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TRIBAL COURT PRAXIS: ONE YEAR IN THE LIFE OF TWENTY INDIAN TRIBAL COURTS

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I. Introduction: Assuming the Worst

In July 1997, Sen. Slade Gorton (R.-Wash.) appended a rider to the Interior Appropriations Act requiring all tribes receiving federal funds to waive sovereign immunity in federal court for cases brought by non-Indians.[1] Although ultimately defeated,[2] the rider was an attack on the entire tribal court system, because it was premised on the assumption that tribal courts are not neutral, justice-administering institutions. A recent letter to the editor of the *Washington Post*, written by a man whose son was killed in an automobile accident with a Yakima tribal police officer, makes this assumption painfully clear. Mr. Bernard Gamache's letter implied that he had no remedy because he could not sue the tribe in state or federal court. He apparently did not even attempt to file suit in tribal court, asserting that the tribe has a "makeshift court system that operates without a constitution." Mr. Gamache broadened this denunciation of the Yakima Tribal Court system to include *all* tribes: "Indian tribal courts have routinely shown their inability to administer justice fairly."[3] Senator Gorton, in an op-ed piece published the same day, made the

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In memoriam, Philip Samuel Francis Deloria.

*Professor of Law, American University, Washington College of Law. Work on this article was supported by a generous summer research grant from Dean Claudio Grossman of American University, Washington College of Law. Thanks also to the people at Boston College Law School who supported this and other tribal court projects, including Dean Aviam Soifer; Howard Brown, B.C. class of 1998, who provided extraordinary research assistance; and Irene Good of the B.C. Law Library. Lynetta St. Clair, WCL class of 1998, Nancy Dunn, and Jacqueline Hamilton smoothed over rough parts of the draft. Mark Van Norman asked me to present a review of tribal court litigation for the Federal Bar Association Indian Law Conference in April 1997. This article is an expanded version of that presentation. A note on citations. Like most scholars, I do not have access to many of the primary sources of tribal law relied on in the tribal court opinions discussed in this article, such as tribal codes and constitutions. Instead of direct citations to these sources, I will cite the tribal court opinion referring to them. Readers should note, however, that the codes or constitutions may have been amended since the case relying on them was decided.

1. *See* Les Blumenthal, *Gorton Says Bills Would Make Tribes Accountable; Measures Defended in Senate As Indians Work to Defeat Them*, NEWS TRIB. (Tacoma, Wash.), Sept. 4, 1997, at B1 (describing provisions appended to the appropriations bill).

2. Dana Wilkie, *Senator Delays Action on Indian Sovereignty*, SAN DIEGO UNION-TRIB., Sept. 17, 1997, at A2. The administration had threatened to veto the appropriation bill if the riders were not deleted. *See* Philip Brasher, *Senate Drops Legislation Opposed By Tribes*, ASSOCIATED PRESS, Sept. 17, 1997, *available in* 1997 WL 2549996.

3. Bernard Gamache, Letter to the Editor, *Simple Justice*, WASH. POST, Sept. 16, 1997, at

point only slightly more subtly: "[N]on-Indians and state governments may not seek justice in an *impartial* court when they have a dispute with tribal governments."[4] Senator Gorton apparently is not disturbed by the fact that after *Seminole Tribe*,[5] Indian governments may not seek justice against *state* governments in the federal courts, but rather are forced to take their disputes with the states into state courts. He also glosses over the numerous barriers presented by the common law and constitutionalized doctrines of sovereign immunity to suits against federal, state, and local governments.

Moreover, Mr. Gamache's letter is misleading because federal law has provided for a forum for such accidents. Before 1990, he would have been able to bring a claim in tribal court because the Indian Self-Determination and Education Act required tribes entering into 638 self-government contracts, as they are called,[6] to secure liability insurance and waive sovereign immunity up to the limits of the insurance policy.[7] Since the added expenses and difficulty of securing insurance cut into the grant money provided under the program, in 1990, Congress provided that tribal officers, like the police officer who hit Mr. Gamache's son, in the performance of a 638 contract are "deemed hereafter to be part of the Bureau of Indian Affairs . . . and its employees are deemed employees of the Bureau . . . while acting within the scope of their employment."[8] Consequently, Mr. Gamache had a remedy under the Federal Tort Claims Act (FTCA).[9] Had Mr. Gamache taken his claim to tribal court, the tribal court would certainly have held that the FTCA preempted tribal law, as did the Colville Tribal Court in a recent case.[10] Mr. Gamache knew about

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A-16.

4. Slade Gorton, *Equal Justice For Indians, Too*, WASH. POST, Sept. 16, 1997, at A-17 (emphasis added).

5. Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1995).

6. The Indian Self-Determination and Educational Assistance Act of 1975 provided for tribes to contract with the Department of the Interior to assume responsibility for delivering services formerly delivered by the Department. Since the public law number was 93-638, the contracts are popularly known as 638 contracts.

7. *See* Act of June 6, 1972, Pub. L. No. 92-310, § 229(c)(2), 86 Stat. 201, 208 (superseded).

8. Act of Nov. 5, 1990, Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959-60, *amended by* Act of Nov. 11, 1993, Pub. L. 103-138, Title III, § 308, 107 Stat. 1416 (codified at 25 U.S.C.A. § 450f notes (West Supp. 1997).

9. *Id.* The statute provides:

> [A]ny civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act.

Id.

10. *See* Palmer v. Millard, 23 Indian L. Rep. 6094 (Colville Ct. App. 1996) (dismissing as preempted by the FTCA a variety of tort claims against tribal police for seizing and destroying the plaintiff's dogs).

this federal remedy when he wrote his letter because he had filed suit in federal court under the FTCA for $2 million.[11] The case was scheduled to go to trial in December 1997, but was settled and dismissed by court order on November 26, 1997.[12] Unfortunately, the public's ideas about tribal courts are so ill-informed that assertions like Mr. Gamache's are presumed to be the truth. Such assumptions require the application of a corollary presumption: that tribal courts are not justice-administering institutions.

When tribal courts have been subjected to intense scrutiny, as they have been in the last fifteen years,[13] they have survived the test.[14] Even

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11. Estate of Gamache v. United States, No. CY-96-3177 (E.D. Wash. 1996).

12. Telephone Interview with Office of the Clerk of the Court (Jan. 5, 1998).

13. Both Houses of Congress have held major hearings to consider problems in the administration of justice in tribal courts. *See, e.g., Tribal Sovereign Immunity: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong. (1996); *Oversight Hearing on Public Law 103-176, Indian Tribal Justice Act: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong. (1995); *To Assist the Development of Tribal Judicial Systems: Hearing on S. 521 Before the Senate Comm. on Indian Affairs*, 103d Cong. (1993); *Proposed Substitute Bill to S. 1752, the Indian Tribal Courts Act of 1991: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong. (1992); *To Assist in the Development of Tribal Judicial Systems, and for Other Purposes: Hearing on H.R. 4004 Before the House of Representatives Comm. on Interior and Insular Affairs*, 102d Cong. (May 21, 1992); *To Provide Support for and Assist the Development of Tribal Judicial Systems: Hearing on S. 667 Before the Senate Comm. on Indian Affairs*, 102d Cong. (1991); *Oversight Hearing to Provide a Broad Overview of the Status of Jurisdictional Authority in Indian Country: Hearing Before the Select Comm. on Indian Affairs*, 102d Cong. (1991); *To Make Permanent the Legislative Reinstatement, Following the Decision of Duro Against Reina (58 U.S.L.W. 4643, May 29, 1990), of the Power of Indian Tribes to Exercise Criminal Jurisdiction Over Indians: Hearing on S. 962 Before the Senate Select Comm. on Indian Affairs*, 102d Cong. (1991); *To Confirm the Jurisdictional Authority of Tribal Governments in Indian Country: Hearing on S. 963 Before the Senate Select Comm. on Indian Affairs*, 102d Cong. (1991); *To Make Permanent the Reinstatement, Following the Decision of Duro Against Reina (58 U.S.L.W. 4643, May 29, 1990), of the Power of Indian Tribes to Exercise Criminal Jurisdiction Over Indians: Hearing on H.R. 972 Before the House of Representatives Comm. on Interior and Insular Affairs*, 102d Cong. (1991); *Oversight Hearing to Provide Support for and Assist the Development of Tribal Judicial Systems and the Implementation of the Indian Civil Rights Act by Indian Tribal Governments: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong. (1991); *To Establish Whether or Not a Direct Right of Appeal Should be Provided to a Federal Court From Judgments of Tribal Courts for Actions Arising Under the Indian Civil Rights Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong. (1991); *To Confirm the Jurisdictional Authority of Tribal Governments in Indian Country: Hearing on S. 963 Before the Senate Select Comm. on Indian Affairs*, 102d Cong. (1991); *Oversight Hearing on Tribal Initiatives for the 1990's: Hearing Before the Senate Select Comm. on Indian Affairs*, 101st Cong. (1990); *To Provide an Overview of the Status of Tribal Courts in Today's Legal System: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong. (1988); *To Authorize the States and the Indian Tribes to Enter into Mutual Agreements and Compacts Respecting Jurisdiction and Governmental Operations in Indian Country: Hearing on S. 1181 Before the Senate Select Comm. on Indian Affairs*, 96th Cong. (1980).

14. Some of the hearings cited in footnote 13, *supra*, were held at the behest of legislators who introduced bills to limit tribal court authority. For example, during several terms in the

investigations which began with apparent hostile intent have ended by stressing the strengths of tribal courts and noting that their weaknesses stem from lack of funding and not pervasive bias. The Reagan-Bush Civil Rights Commission held five hearings across the country targeted at a hot button issue: enforcement of civil rights on reservations.[15] In 1991, the Commission issued its Final Report recommending no changes in federal law and rejecting proposals to bring the tribal judiciary under the control of the federal courts.[16] Rather, the Commission pointed its finger at Congress by concluding that greater financial support should exist for the tribal court

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1980s, Sen. Orrin Hatch (R.-Utah) introduced legislation requiring automatic federal court review of civil rights cases, but this effort was unsuccessful. For a discussion of Senator Hatch's bill, see Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 271-75 (1989). Instead, these hearings resulted in legislation strengthening tribal courts as tribally controlled institutions, either by reaffirming tribal court jurisdiction or by providing for greater resources to be made available to tribal courts. *See, e.g.*, 25 U.S.C. § 450n(1) (1988) (amending the Indian Self-Determination and Educational Assistance Act, to provide that the Act should not be read as "affecting, modifying diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." The most significant legislation was the Indian Tribal Justice Act, 25 U.S.C.A. §3601-3631 (West Supp. 1997), providing for increased funding for tribal courts. Unfortunately, Congress has yet to appropriate the funds to carry out the obligations of the Tribal Justice Act.

