

TRIBAL COURT JURISPRUDENCE: A SNAPSHOT FROM THE FIELD

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INTRODUCTION

While driving over from the Dartmouth College campus in Hanover, New Hampshire to the Stewards of the Land Symposium at Vermont Law School, I was taken with the bright fall foliage and the scenic White River. It made me think of the prairie colors back home and a different White River meandering through the Rosebud Sioux Reservation in South Dakota. With these images in mind, along with the symposium theme of stewardship, I thought I would seek to convey—vividly but somewhat impressionistically—the current contours of tribal court jurisprudence as it is emerging on the South Dakota prairie and throughout the rest of Indian country.

The resulting snapshot includes developments parsed from my ongoing experiences as a tribal appellate justice on the Rosebud Sioux and Cheyenne River Sioux Reservations, conversations with tribal judges and scholars in the field, representative surveys and readings of cases reported in the *Indian Law Reporter*, and late night ruminations. The focus of the snapshot is to provide a sense of the *breadth* of wide ranging tribal court activities in diverse critical areas, rather than to provide an in-depth review of any single area, as several accomplished articles have already done. It is an attempt to stand back for a moment and survey the local and national tribal judicial landscape as it takes on new and exciting coloration. The product of this inquiry is a firm sense that tribal court jurisprudence is developing along three significant tracks, and that a budding second wave of cases are attempting to extend the ambit of tribal authority into heretofore unexplored regions. These tracks and the attendant second wave proceed on an increasingly solid institutional foundation that also bears identification and discussion. All of these activities, taken together, suggest some themes we might identify with the critical tribal court imperative of “doing sovereignty.” This ongoing endeavor, in turn, takes place within the larger reality of the overarching pressure of federal dominance, the call for justice and cultural fidelity, and the historical project of self-government and self-determination.

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I. DEVELOPMENT OF TRIBAL COURT INSTITUTIONAL FOUNDATIONS

The structure and quality of relationships within tribal court systems—especially those between tribal appellate courts and tribal trial courts, and between tribal courts and litigants, the practicing tribal bar, and the rest of tribal government—are critical coordinates in establishing and measuring the health and vitality of tribal judiciaries. In the dominant system,¹ mainline history and conventional civics establish and assert the essential propriety and beneficence of state and federal courts. Tribal courts do *not* have the benefit of such a legacy. Most public education efforts make little or no reference to modern tribal governments, including tribal courts.² Given the fact that Indian tribes are the only minority within the United States with their own government, and the general historical Indian/non-Indian animus and misunderstanding, positive assessments of either the existence or performance of tribal courts cannot be taken for granted. The institutions of indigenous people are often hidden from dominant view and, perhaps especially in situations of decolonization and renaissance, are little known or understood.

A. *The Relationship Between Tribal Appellate Courts and Tribal Trial Courts*

The relationship between tribal appellate courts and tribal trial courts is of particular importance and significance. Because this relationship is relatively new in most tribal court systems, the need for a good working atmosphere, characterized by integrity and mutual respect, is especially acute. In many ways, the institutional stability of tribal judiciaries turns on the quality of this interaction. Characteristics of significance include aspects that are personal, political, and legal in nature.

On the personal level, it is advisable, if not absolutely necessary, that appellate judges have some basic acquaintance with the tribal bench, and vice versa, in order to create a link between their respective efforts.

1. The Marshall trilogy developed the policy and classic rule that the United States federal government was the dominant entity in Indian affairs. The federal government has continued to have an extraordinary amount of power in Indian affairs through the plenary power doctrine. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding that the United States as "conqueror" controls the disposition of Indian lands); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (holding that Indian tribes are "domestic dependent nations" not equivalent to states or foreign nations); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding that Indian nations are "distinct, independent political communities" not subject to the laws of the states); see also *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (establishing the plenary power doctrine).

2. See, e.g., Frank Pommersheim, *When It Comes to Indians, The West Is Ignorant*, HIGH COUNTRY NEWS, May 21, 1990, at 15.

Because most tribal trial and appellate courts are relatively young (thirty to forty years old), they will both inevitably be deciding a large volume of cases of first impression. Given the likely impact of these cases in such areas as jurisdiction, sovereign immunity, civil rights, and the application of tradition and custom, judges at both levels need to realize the unique challenge they face and the potential for substantial divergence in their views. Yet despite whatever divergence may exist, there must be personal and professional respect for the resulting decisions. There is no room, inside or outside the court, for personal rancor. The occasion for reversal is a judicial fact of life, but both the content and acceptance of such reversal must accord with the highest canons of professional integrity and cultural respect. Tribal judiciaries—despite rapid growth and development—are still often institutionally fragile and must not be put at risk by needless conflict or confrontation within the court itself.

There is also a need to maximize personal respect, though not descending to fawning or favoritism, in order to ensure that trial and appellate judges avoid the pitfalls of having their decisions held up to claims that they are personally motivated or politically driven. Again, professionalism and cultural integrity control. The conduct of hearings, the language and style of decisions, and personal relationships inside and outside the court must all hew to standards that place the trial and appellate bench beyond reproach to each other and the general tribal and non-Indian public. There are, of course, elements of the population, both inside and outside Indian country, who would enjoy nothing more than to see tribal courts fail or be severely compromised. The most likely tinder for such naysayers are allegations of personal and political decision-making. Therefore, even the appearance of such decision-making ought to be avoided, lest a stray spark ignite potentially damaging brush fires or worse in the vicinity of tribal courthouses.

At a superficial level, tribal appellate courts merely review those decisions of the tribal trial courts that are properly appealed. There will be instances, however, when there is much more at stake than the disposition of the case. In any number of important areas, there will be neither local statutory nor precedential guidance. Tribal appellate courts will, therefore, often be making and articulating “new” law. Much of this law will identify the legal contours of the relationship between the appellate and trial courts in such areas as standards of review, breadth of habeas relief, and interlocutory appeals.³ In these areas, it is particularly

3. See, e.g., *Woods v. Brown*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6018 (Chy. R. Sx. Ct. App., Nov. 8, 1991) (holding that tribal court of appeals has discretionary original jurisdiction to hear applications for writs of habeas corpus); *Moran v. Rosebud Hous. Auth.*, 19 Indian

important—because of the structural implications—that such decisions be especially well-crafted not only in matters of legal and cultural principles, but in public policy as well, in order to make the most compelling and comprehensive case for any particular principle or ruling.

Because tribal trial courts have responsibilities and “feelings,” appellate courts must be careful not to simply arrogate excessive amounts of review authority. Boundaries and balances must be struck within unique legal and cultural contexts. Tribal appellate courts need to demonstrate special sensitivity and insight in these areas. In many tribal traditions, such as the Lakota’s at Rosebud and at Cheyenne River, harmony and respect are critical. Tribal judiciaries must recognize these traditions in their working relationships. Without such harmony and respect, the requisite equilibrium and unity of purpose are unlikely to be achieved.

B. The Relationship Between Tribal Courts and Litigants

Tribal court litigants are the *direct* recipients of the “services” and decision-making of tribal courts. Their perceptions of the process and results form the foundation on which reputations are established. Because lawsuits tend to have losing as well as winning sides, they are likely to produce some unhappy parties.⁴ This possibility is exacerbated when the results are perceived (correctly or incorrectly) as contrary to traditional cultural expectations or as “inferior” to what might result in state and federal courts. Positive public perception and steady institution-building are often at risk.

Therefore, it is incumbent on tribal courts, at both the trial and appellate levels, to ensure that litigants are treated with dignity and respect. This is especially true at the trial level, where many individuals will not be represented by counsel—particularly in civil matters related to

L. Rep. (Am. Indian Law. Training Program) 6106 (Rbd. Sx. Ct. App., May 30, 1991) (adopting clearly erroneous standard as to questions of fact); Cheyenne River Tel. Co. v. Pearman (Chy. R. Sx. Ct. App., 1990) (holding that appellant failed to identify appropriate standard of review and therefore did not meet his burden of proof) (memorandum opinion on file with author); Red Bear v. South Dakota Dep’t of Social Servs., 16 Indian L. Rep. (Am. Indian Law. Training Program) 6166 (Chy. R. Sx. Ct. App., Sept. 22, 1989) (adopting clearly erroneous standard as to questions of fact); Dupree v. Cheyenne River Hous. Auth., 16 Indian L. Rep. (Am. Indian Law. Training Program) 6106 (Chy. R. Sx. Ct. App., Aug. 19, 1988) (holding that interlocutory appeals are governed by the standard set out at 28 U.S.C. § 1292(b)); *In re J.R.B.*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6137 (Rbd. Sx. Tr. Ct. App., Dec. 9, 1988) (holding that interlocutory appeals are governed by the standard set out at 28 U.S.C. § 1292(b)).

4. *But see infra* text accompanying notes 55-63, 114-15 (discussing non-adversarial approaches in tribal courts).

custody, child support, and small claims actions.⁵ Explanations by tribal court personnel about completion of forms, the schedule of court hearings, and preparation for hearings are critical to assure individuals that they are being treated fairly. In addition to this personal pre-trial solicitude, litigants need clear explanations, bilingual if necessary, to describe what happens in a judicial hearing. Of course, the end result must also be respectfully and lucidly communicated, both orally and in writing.

At the appellate level, the same solicitude is also important because of the unique conduct of appellate hearings where as a general rule neither evidence nor direct testimony is received. Explanations to everyone present about what will occur, and why, are central to establishing baseline judicial credibility. In addition, appellate decisions, almost never directly rendered from the bench, must be both analytically and practically clear with due regard to both the legal claims and human needs of the parties; for the law is a narrative story as well as a practical decision about legal issues. Decisions of tribal courts, more so than those of state and federal courts, often have currency and reverberation within the community-at-large beyond the narrow self-interest of the parties. This is especially true, for example, in such areas as jurisdiction and the application of tradition and custom.⁶

All of this connects to the larger issue of legitimacy.⁷ What can tribal courts do to ensure their legitimacy in the eyes of the public they serve, and what are they presently doing toward that end? The items discussed above reflect the range of possibilities once a person has contact with a tribal court. There are other steps that committed and energetic judges can take outside the formality of litigation and beyond the physical structure of the courthouse. These include visiting communities, speaking to community groups and organizations, and appearing on local radio and television programs to describe and discuss the history, practice, and aspirations of tribal courts and tribal judges. At Rosebud, for example, Chief Tribal Trial Judge Sherman Marshall regularly schedules tribal court "open houses." Members of the public are invited to visit tribal courts for tours, food, and presentations (including the opportunity to ask questions) about the business and mission of the tribal court. These sessions have been quite successful in establishing a better understanding of the tribal court system. In addition, Judge Marshall and other members of his staff

5. This is often true because of the inability of the parties to afford counsel or the inability of legal services attorneys to represent one indigent client against another.

