dual sovereignty doctrine. For example, a recent poll of judges found them split on the issue, though a large majority would follow present dual-sovereignty law. *See* Associated Press, *27% of Judges in Bar-Group Poll Say L.A. Cops' U.S. Trial Illegal*, CHI. TRIB., July 18, 1993, at 7C. And, the American Civil Liberties Union has recently held a very public discussion of double jeopardy, which included a split with its Southern California chapter and a close vote of its board of directors. That vote was 37 to 29 in favor of continuing the organization's traditional opposition to all second prosecutions; all the minority directors were in the 29, voting in favor of the dual-sovereignty doctrine. *See* Neil A. Lewis, *A.C.L.U. Opposes Second Trial in Beating Case*, N.Y. TIMES, April 5, 1993, at 10; Penelope McMillan, *Passion for Causes Shapes Life of ACLU's Ripston*, L.A. TIMES, May 11, 1993, at 1; Leland Ware, *Double Jeopardy vs. Double Standard*, ST. LOUIS POST-DISPATCH, May 14, 1993, at 3C. For a scholarly treatment, *see* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy After Rodney King*, 95 COL. L. REV. 1 (1995).

See also CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 756 (2d ed. 1986) ("While [the dual sovereignty doctrine] is particularly forceful when dealing with international crime, it makes less sense within the United States, even acknowledging the federal nature of our system."). Professors Whitebread and Slobogin do not discuss the doctrine as it applies to tribes, except for a citation to *Wheeler*, but they might have as Indian tribes fit nicely between their mention of international crimes and federalism.

12. *See, e.g.*, Editorial, *Overkill in Government Appeal of King Case*, ATLANTA J. & CONST., Sept. 7, 1993, at 8; Alex Beam, *Double Jeopardy*, BOSTON GLOBE, Apr. 21, 1993, at 19; Byron Dillon, Letter to the Editor, L.A. TIMES, Aug. 30, 1994, at 6; Robert Roy Johnson, Letter to the Editor, CHI. SUN TIMES, August 29, 1994, at 22; Jeffrey A. Meyer, Letter to the Editor, N.Y. TIMES, Apr. 19, 1993, at 18. *Compare* Editorial, *It's Not Double Jeopardy in L.A.*, N.Y. TIMES, Apr. 8, 1993, at 20; Editorial, *King Trial Not A Case of Double Jeopardy*, CLEV. PLAIN DEALER, Apr. 18, 1993, at A6. Some foreign voices, too, have joined the fray. *See* Ambrose Evans Pritchard, *Why LA Law Has Become a Bad Joke*, SUNDAY TEL., Oct. 24, 1993, at 25:

> Panicked by riots, the Bush Administration had the men retried for the same offence on a federal 'civil rights' statute. A few fuddy-duddy conservatives protested that it was a disgraceful abuse of power, that it amounted to double jeopardy and that government was blithely sweeping away a crucial safeguard against tyranny. But hardly anybody cared. The liberal establishment in Washington wanted these policemen locked up, come what may. Thus an ancient liberty was compromised for a moment's peace on the streets of LA, and the Great Republic slipped a notch further into the Third World.

It *is* formalistic to treat the entity we call California as a sovereign separate and independent from the entity we call the United States, especially since on so many occasions we do not make that very distinction. When Congress says "lower the speed limit" and California does so, where is the distinction? Again, the lawyers' explanations are formalistic and unsatisfying. Furthermore, the non-lawyers may be right in that there is something profoundly unfair about *all* dual prosecutions.[13]

It is not the case that all formalism is wrong, nor that the sovereign independence of the states—which we sometimes take for granted, sometimes ignore and sometime agonize over—is unimportant. There are times when it is crucial to insist that the formal distinction between sovereigns be observed, as *Wheeler* shows. But a formalistic explanation should be seen for what it is, and the lawyers in the room should not expect such to be accepted on faith by the non-lawyers.[14]

This leads to the second factor that accounts for the unsatisfying nature of the *Wheeler* case, for the irony seems heavy that such a formalistic dominant-society law should be used to establish an elementary principle of Native American law. If Indian tribes are governments able to "make their own laws and be ruled by them,"[15] and if those laws are often different from the dominant society's—and if they are not, then this is all so much fuss over nothing—then the very place that one would expect the greatest deviation from dominant-society law-making would be in the use and application of dominant-society formalistic legalisms. One such formalistic legalism would have to be that it somehow takes away the innate unfairness of dual prosecutions when they are done by different sovereigns, the very legalism that the *Wheeler* Court used to establish the independent and inherent right of the Navajo Court to make and enforce law.

A word about the term "dominant-society law": Some would prefer "Anglo-American law," but when the discussion concerns American Indians, the distinction is important. Granted that American law in general and formalism in particular are much more influenced by the law of England than of any other country, and of Europe more than any other

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13. While there is something to the position that the dual sovereignty doctrine improperly elevates interests of state sovereignty over individual rights, there is little but nonsense in the just-quoted passage from the *Sunday Telegraph*. The "conservatives" who protested the second prosecution include the American Civil Liberties Union, *see supra* note 11, and the "liberal establishment" that sought the prosecution included the Republican administration. Nor is it generally thought that the existence of a dual-sovereignty doctrine in the double jeopardy jurisprudence of a nation is actually what separates the First and the Third Worlds.

14. This juxtaposition between lawyers and non-lawyers on the issue of the dual-sovereignty doctrine is rather too facile for anything more than an off-hand reference, as in the text. *See supra* note 11.

15. Williams v. Lee, 358 U.S. 217, 220 (1959). Williams v. Lee dealt not with the power of tribes actually to make any particular law, but rather with the power of the state of Arizona to infringe on that power. Nevertheless, there are few handier definitions of what tribal sovereignty is than this compact phrase from Justice Black. It is worth emphasizing that the right to make laws and live by them includes, or should include, the right to apply those laws to visitors. *See Williams*, 358 U.S. at 220.

continent. Granted that African-, Asian-, Hispanic- and Continental-European-Americans find American law only slightly influenced by their cultures and laws, and might insist that "Anglo-American law" is the only apt description.