15. *Enforcement of the Indian Civil Rights Act: Hearing Before the United States Comm'n on Civil Rights*, Rapid City, S.D. (July 31-Aug. 1 & Aug. 21, 1986); *Enforcement of the Indian Civil Rights Act: Hearing Before the United States Comm'n on Civil Rights*, Flagstaff, Ariz. (Aug. 13-14, 1987); *Enforcement of the Indian Civil Rights Act: Hearing Before the United States Comm'n on Civil Rights*, Washington, D.C. (Jan. 28, 1988); *Enforcement of the Indian Civil Rights Act: Hearing Before the United States Comm'n on Civil Rights*, Portland, Or. (Mar. 31, 1988); *Enforcement of the Indian Civil Rights Act: Hearing Before the United States Comm'n on Civil Rights*, Flagstaff, Ariz. (July 20, 1988).

16. U.S. COMM'N ON CIVIL RIGHTS: THE INDIAN CIVIL RIGHTS ACT (1991). The Commission decried the fact that the "failure of the United States Government to provide proper funding for the operation of tribal judicial systems, particularly in light of the imposed requirement of the Indian Civil Rights Act of 1968, has continued for more than 20 years." *Id.* at 72. The Commission urged that Congress enact legislation to increase funding of tribal courts in amounts equal the funding provided to similar state courts. *Id.* at 73. In particular, the Commission recommended to increase funding for training tribal court judicial personnel and council members on the requirements of the ICRA. While expressing concern that tribes may not waive sovereign immunity to the same extent as state and federal courts, the Commission noted that "[e]very level of government within our Federal system invokes the defense of sovereign immunity from suit to some extent." *Id.* at 63. The Commission noted the many differences among individual tribes in their courts' approaches to sovereign immunity and suggested that some tribes may simply not be aware of the kinds of options for waiving sovereign immunity followed by state legislatures and congress as well as the state and federal judiciaries. As a result, the Commission recommended increased appropriations and grants for pilot projects by which "the Federal Government can play a positive role in encouraging the tribes to examine the extent to which they can enact statutory waivers of their sovereign immunity for adjudication of civil rights claims, recognizing that such an examination must include factors such as the size of the tribe's treasury and the competence of their judges." *Id.*

systems. In other words, those who examine what is actually occurring in tribal courts cannot help but be impressed with how well the courts function with the few resources at their disposal. Unfortunately, most people, including elites such as journalists and attorneys, know nothing about the existence, much less the day-to-day operation, of tribal courts.

Those opposing the Gorton rider directed their criticism at the legislative process, arguing against tacking riders on bills to make substantive policy[17] or stressed the importance of tribal sovereign immunity to tribal governments.[18] It is certainly appropriate to criticize making substantive changes to existing law by means of riders to appropriations acts. Laws should result from a deliberative process taken in the open; yet the practice of appending riders to bills without publication until the appropriations act becomes law persists. Appropriations acts require an up or down vote on the floor of Congress. To oppose a rider requires voting down the entire appropriations bill. It is not surprising that legislators are loathe to risk political capital by shutting down a department of the government in order to vindicate institutions not known to exist by most lawyers, much less members of the public. Such riders are more objectionable when they take aim at the smallest racial minority in the United States, members of Indian tribes. Defending tribal sovereign immunity is also an important task. Tribal immunity from suit is very important to Indian tribes for many reasons apart from the most obvious: lawsuits can drain treasuries of local governments.[19]

But perhaps the best answer to Senator Gorton is to reveal that his proposal is premised on a false assumption that tribal courts are biased. This failure to address the actual and potential role of tribal courts as justice-administering institutions indicates that even those working on Indian political and legal issues are ignorant of the day-to-day work performed by tribal judges. This lack of knowledge is understandable. First, most tribal court opinions are not widely distributed. In 1996, for example, only twenty tribes[20] submitted

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17. *See, e.g.*, Timothy Egan, *Senate Measures Would Deal Blow to Indian Rights*, N.Y. TIMES, Aug. 27, 1997, at A1 (decrying secrecy surrounding the measures); Editorial, *Ambushing Indian Sovereignty*, PRESS-ENTERPRISE (Riverside, Cal.), Sept. 14, 1997, at A18 (same); Editorial, *Senator Gorton's Ignoble Crusade*, N.Y. TIMES, Aug. 31, 1997, § 4, at 8 (same); Editorial, *Slade's Stealth: This Is No Way to Rewrite Indian Law*, ANCHORAGE DAILY NEWS, Aug. 29, 1997, at B10 (same).

18. Suits against tribes not only subject them to potentially ruinous damage awards, but interfere with the day-to-day operations of government both directly and by requiring reallocation of resources from basic services in order to defend such suits. Permitting such suits also undercuts tribal sovereignty, which is a right accorded tribes because of their government-to-government relationship with the United States recognized in treaties and by the Constitution. For defenses and criticisms of tribal sovereign immunity, see Bruce A. Wagman, *Advancing Tribal Sovereign Immunity as a Pathway to Power*, 27 U.S.F. L. REV. 419 (1993); Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1072-74 (1982).

19. Other reasons: control over the pace of economic assimilation, overcoming psychological barriers to bringing cases in tribal court.

20. In descending order of the number of opinions published: Mashantucket Pequot (16);

opinions to the *Indian Law Reporter*, a looseleaf service.[21] Few law libraries subscribe to the *Indian Law Reporter*, probably because libraries respond to the needs of their faculty and student constituencies and most law professors and student researchers are not aware of the reporter's existence. Consequently, only those who routinely use tribal court opinions have access to them. A second factor contributing to the law community's ignorance of tribal courts is that tribal court jurisdiction is not generally publicized or acknowledged. Casebooks — the primary method of educating law students — do not include property, tort, or contract cases from tribal courts.[22] Law review articles have begun to address the jurisprudence of tribal courts,[23] but those articles might escape notice as seemingly addressed to a narrow area, holding little interest for those not concerned with Indian law.

If tribal court opinions were more widely available, the work of tribal judges would become visible to the legal as well as the general public. This education will in turn benefit the tribal courts and help to counteract and dispel accusations like those of Mr. Gamache which are now too readily published despite the lack of facts supporting them.

For a presentation to the Federal Bar Association Indian Law Conference in April 1997, I read the eighty-five cases published in the *Indian Law Reporter* during 1996. Although I have read many tribal court opinions in the past, I have never read so many unrelated cases in a sustained manner. I was struck by the diversity of the issues, the difficulty, complexity and subtlety of the choice of law, and other procedural and substantive issues addressed. I was most impressed by the richness of the dialogue in tribal court opinions — a dialogue between the court and the tribal councils, tribal people, and members of the bar. One may also read the opinions as initiating a conversation with the general public. A conversation requires listening, however, and until tribal court opinions are more widely available, accusations such as those of Mr. Gamache will remain unchallenged.

In this article, I will bring to light the work of tribal courts as reflected in

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Colville Confederated Tribes (13); Confederated Salish & Kootenai (11); Cheyenne River Sioux (10); Ho-Chunk (formerly Wisconsin Winnebago) (9); Navajo Nation (5); Winnebago (4); Southern Ute (3); Chitimacha (2); Walker River Paiute (2); Choctaw of Mississippi (1); Choctaw of Oklahoma (1); Coeur d'Alene (1); Intertribal Court of Appeals of Nevada (1); Miccosukee (1); N.W. Region Supreme Court for the Tulalip Tribe (1); Rosebud Sioux (1); Seneca Peacemaker Court (1); St. Regis Mohawk Tribe (1); Three Affiliated Tribes of the Fort Berthold Reservation.

21. In addition to the *Reporter*, the Falmouth Institute publishes the *Native American Law Digest*, which is a monthly summary of court and administrative decisions of interest to the Native American community. The *Digest* does include some tribal court opinions.

22. To my knowledge only one casebook reprints a tribal court case. *See* CURTIS J. BERGER & JOAN C. WILLIAMS, PROPERTY: LAND OWNERSHIP AND USE §11.4 Native American Artifacts, at 1164-1173 (reprinting Chilkat Indian Village IRA v. Johnson, No 90-01, Chilkat Tribal Court 1993).

23. *See infra* note 39.

the eighty-five opinions. I will begin in part II by sketching an overview of the structure of tribal courts and the role that tribal courts play, both in the ongoing construction of tribal identity and in establishing legitimacy within the tribe and the dominant society's legal system. I will then discuss the problem of availability of tribal court opinions, offering some suggestions for greater access to the work of tribal courts. In part III, I will analyze the 1996 cases, beginning with a snapshot of the cases and then addressing the law applied in tribal court opinions. This survey demonstrates that there is a great range of legal norms available to tribal judges in the average case, including tribal, state, and federal norms. In part IV, I will address political and civil rights cases and consider the area giving people like Senator Gorton and Mr. Gamache the most trouble: cases involving non-Indian parties. Political cases are the most delicate, dangerous, and important cases tribal courts must adjudicate; in so doing tribal courts are engaged in a dialogue with the tribal council, the tribal chair, and tribal citizens. Cases involving non-Indians impel judges to initiate a different kind of dialogue with the non-Indian public: a conversation about justice and legitimacy.

II. Overview of Tribal Courts

A. Diversity and Legitimacy

Tribal courts are a study in syncretism. Modern tribal courts had their genesis in the Courts of Indian Offenses, tools of colonialism imposed at the end of the nineteenth century to keep order on Indian reservations while educating tribal people in the dominant culture's norms.[24] The Indian Reorganization Act of 1934[25] was designed to put an end to coercion, but continued the policy of assimilation by requiring tribes seeking the benefits of the IRA to organize Western-style governments. While the IRA constitutions did not provide for a separate judicial branch, tribal legislatures began creating court systems. This process has accelerated greatly since the enactment of the Indian Self Determination and Education Assistance Act in 1975.[26] Today, most tribes have taken over the Courts of Indian Offenses. At the same time, the courts' jurisdiction has broadened from primarily criminal to include civil suits of increasing complexity. As a result, modern tribal courts vary in structure,[27] jurisdiction,[28] and substantive norms.

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24. For a history of the Courts of Indian Offenses, see WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES (1966).

25. Ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1994)).

26. Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. § 450(a) (1994)). For an excellent treatment of Indian tribal courts, see FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE (1995).

27. The tribal opinions studied indicated that most of the tribes had two-tier systems, with a tribal trial and appellate court. Two of the opinions were decided by intertribal courts, one by an intertribal appellate court, Kizer v. Walker River Hous. Auth., 23 Indian L. Rep. 6214 (Inter-

Traditional non-judicial dispute resolution mechanisms continue to function in some tribes along with Peacemaker courts,[29] courts of specialized jurisdiction, such as administrative commissions,[30] gaming,[31] small claims

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Tribal Ct. App. Nev. 1996) (remanding for determination of whether the tribe's discharge of the employee violated due process), and one by an intertribal court system, *In re* C.W., 23 Indian L. Rep. 6213 (Northwest Regional Tribal Sup. Ct. 1996) (affirming tribal court order denying motion to intervene of potential adoptive parents in child custody proceeding). For descriptions of aspects of these intertribal courts, see, e.g., Christine Zuni, *The Southwest Intertribal Court of Appeals*, 24 N.M. L. REV. 309 (1994) (SWITCA), and U.S. COMM'N ON CIVIL RIGHTS, *supra* note 16, at 34-35 (describing Northwest Regional court system and several intertribal appellate systems). On various structures adopted in tribal courts, see Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 127, 128-30 (1995).