6. See discussion *infra* Parts II.A, II.C.

7. See generally FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 57-135 (1995).

attend community meetings (as far as a hundred miles away from the tribal courthouse) to make presentations about, and answer questions concerning, tribal court activities.

Such efforts are part of the robust commitment to advancing the understanding and reputation of tribal courts at the grassroots level. Tribal judges throughout Indian country, and most certainly at Rosebud and at Cheyenne River, know that their challenge and mission exceed those of their state and federal peers. History and conventional civics have given an imprimatur of propriety, even rectitude, to the dominant legal system, while ignoring, if not actually demeaning, tribal courts. This uneven playing ground must be leveled and overcome for tribal courts to obtain parity and take their rightful place within the national (even international) system of justice. Hard work, cultural pride, and the desire for an enduring justice are the central coordinates of this movement.

C. The Relationship Between Tribal Courts and the Practicing Tribal Bar

The relationship between tribal courts and the practicing bar involves several dimensions. The first revolves around the issue of expectations. Tribal judges inevitably establish the unwritten standards with which the practicing bar must comply. These standards include such things as punctuality, the granting of continuances, the level of deference expected, and the expected quality of oral and written work product. Tribal judges (as they certainly do at Rosebud and at Cheyenne River) must demand professional and culturally appropriate conduct from the practicing bar, in their representation of clients and relationship to tribal judges. Attorneys as a group are charged with the responsibility of carrying out society's legal functions on a daily basis. It is their behavior within the system, as well as their attitude toward and their assessment of that system, that establishes much of the reputation and stature of the courts. Therefore, the actions of the practicing bar must accord with high standards.

Many attorneys, particularly non-Indian attorneys, may not know initially what is expected of them and may even have negative stereotypes about tribal courts. Such ambivalence or even negativity must be readily addressed, implicitly and explicitly, from the outset. For example, in a case before the Rosebud Sioux Tribal Court of Appeals,⁸ an attorney telephoned the clerk of courts on the day of oral argument and informed the clerk that, because of a conflict with a hearing in state court, he would

8. The name of the Rosebud Sioux Tribal Court of Appeals was recently changed to the Rosebud Sioux Supreme Court, and will be addressed as such hereinafter.

not be able to make the hearing. He filed no motion for a continuance, but apparently assumed that his "excuse" would be accepted. It was not. The case was heard without his presence. He was cited for contempt and suspended from practice before the tribal court for three months. The attorney never "missed" another court date.

In addition, tribal court advocates who are not law-trained must be held to the same standards as an attorney and must not be permitted to claim that absence of a law degree entitles them to lax standards.⁹ To permit such laxity would imperil the quality of both individual representation and institutional development. This is occasionally a problem at the appellate level, where the requirement of written briefs and tight, focused, oral argument may be beyond the training and capability of some tribal advocates. As a result, very few tribal advocates practice at the appellate level at either Rosebud or at Cheyenne River.

These observations, in turn, raise questions in a second key area: the applicable standards for both tribal advocates and law-trained attorneys who practice before tribal trial and appellate courts. To date, the practice has been to admit law-trained attorneys based on their admission to practice before some state or federal court.¹⁰ Tribal advocates usually are admitted based on tribal membership and rather minimal educational requirements, though neither Rosebud nor Cheyenne River have specific requirements in this regard.¹¹ Increasingly, tribes are revising these exoteric standards for attorneys and the minimal internal standards for tribal advocates. For example, the Rosebud Sioux Tribe recently

9. Tribal court advocates are individuals, usually tribal members, who are not law-trained, but are admitted to tribal court practice in accordance with local tribal ordinances setting minimum educational and other requirements. Tribal court advocates are also referred to as lay advocates or law counselors. Both the Rosebud Sioux Tribe Law and Order Code and the Cheyenne River Sioux Law and Order Code mention lay counselors as officers of the court with the capacity to represent clients in tribal court matters, but do not describe any specific eligibility requirements. ROSEBUD SIOUX TRIBE LAW AND ORDER CODE §§ 9-2-1 to 9-2-7 (1984); CHEYENNE RIVER SIOUX LAW AND ORDER CODE § 1-5-1 (1978).

10. For example, the Rosebud Sioux Tribe Law and Order Code provides that: Any professional attorney who is an active member, in good standing, of the South Dakota State Bar, or any attorney certified to practice before the highest court of any other State or the Supreme Court of the United States is eligible to be admitted to practice before the Rosebud Sioux Tribal Court. ROSEBUD SIOUX TRIBE LAW AND ORDER CODE § 9-2-2 (1984). The Cheyenne River Sioux Tribe Law and Order Code provides that:

Any attorney who is an active member in good standing of the South Dakota State Bar, or any attorney certified and eligible to practice before the highest court of any other state or of the Supreme Court of the United States is eligible to be admitted to practice before the Courts of the Cheyenne River Sioux Tribe. CHEYENNE RIVER SIOUX LAW AND ORDER CODE § 1-5-3 (1978).

11. See *supra* note 9 and accompanying text.

completed preparation of the Rosebud Sioux tribal bar examination, which was administered for the first time in the summer of 1995.¹² The function of the examination is to ensure basic competence and understanding of the principles of tribal and federal Indian Law.

The Rosebud Sioux Tribe has also formally inaugurated the establishment of the Sicangu Oyate Bar Association.¹³ In addition to regulating admission to practice, this bar association oversees the election of officers and tribal bar commissioners and directly regulates such issues as continuing legal education programs, judicial qualifications, screening, investigating and adjudicating complaints against individual members of the tribal bar, and, more generally, strives to develop a sense of élan and rapport among the members of the practicing tribal bar.¹⁴ The formation of tribal bar associations is an important step forward for tribes, providing organization and direction to the tribal legal community as the *local* entity that monitors and carries out the daily legal functions and responsibilities on the reservation.

D. The Relationship Between Tribal Courts and the Rest of Tribal Government

Some decisions of tribal courts inevitably rule against other branches or parts of tribal government and may include injunctive or habeas relief ordering cessation or commencement of specific governmental activities. Obviously, such situations are fraught with possibilities for confrontation and governmental crisis.¹⁵ In such situations, certain practical, structural, political, and cultural concerns arise. Decisions implicating other parts of

12. The Rosebud Sioux Law and Order Code provides that:

All counsel shall take and pass a Tribal Bar Examination testing their knowledge of tribal law and professional ethics. No counsel shall practice in Tribal Court without having first passed such examination, and paying the appropriate admission fee. The Chief Tribal Judge shall be responsible to set up the testing mechanism for all counsel. All attorneys, both lay and professional, shall abide by a Code of Professional Responsibilities which from time to time shall be adopted by the American Bar Association.

ROSEBUD SIOUX TRIBE LAW AND ORDER CODE § 9-2-3 (1984). The Navajo Tribe has administered its bar examination for an extensive period of time and clearly was the groundbreaking tribe in this regard. Paul E. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. REV. 275, 304 (1991).

13. See SICANGU OYATE BAR ASSOCIATION CONST. & BY-LAWS (1994) (on file with author).

14. *Id.*

15. See, e.g., Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969) (discussing the federal constitutional crisis created by the tension involving the federal government and the State of Georgia as a result of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

the tribal government, therefore, need to contain both compelling legal analysis *and* cultural referents to demonstrate that the decisions comport with both applicable law and cultural standards. In addition, tribal court opinions must reflect respect for, and parity with, the coordinate branches of tribal government. Moreover, to avoid the possibility of misunderstanding, or of circumvention of the court's intent, the orders themselves must be precisely drafted to provide absolute clarity about what is required.

On the structural level, a separation of powers, *de jure* or even *de facto*, obviously minimizes potential clashes. Separation of powers is not, however, a solution that can be imposed from the top down. Rather, it needs to work its way up from the grassroots with cultural support, percolating locally from the inside-out rather than being imposed from the outside. It is also worth noting that the separation of powers doctrine is not necessarily an immediate panacea. Without an underlying commitment to the separation of powers doctrine, a structural separation of powers can be breached because this lack of commitment is what makes for constitutional crisis in the first place.¹⁶ Additionally, the separation of powers doctrine may clearly contravene the current tradition and governmental structure of some tribes.¹⁷ Moreover, the fact that separation of powers is a vaunted piece of dominant constitutionalism does not give it intrinsic merit in tribal systems.¹⁸

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

16. *Id.* at 528-31.

17. For example, the Pueblos of New Mexico do not have a tribal government grounded in a theory of three distinct branches possessing executive, legislative, and judicial branches. SHARON O'BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS*, 170-80 (1989). Traditionally the Pueblos have formed a dual system of government—traditional/religious and secular. Only the secular system is patterned after the dominant system. *Id.*

18. Given that the dominant society's "constitutionalism" has also given Indian people the plenary power doctrine, including, for example, the right to unilaterally abridge treaties and terminate tribes, there is nothing "intrinsic" about the merits of separation of powers. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (holding that Congress retains the power to abrogate treaties with Indian tribes).

would not have been realized. In the absence of strong foundational and institutional roots, enduring tribal jurisprudential growth is quite unlikely to occur.

II. SIGNIFICANT TRACKS OF TRIBAL COURT JURISPRUDENCE

Although tribal courts, like their state and federal counterparts, carry out a good deal of routine decision-making, it is possible to characterize their more important activities along three significant tracks: parsing the parameters of tribal court jurisdiction, defining sovereign immunity and protecting individual civil rights, and adjudication via the application of tradition or custom, particularly in the areas of criminal law and family and community relations. These tracks are not completely separate; often there is significant overlap. Nonetheless, there are clearly unique and recognizable patterns within each strand.

A. *Parameters of Tribal Court Jurisdiction*

In the aftermath of the United States Supreme Court's seminal decisions in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*¹⁹ and *Iowa Mutual Insurance Co. v. LaPlante*,²⁰ many tribal courts, as well as federal courts, have faced the task of delineating the appropriate parameters of tribal court activity within the horizons of comity and deference established by these cases. Although these developments are fully analyzed elsewhere,²¹ there are other points to make in addition to summarizing the commentary on these cases.

Almost all of this litigation involves commerce and some individual or corporate non-Indian protagonists. The tribal court jurisprudence that has come under federal review has been uniformly sturdy in its analytical rigor. There has been no reference in this case law to the questionable tribal court performance that was noted, for example, by the Eighth

19. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (holding that the lawful limits of tribal court jurisdiction must be discerned by reference to federal law, including federal common law, but that a federal court proceeding is proper only upon the exhaustion of tribal court remedies).

20. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (holding that, regardless of the basis of federal jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction).