But under American law, it is *only* American Indians who have their own governments and the sovereign right to make their own laws. All others must participate in the dominant society as individuals, or as members of private, voluntary organizations. Hence, it is necessary to contrast tribal law with the law of the dominant society, *in toto*, and for these purposes the formalism found in the law of the dominant society *is* the law of all the groups, minority and majority, that make up that society. African-Americans, Asian-Americans, Polish-Americans and the others are bound by the law of the dominant society and their only recourse is to influence the development of that law, or leave. It is only American Indians who have the recognized right to stay—after all, they have nowhere else to go "home" to—and to make their own laws, independent, to a large extent, of what the dominant society thinks best. It is the adjudication of those laws in their own courts that is the subject of this short essay.[16]

Formalism has its well-ensconced place in the law of the dominant society, and this essay does not urge its large-scale—nor even its small-scale—removal. At this point Professor Pommersheim's essay[17] is helpful. He defines the "Contextual Legitimacy" of his title as

> a post-formalist view that suggests the meaning of legitimacy shifts from a concern for antecedent legitimating foundations, such as the logical application of rules of law, to a demand for a legal and political system which on the whole enjoys and merits the allegiance of the people. The propriety and integrity of adjudication therefore depends on their contribution to the legitimacy of the legal and political system in its social, historical and cultural context.[18]

This passage is broadly consistent with the present essay. But the emphasis here is, instead, entirely on "the logical application of rules

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16. For other articles on law-making in tribal courts, *see* Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994); Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411; Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989); 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 (1988); Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987).

17. 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 (1988).

18. *Id.* at 59-60. To take this passage out of context suggests that Professor Pommersheim is concerned only with the *internal* legitimacy of tribal judicial systems: "a legal and political system which on the whole enjoys and merits the allegiance of the people." But, as the essay makes clear when read in its entirety, the perception of legitimacy by non-members, both on- and off-reservation, is also crucial for the courts to go about their business, assuming, as one must, that that business includes the adjudication of all reservation disputes. Finding the form, procedure and substance that will maintain legitimacy among both members and non-members is one of the most difficult challenges that exists for tribal courts.

of law," the intent being to show that, in tribal court adjudication, logic can lead one quite handily in a different direction whence it leads in the dominant society's courts. *Wherever* one's logic leads one in dominant-society adjudication, one ought not expect to see the same law-making replicated when the adjudication is in tribal court. That the rules are transformed when the case is before a tribal judge is shown first by analyzing how the *Wheeler* case would change if the prosecutions had been in the opposite order.

A. Wheeler-in-Reverse and Double Jeopardy in Tribal Court

Suppose the federal prosecutor had brought the first prosecution against Wheeler in federal court. Assume for the moment that he was acquitted there, at which point the tribe indicted him and the second prosecution commenced, now in tribal court. What result?

It was long ago established, in *Talton v. Mayes*,[19] that the Fifth Amendment of the U.S. Constitution does not work to bind tribal activity.[20] That result is eminently sensible, as the tribes are governments far more ancient than the Constitution itself, and did not ratify that document. In addition, there is neither "state action" nor "federal action" when a tribe acts. Unlike the *Wheeler* case itself, then, the determination of the legitimacy of the tribal prosecution would not be a constitutional determination. Rather, the double jeopardy question would be decided under tribal law and non-constitutional federal law, particularly the Indian Civil Rights Act (ICRA).[21] As will now be shown, those laws are different from constitutional law and the tribal judge—or his or her appellate colleagues—will essentially have the final say on the extent and meaning of those differences. Mr. Wheeler may, in the end, still be prosecuted

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19. 163 U.S. 376 (1896).

20. The first Justice White, writing for the Court in *Talton*, stated the issue this way:

> [W]hether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the constitution of the United States, and hence controlled by the fifth amendment to that constitution, or whether they are local powers not created by the constitution, although subject to its general provisions and paramount authority of congress.

Id. at 382. The Court held that the prosecution of Talton was the exercise of a local power.

It seems unquestioned that the holding of Talton v. Mayes is extendable to the entire body of the Constitution, at least that part that requires "state action." It is never been exactly clear to which "general provisions" Justice White was referring, but perhaps, for example, the Constitution's grant of authority to Congress to establish bankruptcy laws or coin money would somehow prohibit the tribes from doing the same. Of course the Thirteenth Amendment, which reaches private activity, binds the tribes, and they could not permit slavery, at least as long as it is accepted that tribal territory is "within the United States, or . . . subject to their jurisdiction." U.S. CONST. amend. XIII. Only scholars much more nonconformist than any the author knows would argue that this language does not reach into Indian country.

Justice White's reference to the "paramount authority of Congress" was an early statement of the plenary power, and, like many such statements over the years, is both gratuitous and *dicta*. In this instance it was doubly unnecessary, as the Supremacy Clause would appear to be one of Justice White's "general provisions" of the Constitution.

21. 25 U.S.C. § 1301-03 (1988).

twice, but it will be the tribal judge who will decide, that decision will not be governed by *Wheeler*, and the tribal judge's decision will be tantamount to final and unappealable.

First, under tribal law: Note that the body of tribal law may, or may not, have a prohibition of dual prosecutions. Any prohibition that exists, whether it be old and traditional, new and evolving, fully Indian or dominant-society inspired, may or may not have an exception for dual prosecutions by separate sovereigns. Tribes differ greatly, and generalizations about what should or should not be expected in the constitutions, statutes and common law of any particular tribe are hazardous. Certainly there should be no expectation that tribal law is somehow less sophisticated than dominant-society law.[22] If any expectation at all is justified, one would expect the tribal judge to look beyond the dominant-society formalism embodied in the constitutional dual sovereignty doctrine, and cut directly to the perceived fairness, or not, of dual prosecutions by *any* sovereign or combination of sovereigns.

In addition to tribal traditional, common and statutory law, the federal ICRA is also applicable in the tribal proceedings, for, as the Supreme Court has stated, "§ 1302 has the substantial and intended effect of changing the law which [tribal] forums are obliged to apply."[23] The ICRA might also apply indirectly as tribal law, incorporated by constitution or statute into the tribal books.[24] This federal law has a "Fifth Amendment analog" which contains a "Double Jeopardy Clause,"[25] but it is Indian-law dogma that the provisions of the ICRA do not necessarily mean the same as their constitutional counterparts.[26] The tribal judge interpreting the ICRA either as tribal law, or as paramount federal law, has two choices: (1) to find that the ICRA's double jeopardy protection—including a dual sovereignty exception—is co-extensive with the U.S. Constitution's protection, and convict, (or, at least, allow the prosecution to proceed) or (2) to find that the ICRA's protection is more protective of individual rights than the Constitution's, thereby rejecting dominant-society formalism, and dismiss.

If the tribal judge should dismiss the second, tribal prosecution as violative of either tribal law or the ICRA, and release the defendant,

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22. Perhaps the first work to debunk the notion that what was then called "primitive" law was unsophisticated was the classic KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY (1941).

23. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978).

24. *See, e.g.*, OSAGE NATION CONST. (adopted by referendum in 1994) art. XIV, § 2 (containing language identical to the ICRA).

25. 25 U.S.C. § 1302(3) (1988).

26. *See, e.g.*, *Martinez*, 436 U.S. at 62:

> Section 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed, selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments.