28. With regard to subject matter jurisdiction, the Choctaw Nation's court limits jurisdiction to "disputes arising under any provision of this Constitution or any rule or regulation enacted by the Tribal Council," while the Ho-Chunk Nation's jurisdiction is broader, extending over "all cases and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws, customs, and traditions of the Ho-Chunk Nation." *Compare* Morrison v. Choctaw Nation, 23 Indian L. Rep. 6093, 6094 (Ct. Indian App. 1995) (quoting tribal constitution and affirming motion to dismiss for lack of jurisdiction) *with* Kingsley v. Ho-Chunk Nation, 23 Indian L. Rep. 6113, 6114 (Ho-Chunk Tribal Ct. 1996) (quoting HO-CHUNK NATION CONST. art. VII.) The Ho-Chunk Nation (formerly the Wisconsin Winnebago Tribe) recently adopted a new constitution, which may account for the broader jurisdiction. In addition, the Choctaw court's limitation to tribal constitutional and statutory law may be influenced by the court's status as one of the few remaining Courts of Indian Offenses. With regard to persons who may be subject to jurisdiction, some tribes extend their jurisdiction to the acts of persons outside the reservation. The Ho-Chunk Nation Judiciary Act provides for personal jurisdiction over persons "who enter its territory, its members, and persons who interact with the Nation or its members wherever found." *See* Decorah v. Rainbow Casino, 23 Indian L. Rep. 6128, 6129 (Ho-Chunk Tribal Ct. 1996) (quoting Judiciary Act of 1995). The Rosebud Sioux Tribe provides for personal jurisdiction "consistent with due process of law" and has been interpreted as permitting jurisdiction over off-reservation defendants who commit acts having an effect within the reservation.

29. For descriptions of the Navajo Peacemaker court, see Chief Justice Tom Tso, The Process of Decision Making in Tribal Courts, 31 Ariz. L. Rev. 225 (1989); Honorable Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994); Honorable Robert Yazzie, *"Hozho Nahasdlii" — We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117 (1996); James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55 (1997). For a description of the Sitka Court of Elders, see Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 253 (1994). Although in name denominated a Peacemaker court, the Seneca Nation court has been structured to function as a western court system according to Robert Porter. *See* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997)

30. The Colville Tribes have waived sovereign immunity to permit tribal agency employees to contest disciplinary proceedings. *See* Brooks v. Yellow Cloud Residential Center, 23 Indian L. Rep. 6035 (Colville Admin. Ct. 1995) (ordering employee terminated in violation of the Tribal Policies and Procedures Manual and the Colville Tribal Code guarantee of due process reinstated with back pay with record expunged).

31. The Mashantucket Pequot Tribal Council has created a Gaming Enterprise Division of the Mashantucket Pequot Tribal Court which has jurisdiction for tort claims against the tribe's

courts,[32] and courts of general jurisdiction. These differences are a sign of creativity as tribal councils and courts balance variances among the tribes' traditions and present needs against the traditions and requirements of the dominant society's law.

Differences among tribal courts given is to be expected that law is one of the methods by which a community constitutes its own identity. Like all communities, tribal cultures are in a process of continual change, responding to pressures from various interest groups within tribes as well as pressures from the outside world. Tribal court systems create law and justice for a changing world as they apply tribal codes, constitutions, customary, and common law, as well as federal and state law. Nevertheless, because of their colonial origin, tribal courts must continually build legitimacy within the tribe, both among tribal members and with the Tribal Councils. To be sure, the opinions of courts on every level of federal, state, and local government serve to legitimate the work of these courts. The difference is that the legitimacy of state and federal courts is, for the most part, taken for granted, while tribal courts have only begun to thrive in the last fifty years. As a result, tribal courts do not yet have the same degree of respect among tribal people as do state and federal courts which have had hundreds of years of independent operation.

In addition to the ongoing project of establishing legitimacy among the people they serve, tribal courts must also counter attacks on their legitimacy by outside sources, to an extent not encountered by their state and federal counterparts. In other words, tribal courts work under a constant threat that the dominant legal society, acting through Congress or the federal courts, may react to one out of hundreds of tribal disputes in any given year by diminishing the judicial jurisdiction of *all* tribes. The Supreme Court has been active in this regard since *Oliphant v. Suquamish Indian Tribe*,[33] although in the past Congress took the lead.[34]

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gaming enterprise. *See* Lefevre v. Mashantucket Pequot Tribe, 23 Indian L. Rep. 6018, 6018-19 (Mashantucket Pequot Tribal Ct. 1992) (describing the statutory scheme and dismissing for lack of subject matter jurisdiction a claim filed for an injury occurring before creation of the tribal court). The Mohegan Nation, for example, presently operates a gaming court to adjudicate personal injuries and employment cases arising out of the operation of its casino. At the same time, the tribe is creating a Council of Elders for intra-tribal conflicts. Telephone Interview with Thomas Acevedo, Chief of Staff, Mohegan Nation (April 1997).

32. *See* Castillo v. Charlie, 23 Indian L. Rep. 6001, 6001 (Navajo Sup. Ct. 1995) (describing jurisdiction of Navajo small claims court).

33. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (denying tribal courts authority to exercise criminal jurisdiction over non-Indians). In *Oliphant*, non-Indians greatly outnumbered tribal members because the Suquamish reservation had been subjected to allotment. *See infra* note 56 for discussion of "allotment." Nevertheless, the Court's decision in that case applied to *all* Indian reservations. For a criticism of this practice, see Robert N. Clinton, *Reservation Specificity and Indian Adjudication: an Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLINE L. REV. 543 (1985).

34. In *Ex parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court held that neither the

In conscious or unconscious anticipation to the possibility of federal interference with tribal authority, some tribal courts operate as nearly exact replicas of state courts. Although this strategy has been criticized by some,[35] the reason for this strategy is understandable. The courts of gaming tribes, for example, frequently hear cases brought by non-Indians, especially those brought by non-Indian employees and customers injured on the premises. Given the large number of such suits,[36] it is not surprising that at least two of the gaming tribes, Oneida and Mashantucket Pequot, have created courts very much modeled on the courts of the states within which they are located, both as to judicial personnel[37] and the law applied.[38] As the near success of Senator Gorton's rider indicates, whatever the background of the judge, whatever law is applied in tribal court, at least when non-Indian parties are involved, tribal judges adjudicate with a kind of Sword of Damocles over their heads.

B. Bringing the Work of Tribal Courts to Public Attention

Unfortunately, the work of tribal courts is little known outside the circle of attorneys practicing before tribal courts on a regular basis and scholars of Indian law. Yet many others could benefit from exposure to tribal court opinions. On the most pragmatic level, attorneys and judges unfamiliar with Indian law called upon to struggle with an Indian law question would find such a source of legal norms invaluable. Unfortunately, since tribal court

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Treaty of Fort Laramie with the Sioux nor federal statutes deprived the tribe of authority to punish Indians committing crimes against Indians. Congress responded to this affirmation of tribal sovereignty by imposing the Major Crimes Act on Indian tribes, the first major incursion into internal tribal sovereignty. 18 U.S.C. § 1153 (1994). For an excellent treatment of the background of the dispute and its use by the Bureau of Indian Affairs as a lobbying tool to obtain passage of the Major Crimes Act, see SIDNEY HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 100-41 (1994).

35. *See* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997) (arguing that adoption of Anglo norms in tribal courts endangers tribal sovereignty); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 274, 288 (arguing that the Supreme Court's jurisprudence on tribal court jurisdiction forces tribes to develop Anglo systems of justice in place of traditional systems and thus commit "legal self-genocide" in order to be permitted to retain any quantum of self-government).

36. The deep pockets of casino operators not surprisingly attract many slip and fall cases.

37. In 1997, the Oneida Indian Nation retained two retired justices from the prestigious New York State Court of Appeals, Judge Stewart F. Hancock, Jr., and Judge Richard D. Simons. Oneida Indian Nation, Fact Sheet: Oneida Nation Court (Feb. 13, 1997) (on file with author).

38. Mashantucket Pequot directs judges to apply Connecticut law until tribal law has been developed. Mashantucket Pequot Tribal Ordinances (M.P.T.O.) 011092-02, § 5, *quoted in* Eosso v. Foxwoods High Stakes Bingo & Casino, 23 Indian L. Rep. 6027, 6027 (Mashantucket Pequot Tribal Ct. 1994).

opinions are not widely available, busy practitioners often consult regional reporters or *Restatements* for insight into a wide variety of substantive issues in cases in which no tribal code provision or case precedent points the way toward a just resolution of a particular issue. More important, ready access to tribal court opinions could dispel some of the stereotypes regarding the ability of tribal courts to administer justice fairly. Attorneys representing clients sued in tribal court would then be able to research that particular court's treatment of certain kinds of cases. With greater knowledge of and access to the work of tribal courts, attorneys might well choose to bring some cases in tribal courts for the same reasons. Access to tribal court opinions may also aid federal courts called upon to review tribal court exercises of jurisdiction over non-Indians. Judges (and their clerks) may then be better able to put the occasionally ill-considered opinion in context, instead of assuming such an opinion represents the norm. Finally, legal scholars and the press may also benefit from a more nuanced understanding of the work of tribal courts, and thus be less apt to assume the worst when informed that tribal courts exist and even have jurisdiction over non-Indians in some cases.

As noted above, the *Indian Law Reporter* is the major source of tribal court opinions. Although those practicing frequently in tribal courts do subscribe to this excellent publication, many law libraries do not. It would be enormously helpful to have a reporter devoted solely to tribal court opinions which could then make an effort to contact all the tribal courts urging them to submit their opinions for publication. This publication could take the form of a looseleaf binder service like the *Indian Law Reporter*, with back issues being made available on compact disk.

Unfortunately, most researchers today rely on online legal research services or the Internet. Attempts to interest the two major legal research services, LEXIS and Westlaw, in publishing tribal court opinions have yet to bear fruit, however. Professor Robert N. Clinton, the Chief Judge of the Winnebago Supreme Court and an associate justice of the Cheyenne River Sioux Court of Appeals, and Jill E. Shibles, Chief Judge of the Mashantucket Pequot Tribal Court, have been working with the National American Indian Court Judges Association to set up a web site for tribal court opinions. A web site would make an important contribution toward bringing the work of tribal courts to a broader audience. In particular, a web site would make these opinions available to legal elites and journalists with ready access to the Internet. Yet those laboring in the vineyards of Indian law, tribal court attorneys, lay advocates, and personnel, including judges, often have no Internet access. Success breeds success — as tribal court opinions become more available in hard copy, so will the pressure to provide on-line access increase. Ideally, of course, like state and federal judicial opinions, tribal court opinions will become available in a variety of formats.