21. See *infra* text accompanying notes 24-30.

Circuit in *Greywater v. Joshua*²² and the Tenth Circuit in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*.²³ These cases typify the willingness of federal courts to curb tribal authority, regardless of federal doctrinal limitations, when tribal courts appear to overreach and achieve results that have no substantive footing and appear blatantly political or result-oriented, particularly when non-Indians or nonmembers are involved.

This kind of reckless confrontation has *not* occurred in federal court review of tribal court decisions assessing their own jurisdictional parameters in the post *National Farmers Union* and *Iowa Mutual* era. This marks a qualitative step forward. Tribal courts, in this regard, have successfully dealt with federal scrutiny "from above." Nonetheless, the federal courts have adopted different stances with regard to the appropriate level of deference and standards of review. As Timothy Joranko suggests, the various circuits have largely applied one of the two categorical approaches, and one of the two clearly is to be preferred:

Several circuits have applied a "bright line" rule requiring parties to exhaust tribal remedies in all cases except those falling plainly within one of the exceptions to exhaustion listed in *National Farmers Union*. Other circuits have applied a "particularized inquiry" of the application of the policies underlying *National Farmers Union* and *Iowa Mutual* to given cases. The "bright line" rule is better because it has the advantages of clarity, economy, and ease of application. More importantly, it adheres more closely to the policies at the core of the Supreme Court's decisions.²⁴

22. *Greywater v. Joshua*, 846 F.2d 486, 488 (8th Cir. 1988) (holding that exhaustion is not required in criminal law context). The *Greywater* court stated:

In the present case the Sioux Tribal Court denied Petitioners' motion to dismiss for lack of jurisdiction without a hearing and without a record. This is far removed from the suggestion in *National Farmers Union* that exhaustion could serve to further illuminate the jurisdictional issue by an evidentiary hearing and briefing. Encouraging the exercise of sovereignty by a tribal court through development and upgrading of its procedures is *not* served where the tribal court itself fails to do so.

Id. at 488-89 (emphasis added) (citation omitted).

23. *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981) (holding that, in the absence of a tribal court forum in an action brought by a non-Indian, based on the Indian Civil Rights Act of 1968, a federal forum would be provided). While *Dry Creek Lodge* has not been directly followed, it does signify how far a federal court will go to provide a forum for non-Indian plaintiffs who would otherwise be without one.

24. Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After National Farmers Union and Iowa Mutual: Toward A Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 MINN. L. REV. 259, 268-69 (1993).

The particularized inquiry has, for example, focused on such questions as whether the absence of pending tribal court action is significant, whether a tribal criminal action may be challenged through Indian Civil Rights Act habeas relief, and whether a federal statute provides for exclusive federal relief.²⁵ The consensus in the Court of Appeals for the Eighth, Ninth, and Tenth Circuits leans toward a "bright line" approach, but it is a consensus rather than a uniform approach or result.²⁶

Commentators have often suggested that the broad outline established by *National Farmers Union* and *Iowa Mutual* is itself inadequate or inappropriate and is in need of reform. For example, Professor Alex Tallchief Skibine has suggested:

As long as the case arose on the reservation, exhaustion should be mandated if the four *National Farmers Union* exceptions do not apply and there is a colorable claim of tribal jurisdiction. In addition, exhaustion should be extended to all cases arising on Indian reservations even if they involve purely questions of federal law as long as resolution of the federal question will have an impact on the jurisdiction of the tribal courts or otherwise implicates tribal interests.

Similarly, the deference routinely given by the courts to decisions of administrative agencies should also be awarded to decisions of tribal courts when these decisions are being reviewed by federal courts under their federal question jurisdiction or their diversity jurisdiction. This is especially true for jurisdictional determinations based on whether the exercise of tribal jurisdiction is vital to tribal self-government or self-determination.²⁷

In addition, Professor Laurie Reynolds has suggested:

that the exhaustion doctrine has improperly shifted judicial policies in two ways: in some cases, it expands federal jurisdiction where tribal jurisdiction should be exclusive; in others, it unduly limits federal jurisdiction by forestalling federal

25. *Id.* at 278-79. See, e.g., *United States ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273 (8th Cir. 1987); *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989).

26. Joranko, *supra* note 24, at 286-87.

27. Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191, 221-22 (1994) (emphasis added).

court review of cases involving significant federal questions. Based on this argument, the Article suggests a redefinition of federal question jurisdiction in Indian Law disputes that better allocates jurisdictional powers of tribal and federal courts. This redefinition of federal jurisdiction in turn supports the Article's subsequent proposal to eliminate the exhaustion doctrine for cases falling within the redefined and narrowed scope of federal question jurisdiction. Finally, the Article suggests congressional action to provide for Supreme Court review of tribal court decisions by writ of certiorari Although the imposition of ultimate Supreme Court review may not be necessary to check arbitrary treatment of non-Indians or other imagined tribal court abuses of power, it provides a realistic alternative to the federal courts' current power to second guess tribal court decisions in post-exhaustion cases and, more importantly, an opportunity for a fuller expansion of tribal court activities.²⁸

These articles, despite their doctrinal differences, provide ample review of the richly diverse tribal and lower federal court jurisprudence in this area. For present purposes, the salient point remains: this vein of case law is an absolutely central and critical enterprise within nascent tribal court jurisprudence, regardless of the need for additional federal clarity or reform. In this area, tribal courts must remain analytically vigorous and finely attuned to the matter at hand: ensuring federal deference and respect. Undoubtedly, this type of litigation will continue to abound in the absence of further resolution by the Supreme Court. Tribal court decision-making in this area certainly cannot "control" federal review, but it can, with thoughtfulness and analytical rigor, constrain any kind of overreaching federal review directed at correcting allegedly egregious tribal court "mistakes."

In this regard, paradox is a key watchword. Prior to *National Farmers Union* and *Iowa Mutual*, civil litigants routinely circumvented tribal courts completely through federal question and diversity doctrines.²⁹ Federal judicial interest in tribal courts was therefore minimal. After *National Farmers Union* and *Iowa Mutual*, however, deference and exhaustion doctrines were articulated, resulting in a renewed concern for some kind of federal review of the newly resulting tribal court

28. Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1097-98 (1995) (citations omitted).

29. POMMERSHEIM, *supra* note 7, at 95.

jurisprudence.³⁰ Hence the paradox: you're nobody until you're somebody.

This paradox suggests an even larger project: articulating the emerging relationship between tribal courts and federal courts in the absence of constitutional or statutory guidance. This is, as suggested elsewhere, of seismic consequences, underscoring the necessity of avoiding the emergence of a kind of plenary power in regard to tribal courts.³¹ The danger of such a judicial plenary power lies in its potential to precipitate a Supreme Court decision or interpretation that would simply arrogate and claim *unlimited* judicial power to review, set limits, or even expunge tribal court authority. The stakes are, therefore, exceedingly high and the margin for tribal court "error" remains correspondingly narrow. This is neither a fair nor an ideal set of circumstances, but Indian Law has seldom achieved either. Tribal courts know that this historical inequality stalks them and they are determined, with growing competence and confidence, to avoid it.

It is noteworthy, perhaps, to mention the only two decisions of the Cheyenne River Sioux Tribe Court of Appeals (there are none from the Rosebud Supreme Court) during this period that have been subject to review by either federal or state courts. In *City of Timber Lake v. Cheyenne River Sioux Tribe*, the Eighth Circuit ruled that it was bound by the tribal court's finding that *tribal law* required all business establishments on the reservation—including non-Indian and municipal businesses selling liquor—to have a tribal license.³² In addition, the court agreed with the tribal court's interpretation that federal law did not establish any exceptions to this reach of tribal law—in the area of liquor sales and distribution—in regards to non-Indian activity on fee land.³³

In *Gesinger v. Gesinger*, the South Dakota Supreme Court held that it was proper for the state circuit (trial) court to provide comity in accordance with a state statute to a tribal court decision relative to a finding of jurisdiction and damages in a dispute between a non-Indian father and an Indian son involving the purchase and sale of cattle, even when the tribal trial court decision was on appeal to the Tribal Court of Appeals.³⁴ These cases—and those of many other tribal courts—demonstrate, at least in part, a positive trend in federal and state

30. *Id.* at 95-98.

31. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); see also, Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110 (1995).

32. *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8th Cir. 1993).

33. *Id.*

34. *Gesinger v. Gesinger*, 531 N.W.2d 17, 18 (S.D. 1995).

courts that reflects an increasing respect for, and engagement with, tribal court decision-making.

B. Civil Rights Litigation in Tribal Courts

The situation involving civil rights litigation in tribal courts pursuant to the Indian Civil Rights Act of 1968³⁵ (ICRA) reflects the same paradox noted above. Prior to *Santa Clara Pueblo v. Martinez*,³⁶ most significant tribal civil rights litigation was brought directly in federal court under the theory that the ICRA statutory scheme authorized an implied cause of action in federal courts.³⁷ After the *Santa Clara Pueblo* Court held that no such implied cause of action existed, tribal courts, except in habeas corpus actions, became the sole forum in which to litigate ICRA claims.³⁸ In contrast to the existence of some kind of federal review of jurisdictional issues under *National Farmers Union* and *Iowa Mutual*, there is no federal review of any kind, unless the dispute is amenable to habeas relief, in tribal ICRA litigation.

The obvious question arises: What does the resulting tribal jurisprudence look like? This is especially significant in light of congressional calls from some quarters for statutory reform allowing for increased federal review. The criticism of tribal courts in this arena generally has had two prongs: potential retribution by tribal courts against persons seeking civil rights redress and the perceived incompetency of tribal courts to adjudicate allegations involving the violation of individual rights.³⁹ For the most part, these claims were effectively refuted in a 1991 study by the United States Civil Rights Commission, which recommended against such legislation and concluded that it could be a "further encroachment on tribal government sovereignty."⁴⁰

The most pertinent issues in the individual rights context are judicial review, sovereign immunity, and the procedural and substantive contours

35. 25 U.S.C. §§ 1301-1303 (1994).

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

37. See, e.g., Douglas B.L. Endreson, *The Challenges Facing Tribal Courts Today*, 79 JUDICATURE 142, 143-44 (1995).

38. *Id.*

39. *Id.* at 145; see also SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS, THE COST OF SEPARATE JUSTICE (1978) (noting that the Indian Civil Rights Act resulted from hearings on the constitutional rights of Indians, which illuminated concerns that Indians' rights were "frequently denied by tribal courts and governments").