Departures from this dogma are uniform in their sparse reasoning. *See, e.g.*, United States v. Strong, 778 F.2d 1393, 1397 (9th Cir. 1985); United States v. Clifford, 664 F.2d 1090, 1091-92 n.3 (8th Cir. 1981); United States v. Lester, 647 F.2d 869, 872 (8th Cir. 1981); Ortiz-Barraza v. United States, 512 F.2d 1176, 1180-81 (9th Cir. 1975).

there would be no possible appeal other than to a tribal appellate court. Surely there is no known legal theory that could result in a collateral attack in federal court brought by a losing tribal prosecutor, even in the case where the tribal judge has departed from dominant-society norms in her construction of the federal ICRA.[27] On the other hand, if the tribal judge should find that tribal law permits the second prosecution, then the defendant has a federal habeas corpus remedy under § 1303 of the ICRA, which will allow the conviction to be attacked collaterally in federal district court.

That collateral attack is unlikely to succeed, and it is practically inconceivable that the federal court would invalidate the tribal conviction. For the prisoner to be ordered released by the federal court would require a federal court holding that the ICRA departs from dominant-society law—a departure almost always justified by the existence of a closely held tribal tradition[28]—in the face of a tribal court's holding that there is no departure, and that no such tradition exists. A reversal of expectations like this is logically possible, and stranger things have happened under the ICRA,[29] but it is unlikely. Much more likely is that the tribal conviction would stand.

As described above, with the order of prosecutions reversed, the final determination of the meaning of double jeopardy in tribal court is almost entirely in the hands of the tribal court judge. Furthermore, the order of the prosecutions is in fact irrelevant; it was only a rhetorical trick in this essay to require the reader to focus on the tribal, not federal, adjudication. Concurrent prosecutions raise all the same issues before the tribal court, once one is attuned to seeing that, due entirely to *Talton v. Mayes*, a different analysis obtains there. Even tribal prosecution *in advance* of a threatened federal prosecution might raise the tribal-law double jeopardy issue. Dominant-society jurisprudence requires that jeopardy "attach" before there is any double jeopardy problem,[30] but this may not be tribal law. The same rules might, or might not, apply in tribal court. It is somewhat more likely that these "attachment" rules would apply in the tribal court via the ICRA, but as a practical matter the tribal judge alone will make that federal-law determination, without much fear of a collateral overruling by a federal judge.

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27. Conceivably, there might be some administrative complaint that could be made by tribal prosecution authorities against the tribal courts, within the Bureau of Indian Affairs. Any such administrative remedy is beyond the scope of this article.

28. *See, e.g.*, the district court opinion in Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 16 (D.N.M. 1975), *rev'd* 540 F.2d 1039 (10th Cir. 1976), *rev'd* 436 U.S. 49 (1978), which allowed the tribe to depart from dominant-society gender-neutral norms due to the patrilineal, patrilocal tribal tradition.

29. *See, e.g.*, Conroy v. Bear Runner, 16 I.L.R. 6037, 6039 (Oglala App. 1984), in which the tribal court found, contrary to most well-reasoned federal authority, that the protections of the ICRA are co-extensive with those of the U.S. Constitution.

30. In a jury trial, jeopardy "attaches" when the jury is impaneled and sworn, Crist v. Bretz, 437 U.S. 28, 38 (1978). In a bench trial, jeopardy "attaches" when the court begins to hear evidence. *See generally*, STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 1243 (4th ed. 1992).

Likewise, dominant-society double jeopardy jurisprudence makes little distinction whether the first prosecution ended in conviction or acquittal; once jeopardy attaches, the second prosection is barred, unless it is instigated by a separate sovereign.[31] Again, however, this is a formalism that the tribal judge might well reject and find, for example, that a second prosecution is barred under tribal law following a conviction, but not following an acquittal. Or *vice-versa*.

The trap for the unwary dominant-society lawyer is thinking that the tribal judge must permit the second prosecution—as the U.S. Supreme Court did in *Wheeler*—in order to honor tribal sovereignty. But this is the view only from the perspective of dominant-society formalism. To require a tribal judge to follow *Wheeler* as the only way to honor tribal sovereignty is to bind her to the Constitution in ways that *Talton v. Mayes* said were unnecessary. Surely it is every bit as much an exercise of independent rule-making authority, and therefore an exercise of tribal sovereignty, for the tribal judge to find tribal law or the ICRA to be more protective of individual liberty than is the U.S. Constitution.

The point of this little colloquy on double jeopardy is not to suggest either that the tribal judge should follow *Wheeler*'s dominant-society formalism or that she should not, nor even that all tribal judges should answer the question the same way. It is in that exercise of adjudicative decision-making that one aspect of tribal sovereign authority resides. The point, rather, is this: It is plain that the dual sovereignty doctrine of dominant-society double jeopardy jurisprudence is not necessarily related to the federal doctrine of inherent tribal sovereignty. The relationship between the two, as established by *Wheeler*, was necessary only in the sense that the recognition of one (tribal sovereignty) required the application of the other (the dual sovereignty doctrine) *in the dominant society's courts*. The tribal judge who determines that dual prosecutions, even by separate sovereigns, are unfair and ought to be prohibited is not derogating tribal sovereignty by failing to follow *Wheeler*'s logic. Instead, the tribal judge is exercising tribal sovereignty by the very act of rejecting dominant-society law and by reaching conclusions different from the ones reached by the dominant society's sometimes formalistic courts. The important part of a tribe's ability to "make its own laws and be ruled by them" is the ability to make those laws be different from the dominant society's.

B. Tribal Sovereign Immunity and Ex parte Young in Tribal Court

Consider now the case of sovereign immunity. In state and federal court, tribes are entitled to sovereign immunity quite similar to that

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31. United States v. Ball, 163 U.S. 662 (1896), established both that a first acquittal bars a second trial and that a first conviction poses no bar where the defendant appeals and the first conviction is reversed. Where the conviction is reversed due to an appellate finding that the evidence was insufficient—not the case in *Ball*, where the indictment had been faulty—a second prosecution is barred. Burks v. United States, 437 U.S. 1, 18 (1978). *See generally* United States v. Scott, 437 U.S. 82, 87-92 (1978). Following conviction for one crime, there can be no reprosecution for that crime or for a lesser included one. Brown v. Ohio, 432 U.S. 161, 169 (1977). All of these rules, of course, are subject to the dual sovereignty exception under discussion in the text.

enjoyed by state and federal governments and their agencies.[32] The protection is not perfect,[33] and is waivable either by the tribe itself,[34] or by Congress, if done with sufficient explicitness.[35] But these rules are for the application of the *federal* doctrine of tribal sovereign immunity when a tribe is sued in state or federal court. What will the doctrine be and how will it be enforced in tribal court adjudication?[36]

One can imagine a tribal court rejecting the entire doctrine as a colonial implant, especially in its the-sovereign-can-do-no-wrong guise; there is something decidedly un-American—native or not—about the idea that *any* government can commit torts or breach contracts with impunity.[37]

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32. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Padilla v. Pueblo of Acoma, 107 N.M. 174, 754 P.2d 845 (N.M. 1988).