A second method to bring the work of tribal courts to a larger audience is to encourage more articles on their work. Scholarly attention has begun to

focus on tribal court opinions, with some excellent work on tribal law beginning to appear in law reviews.[39] Greater availability of tribal opinions should cause this work to increase. An extremely beneficial undertaking for a law review would be to publish an annual review of tribal court decisions. The issues are fascinating and the opinions are often well-crafted. The resolution of a difficult problem may require discussion of federal and tribal

39. This scholarship began in earnest in the late 1980s. *See* Ralph W. Johnson & James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153 (1987) (examining tribal court decisions concerning sovereign immunity); Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987) (discussing choice of law, jurisdiction, procedural and substantive issues frequently arising in tribal courts and enforcement of judgments); Frank Pommersheim & Terry Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D. L. REV. 553 (1986); Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49 (1988). Since then scholarship has blossomed. *See, e.g.*, FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE (1995); Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589, 594-99 (1990) (arguing that tribal courts need not give full faith and credit to state court judgments); Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1 (1993) (examining tort, property, & family law issues decided by Navajo customary law and asserting that customary law is not used in deciding transactional matters); Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 70 DENV. U. L. REV. 359 (1993) (analyzing tribal court sovereign immunity decisions); Daniel L. Lowery, Comment, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. INDIAN L. REV. 379 (1993) (examining the use of Navajo common law in criminal law, family law, property, torts, contracts, and individual rights cases); James W. Zion & Elsie B. Zion, *Hozho' Sokee' — Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407 (1993) (examining Navajo Courts' treatment of family violence cases); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994) (examining the use of custom in tribal court cases); Christine Zuni, *The Southwest Intertribal Court of Appeals*, 24 N.M. L. REV. 309 (1994) (detailing the appellate jurisdiction of SWITCA); Robert Laurence, *Dominant-Society Law and Tribal Court Adjudication*, 25 N.M. L. REV. 1 (1995) (analyzing potential and actual tribal court deviations from dominant society law rooted in formalism in the areas of double jeopardy, sovereign immunity from suit, and ex parte communications); Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse in Tribal Court*, 27, CONN. L. REV. 1003 (1995) (discussing the role of tribal courts in constituting community identity in the context of analyzing a dispute brought in tribal court by the Estate of Crazy Horse); Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69 (1995) (contrasting indigenous and Anglo legal perspectives on dispute resolution and comparing the codes and case law of 14 tribes with regard to domestic violence); Christian M. Freitag, Note, *Putting Martinez to the Test: Tribal Court Disposition of Due Process*, 72 INDIANA L.J. 831 (1997) (analyzing the concept of due process in tribal courts); Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997) (arguing that adoption of Anglo norms in tribal courts endangers tribal sovereignty). In 1995, the *Journal of the American Judicature Society* devoted an entire issue to tribal courts. *Indian Tribal Courts and Justice*, JUDICATURE, Nov.-Dec. 1995, vol. 79, no. 3.

codes, the tribal constitution, tribal customary and common law, as well as state law. Resolution of cases of first impression require the judges to consider how other tribes and states have resolved issues and then consider the extent to which those approaches are consistent with tribal values. In each year's crop of cases, some might merit separate treatment in a casenote. In addition, comments could usefully pursue either substantive areas, such as employment law, tribal sovereign immunity, and the Indian Civil Rights Act, or broader themes such as the use of customary law or the reliance on the law of other tribes. An annotated index to the tribal court opinions, more detailed than that currently available in the *Indian Law Reporter* would also be enormously helpful. The editors of the law journal undertaking this task could ask an academic to write a Foreword, like that published in the annual review of Supreme Court cases by the *Harvard Law Review* — a long, thoughtful article discussing a recent trend or focusing in depth on one particular issue. The tribal bar, legal scholars, federal and state judges, news media, and policymakers in general would find such a publication exceedingly useful. Such an annual review would well serve the cause of tribal court legitimacy, for anyone reading about the opinions issued by tribal courts in a single year could not help but be impressed by the professionalism of most tribal judges.

Nevertheless, as criticisms of federal and state opinions must be informed by an understanding both of the law and the context of the case, so too must criticism of tribal courts be similarly grounded. While someone ignorant of tribal courts might chastise a court for not following the United States Constitution, someone with knowledge of tribal courts would understand the role of the tribe's own civil rights' ordinances or constitutional bills of rights[40] as well as the Indian Civil Rights Act in developing a critical analysis of a tribal civil rights case.

In other words, students and scholars approaching tribal court opinions with respect for the tribal context would not automatically criticize deviations from state or federal law, but would understand that difference does not always mean inferiority. Moreover, just as tribal courts need not speak with one voice, those writing about tribal courts need not agree about whether a particular opinion is wise and just in context. One scholar may decry what she sees as overreliance on federal law in an opinion; another might think such reliance well placed, especially in a sensitive case; a third may argue a particular opinion is simply wrong on the law or bad policy.[41] Although,

40. *See* JOHN R. WUNDER, RETAINED BY THE PEOPLE: A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 132 (noting that of the 247 tribes with constitutions in 1968, 117 included bill of rights provisions in their constitutions).

41. *See* Robert Laurence, *Full Faith and Credit in Tribal Court: Tribal Sovereignty, Cross-Boundary Reciprocity, and the Unlikely Case of Eberhardt v. Eberhardt*, N.M. L. REV., forthcoming in 1998 (criticizing a 1997 opinion of the Cheyenne River Sioux Tribe Court of Appeals).

some opinions may generate much more criticism than praise, such opinions might then be placed in better perspective. In short, it is the hope that articles like this reviewing the work of tribal courts each year may advance the understanding and legitimacy of tribal courts.

III. Analysis of Cases Published in 1996

A. Methodology

This report is based on the cases published in the *Indian Law Reporter* during the calendar year 1996. Although many of the opinions were dated in 1995 or 1996, some were dated as early as 1992.[42] It must be stressed, therefore, that the sample of eighty-five tribal cases is much smaller than the actual number of cases heard by tribal courts. Tribes do not send all published opinions to the *Indian Law Reporter* and the reporter does not publish all trial court decisions submitted.[43] Therefore, one should not regard this sample as complete even for those twenty tribes which submitted opinions published by the *Indian Law Reporter* in 1996.

It is difficult to give an accurate snapshot of the issues before tribal courts, because many cases involved multiple issues.[44] For example, the opinion in *Estate of Tasunke Witko v. G. Heileman Brewing Co.*[45] by the Rosebud Sioux Supreme Court dealt primarily with personal and subject matter jurisdiction, yet the underlying conflict raises important issues of tort, property, and customary law. Most of the opinions considered issues of civil[46] or criminal procedure;[47] only a relatively small number of criminal law cases reached the

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42. Most of the earlier opinions were released by the Mashantucket Pequot Tribal Court, which was created in 1992. *See* Lefevre v. Mashantucket Pequot Tribe, 23 Indian L. Rep. 6018, 6018 (Mashantucket Pequot Tribal Ct. 1992) (describing creation of the court system). The Tribal Court publishes its own reporters: the Mashantucket Pequot Tribal Court reports and the Mashantucket Pequot Reporter (court of appeals decisions).

43. According to Chief Judge Jill E. Shibles, the *Indian Law Reporter* "is many months behind in its publication of tribal court opinions [and] is very selective about the trial-level decisions that go in." Letter from Chief Judge Jill E. Shibles to Nell Jessup Newton (July 13, 1997).

44. I attempted such a snapshot for the federal bar conference, but on reflection have decided to omit it in these written remarks, because pigeonholing the cases obscures their richness.

45. 23 Indian L. Rep. 6104 (Rosebud Sioux Sup. Ct. 1996). This case is discussed *infra* notes 153-8, 189 and accompanying text.

46. *See, e.g.*, Lee v. Tallman, 23 Indian L. Rep. 6029 (Navajo Sup. Ct. 1996) (holding in a suit by Taiwanese nationals and a Japanese Corporation against Peabody Coal, denying defendant's motion to dismiss corporate defendant as a non-jural entity for failure to raise the issue at trial and denying the corporate plaintiff's motion to modify the record on appeal by adding documents from a simultaneous state court case).

47. *See, e.g.*, Handboy v. Carroll, 23 Indian L. Rep. 6012 (Cheyenne River Sioux Ct. App. 1995) (holding that because an ineffective assistance of counsel claim requires a factual record complete with factual findings, it must be first heard by trial court; appellate court has discretion to grant original jurisdiction over writs for habeas corpus, but no extraordinary circumstances

merits.[48] Twenty cases addressed purely procedural issues, including statutes of limitations cases; some considered more thorny procedural issues, such as personal and subject matter jurisdiction and immunity from suit, which require an analysis of issues of tribal constitutional law and Indian Civil Rights Act questions. There were fifteen employment cases, representing a significant number in the sample,[49] and a few property, tort, or family law opinions on the merits.[50]

B. Sources of Law Applied in Tribal Courts

1. Choice of Law and a Note of Caution

Tribal codes often contain choice of law provisions, which vary widely. All tribal courts must apply federal and tribal law on point. In ranking outside sources of law, tribal codes vary in some interesting ways. Some codes rank state law immediately after tribal law. The Colville Tribal Law and Order Code, for example, provides that: "In all cases the Court shall apply, in the

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exist in this case); Navajo Nation v. Hunter, 23 Indian L. Rep. 6005 (Navajo Sup. Ct. 1995) (ruling on timeliness of filing appeal of conviction); Colville Confederated Tribes v. Wiley, 23 Indian L. Rep. 6037 (Colville Tribal Ct. 1996) (granting motion to dismiss a misdemeanor charge of possession of alcohol on due process grounds); Elk Nation v. Chasing Hawk, 23 Indian L. Rep. 6085 (Cheyenne River Sioux Ct. App. 1994) (denying defendant's motion for a stay pending appeal in this contempt case on grounds stay is an extraordinary remedy authorized by the Cheyenne River Sioux Tribal Rules of Civil Procedure only "in those cases in which manifest injustice would result if no stay were issued"); Mississippi Band of Choctaw Indians v. Ben, 23 Indian L. Rep. 6119 (Miss. Choctaw Crim. Tribal Ct. 1996) (denying defendant council member's motion to dismiss criminal charges for unauthorized possession of documents); Walker River Paiute Tribe v. Jake, 23 Indian L. Rep. 6204 (Walker River Tribal Ct. 1996) (dismissing complaint without prejudice sua sponte because of procedural errors); Walker River Paiute Tribe v. Miller, 23 Indian L. Rep. 6207 (Walker River Tribal Ct. 1996) (dismissing complaint without prejudice because of procedural errors); Colville Confederated Tribes v. Tatshama, 23 Indian L. Rep. 6211 (Colville Tribal Ct. 1996) (denying defendant's motion for deferred prosecution); Southern Ute Indian Tribe v. CHB, 23 Indian L. Rep. 6204 (Southern Ute Tribal Ct. 1996) (denying motion to dismiss charges against juvenile on grounds right to speedy trial not violated and noting that defendant's counsel had caused delay by requesting pre-trial conference); Waters v. Colville Confederated Tribes, 23 Indian L. Rep. 6120 (Colville Ct. App. 1996) (reversing conviction in domestic violence case on grounds of prosecutorial misconduct and remanding for a new trial).