40. THE INDIAN CIVIL RIGHTS ACT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, ii-iii (June 1991).

of individual civil rights. Tribal courts have concluded that judicial review of tribal executive action and tribal council action is proper.⁴¹ The most well-known example in this regard is the decision of the Navajo Supreme Court in *Halona v. MacDonald*, imposing judicial review, even in the absence of a written constitution.⁴² Such decisions are often made in situations that are hotly contested and politically volatile. Tribal courts have not flinched but have placed themselves squarely within the legacy of *Marbury v. Madison*.⁴³

Tribal courts have made a range of responses to issues of sovereign immunity under ICRA. Generally, but not always, tribal courts have found a waiver of sovereign immunity, explicitly or implicitly, in the tribal constitution or the holding of *Santa Clara Pueblo*.⁴⁴ Tribal courts have also made principled decisions in this area relative to permissible relief and whether tribal officials have exceeded their authority.⁴⁵ For example, in *Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners*, the Cheyenne River Sioux Tribal Court of Appeals held that a direct suit against the *tribe*, based on due process claims and seeking limited back pay, was barred based on the principle of sovereign immunity.⁴⁶ The

41. See, e.g., Endreson, *supra* note 37, at 146, and cases cited therein.

42. *Halona v. MacDonald*, 1 Navajo Rptr. 189 (Navajo 1978), quoted in WEBER, *infra* note 55, at 238.

43. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

44. See, e.g., *Davis v. Keptin*, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6148 (Turt. Mt. Tr. Ct., Sept. 6, 1991) (holding that an action under the Indian Civil Rights Act was not barred by the defense of sovereign immunity); *Committee for Better Tribal Gov't v. Southern Ute Election Bd.*, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6095 (S. Ute Tr. Ct., Aug. 13, 1990) (dismissing claim against tribal council members acting within scope of their authority on the grounds of sovereign immunity); see also *Francis v. Wilkinson*, 20 Indian L. Rep. (Am. Indian Law. Training Program) 6015 (N. Plns. Intertr. Ct. App., Jan. 21, 1993) (holding that the Constitution of the Three Affiliated Tribes of the Fort Berthold Reservation waived the immunity of the tribal council from suit in actions under the ICRA); *Guardipee v. Confederated Tribes of the Grande Ronde Community*, 19 Indian L. Rep. (Am. Indian Law. Program) 6111 (Gr. Ronde Tr. Ct., June 11, 1992) (holding that the tribal court was without jurisdiction to consider the case on appeal because the tribe did not waive its sovereign immunity to suit); *Gonzales v. Allen*, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6121 (Sho.-Ban. Tr. Ct., Sept. 17, 1990) (holding that sovereign immunity bars court from awarding back pay, but awarding injunctive relief); *Garcia v. Tohono O'Odham Council*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6151 (T. O'odm. Ct. App., Sept. 17, 1989) (holding that tribal constitution vested tribal courts with jurisdiction to hear claim challenging action of legislative council under tribal constitution and ICRA).

45. *Committee for Better Tribal Gov't*, 17 Indian L. Rep. at 6097; accord *Davis v. Turtle Mountain Hous. Auth.*, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6035 (Turt. Mt. Tr. Ct., Feb. 13, 1990).

46. *Thompson v. Cheyenne River Sioux Tribe Bd. of Police Comm'rs*, 23 Indian L. Rep. (Am. Indian Law. Training Program) 6045 (Chy. R. Sx. Ct. App., Feb. 9, 1996).

court did find, however, that a suit seeking declaratory or injunctive relief against the Commission and individual Commissioners was *not* barred.⁴⁷

In *Thompson*, as well as in *Clement v. LeCompte*,⁴⁸ the court distinguished between suits against tribal officials and agencies and suits against the tribe itself, particularly in light of the tribal code's specific language relating to the waiver of sovereign immunity and the availability of alternative forums and remedies.⁴⁹ The *Clement* court also included language drawn both from Chief Justice Marshall's opinion in *Marbury v. Madison* and Lakota tradition in *Bloomberg v. Dreamer* to emphasize the necessity to further fulfill the aspirations set out in these cases.⁵⁰

The issue of sovereign immunity in the area of tribal civil rights litigation will undoubtedly continue to be a focal point of some important tribal court litigation. Such litigation, along with tribal legislative initiatives,⁵¹ will likely further limit the range and applicability of the ancient, western doctrine of sovereign immunity that has deep roots in dominant federal and state jurisprudence.

The range of applications of ICRA protection is impressive. These include such issues as notice, the opportunity to be heard, the right to a hearing, speedy trial concerns, equal protection, and the right to counsel.⁵² As noted by Douglas Endreson in his extensive survey:

These decisions demonstrate that tribal courts are committed to the protection of individual rights. The tribal courts have also upheld the right of individuals to a hearing prior to significant governmental actions such as employment termination and termination of parental rights. While these decisions cannot be fairly evaluated simply by cataloguing wins and losses, it is fair to say that, on balance, they show a careful consideration of the

47. *Id.* at 6048.

48. *Clement v. LeCompte*, 22 Indian L. Rep. (Am. Indian Law. Training Program) 6111 (Chy. R. Sx. Ct. App., Jan. 12, 1994).

49. *Thompson*, 23 Indian L. Rep. at 6049.

50. *Clement*, 22 Indian L. Rep. at 6117 (citing *Marbury*, 5 U.S. (1 Cranch) at 163, and *Bloomberg v. Dreamer*, Ogala Sioux Civ. Ap. 90-348 at 5-6 (Ogala Sup. Ct. 1991)).

51. *See, e.g.*, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION CONST. art. VI, § 3(b), quoted in *Francis v. Wilkinson*, 20 Indian L. Rep. at 6015.

The People of the Three Affiliated Tribes, in order to achieve a responsible and wise administration of this sovereignty delegated by this Constitution to the Tribal Business Council, hereby specifically grant to the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act, 25 U.S.C. § 1301, et seq., including the award of injunctive relief only against the Tribal Business Council if it is determined through an adjudication that the Tribal Business Council has in a specific instance violated the Act.

Id.

52. 25 U.S.C. § 1302 (1994).

claims presented on the merits, and no reluctance to rule against the tribal government.⁵³

There is no doubt that, as in state and federal courts, tribal court civil rights litigation will continue to grow in order to secure individual rights within the horizon of evolving tribal court jurisprudence. It is also true that tribal court development in this area need not directly replicate the federal approach.⁵⁴

C. *Application of Tribal Tradition and Custom in Tribal Courts*

A good deal of attention in recent tribal court case law and scholarship has focused on the application of tribal tradition and custom.⁵⁵ Unlike issues of tribal court jurisdiction, which concern federal pressure "from above," issues of tribal custom and tradition involve cultural imperatives "from below." It is in this realm that tribal courts most ardently strive to maintain cultural continuity with the past by seeking to ensure that certain traditional values and processes continue to play a vital role in the daily judicial life on the reservation. Without such a commitment, disconnection from a central core of cultural meaning and tribal self-understanding will likely occur. Such concerns cannot be left to the private lives of tribal individuals alone, but must also take root and find connection in the modern institutional life of the tribe. This is particularly true in the context of indigenous people, where continuing

53. Endreson, *supra* note 37, at 146.

54. See POMMERSHEIM, *supra* note 7, at 96; see also *Smith v. Confederated Tribe of the Warm Springs Reservation*, 783 F.2d 1409, 1412 (9th Cir. 1986) (stating that the procedures that tribal courts choose to adopt are not necessarily the same procedures that the federal courts follow); *Tom v. Sutton*, 533 F.2d 1101, 1104-05 n.5 (9th Cir. 1976) (stating that due process and equal protection under ICRA are not necessarily defined in the same way as they are under the Fourteenth Amendment).

55. See, e.g., Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, The First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 5 (1994); Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987); Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994); Jayne Wallingford, *The Role of Tradition in the Navajo Judiciary: Reemergence and Revival*, 19 OKLA. CITY U. L. REV. 141 (1994); Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994); Frederic Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991 (1991); Daniel L. Lowery, Note, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. INDIAN L. REV. 379 (1993). On the relationship of tribal courts to the larger judicial system, see Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

emphasis is placed on the importance of the group and the communal relationship of individuals.

These endeavors are noteworthy not only because of their "interior" tribal importance, but also because they highlight differences from the dominant system's relentless concern with the individual.⁵⁶ The contrast can be described as follows: "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."⁵⁷

These differences manifest themselves both procedurally and substantively. As Tom Tso, former Chief Justice of the Navajo Supreme Court, notes:

Both our language and our tradition 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 the Navajo people, dispute settlement required the participation of the community elders and all those who either knew the parties or were familiar with the history of the problem. Everyone was permitted to speak. Private discussions with an elder who could resolve a problem was [sic] also acceptable. It was difficult for Navajos to participate in a system where fairness required the judge to have no prior knowledge of the case, and where who can speak and what they can say are closely regulated.⁵⁸

Tradition and custom are inevitably connected to overarching tribal objectives. These objectives are grounded in the interlocking and ongoing processes both to survive and to flourish. Tradition and custom have been and continue to be a source of resistance to encroachments of an expansionary, colonizing western society. They also contain the complementary store of values that are central to the cultural ability to flourish. Despite this broad, indigenous symmetry of effort, there often are variances at the level of the particular.

56. Paradoxically, that element of dominant thinking is increasingly subject to criticism as having gone "too far."

57. Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393, 405 (1991).

58. Tso, *supra* note 55, at 229.

Lest we slip into an overly harmonious or romantic view, it should be noted that there likely will be local disagreements in this area. These variances may present themselves in at least two ways. First, as a result of, among other things, ongoing "contact" between indigenous and western ways, the definition of local custom or tradition may be contested in any given case. For example, in Navajo courts:

There may be a dispute as to what the custom is and how it is applied; or, A [sic] 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 [c]ourt.⁵⁹

Because tribal customary or common law by definition is *not* statutory law created by the tribal council, it must be presented by trial counsel who are prepared to present the necessary "evidence"—usually in the form of academic and tribal experts—about the existence, vitality, and substantive content of the alleged tradition or custom. Such a responsibility creates a unique burden on members of the practicing bar in tribal courts to be culturally sensitive and literate—qualities unlikely to be acquired in a typical law school education. As noted by Robert Yazzie, Chief Justice of the Navajo Supreme Court: "You will pick up some souvenirs on your trip [through law school] in the form of Anglo rules, principles, and procedures. The trick is to put them in perspective."⁶⁰

The second difficulty presented by application of custom and tradition is that commitment to tribal custom or common law does not require or ensure uniform results. As Professor Gloria Valencia-Weber notes:

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

59. Hood v. Bordy, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6061, 6063 (Nav. Sup. Ct., Feb. 22, 1991); see also C.B. v. Little Flower Freedom Ctr., 18 Indian L. Rep. (Am. Indian Law. Training Program) 6121, 6123 (N. Pls. Intertr. Ct. App., Feb. 8, 1991).