33. In *Pueblo of Acoma*, the New Mexico Supreme Court refused to find the tribe immune on the grounds that, in like circumstances, the state of New Mexico would not have been immune (arguing by analogy from Nevada v. Hall, 440 U.S. 410 (1979), which stated the general proposition that one state was not required by federal law to grant another state more immunity than it would grant itself). *Pueblo of Acoma*, 107 N.M. at 179, 754 P.2d at 850. *Pueblo of Acoma* is a much-criticized case, usually on the sensible grounds that the analogy does not hold. *See, e.g.*, Note, *Sovereign Immunity—Indian Tribal Sovereignty—Tribes Not Immune from Suits Arising from Off-Reservation Activity*, 102 HARV. L. REV. 556 (1988); ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 338 (3d ed. 1991); DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 435 (3d ed. 1993).

34. Because of the federal trust responsibility, and a lingering paternalism (some would say "colonialism"), there is a question as to whether a tribe, acting alone, can waive its immunity, or whether Congress must agree. *See*, United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940); GETCHES ET AL., *supra* note 33, at 435-36.

35. Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165 (1977). A unilateral congressional abrogation of sovereign immunity "cannot be implied but must be unequivocally expressed." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). *See generally* ROBERT N. CLINTON ET AL., *supra* note 33, at 341-43.

36. "As sovereign governments, Indian tribes can adopt or reject sovereign immunity either as a whole, or in some limited form, or create waivers. No federal law requires any particular result; the choice is up to the tribe." Ralph W. Johnson & James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153, 161 (1984).

This article by Professor Johnson and Attorney Madden is a helpful one, but is at least subtlety contrary to the present article. Most of the discussion therein is a rendition of dominant-society law, *see id.* at 169-90, the authors explaining this section of the article as follows:

> Tribal courts are not bound by federal or state common law on sovereign immunity, nor by federal or state statutes waiving or changing the doctrine in federal or state courts. Tribal courts have nonetheless tended to rely on federal cases and to a lesser extent on state cases and on standard non-Indian treatises and articles for ideas, wisdom, and authority. Because of the complexity of the subject and the often limited library facilities available to tribal courts, the history, development, and current status of the doctrine in federal law and in selected states is summarized below.

Id. at 169.

Of course, the discussion that follows this paragraph makes it that much easier and more likely that dominant-society law will become tribal law by default. At the end of their article, Johnson and Madden return to the question of how tribal courts should receive the doctrine and helpfully discuss the competing values that the question poses, both for courts and councils. The authors end with this hope: "[that] this article will assist tribal councils and tribal courts in exploring whether this doctrine should become, or remain, part of the law of each tribal jurisdiction." *Id.* at 193. That hope is surely justified.

37. In a little-known, but thought-provoking article, Professor Smolla argued that sovereign immunity—or rather a state's limited waiver in the context of the establishment of its claims commission—is violative of due process. *See* Rodney A. Smolla, *Politics and Due Process Don't Mix: Should the State Claims Commission Be Abolished?*, 1986 ARK. L. NOTES 43.

On the other hand, tribal fiscs tend to be small and vulnerable[38] and need the protection of the doctrine.[39] And few tribal courts have held their government's treasury to be available as a general matter to compensate private wrongs.[40]

However, and from the perspective of the discussion above regarding departures from *Wheeler*'s dominant-society formalism, contemplate the treatment that a tribal court might give to the dominant-society jurisprudence contained in the *Ex parte Young*[41] exception to the doctrine of sovereign immunity. Again, as with double jeopardy law, the exception is easy enough to master: while a government itself might be immune from suit, there is no objection to suing an individual governmental officer, seeking to enjoin him or her from acting in the way that the plaintiff wishes the government itself would not act. *Ex parte Young* permitted such a procedure, and *Home Telephone & Telegraph Co. v. City of Los Angeles*[42] held that the officer's actions were still "state action" for the purposes of the constitutional requirement, notwithstanding that the state's immunity does not protect the officer.[43]

We see again exactly the kind of dominant-society formalism that tribal courts might well be expected to reject and to bar all suits, in the name of sovereign immunity, against either the government or its officers. Unlike the double jeopardy example discussed above, however, the tribal judge is subject to being second-guessed.

Suppose a suit is brought on the civil side in tribal court, challenging some tribal action, the cause of action being under tribal law. Suppose the tribal court decides, as a matter of tribal law, that there is no *Ex parte Young* exception to tribal sovereign immunity. The suit is thus dismissed, which dismissal is affirmed on appeal to the tribal appellate court. Can the plaintiff somehow convert the case to one under federal law and sue the tribe in federal court? And if so, what result in that venue?

The first question for the federal court, as always, is whether there is federal subject matter jurisdiction, and two distinct theories come to mind. First, it is always a federal question whether a tribe has any jurisdiction at all over non-Indians,[44] so, if the plaintiff—that is to say the *federal* plaintiff—is non-Indian, then it is theoretically possible to make an attack in federal court on the power of the tribal court to hear

38. The very high-profile tribes with lucrative gambling operations are exceptions to this general rule, with corresponding changes in those tribes' sovereign immunity discussions. *See* Ben Nighthorse Campbell, *The Foxwood Myth*, N.Y. TIMES, Mar. 29, 1995, at 23A.

39. *See* Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058 (1985). *Compare* Thomas P. McLish, Note, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 COLUM. L. REV. 173 (1988).

40. *See* Johnson & Madden, *supra* note 36. These authors made a comprehensive study of the doctrine of tribal sovereignty in tribal courts, finding no cases raising the issue before 1968, and only eighteen cases between 1978 and 1984. *Id.* at 154-55.

41. 209 U.S. 123 (1908).

42. 227 U.S. 278 (1913).

43. *See id.*

44. National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 852 (1985).

the initial case. Though there are several excellent reasons to support the existence of such jurisdiction—for example, that it is *exactly* in the nature of a government that it exercises power over all persons who consent to that exercise by their physical presence within the jurisdiction—the Supreme Court has never so held with any definiteness.[45] In the present context, however, where the tribe is being sued, the only possible non-Indian is the plaintiff who originally invoked the tribal court's jurisdiction. Even an off-reservation court hostile to tribal sovereignty would be loath to hold the tribe without power to adjudicate a case brought by the party now attacking its jurisdiction, so we may assume that the extent of the tribal adjudicative power is not raised by the present hypothetical.