48. *See* Colville Confederated Tribes v. Seymour, 23 Indian L. Rep. 6008 (Colville Ct. App. 1995) (affirming misdemeanor convictions); Confederated Salish & Kootenai Tribes v. Devereaux, 23 Indian L. Rep. 6099 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (affirming conviction for driving under the influence); Colville Confederated Tribes v. Condon, 23 Indian L. Rep. 6127 (Colville Ct. App. 1996) (affirming conviction for constructive possession of alcohol by a person under 21 years of age); Boyd v. Colville Confederated Tribes, 23 Indian L. Rep. 6245 (Colville Ct. App. 1996) (upholding defendant's stipulation to judgment and sentence).

49. *See infra* notes 93-98 and accompanying text.

50. Tort cases included *Castillo v. Charlie*, 23 Indian L. Rep. 6001 (Navajo Sup. Ct. 1995) (affirming judgment in negligence case) and *Bick v. Pierce*, 23 Indian L. Rep. 6175 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (upholding damages award in personal injury claim).

following order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law."[51] In the past many, if not most, tribal courts were directed to apply the law of the state within which the reservation was located.[52] The Confederated Salish and Kootenai Tribes of the Flathead Reservation continue such a practice. Their tribal code directs courts to apply Montana law to decide issues not specifically addressed by tribal or federal law. Nevertheless, the tribal code provides an escape clause, noting that Montana law should be applied only where it is "just and appropriate."[53] Since the Mashantucket Pequot Tribal Court has only been in existence since 1992, its code directs the tribal court to apply Connecticut law: "Until such time as a sufficient body of tribal court law has developed, the Gaming Enterprise Division, unless otherwise specified, shall apply the principles of law applicable to similar cases in Connecticut."[54] Nevertheless, where tribal law differs, the court can and does develop common law.[55]

For many tribes, the application of state law to fill gaps may be regarded

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51. *See* Colville Confederated Tribes v. Seymour, 23 Indian L. Rep. 6008, 6009 (Colville Ct. App. 1995) (quoting COLVILLE TRIBAL CODE 4.1.11). The reference to international law is not typical to my knowledge, but has been appearing more frequently of late.

52. NATIONAL AM. INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 43 (1978) [hereinafter INDIAN COURTS AND THE FUTURE] (noting that tribal opinions at the time actually relied on state case law and ordinances more than tribal judges reported in a survey).

53. *See* Lulow v. Peterson, 23 Indian L. Rep. 6200, 6201 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (summarizing the Law & Order Code choice of law provision); *see also* Sherman v. Scottsdale Ins. Co., 23 Indian L. Rep. 6232, 6233 (Chitimacha Ct. App. 1996) (quoting § 501 of the tribal code ranking "applicable" U.S., then tribal constitutional and statutory law, then tribal customary law not in conflict with tribal positive law or federal law, and finally stating that "[w]here appropriate, the Court may . . . be guided by statute, common law or rules of decision of the State in which the transactions or occurrence giving rise to the cause of action took place").

54. Manshantucket Pequot Tribal Ordinance 011092-02, § 5, quoted in Eosso v. Foxwoods High Stakes Bingo & Casino, 23 Indian L. Rep. 6027 (Mashantucket Pequot Tribal Ct. 1994). In deciding that the plaintiff could not name fictitious parties in a personal injury action, the court turned to Connecticut case law, noting: "This is not an appropriate occasion to develop a new or different body of 'tribal law' on this subject." *Id.* at 6028.

55. *See* Tajildeen v. Mashantucket Pequot Gaming Enter., 23 Indian L. Rep. 6030, 6031 (Mashantucket Pequot Tribal Ct. 1993) (noting, because tribal ordinance requiring that a written notice of claim be filed with the tribal court differs from procedure used in Connecticut, where filing must be done with municipal or state agencies, that "Connecticut case law . . . is of limited utility [and] it is appropriate for the Mashantucket Pequot Tribal Court to develop its own body of tribal case law on this subject"); *see also* Casillo v. Mashantucket Pequot Gaming Enter., 23 Indian L. Rep. 6036 (Mashantucket Pequot Tribal Ct. 1994) (relying on tribal cases interpreting the tribe's statute of limitations); Middleton v. Mashantucket Pequot Gaming Enter., 23 Indian L. Rep. 6118 (Mashantucket Pequot Tribal Ct. 1994) (noting Tribal Code requires process to be filed with court to be timely and rejecting Connecticut case law to the contrary, citing *Tajildeen, supra*).

as appropriate in light of the tribe's assessment of the basic fairness of state common law doctrines and of the tribal interest in making tribal courts accessible for non-Indian parties. For example, the Mashantucket Pequot courts entertain many personal injury and employment cases involving non-Indians. The Flathead reservation is heavily allotted,[56] which may account for the acceptance of Montana state law in cases not governed by tribal law. As some tribes have repatriated their tribal courts, however, they have afforded those courts the opportunity to consult more sources of law, including the law of other tribes, and other states.

Other tribal codes direct the courts to turn to federal law before state law if there is no tribal law on point. The Winnebago Tribe of Nebraska is such an example ranking norms in the following order:

> 2-111 *Laws applicable in civil actions*
>
> 1. In all civil actions the tribal court shall apply:
>
> A. The constitution, states, and common law of the tribe not prohibited by applicable federal law, and if none, then
>
> B. The federal law, including federal common law, and if none, then
>
> C. The laws of any state or other jurisdiction which the courts find to be compatible with the public policy and needs of the tribe.
>
> 2. No federal or state law shall be applied to a civil action pursuant to paragraphs (B) and (C) of subsection (1) of this section if such law is inconsistent with the laws of the tribe or the public policy of the tribe . . . .[57]

With the development of more tribal statutory as well as case law, tribes have turned less frequently to states or federal opinions for guidance. The Rosebud Sioux choice of law provision is particularly interesting in this respect.

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56. The term "allotment" refers to the late nineteenth century policy under which reservation land was allotted to individual heads of families, with the excess or "surplus" lands not needed for allotment opened to settlement. In this way, the policy was designed both to encourage tribal people to assimilate by breaking their attachment to communal land ownership and turning them into farmers and ranchers and by making tribal land available for settlement by non-Indians. Although this policy was repudiated in the Indian Reorganization Act, over 27 million acres of tribal land was lost to tribal or Indian ownership. As a result, the majority of residents of some reservations are non-Indians. *See generally* FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984) (relating the history of the allotment and assimilation movement); Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (tracing the history of allotment, its impact on tribal sovereignty, and criticizing the Supreme Court for continuing to give effect to a policy long repudiated by Congress and the Executive).

57. CODE OF THE WINNEBAGO TRIBE § 2-111, *quoted in* Rave v. Reynolds, 23 Indian L. Rep. 6150, 6156 (Winnebago Sup. Ct. 1996). The case is discussed *infra* notes 89-91 and accompanying text.

> The court shall apply the applicable laws of the Rosebud Sioux Tribe and the United States in actions before it. Any matter not covered by applicable tribal or federal laws shall be decided according to the customs and usages of the Tribe. Where doubt arises as to customs and usages of the Tribe, the Court may request the advice of persons generally recognized in the community as being familiar with such customs and usages. In any matter in which the rule of law is not supplied by any of the above, the Tribal Court may look to the law of any tribe or state which is consistent with the policies underlying tribal law, custom and usages.[58]

In short, while some tribes still require the application of state law or federal law to resolve issues not covered by tribal law, many merely refer to state and federal law as potential sources of norms available for application in an appropriate case as long as those norms do not contradict tribal norms. For this reason, attorneys practicing in tribal court should take care to examine carefully any tribal code provision listing potential sources of legal norms and remember that permissive use of a federal or state norm does not mean the attorney should automatically turn to the closest federal or state case to resolve the particular issue. Even in areas such as sovereign immunity, significant differences may exist. The Tribal waiver of sovereign immunity may be more limited,[59] or the proffered state or federal norm may not fit the tribal context.[60] Attorneys not familiar with tribal courts may also assume the Federal Rules of Civil Procedure apply in tribal courts, although in some tribal courts this assumption may be completely unwarranted.[61] Application of procedural norms is discussed below.

2. Tribal Law in Tribal Courts

On the one hand, all of the cases reviewed involved application of tribal law, whether tribal constitutions, codes, statutes, traditional, customary, or common law, including opinions which turn to federal or state law for norms applicable to the tribal context. Moreover, many tribal court opinions discuss

58. ROSEBUD SIOUX TRIBAL LAW & ORDER CODE § 4-2-8 (1989).

59. *See* Thompson v. Cheyenne River Sioux Tribe Bd. of Police Comm'rs, 23 Indian L. Rep. 6045 (Cheyenne River Sioux Ct. App. 1996) (stating that the tribe's sovereign immunity statute is narrower than federal sovereign immunity doctrine because the federal doctrine permits damages actions against officers in certain circumstances, but the Cheyenne River Sioux Tribal Code does not).

60. *See, e.g.* Colville Confederated Tribes v. Coleman, 23 Indian L. Rep. 6188, 6189 (Colville Ct. App. 1996) (noting that "[w]hile other courts have adopted the rule pursuant to the federal and state constitutions, the tribal court is not constitutionally or statutorily bound to adopt the rule of lenity [presuming criminal sentences to be concurrent]").

61. *See* Palmer v. Millard, 23 Indian L. Rep. 6094 (Colville Ct. App. 1996) See *infra* text accompanying notes 118-27 for a discussion of applicability of federal procedure in tribal courts.

the entire range of available norms. An excellent example is *Baylor v. Confederated Salish & Kootenai Tribes*,[62] a case arising out of an on-the-job accident in which an employee of a tribal saw mill lost his right hand. The lower court denied the tribe's motion to dismiss, which was based on an argument that Montana's workers compensation law provided the exclusive remedy according to tribal law. When the tribe appealed the denial of the motion to dismiss, the injured worker argued that the tribe's final judgment rule barred the tribe's appeal. The Confederated Salish & Kootenai Tribal Court of Appeals agreed with the worker, and dismissed the tribe's appeal. In so doing, however, the Court had to interpret the scope of the tribe's final judgment rule,[63] and in particular whether it should read tribal law, which permits the application of federal procedures in some situations, as adopting 28 U.S.C. § 1292(b),[64] which provides for narrow exceptions to the rule of finality. The court of appeals rejected this argument. Before arriving at this conclusion on the narrow issue of finality, the trial court and the court of appeals were required to engage in analyses of Montana workers compensation law, state judicial opinions, the opinion of a sister tribe, federal statutory and common law regarding the relations of states and tribes, tribal statutory law and the general policies regarding the relation of trial and appellate courts undergirded by the rule of finality.