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.

Id.

60. Robert Yazzie, *Law School as a Journey*, 46 ARK. L. REV. 271, 273 (1993).

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 stereotypical expectations to appreciate how customary reasoning works.⁶¹

The application of tribal tradition and custom is not unlike the dominant jurisprudential process of converting custom into common law. As noted by a leading scholar, "[t]he materials of the common law, therefore, were the customs of true communities whose geographical boundaries had in some cases divided peoples and cultures, and not just areas of governmental authority."⁶² The key element in this process at the tribal court level is to establish and recognize viable and respected principles grounded in the past, but contemporaneously sound enough to resolve current disputes or differences with harmony and fairness.

This process, easily subject to overly romantic and rosy views, remains central to the cultural project of tribal historical continuity. Yet the process will often include contested notions about the contemporary existence, meaning, and appropriateness of the use of custom in any particular case. There are even broader extrajudicial concerns about the impact of converting (at least in part) the *oral* custom into the *written* decision, the plural into the singular, and the dynamic into the potentially static. Regardless of the final pattern, this process of stitching the cultural past into the judicial present has thoughtfully begun with both zest and caution. The process has set its eyes firmly on the objective of seeking to realize ancient values in contemporary settings: not as museum exercises, but so a people might flourish.

In this vein, Judge Carey Vicenti of the Jicarilla Apache Tribe has described an insightful range of institutional responses available to tribal courts as they navigate the ground between past and present, between indigenous roots and dominant branches, and between national and local tribal experiences running east to west across this land. Judge Vicenti sketches a paradigm involving five models: the American model, the American-traditional hybrid model, the dual model, the traditional model,

61. Valencia-Weber, *supra* note 55, at 250-51 (emphasis added).

62. S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 12 (2d ed. 1981).

and the explorative or non-existent model.⁶³ The importance of the typology is not necessarily in its particulars, but rather in its firm recognition of the *range* of responses, both already made *and* yet to be made, as tribal courts continue to forge their legal, institutional, and cultural identities. In essence, Judge Vicenti's paradigm constitutes a salient reminder of diversity *within* Indian country, the dynamic *ongoingness* of the attendant processes, and the progress from youth to maturity.

III. THE SECOND WAVE OF TRIBAL COURT JURISPRUDENCE

In addition to the significant tracks of tribal court jurisprudence discussed above and their inevitable overlap, general complementarity, and even occasional tension, there is a second wave of tribal court litigation riding the crest of the ongoing first wave into new and uncharted territory. This second wave seeks to increase the ambit of tribal court authority in exciting and unexpected ways.

This second wave reflects a resounding sense of confidence in the developing institutional and jurisprudential maturity of tribal courts to deal with complex and innovative matters. This is true particularly because often these matters might well be litigated in other competent forums, especially federal courts. This discussion will provide two general, but distinct, examples. There are surely others. One is a case involving unique cultural and substantive claims currently being litigated before the Rosebud Sioux Tribal Court. The other involves the use of tribal courts to enforce federal causes of action.

In *Estate of Tasunke Witko v. G. Heileman Brewing Co.*, Seth Big Crow, the heir of the well-known Lakota leader, Crazy Horse, seeks redress against the manufacturers and distributors of an alcoholic product

63. Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 139-41 (1995). "By this brief and rather rough generalization, it should be clear that most tribal courts are somewhat between formative and youthful stages of development." *Id.* at 141.

known as Crazy Horse Malt Liquor.⁶⁴ In the complaint and amended complaint, five causes of action are asserted.⁶⁵ They are:

the knowing and willful tortious interference with customary rights of privacy and respect owed to a decedent and his family, the tortious interference with Plaintiff's property right commonly known as the "right of publicity," the negligent and intentional infliction of emotional distress on the heirs of the Estate through acts of exploitation and defamation, violation of the Indian Arts and Crafts Act, and violation of the Lanham Act.⁶⁶

The relief sought includes, *inter alia*, declaratory injunctive relief, and conventional monetary damages, a written public apology and other culturally based relief such as a "braid of tobacco, one . . . Pendleton blanket and one . . . racing horse for each State, Territory or Nation in which said products have been distributed and offered for sale."⁶⁷

The breadth of the theory of this case reflects a unique confidence in the competence of the Rosebud Sioux Tribal Court to adequately hear claims rooted in dominant society jurisprudence, Lakota tradition and custom, and federal law. This is significant particularly because there is clearly independent federal court jurisdiction based on diversity of citizenship and the federal statutory claims. It is obviously too early to talk about any likely result, but this case—even in its current unresolved posture—demonstrates the dramatic advances (at least from the perspective of tribal litigants) in the legitimacy and competence of tribal courts.

The second example of second wave tribal court litigation involves the increasing use of tribal courts as appropriate forums in which to seek redress of federally authorized claims. In *United States v. Plainbull*, the Ninth Circuit held that it was proper for the federal district court to dismiss on exhaustion grounds a proceeding to enforce an action deriving from 25 U.S.C. § 179 (and 25 CFR § 166.24) so that a tribal court could

64. Estate of Tasunke Witko v. G. Heileman Brewing Co., No. 93-204, memorandum op. at 5 (Rbd. Sx. Supr. Ct. May 1, 1996) (on file with author). The action was originally dismissed by the tribal trial court on jurisdictional grounds, but was reversed in part and remanded for a trial on the merits by the Rosebud Sioux Supreme Court. *Id.* at 40. The Defendants have also filed for federal relief claiming that the Rosebud Sioux Tribal Court lacks jurisdiction over this case. Hornell Brewing Co. v. Rosebud Sioux Tribal Court, No. 96-3028 (D.C.S.D. filed July 24, 1996). Note also that the author is a member of the Rosebud Sioux Supreme Court, and participated in the appellate decision of this case.

65. Estate of Tasunke Witko, No. 93-204, memorandum op. at 5-6.

66. *Id.* at 5-6 (citations omitted).

67. *Id.* at 6.

consider this action in the first instance.⁶⁸ This federal statutory cause of action authorizes the federal government to bring a civil trespass action for damages against anyone improperly grazing or feeding livestock on individual Indian or tribal trust land.⁶⁹

The Court's decision focused on whether 28 U.S.C. § 1355, the jurisdictional statute, provided for *exclusive* federal jurisdiction.⁷⁰ The Court concluded it did not. Section 1355 describes its jurisdiction as "exclusive of the courts of the states."⁷¹ The Court reasoned that, because § 1355 does not mention tribal courts (the courts of a sovereign neither federal nor state in nature), the tribal court was not barred from asserting jurisdiction.⁷² Federal abstention was particularly appropriate, according to the Ninth Circuit, "[u]pon careful consideration of the judicial policy of encouraging tribal self-government."⁷³ In *Plainbull*, the Ninth Circuit clearly evinced a broadened deference to tribal courts by incorporating *federal* causes of action within the reach of *National Farmers Union* and *Iowa Mutual*.⁷⁴ *Plainbull* is also unique in that it requires, at least in the first instance, the *federal* government to use a *tribal* forum in carrying out one of its responsibilities in Indian country.

Another complementary example in this regard is the decision of several plaintiffs to use tribal courts to bring federal civil rights actions under 42 U.S.C. § 1983 *against* state and other local government officials. For example, in a series of proceedings in the Fallon Paiute-Shoshone Tribal Court in Nevada, a tribal member brought several civil rights claims based on violations of the Indian Civil Rights Act of 1968, as well as 42 U.S.C. § 1983, against both tribal and county officials involving an allegedly defective warrant and an attendant illegal search and seizure at the plaintiff's residence on the reservation.⁷⁵ The § 1983 claim against local law enforcement and county officials was based on the deprivation of the plaintiff's federal civil rights under "the color of state law."⁷⁶ While this action was proceeding in tribal court, the state defendants filed

68. *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992).

69. 25 U.S.C. § 179 (1994); 25 CFR § 166.24 (1994).

70. *Plainbull*, 957 F.2d at 727.

71. 28 U.S.C. § 1355 (1994).

72. *Plainbull*, 957 F.2d at 727.

73. *Id.*

74. *See supra* Part II.A (discussing *National Farmers Union* and *Iowa Mutual*).

75. *See, e.g.*, *Hicks v. Harold*, 20 Indian L. Rep. (Am. Indian Law. Training Program) 6082 (Fallon Tr. Ct., July 21, 1993); *Hicks v. Harold*, 20 Indian L. Rep. (Am. Indian Law. Training Program) 6091 (Fallon Tr. Ct., Sept. 2, 1993); *Hicks v. Harold*, 21 Indian L. Rep. (Am. Indian Law. Training Program) 6076 (W. Nev. Interr. Ct. App., May 13, 1994).

76. 42 U.S.C. § 1983 (1994).

suit in federal district court seeking declaratory and injunctive relief.⁷⁷ The district court recently decided that there was no bar to tribal court jurisdiction.⁷⁸

Similarly, in *Allen v. Myers*, a case arising on the Nez Perce Reservation in Idaho, a tribal plaintiff brought suit against several county law enforcement officials and the county itself for an allegedly illegal arrest.⁷⁹ The lawsuit alleged, *inter alia*, false imprisonment and wrongful incarceration.⁸⁰ The lawsuit eventually was tried before a jury (after a motion to dismiss was denied) and the jury returned a verdict against all the defendants, awarded modest monetary damages, and apportioned fault accordingly.⁸¹

One of the defendants in *Allen*, Lewis County, appealed to the Nez Perce Tribal Court of Appeals, which affirmed the tribal trial court decision.⁸² The County then filed an action in federal district court challenging the tribal court's jurisdiction.⁸³ The district court held that the tribal court did *not* have jurisdiction over the county.⁸⁴ The case is currently pending on appeal before the Ninth Circuit.⁸⁵

Obviously, the final federal court results of these cases will tell us much about the potential ambit of tribal court jurisprudence from the federal courts' perspective. Yet this much already is clear: some litigants—at least in the § 1983 context—view tribal courts not only as viable, but apparently as the preferred forum in which to bring § 1983 claims against state and local officials. Their reasons may be based on convenience (federal courts may be hundreds of miles away), advancing tribal court jurisdiction, or perceptions of a more hospitable forum. It is probably too early to know with any certainty what influenced these litigants to choose the tribal forum, but the selection of a tribal court clearly represents something new on the tribal judicial horizon. Tribal courts find themselves increasingly on the cutting edge as a potential forum for federal civil rights actions and other statutory claims that arise on the

77. *Nevada v. Hicks*, No. 94-351 (N.D. Nev. Oct. 1, 1996) (memorandum opinion on file with author).