The only other federal question that might support federal court jurisdiction is whether the tribal court's failure to follow the *Ex parte Young* exception to sovereign immunity somehow rises to a breach of a federal law by the tribe. The only such law that comes to mind is the ICRA, and, therefore the question would seem to be entirely answered by the *Martinez* holding that the ICRA creates no civil cause of action over which suit may be brought in federal court.[46] In the more than fifteen years since *Martinez* was decided, the Congress has chosen to leave intact that holding interpreting its statute[47] and, hence, there ought to be at least a presumption that it was correct. One notorious case, however, cautions a tribe against counting on *Martinez* to bar an ICRA assault on tribal sovereign immunity.

In *Dry Creek Lodge v. Arapaho & Shoshone Tribes*,[48] a non-Indian corporation thought it had permission to use a road across the reservation to the lodge and to a wilderness area lying adjacent to the reservation.[49] However, one day after the lodge opened, the tribes closed off the only access road, apparently trapping some guests and owners inside.[50]

The lodge and its owners sued the tribes in state court—and were removed to federal court—seeking money damages and injunctive relief.[51] Of course, the gravamen of the complaint was a simple breach of contract, over which there was no federal jurisdiction.[52] Nor would the state have

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45. The recent decision in South Dakota v. Bourland, 113 S. Ct. 2309 (1993), has left tribal advocates with a certain foreboding about the eventual resolution of this question.

46. *Martinez*, 436 U.S. at 72.

47. *See, e.g.*, S. 517, 100th Cong., 1st Sess. (1987). This bill would have overruled *Martinez* and created a federal cause of action for ICRA breaches. It was never passed.

48. 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).

49. This permission came, not from the tribes or any tribal official, but from the superintendent of the reservation, a federal employee. *Id.* at 684. To call this choice, on the corporation's part, of a negotiating partner, a "tactical mistake" seems an understatement.

50. *Id.* at 683-84. "Trapped," of course, is relative; they could have hiked or hoofed out through the wilderness area.

51. *Id.* at 684.

52. On federal court subject matter jurisdiction for Indian reservation claims, see generally FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 308-17 (Rennard Strickland ed., 1982). The proposition in the text at this footnote is so fundamental that the Cohen discussion does not even mention it, but no known case has ever held that federal jurisdiction exists for an otherwise tribal cause of action merely because the relevant events occurred on an Indian reservation. The question of diversity

jurisdiction over such an on-reservation transaction,[53] so the most likely venue was in tribal court, a venue that the owners of the lodge might have understandably considered hostile.[54]

Dry Creek Lodge, as argued in federal court, alleged not only private law infractions, but ICRA due process and equal protection violations. The plaintiff's jurisdictional theory was entirely inconsistent with *Martinez*, the Supreme Court's precedent for the absence of any federal civil cause of action under the ICRA.[55] However, the Tenth Circuit allowed the suit to be brought and remanded the case for a new trial on the issue of damages.[56]

Dry Creek Lodge was a suit against the sovereign tribe for money damages, as well as an injunction. Under traditional dominant-society jurisprudence, sovereign immunity would have been a non-trivial defense to the money damage claim.[57] Nevertheless, the Tenth Circuit, without directly discussing sovereign immunity, lamented the lack of a tribal forum, and used that lack as one justification for distinguishing *Martinez*.[58]

Even in the part of the suit seeking to enjoin the tribe to lift the barricade, it is entirely unclear that tribal law would, should, or must have an exception similar to *Ex parte Young* for suits against the tribe and its officials brought in tribal court. Of course, there are certain costs for any tribal, state or federal government that decides to experiment with the protections of the sovereign immunity doctrine. A loose doctrine threatens the treasury and allows for judicial activism in the supervision of executive matters; a tight doctrine makes outsiders less willing to deal with the government and gives insiders fewer protections from local abuses of power. These, however, are *tribal* concerns, entirely so when the issue is the interpretation of tribal law. If self-determination is to mean anything, these are trade-offs that the tribe must decide whether or not to

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jurisdiction is more complicated. *See id.* at 317.

Federal jurisdiction does exist under 28 U.S.C. § 1362 (1988) for civil actions brought *by* tribes. The presence of this section suggests that if Congress wishes to make all suits *against* tribes subject to federal jurisdiction, it knows how to do it.

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

54. Neither this statement nor the attitude anticipated is in broad derogation of the fairness nor legitimacy of tribal court jurisdiction, any more than the existence of federal diversity jurisdiction is in derogation of the same in state courts. Forum-shopping by plaintiffs far from home in order to avoid perceived or real home-court advantage is a sin venial if at all. The courts of Madison County, Arkansas, for example, are thought best avoided by many strangers and, while this attitude is hardly a testimonial to Madison County jurisprudence, it at least shows that there is nothing particularly remarkable about tribal home-court advantage, nor about Dry Creek Lodge's attempt to avoid it.

55. For a more complete inspection of the case's rationale, see Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589, 594-99 (1990); Kevin Gover & Robert Laurence, *Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions under the Indian Civil Rights Act*, 8 HAMLINE L. REV. 497, 499-515 (1985); ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 395-96 (3d ed. 1991).

56. *Dry Creek Lodge*, 623 F.2d at 685.

57. *See* Johnson & Madden, *supra* note 36, at 174-76.

58. *Dry Creek Lodge*, 623 F.2d at 685.

make. Even as a "platonic notion,"[59] the sovereignty of the tribe guarantees that it must have the first opportunity to establish and limit the bounds of sovereign immunity. Specifically, the tribal court must have the first opportunity to follow, or not, the formalistic logic of *Ex parte Young*.

More than a decade has come and gone since *Dry Creek Lodge* and the case has lost whatever *stare decisis* force it ever had, which was little.[60] Still, observe that *Dry Creek Lodge* was a suit against the sovereign tribe for money damages. The Tenth Circuit deplored the lack of a tribal forum, and allowed a new trial on the issue of money damages, notwithstanding the apparent validity of a sovereign immunity defense. Indeed, it was the very absence of a tribal forum—justified by traditional notions of sovereign immunity—that caused the federal court to carve out an exception to *Martinez*.

The Supreme Court may well have been right that *Ex parte Young* allowed the *Martinez* federal court case to continue against the named Governor of the Santa Clara Pueblo.[61] But that was a construction of the federal, not tribal, doctrine of sovereign immunity. Absent *Martinez*, an interesting question is presented: Is ICRA due process offended when a tribal court, as a matter of tribal law, determines that there is no *Ex parte Young* exception to tribal immunity? As long as *Martinez* is the law, however, this question is not raisable in federal court, *Dry Creek Lodge* notwithstanding.