With opinions covering such a wide scope of legal materials, it might not seem worthwhile to pigeonhole cases by whether tribal statutory or customary law or state or federal law was applied, but instead to analyze each substantive issue on its own terms. On the other hand, a major argument in favor of the tribal court system is that tribal judges are both familiar with tribal law and sensitive to the tribal context. In addition, tribal people and policymakers have increasingly invoked tribal traditions in a wide variety of contexts apart from judicial dispute resolution. In the wake of what some are hailing as a re-traditionalization movement, it is useful to examine the published cases, even though they are an imperfect sample of the reality of tribal court decision making, to determine the extent to which traditional or customary law is invoked in these tribal courts.

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62. Baylor v. Confederated Salish and Kootenai Tribes, 23 Indian L. Rep. 6221 (Confederated Salish & Kootenai Tribes Ct. App. June 28, 1996) (dismissing appeal on grounds that denial of motion to dismiss is not an appealable order).

63. Ordinance 90B, §3-2-303, *cited in Baylor*, 23 Indian L. Rep. at 6222.

64. Federal law permits appeal from an otherwise unappealable order in cases involving "a controlling question of law as to which there is substantial ground for difference of opinion and . . . immediate appeal from the order may materially advance the ultimate termination for the litigation." *Id.* The Federal Rules of Appellate Procedure adopt this principle. FED. R. APP. P. § 5.

a) Customary Law

Most tribes are directed to apply customary or traditional law where applicable. Tribal codes also frequently provide formal mechanisms for tribal courts to consult elders for help in determining appropriate customs and usages. The Winnebago Tribe of Nebraska provides, for example: "Where any doubt arises as to the customs and usages of the tribe, the court either on its own motion or the motion of any party, may subpoena and request the advice of elders and counselors familiar with those customs and usages."[65] This practice is in sharp contrast to that followed in state and federal courts.

Tribal judges are not constrained only to apply customary law, however, but increasingly create tribal common law in a wide variety of settings. It is often difficult to distinguish between tribal customary or traditional and common law. The Winnebago Tribal Code uses the term "common law" to include both customary and what a state court would consider as common law:

> The customs and traditions of the tribe, to be known as the tribal common law, as modified by the tribal constitution and statutory law, judicial decisions, and the condition and wants of the people, shall remain in full force and effect within the tribal jurisdiction in like force with any statute of the tribe insofar as the common law is not so modified, but all tribal statutes shall be liberally construed to promote their object.[66]

Where possible, I have distinguished decisions clearly invoking traditions of the tribe, whether those traditions were clearly linked to the past or reflect present needs, and opinions in which the court relies on previous judicial decisions or creates common law to fill the interstices of a tribal statutory scheme. Of course, even in opinions in which the reasoning appears indistinguishable from Anglo common law opinions, the choice to adopt or create a rule to solve the problem before the court is inescapably tied to the context of the case within the tribal system and of the parties within that system. As Gloria Valencia-Weber has said: "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."[67]

An excellent example is *Castillo v. Charlie,* in which the Navajo Supreme

65. CODE OF THE WINNEBAGO TRIBE OF NEBRASKA § 2-111, *quoted in* Rave v. Reynolds, 23 Indian L. Rep. 6150, 6156 (Winnebago Sup. Ct. 1996).

66. CODE OF THE WINNEBAGO TRIBE OF NEBRASKA § 2-104, *quoted in* Rave v. Reynolds, 23 Indian L. Rep. 6150, 6157 (Winnebago Sup. Ct. 1996).

67. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 250 (1994).

Court affirmed the lower court's decision holding the owner of livestock liable for damage to a pickup truck incurred when the truck collided with a cow and bull which had wandered onto Navajo Route 9.[68] The issues discussed by the Supreme Court — whether the livestock owner had a duty to prevent the livestock from roaming on the highway, whether the accident was foreseeable, whether the driver was comparatively negligent, and whether the damages had been proven with reasonable certainty — mirrored similar discussions of the common law in a state court system, with citations to previous Navajo court cases instead of to state cases. The discussion of the Navajo Grazing Code, with respect to a closed grazing area, and the defendants' attempts to get the Navajo Nation to fix the cattle guards, as well as the reasonable expectations of someone driving in a closed rather than an open grazing range, were influenced both by life in a rural area as well as the relationships of all the members of a tribal community. Clearly sympathetic to the defendants' unsuccessful attempts to get the Nation to fix the problem, the court concluded that these attempts demonstrated the defendants knew what harm could result and held that the defendants had the duty to repair the fence, replace the gate, or install a cattle guard: "If they had done so, they would not have to chase cattle all night to prevent them from trespassing onto the road . . . ."[69]

Assuming that the conscious invocation of traditional law in a case reflects a tribal judge's attempt to link her present role to the tribe's traditional culture or otherwise to highlight the tribe's difference from the dominant culture, I think it is worth discussing these opinions separately. Customary law plays an important role in tribal adjudication in three major ways: (1) as the rule of decision in a case; (2) as a touchstone in analyzing the extent of an adoption of a state or federal norm in tribal court as tribal common law; and (3) as an aid in interpreting tribal law, including tribal sovereign immunity and civil rights laws, both tribal civil rights laws and those embodied in the Indian Civil Rights Act.

Perhaps because so many of the opinions printed in the *Indian Law Reporter* involve procedural issues and questions of first impression, only a few of the decisions in my sample were based solely on tribal customary or common law.[70] Resolution of customary law cases often takes place non-

68. 23 Indian L. Rep. 6001 (Navajo Sup. Ct. 1995).

69. *Id.* at 6002.

70. In addition to *Castillo*, see Seneca Nation v. Williams, 23 Indian L. Rep. 6254 (Seneca Peacemakers Ct. 1996). The *Seneca Nation* case is illustrative of differences between tribal and state common law. In holding that land on which a non-Indian had built a cottage was the common property of the Seneca Nation and issuing an order prohibiting the defendant from occupying the property and a civil penalty for trespass, the court noted that the defendant had not established a claim for adverse possession against the tribe, because the defendant had not occupied the property for a sufficient length of time. *Id.* at 6256. In so entertaining an adverse possession claim, the tribal court adopted a rule rejected by state and federal adverse possession

judicially or in traditional courts whose opinions are not published. Also, resolution of some disputes turning on tribal customary law may require the discussion of matters not appropriately revealed to outsiders.[71]

Although rarely the ratio decidendi of the published tribal cases, tribal traditions are often invoked when a tribal court examines a state or federal norm to determine whether the norm should be adopted in tribal court as tribal common law. Although tribal judges, many of whom are not tribal members, may lack familiarity with tribal law, invocations of tribal traditions can be a very powerful method of grounding the legitimacy of tribal decisions in tribal cultures, as well as tribal statutes and constitutions. Counsel, too, must make these links to traditional or customary law. In *Walker River Paiute Tribe v. Jake*,[72] the criminal defense attorney may have missed an opportunity to use Northern Paiute or Walker River custom or tradition to persuade the tribal court to adopt a twenty-four-hour, rather than forty-eight-hour, time period for holding a criminal defendant without a probable cause hearing. Chief Judge Johnny adopted the forty-eight-hour rule enunciated by the Supreme Court in *County of Riverside v. McLaughlin*,[73] in part because neither party had drawn the court's attention to any customs that might persuade it to adopt the shorter period. In the absence of any such persuasive authority, the court was much influenced by the realities of reservation life, in particular that "while this is the second largest Indian reservation in the state of Nevada . . . there are presently only two tribal policemen . . . ."[74]

A striking example of sensitivity to tribal traditions is *Middlemist v. Member of the Tribal Council of the Confederated Salish and Kootenai Tribes*,[75] a case illustrating the tremendous importance of tribal courts as vehicles to educate the non-Indian as well as tribal public. The case involved a pre-enforcement challenge to a tribal regulatory ordinance. Several non-Indian residents of the Flathead reservation and an organization of members of three irrigation districts filed suit in federal district court, arguing that the tribe had no jurisdiction to apply its conservation ordinance to the use of aquatic lands by non-Indian fee owners under the principles of *Oliphant*[76] and

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doctrines, in which adverse possession can never run against the sovereign.

71. I recall a long discussion about a potential property claim with a tribal member of one of the Pueblos. The land was within the tribe's ancient land and had spiritual significance to the group. Although there were some promising avenues of federal Indian law on which to base a claim, my informant was forbidden to tell anyone where the land was or why it was significant religiously.

72. 23 Indian L. Rep. 6204 (Walker River Tribal Ct. 1996).

73. 500 U.S. 44, 53 (1991).

74. *Jake*, 23 Indian L. Rep. at 6206.

75. 23 Indian L. Rep. 6141 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

76. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that tribes have lost some authority over non-Indians by virtue of their dependent status, including criminal jurisdiction over non-Indians).

Montana.[77] The district court required them to exhaust their tribal remedies[78] under the principles of *National Farmers Union*[79] and *Iowa Insurance*.[80] At issue in the tribal court was whether the plaintiffs must exhaust their administrative remedies by seeking a permit from the Shoreline Protection Board created by the tribal ordinance, the Aquatic Lands Conservation Ordinance (ALCO), before asking for a declaration that the ordinance could not be applied to the non-Indian fee owners.

The tribal court required the plaintiffs to apply for a permit before challenging the statute. Under ordinary (i.e., non-tribal) administrative law principles as well as federal justiciability doctrines such as ripeness, ample precedent exists to require exhaustion before a regulatory body. The court did not solely rely on federal cases, but consciously referred to traditions of many indigenous peoples reaching consensus by persuasion and inspiration. The court noted that fewer than one percent of the applications had been denied to date and stressed that the process permits the Indian and non-Indian parties to better understand each other's interests, so that the tribes "may be willing to allow projects that have some adverse effect on tribal interests if the tribes have a full understanding of the interests of the non-Indian."[81] The court ended this discussion by noting: "We are not so naive as to believe that peace and harmony will reign in all matters as a result of each party understanding the position of the others. However, we do believe that some unnecessary litigation will be avoided."[82] Although the court referred to the *Handbook of Federal Indian Law*,[83] not to specific traditions of the Salish and Kootenai people, it is well-known that indigenous cultures generally resolve issues by consensus.[84] While it is important to avoid essentializing tribal people, it

77. Montana v. United States, 450 U.S. 544 (1981) (holding tribes lack inherent authority to regulate non-Indian activities on fee-land absent a consensual relationship or an interference with the political integrity, economic security, or health and welfare of the tribe).