78. *Id.*

79. *Allen v. Myers*, 20 Indian L. Rep. (Am. Indian Law. Training Program) 6105 (Nez Perce Ct. App., Sept. 23, 1993).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Lewis County v. Allen*, No. 93-382 (D. Id. Aug. 18, 1994).

84. *Id.* at 30.

85. *Lewis County v. Allen*, No. 94-35979 (9th Cir. filed Oct. 11, 1994).

reservation, even when the federal government may be the plaintiff, or when state or local governments and their officials may be defendants.

IV. "DOING SOVEREIGNTY:" SOME JURISPRUDENTIAL VIEWS FROM THE FIELD

The process of deciding tribal court cases, particularly at the appellate level, inevitably raises important jurisprudential questions in at least three areas. These include understanding the nature and significance of judicial decision-making *per se*; developing a view toward established or received law, particularly when it is rooted in the dominant culture and lacks tribal consent or authorization; and fashioning a view of the direction tribal court decision-making, taken as a whole, should be pursuing. In other words, the process of deciding tribal court cases raises questions of process, doctrinal rules, and vision.

A. *Process*

Because most modern tribal courts are relatively young, concerns involving judicial process are of particular significance in developing a sense of institutional identity and integrity. This is especially true in the context of the relative youth of most tribal judges themselves, who do *not* usually come to the tribal bench—either trial or appellate—after lengthy careers in other areas of the law. For many tribal court judges, the opportunity to think or experience judicial decision-making beyond the most conventional law school formalism of applying the appropriate "rule" to the "facts" has often not been available. Therefore, it is even more important to discuss the implications and significance of these inquiries. Legal decision-making is not simply a matter of logic—reasoning deductively from the "rule" through the "facts" to the decision—but is rather a process ultimately premised on a choice between competing legal and policy contentions. Legal rules, standing alone, are not outcome determinative.

Tribal judicial decisions are not isolated events but constitute "social events" that ultimately form an important and revealing mosaic concerning the meaning and value of law on the reservation. As noted by Felix Cohen, the preeminent Indian Law scholar:

A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say, as a product of social

determinants and an index of social consequences. A judicial decision is a social event. . . . Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it.⁸⁶

This observation, though not made in the context of Indian Law, nevertheless is resonant within the field. The force and daily relevance of law in Indian country are substantial, almost prodigious. Indian people know that the law—for better or worse—often has powerful, even seismic, implications in their daily lives. Indeed, Indian people know that they might wake up one day to find that their reservation no longer exists or that they are no longer (legally) Indian.⁸⁷

Given the force and relevance of the law within Indian communities, many people within Indian country are exceedingly well-informed and knowledgeable. They know the landscape of the law as well as the physical landscape itself. Given this social reality, tribal courts must strive to express themselves in a way that is comprehensible by the community at large. This does not mean that tribal court decisions should sacrifice analytical rigor. However, such rigor should not necessarily preclude accessibility to a more general readership. In fact, tribal court awareness of the social nature and community implications of judicial decisions can only sharpen the focus on quality of exposition and in-depth thought.

At least a portion of this approach is grounded in a school of jurisprudence known as legal realism. The realists, despite their wide diversity of opinion, may be fairly characterized by two elements. First is the rejection of formalism, the logical deduction of specific results from first principles or other sources of positive law such as statutes and precedents.⁸⁸ The second element of legal realism is the emphasis on the range of choices available in judicial decision-making. The grounding of these choices might be found, depending on the scholar, within the

86. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935).

87. See, e.g., *Hagen v. Utah*, 114 S. Ct. 958 (1994) (holding that Utah courts properly exercised jurisdiction because a reservation had been diminished by Congress); *DeCoteau v. District County Court*, 420 U.S. 425 (1974) (holding that a reservation was terminated and returned to the public domain); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (holding that Congress intended to diminish the reservation); see also Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977) (describing the legal termination of over one hundred tribes).

88. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 622-24 (2d ed. 1985); MORTON HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, 245-56 (1977).

“complex interplay of personal, cultural, social, ideological, political, and economic factors.”⁸⁹

Two specific realist observations are particularly pertinent in the context of tribal judicial decision-making. These are the observations of Oliver Wendell Holmes that “[t]he law is the witness and external deposit of our moral life,”⁹⁰ and of Roscoe Pound that “the conception of law as a means toward social ends, the doctrine that law exists to secure interests, social, public and private, requires the jurist to keep in touch with life.”⁹¹ These seminal legal thinkers were not, of course, intending to elevate judicial whim or simple personal proclivity as the norm, but were seeking to assess more accurately the complexity of factors—particularly at the appellate level—that influence, consciously or unconsciously, judicial decision-making.

Holmes’ notion of law as the witness of moral life and Pound’s instruction to keep in touch with life are critical benchmarks if tribal jurists are to remain in sensitive contact with the sociological and cultural reality that they both serve and from which they draw their legitimacy. Yet this jurisprudential reality inevitably must interact with the potential of federal (even congressional) review, and mere hermetic introspection therefore is inadequate. Tribal jurists also need to be responsive, though not fawning, to the dominant legal reality and its possible constraints.

Tribal court decision-making often takes place at the intersection or overlapping of the legal and cultural worlds of the dominant and tribal societies. Judicial sensitivity and balance are essential. The process itself does not begin and end with a formalistic exercise of deductive logic: mere application of the correct rule to the facts at hand. There is much more to the process and there is much more at stake than conventional legal reasoning reveals. This includes the realization of important legal and cultural values, the growth of institutional competence, and the achievement of tribal self-determination. Tribal judges—particularly at the appellate level—must be careful not to allow the attractive simplicity of formalism to turn into a reproduction of federal dominance or cultural dissonance at the reservation level. Yet there must also be a balance between the requirements of dominant constraints and analytical processes and the indigenous aspirations and methods of tribal decision-making. In

89. ROBERT L. HAYMAN, JR. & NANCY LEVIT, *JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES* 14 (1994).

90. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

91. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140, 146-47 (1912).

other words, there needs to be a creative understanding and synthesis of the requirements and values within both systems.

It is worth remembering that law is essentially about two things: power and values. This basic understanding is central to the mission of tribal courts. Tribal courts often confront this blunt face of law in the context of commonplace decision-making. Do they have the power—both as a matter of tribal law and potentially constraining federal law—over the individuals (particularly non-Indians), over the place (particularly non-Indian fee land), and over the subject matter of the controversy at hand? And if so, what *values* are the tribe (and tribal court) seeking to advance by its decision-making? These simple reference points—a foundational “Q and A,” as it were—provide tribal courts with a quintessential reality check about what they can do (*i.e.*, power) and what they want to accomplish (*i.e.*, values).

B. Doctrinal Rules

These process concerns are, in turn, linked to the issue of how tribal courts ought to think about decisional law—especially in cases of first impression when there is no governing (written) tribal law on point. Given the relative youth of most tribal courts, this is by no means an atypical situation. Judging by the experiences of the appellate benches at Rosebud and Cheyenne River, precedent will come from other tribal decisions, federal law, local tradition and custom, and even state law. Unless a tribal ordinance specifies how to rank these sources,⁹² tribal courts must make their own way in weighing these varying sources of legal precedent.

92. See, e.g., SISSETON-WAHPETON TRIBAL CODE ch. 33, § 1 (1982), quoted in POMMERSHEIM, *supra* note 7, at 245. The Sisseton-Wahpeton Tribal Code specifically provides: civil matters shall be governed by the laws, customs and usage of the tribe not prohibited by the laws of the United States, applicable federal laws and regulations and decisions of the Department of Interior. The laws of the State of South Dakota may be employed as a guide. Where doubt arises as to the customs and usage of the Tribe, the court shall request the address of tribal elders 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 law.

Id.; see also CHEYENNE RIVER SIOUX TRIBE R. CIV. P. I.1(d) (1992).

Any procedures or matters not specifically set forth herein shall be handled in accordance with the Federal Rules of Civil and Appellate Procedure insofar as such are not inconsistent with these rules, and with general principles of fairness and justice as prescribed and interpreted by the Courts [of the Cheyenne River Sioux Tribe].

Id.

In thinking about these potential sources of precedent, a certain critical reflection is necessary. The key is not merely whether the proffered precedent is on point, but whether the suggested precedent embodies a substantive rule that is just and normatively appropriate in the tribal context. For example, many attorneys—particularly local non-Indian attorneys—who appear before the Cheyenne River Sioux Tribal Court of Appeals and the Rosebud Sioux Supreme Court, routinely cite, without explanation, South Dakota case law as governing precedent. Such an approach evinces both the expectation of routine, outside dominance, and conventional legal thinking.

Attorneys in these situations need to be more sensitive and more creative. They need to be cognizant of the appellate bench's expectation that they look beyond state law for relevant precedent—particularly to cases of other tribal courts.⁹³ Practitioners must also recognize that the appellate bench expects attorneys to indicate why precedents from an outside jurisdiction are factually relevant and how such precedents advance notions of fairness, justice, and good public policy. Tribal courts, perhaps more so than other courts, face constraints of time and resources (both human and technical) that heighten the expectations in, and responsibilities of, the practicing bar.

Tribal courts in this regard present somewhat different aspects of their identity. First, they are similar to their state and federal counterparts in the way that they carry on most judicial business—particularly routine business—both procedurally and substantively. Yet these are young, developing institutions seeking an identity that neither mindlessly replicates the majoritarian dominance of the past, nor repudiates its accumulated experience and aspirations of fairness and justice. Tribal courts also seek an identity that is consistent with their own cultural past and sensitive to the need for integrity, meaningful continuity, and adaptability. It is the dynamics of this twofold process with which the tribal bench and bar must concern themselves on a daily basis. Much of what is possible, or even likely, is unpredictable and indeterminative; but the awareness of both the tribal bench (already very evident in many cases) and the bar to these issues will clearly enhance the potential for significant accomplishment.

93. Such cases will normally be found in the *Indian Law Reporter* published as a loose-leaf service by the American Indian Lawyer Training Program of Oakland, California. As a practical matter, finding these cases is sometimes easier said than done. Most rural practitioners do not subscribe to the service and most tribal court decisions are not currently available on Westlaw or Lexis. As a result of this state of affairs, it is an ongoing project of the Indian Law Committee of the State Bar of South Dakota to enlist West Publishing to reprint tribal court opinions in the *Northwest Reporter* and to make them available on Westlaw, as well as to develop a *South Dakota Indian Law Reporter*. To date, there has been no success in any of these endeavors.

The playing fields of tribal courts are not level, and it is foolish to think that they are. An oppressive past, coupled with the unique vigor of youth, give tribal courts both a distinct sense of situatedness and a unique conception of their legal and cultural mission. This gives rise to the pursuit of what might be called a form of asymmetrical parity. On one hand, the goal is to achieve a parity of competency, deference, and local and national recognition similar to state and federal courts. On the other hand, the goal is asymmetrical in that the tribal courts do not always seek a jurisprudence identical to state and federal courts, but rather one that is true to both current ideals and cultural imperatives of the past.