Even though it is almost universally considered to be wrong, *Dry Creek Lodge* shows the distinction between a tribal rejection of the dual sovereign rule of dominant-society double jeopardy jurisprudence and the rejection of the *Ex parte Young* rule of dominant-society sovereign immunity jurisprudence. Here, a rejection of dominant-society law would be more protective of the tribe at the expense of an individual. And, as the Tenth Circuit showed, a federal court can be sorely tempted to second-guess a tribe's rejection of dominant-society law when it works to the disadvantage of a white plaintiff. Because the rule of *Martinez* is so clear and the result in *Dry Creek Lodge* is so clearly wrong, this second-guessing via a civil-side application of the ICRA poses no considerable threat to tribal court adjudication at the present. The next example shows a more legitimate second-guess.

C. *Ex parte Judge-Jury Communications and Full Faith and Credit*[62]

One of the places where dominant-society legal formalism is most visibly on display is in the conduct of a trial. Much of what happens

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59. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973).

60. Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 319 n.4 (10th Cir. 1982) (limiting *Dry Creek Lodge* to its facts). *But see* Little Horn State Bank v. Crow Tribal Court, 690 F. Supp. 919 (D. Mont. 1988), *vacated without opinion on stipulation of the parties*, 708 F. Supp. 1561 (D. Mont. 1989).

61. *Martinez*, 436 U.S. at 59.

62. Much of the following discussion is drawn from P.S. Deloria & Robert Laurence, *Negotiating*

from the moment the judge walks in the courtroom to the reading of the jury's verdict is prescribed by very formal rules as well as elaborate folkways. Sometimes these rules take on constitutional dimensions; sometimes they do not. Sometimes the folkways are sacrosanct; sometimes not. In either case, they are the kinds of rules and manners from which one, contemplating tribal court adjudication, would anticipate some substantial tribal court deviation.

Consider, for instance, the dominant society's rules governing *ex parte* judge-jury communications. While some lawyers, trained in dominant-society ways, might have a visceral reaction against the fundamental fairness of *ex parte* communications, it is not at all clear in which circumstances the U.S. Constitution prohibits them. The rules are complex, to some extent ambiguous, and apparently still evolving. The Supreme Court has stated, in *United States v. Gagnon*,[63] that "the mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right."[64] That, of course, suggests that occasionally a judge-jury *ex parte* communication is more than a "mere occurrence" and will fail to meet the Constitution's demands.

Making the analysis more difficult, the authority on which the majority based its reasoning is frail.[65] The only support cited by the majority in *Gagnon* was Justice Stevens' concurrence in *Rushen v. Spain*.[66] The *Rushen* Court, in turn, was very divided and five opinions were written, with no other Justice joining in Stevens' concurrence.

Consider the case of *United States v. United States Gypsum Co.*[67] There, the Court offered as an alternative ground for reversal of criminal convictions that the trial judge had met privately with the jury foreman and

> [w]e are persuaded that the Court of Appeals would have been justified in reversing the convictions solely because of the risk that the foreman believed the court was insisting on a dispositive verdict; a belief which we must assume was promptly conveyed to the jurors. The unintended direction of the colloquy between the judge and the jury foreman illustrates the hazards of *ex parte* communications with a deliberating jury or any of its members.[68]

But Chief Justice Burger's opinion, which was joined in by four other Justices on this point, does not make clear whether the holding—if it is

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Tribal State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question, 28 GA. L. REV. 365 (1994). *See also*, Robert Laurence, *The Bothersome Need for Asymmetry in Any Federally Dictated Rule of Recognition for the Enforcement of Money Judgements Across Indian Reservation Boundaries*, 26 CONN. L. REV. ____ (forthcoming Sept. 1995).

63. 470 U.S. 522 (1985) (*per curiam*).

64. *Id.* at 525 (quoting Rushen v. Spain, 464 U.S. 114, 125 (1983) (Stevens, J., concurring in the judgment).

65. *See Gagnon*, 470 U.S. at 530 (Brennan, J., dissenting).

66. 464 U.S. 114 (1983) (Stevens, J., concurring in the judgment).

67. 438 U.S. 422 (1978).

68. *Id.* at 462.

a "holding"—is a constitutional one or, instead, part of non-constitutional federal criminal procedure. Here again, as with Justice Brennan's *Gagnon* dissent, we have an expression of dominant-society distrust of judge-jury *ex parte* communications, but surely such a closely divided Court and equivocal statement should not lead one to find that the dominant legal society's attitude toward such communications is one of repugnance.[69]

Hence, perhaps, the judge-jury *ex parte* communication example is counter-intuitive, chosen to trap the unwary into an instinctive reaction against one common stereotype of tribal court procedure. Those trapped may have anticipated dependable and agreed-upon dominant-society formal rules against *ex parte* conversations, instead of flexibility or even ambiguity coming from divided dominant-society courts. Judge-jury *ex parte* communications, though usually spurring uniform expressions of dislike from the non-Indian bench and bar, in fact are met with equivocation by non-Indian jurisprudence.

Should one expect more, or less, tribal court deviation from such rules? Surely it depends on the tribal court: some will likely be more suspicious of dominant-society rigidity than of dominant-society flexibility; some less. The Indian tribes of North America are less alike than the present nations of Europe and those approaching Indian law for the first time ought to be prepared to encounter a stunning diversity of opinion about both law and procedure.[70]

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69. For a recent case on this issue, following *Gagnon*, see Verdin v. O'Leary, 972 F.2d 1467 (7th Cir. 1992). Extensive judge-jury *ex parte* communications were part of a recent case of high visibility. *See* Seth Mydans, *In Riot Trial, a Sense of Disarray Grows as Judge Won't Oust Juror*, N.Y. TIMES, Oct. 15, 1993, at A1.

70. Including such things as religion, spirituality, environmentalism, and so forth. Native American law and politics have a stimulating way of upsetting the expectations of newcomers to the field, as when those presuming otherwise discover the high level of flag-honoring patriotism (toward the Stars and Stripes, on the off-chance that it does not go without saying) generally displayed on reservations. Or when the benediction at the recent federal-tribal "Listening Conference" was a Christian prayer. Or when tribes choose to site landfills or casinos on-reservation.