78. Middlemist v. Secretary, DOI, 824 F. Supp. 940 (D. Mont. 1983), *aff'd* 19 F.3d 1318 (9th Cir. 1994).

79. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (holding those challenging tribal inherent authority under the *Oliphant/Montana* line of cases must give the tribal court the opportunity to address the issue before going to federal court).

80. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (extending exhaustion requirement to diversity cases).

81. *Id.* at 6143.

82. *Id.*

83. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 230 (Rennard Strickland et al. eds., 1982).

84. Several of the articles cited *supra* note 39 discuss the importance of consensus in traditional decision making. In addition, see Philmer Bluehouse and James W. Zion, Hozooji Naat'aanii*: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993) (explaining the Navajo peacemaking process); Emily Mansfield, *Balance and Harmony: Peacemaking in Coast Salish Tribes of the Pacific Northwest*, 10 MEDIATION Q. 339 (1993) (explaining how three tribes traditionally settled inter-tribal and inter-family disputes); Catherine Price, *Lakotas and Euroamericans: Contrasted Concepts of "Chieftainship" and Decision-Making*

does seem permissible for a court to take judicial notice of such well-accepted indigenous traditions. Making this appeal in the case of the Flathead irrigators seems particularly apt since their attack on tribal authority appears to be grounded in mistrust of the entire tribal judicial system with, as the court pointed out in the opinion, very little reason other than a willingness to label a system that might be different as inferior.

Although the *Middlemist* opinion is the most interesting of those invoking tribal tradition to determine whether to adopt state or federal norms, several other opinions referred to traditions in deciding the extent to which federal norms apply, particularly with respect to the Indian Civil Rights Act and sovereign immunity. A fuller discussion of these cases is contained in a separate section of this paper.[85]

Several of the opinions referred either to specific or general indigenous traditions in interpreting applicable law, or as an alternative ground of decision in a case in which tribal statutory law provided the ratio decidendi. Tribal cultural differences are most obviously marked in property and family law cases. Thus it is not surprising that an opinion deciding title to real property, *St. Regis Mohawk v. Basil Cook*,[86] and several family law cases referred to tribal traditions. *In re Felsman*[87] is an interesting family law case. In a contest between two non-Indian couples, one a heterosexual couple and the other a lesbian couple, for custody of two Salish & Kootenai children whose mother had committed suicide, the court granted temporary guardianship to the lesbian couple. There were grounds for disqualifying the heterosexual couple: the woman was ill and had not complied with discovery regarding her medical condition, and she and her husband did not have a preexisting relationship with the children. Yet the court also stressed that the lesbian couple, who had been close to the mother and knew the children, was "willing to provide the children with the unique values of Indian culture."[88]

Although one would expect discussions of tribal tradition in these family

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Authority, 41 ETHNOHISTORY 447 (1994) (explaining the importance of consensus within the leadership structure of Lakota society and the resulting inability of Euroamericans to understand this reliance on consensus); Sandra Robinson-Weber, *Native-Americans Before the Bench: The Nature of Contrast and Conflict in Native-American Law Ways and Western Legal Systems*, SOC. SCI. J., July 1982, at 47 (discussing differences between Indian and American law and noting the social and community influences on Indian law).

85. *See infra* notes 209-48 and accompanying text.

86. 23 Indian L. Rep. 6172, 6173-74 (St. Regis Tribal Ct. 1996) (relying on a contract, the Indian Gaming Regulatory Act, the Tribal Constitution, New York law and the "ancient Mohawk practice which has been that all tribal lands are community property with tribal members enjoying use and occupancy rights" to decide that land on the reservation purchased and put in the name of a development corporation in order to obtain financing for construction of a casino reverted to the tribe after the tribe had reimbursed the corporation for all development costs).

87. *In re* Felsman, 23 Indian L. Rep. 6086 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

88. *Id.* at 6087.

law and property cases, Chief Justice Robert Clinton of the Winnebago Supreme Court relied on tribal tradition to decide what may seem a quintessential Western legal concept — standing. The Burger and Rehnquist courts have considerably tightened standing doctrine to make it very difficult for a taxpayer or voter to obtain standing or for a litigant to raise the rights of third parties. In *Rave v. Reynolds*[89] the Court borrowed some of this standing doctrine but relied on tribal tradition to support an arguably broader standing doctrine.[90] The Court's rationale was a simple one: making it too difficult to get into court violates the tribal tradition of full participation in dispute resolution in a context designed to prevent friction and promote healing.[91] In deciding that voters had standing to challenge a tribal election and procedures, Justice Clinton observed:

> The Winnebago tribal traditions of affording maximum opportunity through family, clan or council deliberations to air, heal and resolve other types of disputes within the community, however, counsel against this court adopting the same narrow limiting standing rules applied in federal courts. In small, close-knit tribal communities, like the Winnebago Tribe of Nebraska, denying an opportunity to air and heal grievances in a neutral forum otherwise possessed of jurisdiction, such as the tribal courts, could have disruptive effects by sowing dissension, hostility and distrust that otherwise could be ameliorated by airing and resolving the dispute.[92]

Unlike most of the cases involving difficult questions of mixed tribal and statutory law, which focus more on interpretation of the statutes and federal common law, the *Rave* opinion is replete with other references to tribal traditions. *Rave* and other cases involving election disputes, other civil rights, and constitutional law questions are discussed in part IV.

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89. 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996).

90. The Court did note that under its reading of the federal standing doctrine involving election disputes the individual plaintiffs and the association would probably be granted standing, *id.* at 6159, but its citation to Supreme Court cases did include one rather important "but see": United States v. Hays, 115 S. Ct. 2431 (1995) (limiting standing to challenge gerrymandering to those living inside the district).

91. The court also noted that unduly strict standing requirements keep litigants from pressing important claims; moreover, the strict standing requirement in federal courts is also designed to preserve the autonomy of state courts, which is not an issue in tribal court. *Rave*, 23 Indian L. Rep. at 6158.

92. *Id.* The *Rave* court overturned the lower court's invalidation of tribal election ordinance barring a person from voting or attending more than one caucus and the lower court's declaration that one council member's seat was vacant because his actions in the election dispute violated due process. This complicated case resolving a serious election controversy is more thoroughly discussed *infra* notes 272-74 and accompanying text.

b) Tribal Statutes and Rules of Procedure

Most tribal court opinions resolved questions of tribal statutory law or procedural law.[93] As Robert Porter has argued in a recent article,[94] tribal procedures have been modeled on state and federal procedures, a practice he decries as a fatal step down the long road to assimilation because procedural rules are designed to promote the goals of an adversary system of justice, which is antithetical to traditional tribal dispute resolution. While he argues that such procedures may play a role in tribal court cases involving commercial issues,[95] or resolving disputes between members of different

93. Most opinions dealt with ancillary procedural issues, such as the appropriate standard of review of trial court findings of fact or conclusions of law. *See, e.g.*, Dorff v. Dorff, 23 Indian L. Rep. 6081 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (setting forth standards applicable in reviewing child support modification orders). Procedural issues predominated in some of the published opinions. *See* Lawrence v. Lawrence, 23 Indian L. Rep. 6251 (Cheyenne River Sioux Ct. App. 1996) (invoking tribal code provision providing for continuing jurisdiction in divorce cases involving children to reverse tribal court's refusal to reopen property settlement); Cheyenne River Sioux Tribe Bd. of Police Comm'rs v. Thompson, 23 Indian L. Rep. 6002 (Cheyenne River Sioux Ct. App. 1995) (issuing order requiring clerk of courts to maintain a civil docket book in which judgments are entered to facilitate ascertaining dates for timely appeals);. Laramie v. Colville Confederated Tribes, 23 Indian L. Rep. 6250 (Colville Ct. App. 1995) (holding that absence of statutory procedure bars appellate court from deciding questions certified to it by the tribal court and remanding for trial). Some cases were decided on purely procedural grounds, however. *See* Navajo Nation v. Hunter, 23 Indian L. Rep. 6005 (Navajo Sup. Ct. 1995) (interpreting Navajo code provision excepting "court holidays" from time counted for purposes of timely appeal of criminal conviction as including days court is closed for judicial conference); Cheyenne River Sioux Tribe v. Handyboy, 23 Indian L. Rep. 6007 (Cheyenne River Sioux Ct. App. 1995) (clarifying rules of timely appeal and proper service under the CHEYENNE RIVER SIOUX TRIBAL R. CIV. P. 84); Brehmer v. White Wolf, 23 Indian L. Rep. 6073 (Cheyenne River Sioux Ct. App. 1993) (relying on court's supervisory authority to vacate lower court's temporary restraining order issued even though plaintiff had not filed a complaint); Baylor v. Confederated Salish and Kootenai Tribes, 23 Indian L. Rep. 6221 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (dismissing appeal on grounds denial of motion to dismiss is not an appealable order); *In re* Felsman, 23 Indian L. Rep. 6086 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (overturning tribal court dismissal of adoption proceeding without a hearing as violative of tribal code adoption proceedings); Urbanec v. Winnebago Tribe of Nebraska, 23 Indian L. Rep. 6244 (Winnebago Sup. Ct. 1996) (dismissing appeal as not timely filed). Opinions in criminal cases also involved procedural issues other than civil rights. *See, e.g.*, Elk Nation v. Chasing Hawk 23 Indian L. Rep. 6085, 6085 (Cheyenne River Sioux Ct. App. 1994) (denying defendant's motion for a stay pending appeal of contempt on grounds stay is an extraordinary remedy authorized by the CHEYENNE RIVER SIOUX TRIBAL R. CIV. P. 60, 84 only "in those cases in which manifest injustice would result if no stay were issued"); Confederated Salish & Kootenai Tribes v. Devereaux, 23 Indian L. Rep. 6099 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (affirming conviction on grounds trial judge had committed harmless error in refusing to reconvene to clarify jury instructions in violation of TRIBAL LAW & ORDER CODE R. J9(5), because instructions were otherwise clear).

94. Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo- American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997).