As noted above, tribal courts most decidedly need *not* routinely accept what is proffered from dominant jurisprudence. Yet at the other extreme, that jurisprudence is not to be rejected *ab initio*. The task is to engage in a critical practice of holding the precedential past up to the light and asking hard questions about justice, fairness, and relationships.

C. Vision

All of this culminates with reflection on the collective destiny of these case-by-case decisions made by tribal appellate courts. What, if anything, ought to animate these individual decisions and give coherent direction to the many separate vectors considered there? None of conventional (dominant) labels like liberal or conservative, originalist or changing intent, or specific jurisprudential tags like formalism,⁹⁴ law and economics,⁹⁵ critical legal studies,⁹⁶ or post-modernism,⁹⁷ appear to be sufficiently relevant to the task at hand. Instead, this fledgling process can be initially and provisionally identified by the phrase "doing sovereignty."

"Doing sovereignty" at this early stage might be thought of as a dynamic process containing at least three separate but related components: narrative structure and clarity, reflective equilibrium, and sacred trust.

1. Narrative Structure and Clarity

Tribal courts, particularly appellate courts, need to be continually cognizant of their narrative function.⁹⁸ This commitment to narrative is critical for several reasons. It provides the opportunity for the courts to

94. See *supra* note 88 and accompanying text.

95. HAYMAN & LEVIT, *supra* note 89, at 95-166.

96. *Id.* at 213-64.

97. *Id.* at 507-70.

98. POMMERSHEIM, *supra* note 7, at 108-12.

remind themselves that they are indeed engaged in the process of both constructing and communicating a story about their attempt to identify and realize certain cultural and public policy objectives. In a tribal judicial setting, a sense of narrative or story encourages a look back to beginnings and a look forward to destinations from someplace *in medias res*. Such a narrative perspective helps to anchor tribal court decision-making in a (tribal) *historical* process, rather than in some disconnected present moment.

In addition, narrative is propelled by a search for clarity and is the most effective means by which to tell the story. Concerns for clarity and effectiveness in the context of tribal adjudication and opinion writing are likely to enhance the quality of tribal decision-making. These narrative concerns are not mere adjuncts, or so much window dressing, to the actual legal analysis of a case, but rather are inextricably bound up with it.

Finally, the making of narrative often leads to a unique sense of voice. With this emerging sense of voice, the dialogue with state and federal courts potentially becomes increasingly exciting and meaningful. The tribal voice becomes a significant strand in the national braid of jurisprudence, particularly as it relates to self-determination and pluralism.⁹⁹ Of course, rigorous legal analysis is also central to this enterprise, but suggesting that tribal courts should look no further sells tribal courts incredibly short. In many ways, it is the presence of voice that tells individuals and peoples that they are alive and that they matter. This is also the situation in cases—day in and day out—in tribal courts throughout Indian country.

Commitment to narrative and voice also reveals a concern for coherence and continuity. This might appear automatic or obvious. It is not. One need only read a sampling of recent United States Supreme Court Indian Law opinions, such as *Montana v. United States*,¹⁰⁰ *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,¹⁰¹ *Lyng v. Northwest Indian Cemetery Protective Ass'n*,¹⁰² *United States v. Dion*,¹⁰³

99. See, e.g., *id.* at 99-120.

100. *Montana v. United States*, 450 U.S. 544 (1981) (holding that treaty conveying reservation to Crow Tribe did not convey ownership of streambeds therein, and that the Tribe had no power to regulate non-Indian hunting and fishing on reservation land owned in fee by non-Tribal members).

101. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (holding that the Yakima Indian Nation could not always zone land owned in fee by nonmembers).

102. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (holding that the Free Exercise Clause does not prohibit the Government from permitting timber harvest in sacred areas).

and *South Dakota v. Bourland*,¹⁰⁴ to realize that the nation's high court has slipped into doctrinal incoherence. This is largely because the national narrative—however muted—of tribal sovereignty is in the process of being lost in a series of ad hoc pronouncements. Robert Frost's suggestion that poetry is a "momentary stay against confusion"¹⁰⁵ has telling significance to tribal judicial decision-making. The touchstone of narrative is a constant reminder, though not a guarantee, to avoid confusion, to stay the course of self-determination, and to be sensitive to the nuances of the interconnected journey from both the recent colonized past and pre-Columbian independence.

2. Reflective Equilibrium

The concept of reflective equilibrium refers to a process of regularly assaying, in the context of deciding cases, the impact of a particular case on tribal sovereignty and well-being. This is not to say that legal analysis that does not advance tribal sovereignty should necessarily be sacrificed. Rather, it counsels a perspective that seeks neither to advance tribal sovereignty (at least in the short run) at the expense of good legal reasoning, nor to claim an *ex cathedra* knowledge about how the tribal sovereign itself might assess sovereignty in a particular case.

This is particularly true in any case in which the tribe itself is not a litigant. The Rosebud case of *Fuller v. Blaze Construction Co.* involved a venue selection clause in a contract between an off-reservation, non-Indian corporation and an on-reservation, Indian corporation for work to be performed on the reservation.¹⁰⁶ The Rosebud Sioux Supreme Court reversed and remanded the trial court's decision enforcing the venue selection claim¹⁰⁷ largely on its reading of the United States Supreme Court's decision in *Iowa Mutual Insurance Co. v. LaPlante*.¹⁰⁸ In addition, the Court invited the tribe to submit an amicus brief on remand

103. *United States v. Dion*, 476 U.S. 734 (1986) (holding that the Eagle Protection Act abrogated tribal rights to hunt bald or golden eagles).

104. *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993) (holding that the Flood Control and Cheyenne River Acts abrogated tribal rights to regulate non-Indian hunting on lands taken by the United States for a reservation).

105. JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 21 (1990) (quoting Robert Frost).

106. *Fuller v. Blaze Construction Co.*, 20 Indian L. Rep. (Am. Indian Law. Training Program) 6011 (Rbd. Sx. Ct. App., Jan. 14, 1993).

107. *Id.*

108. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (holding that federal diversity jurisdiction was not available in a cause of action arising on the reservation absent exhaustion of tribal court remedies).

so the Court could take into account the tribe's position on these critical issues of sovereignty and venue selection clauses.¹⁰⁹

It is this kind of situation, which is not uncommon, that calls for recognition of the importance of reflective equilibrium. Tribal courts are neither mindless advocates for, nor insensitive counter-advocates against, tribal sovereignty and self-governance. They are, instead, often in the middle, prepared to evaluate and to consider the effects of their actions in these critical areas. Such considered reflections may, as in *Fuller*, suggest that coordinate branches of tribal government are best suited to resolve certain kinds of disputes and that the court's efforts, while necessary in the given case, are insufficient to reach the full implications of the underlying dispute. This is *not* unlike, for example, *County of Oneida v. Oneida Indian Nation*, in which the United States Supreme Court considered whether the Oneida Tribe could sue for damages for trespass to land allegedly conveyed unlawfully in 1795, and indicated that full redress was likely only through consideration by Congress.¹¹⁰

Reflective equilibrium is a kind of practical reasoning with a dollop of additional thought.¹¹¹ Tribal courts find themselves exactly where they are: enmeshed in both their own unique, individual, tribal history as well as broader national Indian Law development and movement of tribal courts. They must move forward as they—not others—best see fit. Of course, they may find incentive or draw inspiration from the examples of other tribal courts and even, on occasion, other state or federal courts, and that is all to the better. Yet tribal courts must finally address cases before them and just “do it.” Tribal courts, for the most part, face exigent circumstances that press for decision and resolution. In this context, it is fair to say that most tribal courts—and most certainly the Rosebud Sioux Supreme Court and the Cheyenne River Sioux Tribal Court of Appeals—are committed to continual growth and improvement.

On one level, this simply means a continuing resolve to decide cases as they come before the court with a deepening analytical perspective and a growing sense of judicial craft in the preparation of decisions. In other words, tribal courts must fashion a new and improved way of getting from

109. *Fuller*, 20 Indian L. Rep. at 6011. In fact, two subsequent circuit court decisions have upheld venue selection clauses against the tribes. See *Altheimer & Grey v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993); *Rosebud Sioux Tribe v. Val-U Constr. Co. of South Dakota*, 50 F.3d 560 (8th Cir. 1995). Another recent case also upheld a venue selection clause involving private parties. See *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230 (8th Cir. 1995).

110. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

111. See, e.g., Philip Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1239 (1990); see also HAYMAN & LEVIT, *supra* note 89, at 452-504.

here—the contested case with its briefs and oral argument—to there—the final written decision usually contained in a memorandum opinion. A perspective that focuses on practical results and consequences is most likely devoid of any overreaching jurisprudential theory.

On another level—the dollop, as it were—tribal judiciaries must take continuous and collective stock of the impact of their decisions on tribal sovereignty. The impact of any single decision on tribal sovereignty may not be readily apparent. Nonetheless, such increments eventually form recognizable patterns that must be considered and evaluated as they relate to the development of tribal sovereignty. This is indeed the heart of reflective equilibrium. It involves the examination of the gradients of tribal sovereignty—both as they relate to the range of permissible tribal power and the valence of the values embedded in this power. It seems presumptuous to posit any formula for application in this area. Instead, tribal courts should identify the need for a localized sensitivity to review both the procedural and substantive vectors of tribal jurisprudence as they relate to reservation well-being. It is a way of *pausing* both before and after a decision is made.¹¹²

This notion of reflective equilibrium holds additional sway because of the disequilibrium that (dominant) history has visited on many tribes. As insightfully noted by the French writer Simone Weil: "If we know in what way society is unbalanced, we must do what we can to add weight to the lighter scale . . . we must have formed a conception of equilibrium and be ever ready to change sides like justice, 'that fugitive from the camp of conquerors'."¹¹³ Reflective equilibrium is therefore necessary to correct the disequilibrium imposed by dominant history, but also to control and direct with a steady hand the current trajectory of tribal court jurisprudence.

3. Sacred Trust

Tribal courts are also imbued with a sense of sacred trust that is not so much a legal, but rather a cultural, charge. They are charged with providing continuity and a nuanced sense of adaptation of tradition in contemporary circumstances, while also incorporating the best from dominant jurisprudence. Although this is not an easy task, it is possible

112. Judge Mary Wynne of the Colville Tribal Court recently articulated, forcefully and eloquently, this notion of "pausing" in an attempt to understand and think through the likely ramifications of any tribal court action or decision. Judge Mary Wynne, Address at the Harvard Law School Symposium on Tribal Courts (Dec. 2, 1995).