Consider, for example, the following letter to the editor of "E" magazine, in response to Andre Carothers, *The First People*, E, Vol. II, No. 5, Sept./Oct. 1991, in which Mr. Carothers wrote: "[I]n the newly revived cosmology of Indian people, waste dumps and Indian lands [are] simply incompatible." Kevin Gover, a member of the New Mexico and District of Columbia bars, and the attorney for various Indian tribes, responded as follows, in a letter that deserves wide celebrity:

> I am thoroughly weary of environmentalists who claim to know what Indian people want and need or, indeed, who claim to have *any* understanding of what is happening in Indian country. In an arrogant and ethnocentric perspective, Andre Carothers holds forth on the perceived phenomenon of waste companies moving onto Indian reservations to site "toxic waste" facilities on Indian reservations. So arrogant is Mr. Carothers that he would observe that, "In the newly revived cosmology of Indian people, waste dumps and Indian land were simply incompatible." Carothers' expertise on Indian cosmology appears to derive from having joined 300 Indians in a five-day gathering to discuss this issue; Carothers even had the thrill of participating with a few Indians in a "sunrise ceremony" that "purif[ied their] souls." God spare us from more white liberals who find spiritual purification in a sweat lodge.
>
> First, Mr. Carothers describes a gathering of 300 Indians in terms that suggest that these 300 represent all Indian people. While I do not know all those who attended, my guess is that they would claim to represent only themselves. Before Carothers presumes to describe the attitudes of Indian people about anything, he

Suppose, then, that a tribal court determines to deviate from dominant-society norms, such as they are, regarding judge-jury *ex parte* communications. If this deviation comes in a criminal prosecution and the defendant is convicted, then federal court review exists under the habeas corpus provision of 25 U.S.C. § 1303. Of course, the question for the federal court would not be whether the tribal court procedure offends the United States Constitution, nor should the court wonder whether tribal law was followed. Rather, the only inquiry is whether the tribal court procedure offended the ICRA.[71] Given the state of the federal, non-Indian law on such *ex parte* communications, it would be unlikely for a federal court to find that they are prohibited by the federal statute.

But let us turn our attention to the civil side. Suppose an Indian sues a non-Indian in tribal court for money damages. Suppose the tribal court judge talks the case over with the jury, which then returns a verdict for the plaintiff. The judge then enters a tribal court money judgment against the defendant, which is affirmed on appeal. How does the analysis go now?

Martinez stands for the proposition that, while the ICRA is still implicated in such action by the tribal court, there is no federal review, there being no federal civil cause of action contained in the ICRA. This is not to say that the ICRA is merely a statement of congressional policy; as Justice Marshall wrote for the Court, "[t]ribal forums are available to vindicate rights created by the ICRA . . . ."[72] Nevertheless, there is

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should learn the attitudes of at least some of the other two million Indian people who live in this country.

Second, how dare Carothers describe any element of "Indian cosmology." I have been an Indian all of my life. My partners and I have devoted our careers to the empowerment of Indian communities. We have spent many thousands of hours talking to the political and spiritual leaders of Indian communities throughout the United States. We have learned of no "Indian cosmology" that is "simply incompatible" with waste dumps. There are thousands of waste dumps on Indian lands. Does Carothers believe that, through some mystical procedure known only to Indians, Indian trash simply disappears?

Next is the characterization of "Indian cosmology" as "newly revived." Says who? These ways, beliefs, attitudes, customs, and traditions have existed continuously for thousands of years. To be sure, Indian tribal cultures have been adapted to the circumstances in which Indians find themselves, but the culture that is unable to adapt is the culture that is doomed to extinction. Just because Mr. Carothers only now has discovered Indian cultures does not mean that they are "newly revived."

This issue of waste disposal on Indian lands is complex, and the solutions will be different from one community to the next. This is at the very heart of what Indians have been fighting for over these past 500 years: the right to make their own decisions about what is happening in their communities. Mr. Carothers' presumptuous descriptions of Indian cosmology and attitudes smacks of the same arrogance that led Fifteenth-Century Europeans to conclude that they had "discovered" America. I hope that in the future, E Magazine—and the environmental community in general—will take great care before presuming that they have any understanding of Indian communities.

71. An arbitrary and capricious departure from settled tribal law could work an ICRA due process violation.

72. *Martinez*, 436 U.S. at 65.

no appeal from the tribal court system, nor any collateral ICRA attack in federal court.[73]

But now suppose the defendant does not pay the judgment voluntarily and that it has no on-reservation property reachable by tribal court process. The plaintiff must take its tribal court judgment to state court and seek recognition and enforcement under state law.[74] How should the state court react when presented with a civil tribal court judgment rendered following an *ex parte* judge-jury conversation?[75]

The question is not an easy one and neither the courts nor the commentators are anywhere near unanimity. Some would argue that existing federal statutory law requires that the state court give "full faith and credit" to the tribal court judgment.[76] Some would argue that a more generalized, and non-statutorily-imposed, respect for tribal sovereignty prevents the state court judge from second-guessing the tribal court procedure.[77] Some would argue that the question is one of comity, a discretionary act by the state-as-sovereign.[78]

The preferred analysis is this: The state court judge need not automatically defer to the tribal court procedure and enforce the tribal court judgment against off-reservation property, but federal law governs and restricts the state judge's inquiry to the questions of whether the tribal court had jurisdiction over the matter and whether the tribal court procedure was in compliance with the ICRA.[79]

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73. In National Farmers Union Ins. Co. v. Crow Tribal Court, 471 U.S. 845, 845 (1985), the Court held that a federal question arises, and hence federal court jurisdiction is proper, when a challenge is made under federal common law to the very existence of tribal court jurisdiction, as distinguished from an ICRA challenge to the way such jurisdiction is exercised. The Court also held that the federal court should abstain for the time being to await the tribal court's determination of its own jurisdiction.

There is a clear connection between the holdings of *Martinez* and *National Farmers Union*. The former strips the federal court of any ability to inspect tribal process to see if the judgment has been issued in conformity with ICRA "fairness." The latter leaves intact, though temporarily unexercised, the ability of the federal court to deny tribal jurisdiction in its entirety. This seems backwards to some. *See* William Canby, *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1 (1987); Robert Laurence, *Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 68 N.D. L. REV. 657 (1992).

74. This conclusion is premised on the assumption that tribal officers are unable to enforce civil judgments off-reservation, an assumption unquestioned either in theory or practice. That is not to say that tribal power never reaches off-reservation; it is almost certainly the case that a tribal long-arm statute would be valid, if written and applied consistently with the ICRA.

75. Theoretically, this issue was implicit in the *Ex parte Young* inquiry. Of course, sovereign immunity arises only when it is the tribe, or tribal officer, who is being sued. There, when sovereign immunity is not held to be a defense in tribal court, a money judgment might be entered and, in the rare case, this judgment might be enforced against off-reservation, non-trust, tribal property.

76. *See* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990).

77. Judge Carey Vicenti of the Jicarilla Apache Tribe presented this position to the recent sessions of the National Judicial College concerning tribal court jurisdiction. Judge Carey Vicenti, Address at the National Judicial College (Oct. 1993).