113. SEAMUS HEANEY, *THE REDRESS OF POETRY* 3 (1995) (quoting Simone Weil).

to suggest some of the touchstones for such an endeavor. These include the concept of law as medicine or healing,¹¹⁴ the injunction that continuity disfavors dichotomy, and the importance of balance and creativity.

Justice is often conceived in dominant jurisprudence as fairness, or the balancing of rights. In much of tribal jurisprudence—especially as it relates to tribal members—there is a concern for right relationships and group harmony as key cultural coordinates in seeking to render justice.¹¹⁵ This concept has been further adumbrated in recent Indian Law symposium conversations suggesting that individual and tribal oppression, both past and present, has, in many cases, seriously impaired the ability of tribal individuals and sometimes the tribe itself to function in healthy, culturally appropriate ways. In this context, what is needed, it is argued, is a regime of law that seeks to heal and to bring individuals and tribes back to health so that they adequately “return” to take their rightful place within the tribal circle of life. A forceful example regarding the indigenous Canadian experience is the potential use of healing circles in the criminal law context in which members of the community, including the victims and tribal elders, seek to articulate and to come to a consensus about the most appropriate “sentence” to help both the convicted wrongdoer and the community itself.¹¹⁶

This view is premised on the primacy of relationships and the centrality of group well-being: a well-being that can only be achieved by the active contribution of culturally healthy individuals. Although many specifics have yet to be articulated, this movement appears to be one of increasing momentum. Yet there are a few cautionary notes to emphasize. This movement is *not* messianic. It is not a new Indian Law ghost dance, but rather a commitment to pragmatism, cultural renewal, and incremental change based on daily experience and a case-by-case approach. In addition, there is the necessary complement that such approaches are totally *voluntary* in either the criminal or civil (domestic relations) context.

114. This metaphor has recently been articulated by a number of individuals I heard speak at recent Indian Law Conferences at the University of New Mexico School of Law on November 10, 1995, and Harvard Law School on December 2, 1995. The speakers I specifically remember include Professor James Youngblood Henderson of the University of Saskatchewan Law School, Canadian Justice David Arnot, and Chief Justice Robert Yazzie of the Navajo Supreme Court. There were likely others whose names I do not recall. My apologies to them.

115. See, e.g., POMMERSHEIM, *supra* note 7, at 112-20.

116. See, e.g., *Justice as Healing: A Newsletter of Aboriginal Concepts of Justice* (Native Law Centre, University of Saskatchewan), Spring 1995; see also the discussion of efforts in a similar vein in New Zealand, Jim Considine, *A Justice Based on Healing*, THE CATHOLIC WORKER, Jan.-Feb. 1996, at 1.

No individuals can be "healed" in either a criminal law or family law proceeding without their fully informed consent.

These approaches clearly reflect a culturally derived insight into part of the "problem" faced by tribes and tribal courts. It is a means of defining the problem from the "inside-out" rather than from the "top-down." Such introspection and praxis epitomize the actualization of tribal sovereignty and meaningful self-determination on a daily basis. It also deepens and furthers the narrative thrust explicating the story of tribal court jurisprudence that increasingly includes a theme of healing. Lastly, it links a contemporary tribal institution to its cultural taproot in a demonstrable (as opposed to a rhetorical) way.

Because this thrust is not coercive, it highlights the importance of avoiding both dichotomy and unitary solutions. Too often, the choice of tribal courts is posited as either the traditional way or the non-Indian way. The problem of definitions aside, this description of choice is cast as a one-dimensional "either/or." It misapprehends the reality it seeks to address. Tribal reality is a much richer braid than any simple dichotomy indicates.

A good example here involves the principle of due process. Is due process an Indian or non-Indian concept? While it clearly is a non-Indian concept,¹¹⁷ it is also an Indian concept in many tribal cultures.¹¹⁸ This seems worth noting to emphasize that reality is often more accurately described by a continuum characterized by shadings and degrees rather than by dichotomies that often suggest incompatible endpoints with no potential common ground in between. Dichotomies are often seductive because of their apparent simplicity, but this simplicity often comes at the high price of blinking a more textured complex reality.

Tribal individuals in most tribes, as well as non-tribal individuals, cover a wide spectrum of positions or views along any continuum, running from traditional to non-Indian (*or* assimilationist *or* dominant society identification, etc.). This reality is sharply reflected in the following experience. In the fall of 1994, I took my Indian Law class to visit the

117. See, e.g., the Fifth and Fourteenth Amendments to the United States Constitution.

118. See, e.g., the Supreme Court of the Oglala Sioux Tribe:

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. We are allowed to disagree. . . . What must be remembered is that we must allow the other side the opportunity to be heard.

Bloomberg v. Dreamer, Oglala Sioux Civ. Ap. 90-348 at 5-6 (1991) (holding that due process requires a hearing before attempting to remove anyone from the Pine Ridge Reservation), *quoted in* POMMERSHEIM, *supra* note 7, at 135, 247.

Rosebud Sioux Tribal Court. In a question and answer session, one of the students asked Chief Tribal Judge Sherman Marshall whether Indian people preferred traditional or mainstream society approaches to their cases. Judge Marshall, a bilingual and bicultural tribal member, said it depended on the individual and the nature of the case. Tribal individuals, he indicated, held a wide range of perspectives, and depending on the particular case, they might be more amenable to a traditional or a mainstream approach or some blend of both. These observations appear both accurate and practically grounded in the daily experience of tribal court decision-making as it applies to a diversity of membership within most tribes.

These comments also apply, though perhaps to a less vivid extent, to cases involving non-Indians. It is clearly a mistake to assume that individual non-Indians, especially in personal litigation involving Indians, are *not* amenable to approaches, whether in the adjudicatory or remedial stage, that focus on right relationships. This is also potentially true—though perhaps more doubtfully—when non-Indian corporate entities are involved. There is nothing to be gained from assuming that the identity of the parties as Indian or non-Indian—individual or corporate—fully predicts their potential stance toward adjudication and remedial options. Reality always outflanks and outwits our descriptions of it.

This rich interweave of concern about expanding tribal court jurisprudence into the realm of healing and avoiding dichotomy ultimately reveals the need to discuss the importance of creativity and balance. Creativity is not always a hospitable word in law because it suggests, at least to some, departure from regularity and predictability as irreducible qualities of law. While this is certainly true, mindless adherence to these precepts can also lead to an arid stasis that provides results disconnected from the meaningful values that tribal law seeks to realize in the first instance. Yet creativity—particularly in the historical context of oppression and colonialism—is absolutely central and cannot be so easily denied. As noted by the Irish poet Seamus Heaney, recent recipient of the Nobel Prize in literature: "In any movement towards liberation, it will be necessary to deny the normative authority of the dominant language or literary tradition."¹¹⁹

Although literature is not law, in periods of liberation, law too will confront dominant norms. Given the law's conserving ethos, creativity in law—especially in the judging context—must also be flanked by concerns

119. HEANEY, *supra* note 113, at 7.

for due process and essential fairness. Moreover, the movement of law—again especially in the judicial setting—is most often characterized by attention to nuance and incremental change. The increasing diversity of both parties and subject matter found on many tribal court dockets, especially in areas *not* covered by statutory law, will often call for thoughtful and potentially creative decision-making.

Creativity and nuance are most persuasively joined in the craft of tribal court opinions. Any review of the tribal court opinions in the *Indian Law Reporter* provides a convincing survey of this developing and sophisticated craft. Law remains a field of persuasion and civil argument.¹²⁰ Legal decisions are matters of force in the particulars of any given case, but their future use and application resides largely in their craft and interior persuasiveness. These precedents, which are often the first of their kind in many tribal court systems, are truly unique and must face the tests of whether they merit emulation and respect, both within the tribal community at large and the professional community of tribal litigants and practitioners.

CONCLUSION

The physical landscape of Indian country is central to tribal well-being, both literally and metaphorically.¹²¹ This is no less true for the legal landscape. Law remains—for better or worse—an absolutely central enterprise in Indian country. What is new, however, is not the issue of centrality, but a partial shift of the locus of centrality away from state and federal courts to tribal courts. This Article has surveyed some of the elements of that shift in Indian country in the particular light of the experience of both the Rosebud Sioux Supreme Court and the Cheyenne River Sioux Tribal Court of Appeals during the last decade. It constitutes a field report seeking to convey the most salient features of an ongoing dynamic process.

The results reveal startling growth in the development of tribal law—both procedurally and substantively—in many diverse areas, and rapidly increasing institutional competence and sophistication. In addition, there emerges a description of the nascent process of “doing sovereignty” with some coordinate and tentative reflections about the jurisprudential contours of such efforts, and some suggestions about issues and implications for the future.

120. See, e.g., Endreson, *supra* note 37.

121. See, e.g., POMMERSHEIM, *supra* note 7, at 11-36.

The final frontier or resting place of tribal court jurisprudence is nowhere in sight. Much hinges on the continued and developing deference and respect to tribal court decision-making by the United States Supreme Court and lower federal courts. Given the history and vast changes in Indian Law, this continuing deference is by no means assured. Part of the work remains to ensure, through artful and cogent decision-making, that federal deference continues. Yet there is the complementary need, through creativity and nuance, to make decisions that continue to render justice and fair play to litigants in the context of both cultural continuity and contemporary advances.

Much of what tribal courts do—because they do it so well—does *not* even percolate up the tribal appellate system. This seems particularly true in the context of consensual agreements to traditional forms of remediation involving tribal elders, peacemakers, and other culturally appropriate mediators. This strengthens the foundation of many tribal court systems. In addition, in many cases of first impression that are grounded in procedural questions or principles of custom and tribal common law, the appeals often simply seek explication or clarification of the rule. As a result of this growing body of decision-making, there are more and more legitimate reference points on the horizon.

As confidence in tribal courts grows, there will be (and already is) a second wave of tribal court cases that pose unique and provocative legal questions. A good example of this is the Rosebud case of *Estate of Tasunke Witko v. G. Heileman Brewing Co.*, which seeks both conventional and traditional relief under causes of action grounded in conventional tort theory, traditional tribal customary law, and federal law.¹²² Regardless of the ultimate disposition of this and similar cases, this second wave reflects a growing confidence in tribal courts as *the* appropriate forum in Indian country to handle cases involving claims that come from *both* the heart of a culture's tradition and the dominant society's most ingrained ways of thinking about legal problems. The twin notions of deference and confidence will continue to be the benchmark for the future of tribal courts. Taken together, these dynamic processes form the foundation for a jurisprudence of stewardship that nurtures respect, advances dignity, and seeks wisdom.

122. See *supra* notes 64-67 and accompanying text.