78. *See* Richard E. Ransom et al., *Recognizing and Enforcing State and Tribal Judgments: A Roundtable Discussion of Law, Policy and Practice*, 18 AM. INDIAN L. REV. 239, 253 (1993) (position advanced by Professor Nell Jessup Newton).

79. *See* Robert Laurence, *The Enforcement of Judgments across Indian Reservation Boundaries: Full Faith and Credit, Comity and the Indian Civil Rights Act*, 69 OR. L. REV. 589 (1990).

The first part of this preferred analysis—that automatic deference to tribal-court ways is not called for—is premised on a variety of factors: that the tribes and states are not "sisters," as the states are, and hence that automatic deference is not necessary. That the state's determination of if, when, and how to commit the sovereign act of enforcing a judgment against specific property is one of serious local concern; "enforce" does not derive from "force" for nothing. "Sisterhood" aside, such an application of force by the state need not be done without an occasion for the defendant to object. If the state court is not given the opportunity to make an ICRA "fairness check" on the rendition of the judgment, it is more likely to resist enforcement in the only way left: by denying that the tribal court had jurisdiction at all over the non-Indian defendant.

The second part of the preferred analysis—that federal law binds the state court determination of whether or not to enforce the tribal court judgment—is in keeping with Indian law dogma, initially established in *Worcester v. Georgia*,[80] that the field is dominated, indeed almost preempted, by federal concerns. States and tribes, as the sovereign entities closest to the problem, ought be allowed to opt out, by mutual agreement, of any uniform federal rule. In the absence of agreement, however, federal law must control.

Finally, the third part of the preferred analysis—that the issues before the state court receiving the tribal judgment for enforcement are narrowed to the federal questions of tribal court jurisdiction and ICRA compliance—merely states the obvious: that matters of tribal law are not to be reviewed by the state court. It is one thing for a state court to find that the ICRA prohibits *ex parte* judge-jury communications; it is entirely another for the court to think it knows better than the tribal court whether *tribal* law permits them.

The details of cross-reservation-boundary enforcement of judgment are complex and the purpose here is not to cover the field. For instance, no mention has been made of the reception a state court judgment deserves when it arrives for on-reservation enforcement before the tribal court.[81] For the objectives of the present essay, it is enough to note that the treatment given to tribal court deviations from dominant-society legal norms regarding judge-jury *ex parte* communications differs from that given to deviations from dominant-society rules regarding double jeopardy or sovereign immunity.

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80. 31 U.S. (6 Pet.) 515 (1832).

81. Here the ICRA will be irrelevant to the tribal court's inspection of the state judgment. And the tribal court should hesitate to inspect the state judgment for compliance with the federal Constitution, as there are federal courts to do that. The tribal court review should be restricted to the question of whether, on the merits, the state judgment threatens a serious deviation from strongly held tribal custom, tradition and law. *See* Laurence, *supra* note 79. Note that the off- and on-reservation rules are not the same. For further discussion, *see* Robert Laurence, *The Bothersome Need for Asymmetry in Any Federally Dictated Rule of Recognition for the Enforcement of Money Judgements Across Indian Reservation Boundaries*, 26 CONN. L. REV. ____ (forthcoming Sept. 1995).

CONCLUSION

The existence of minority groups within any otherwise homogeneous society inherently tests the dominant society's tolerance for diversity. That American Indian tribes are recognized as sovereign governments, that American Indian people represent such a small percentage of the society as a whole, that the ancestors of those people were here first, that their customs and law derive from sources different from the dominant society's, that there is such stunning diversity among the various tribes, and that these tribes are so small, so ancient, and so fragile: all these reasons mean that the existence of American Indians and their governments in our midst present an even greater tax on the dominant society's tolerance for deviations from its norms.

As we have seen, these deviations should be expected nowhere if not from dominant-society law, especially dominant-society legal formalism, and the reaction of the dominant society's legal institutions to these deviations varies, depending on, among other things, the procedural context in which they occur. A tribal judge's rejection of double-jeopardy formalism is unlikely to be second-guessed by any court, state or federal, perhaps because that dominant-society law is so dismissive of the individual rights of the defendant. A tribal judge's rejection of sovereign-immunity, *Ex parte Young*, formalism is more likely to be second-guessed, especially if the plaintiff suing the tribe is white (or at least non-Indian), but that second-guessing, under a *Dry Creek Lodge* theory, is inconsistent with Supreme Court precedent. Finally, a tribal judge's rejection of the dominant-society law that surrounds judge-jury communications might be legitimately second-guessed, on the criminal side by a federal *habeas corpus* proceeding and on the civil side by collateral attack in the enforcement proceeding, if any.

All of this may fit into a fairly sensible analytic scheme. But the more fundamental conclusion is to debunk the belief that a respect for tribal sovereignty—whether self-respect by the tribal court or cross-boundary respect by state or federal courts—requires or even permits one simple response to tribal-court deviations from dominant-society law. In each particular instance, one must determine the strength and sense of the underlying dominant-society law and the extent and sense of the tribal deviation therefrom. To require tribes uniformly to exercise their sovereignty consistently with the law in off-reservation courts, even when that law is respectful of tribal sovereignty, is to demand too much. To hope that off-reservation courts will uniformly ignore the significance of such tribal court deviations is to expect too much.

Most seriously, to demand that off-reservation courts ignore these deviations is to tempt them to ignore the very existence of tribal sovereignty, the essence of which—the essence of *all* sovereignty—is the power of governments, including tribal governments, to exercise power over non-consenting citizens and visitors. This is the *Oliphant* solution to the Gordian knot created by the existence of tribal governments within the dominant society. It is regrettable that the present state of federal Indian law leaves in the hands of federal trial and appellate judges the

power to annihilate any aspect of tribal power deemed, by the judges alone, "inconsistent with [the tribes' dependant] . . . status."[82] Federal law gives federal judges two alternatives: to observe with care tribal deviations from dominant-society law, reacting to each as substance, procedure and good sense allow, or to rub out tribal power entirely, and with it all tribal deviations from dominant-society norms. The second alternative leads to disaster; the first must be preferred.

It is not a bargain attractive to tribes to require or suggest that tribal courts turn themselves, in manners, procedure and analysis, into the United States Court of Appeals for the Tribal Circuit. Nor, ultimately, is it to their advantage to insist that off-reservation courts blind themselves to the differences of manners, procedure and analysis at the tribal bar, and never to permit the observation that, while the dominant society tolerates and indeed respects the tribal difference, it still prefers its own rule. The issues are complex and perplexing, but so be it. Without Indian governments, without tribal differences, without the ability of people on both sides of those differences to prefer their own ways, even while admiring the diversity, without both formalism and the rejection of formalism, North American life would be the poorer.

82. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (citation omitted).