95. *See* Clown v. Coast to Coast, 23 Indian L. Rep. 6055 (Cheyenne River Sioux Ct. App.

tribes or non-Indians and tribal members, he is especially concerned about using an adversary model for intra-Indian disputes. The reported decisions, whether intra-tribal or involving disputes with non-members, do support his observation that tribal procedures are heavily influenced by state and federal law.[96] When applying federal or state procedures as persuasive authority, several of the opinions adapt the procedure to the tribal setting or otherwise note that the procedural rules should not be applied with rigidity. Many times the courts merely applied the procedural norm without comment.[97]

In addition to purely procedural issues, tribal courts also resolved questions in the grey area between substance and procedure, such as statutes of limitations,[98] survival of tort actions,[99] and interpretation of statutory waivers of sovereign immunity. For example, many of the Mashantucket Pequot cases interpreted the tribe's Tribal Sovereign Immunity Waiver Ordinance.[100]

1993) (holding that debt collection proceedings as a whole in a trial court in which neither party was represented by counsel violated the defendant's due process rights in violation of the ICRA and establishing guidelines to ensure due process in similar cases in the future). The plaintiff in *Clown*, a non-Indian who operated a business on the reservation, sued the defendant, a member of the Tribal Council, in tribal court to collect a debt. The court of appeals chastised the tribal court judge for "leading and directive questions" premised on an assumption of defendant's guilt. Robert Porter might well agree with this opinion because of the setting of the case. In a case involving only tribal members, however, he would perhaps want the tribal judge to have the kind of latitude exercised by the tribal judge in *Clown*. He contrasts traditional dispute mechanisms in which a judge can be an interested mediator bringing her own moral power to bear on the dispute with the adversary system's requirement of an impartial judge. PORTER, *supra* note 94, at 280. In tribal communities, judges frequently know one or both parties. For example, in *Clown*, it appears the judge knew the defendant True Clown.

96. *See* Bartell v. Kerr, 23 Indian L. Rep. 6209, 6210 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (noting that the newly enacted tribal survival statute "varies in no significant way" from Montana's survival statute).

97. *See, e.g.*, Bartell v. Kerr, 23 Indian L. Rep. 6209, 6209 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (applying the harmless error standard for reviewing a tribal court failure to grant a directed verdict by referring to "caselaw from other jurisdictions").

98. *See, e.g.*, Mirabal v. Rael, 23 Indian L. Rep. 6203 (Southern Ute Tribal Ct. 1996) (barring suit for child support enforcement to bar suit by state agency seeking reimbursement for AFDC benefits three years after the last AFDC payment had been made); Watts v. Sloan, 23 Indian L. Rep. 6033 (Navajo Sup. Ct. 1995) (applying the tribe's tort statute of limitations of two years to legal malpractice case).

99. Bartell v. Kerr, 23 Indian L. Rep. 6209 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

100. The tribe's Sovereign Immunity Waiver Ordinance permits claims for money damages for personal injuries if the injury would constitute a tort under Connecticut law and is covered by the tribe's liability insurance. The ordinance limits damage awards for pain and suffering or mental anguish to 50% of the amount of actual damages. *See* Towpasz v. Mashantucket Pequot Gaming Enter., 23 Indian L. Rep. 6032 (Mashantucket Pequot Tribal Ct. 1994) (interpreting the tribe's waiver ordinance covering only actual damages and limiting damages for pain and suffering to 50% of the actual damages as not covering damages resulting from scarring sustained in plaintiff's accident). Like the state and federal courts, the tribal court construes the waiver ordinance strictly. *See* Lefevre v. Mashantucket Pequot Tribe, 23 Indian L. Rep. 6018

Other statutory issues of importance included cases concerning the interpretation of tribal regulatory laws.[101] Fifteen of the opinions addressed employment law issues, usually cases challenging the termination of employees, but also cases based on tribal employment codes requiring accommodation of disabilities or protection of classes of employees from discrimination.[102] While most of these involved casino employees,[103] other

(Mashantucket Pequot Tribal Ct. 1992) (holding waiver of sovereign immunity to be jurisdictional and dismissing personal injury claim brought for injury occurring before the statute was enacted); Jenkins v. Mashantucket Pequot Gaming Enter., 23 Indian L. Rep. 6015 (Mashantucket Pequot Tribal Ct. 1993) (granting motion for summary judgment for failure to timely file personal injury claim); St. Jean v. Mashantucket Pequot Gaming Enter., 23 Indian L. Rep. 6030 (Mashantucket Pequot Tribal Ct. 1993) (same); Casillo v. Mashantucket Pequot Gaming Enter., 23 Indian L. Rep. 6036 (Mashantucket Pequot Tribal Ct. 1994) (same); Maddelena v. Foxwoods Casino, 23 Indian L. Rep. 6093 (Mashantucket Pequot Tribal Ct. 1994) (same); Macaruso v. Mashantucket Pequot Gaming Enter., 23 Indian L. Rep. 6117 (Mashantucket Pequot Tribal Ct. 1994) (same); Middleton v. Mashantucket Pequot Gaming Enter., 23 Indian L. Rep. 6118 (Mashantucket Pequot Tribal Ct. 1994) (same); Eosso v. Foxwoods High Stakes Bingo & Casino, 23 Indian L. Rep. 6027 (Mashantucket Pequot Tribal Ct. 1994) (ordinance does not waive sovereign immunity for tribe, only gaming enterprise; claim dismissed); Tajildeen v. Mashantucket Pequot Gaming Enter., 23 Indian L. Rep. 6030 (Mashantucket Pequot Tribal Ct. 1993) (denying tribe's motion to dismiss on grounds plaintiff's amended complaint was timely).

101. *See* Pouley v. Confederated Tribes of the Colville Reservation, 23 Indian L. Rep. 6143 (Colville Tribal Ct. 1996) (interpreting tribal membership ordinance); *In re* JRB, 23 Indian L. Rep. 6103 (Cheyenne River Sioux Ct. App. 1996) (noting tribe's comprehensive Children's Code established new standards, including that there is no need to prove harm to children from parent's alcohol abuse and affirming termination of parental rights); Safe Ride Services, Inc. v. Todachine, 23 Indian L. Rep. 6253 (Navajo Sup. Ct. 1996) (interpreting Navajo employment preference law); Brehmer v. White Wolf, 23 Indian L. Rep. 6073 (Cheyenne River Sioux Ct. App. 1993) (vacating temporary restraining order in dispute over tribal grazing rights).

102. *See, e.g.*, Ho-Chunk Nation Personnel Policies and Procedures, HCN Legislature Resolution No. 2/15/96C equal employment policy, barring discrimination based on sex, race, religion, national origin, pregnancy, age, marital status, sexual orientation, or physical handicap, *quoted in* Simplot v. Ho-Chunk Nation Dep't of Health, 23 Indian L. Rep. 6235, 6238 (Ho-Chunk Tribal Ct. 1996).

103. Cholka v. Ho-Chunk Gaming Comm'n, 23 Indian L. Rep. 6075 (Ho-Chunk Tribal Ct. 1996) (reversing employee's suspension because of failure to give notice as required by Gaming Ordinance employment provisions); Creapeau v. Ho-Chunk Nation-Rainbow Casino, 23 Indian L. Rep. 6078 (Ho-Chunk Tribal Ct. 1996) (holding notice given to employee regarding suspension fulfilled the tribe's Personnel Procedures Manual); Kingsley v. Ho-Chunk Nation Personnel Dep't, 23 Indian L. Rep. 6113 (Ho-Chunk Tribal Ct. 1996) (upholding personnel commission's order to reinstate employee, but rejecting employee's argument that she was not placed in a comparable position); Decorah v. Rainbow Casino, 23 Indian L. Rep. 6128 (Ho-Chunk Tribal Ct. 1996) (holding ordinance did not waive sovereign immunity for review of personnel commission decisions); Frogg v. Ho-Chunk Casino, 23 Indian L. Rep. 6197 (Ho-Chunk Tribal Ct. 1996) (upholding termination of employee for excessive absences); Rowlee v. Majestic Pines Casino, 23 Indian L. Rep. 6218 (Ho-Chunk Tribal Ct. 1996) (holding tribe made a good faith effort to accommodate plaintiff's disability as required by the Tribal Personnel Policy and Procedures Manual); Simplot v. Ho-Chunk Nation Dep't of Health, 23 Indian L. Rep. 6235 (Ho-Chunk Tribal Ct. 1996) (ordering reinstatement of employees terminated in violation of the manual and due process). Although the Ho-Chunk cases relied on the tribe's Policy and Procedure Manual as the

cases, several of them significant, arose in other tribal employment contexts.[104] Frequently tribal courts turned to common law to fill in the interstices of the statutory scheme. For example, several cases from the Mashantucket Pequot Tribal Court involved the extent to which an employee who resigned voluntarily can appeal his termination from employment in the tribe's Gaming Enterprise by arguing that his resignation was coerced or otherwise proffered under duress. In each case the tribal court turned to common law as expressed in federal and state opinions setting standards for what conduct constitutes coercion.[105]

Although tribes require exhaustion of administrative remedies before seeking review in tribal court, the Ho-Chunk Tribe held that exhaustion was not necessary in a sensitive case involving a tribal agency reorganization plan, because on the facts of the case, exhaustion would be futile.[106] Although tribal courts frequently upheld the tribal termination of employees, employees won some significant victories.[107] In *Brooks v. Yellow Cloud Residential*

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source of the binding norms, apparently the Ho-Chunk Tribe's manual was a product of Council Resolution, see Simplot v. Ho-Chunk Nation Dep't of Health, 23 Indian L. Rep. 6235, 6238 (Ho-Chunk Tribal Ct. 1996).

The Mashantucket Pequot Tribal Court produced several employment cases as well. *See* Fickett v. Brown, 23 Indian L. Rep. 6190 (Mashantucket Pequot Tribal Ct. 1995) (upholding termination of beverage server who "charged" for free drinks); Mitchell v. Brown, 23 Indian L. Rep. 6215 (Mashantucket Pequot Tribal Ct. 1995) (upholding termination for cause of floor supervisor aware of theft scheme); McLean v. Brown, 23 Indian L. Rep. 6229 (Mashantucket Pequot Tribal Ct. 1995) (upholding motion to dismiss on grounds tribal Temporary Emergency Employment Appeal Ordinance does not permit an employee to contest a voluntary resignation absent a showing of duress or coercion); Busch v. Brown, 23 Indian L. Rep. 6246 (Mashantucket Pequot Tribal Ct. 1995) (same); Dulin v. Brown, 23 Indian L. Rep. 6132 (Mashantucket Pequot Tribal Ct. 1995) (dismissing appeal of termination as not timely).

104. *See* Lovermi v. Miccosukee Tribe, 23 Indian L. Rep. 6090 (Miccosukee Tribal Ct. 1996) (dismissing appeal of employment termination board decision because tribe had not waived sovereign immunity); Thompson v. Cheyenne River Sioux Tribe Bd. of Police Comm'rs, 23 Indian L. Rep. 6045 (Cheyenne River Sioux Ct. App. 1996) (interpreting tribal ordinance barring convicted felons from law enforcement positions as applicable to detention officers); Brooks v. Yellow Cloud Residential Ctr., 23 Indian L. Rep. 6035 (Colville Admin. Ct. 1995) (ordering employee reinstated with back pay because of violation of Code of Conduct); Kizer v. Walker River Hous. Auth., 23 Indian L. Rep. 6214 (Inter-Tribal Ct. App. Nev. 1996) (remanding for determination of whether employee's termination violated due process).

105. The cases involved "raked games," in which casino employees had participated in off-premises games for profit. *See* Busch v. Brown, 23 Indian L. Rep. 6246, 6247-48 (Mashantucket Pequot Tribal Ct. 1995) (upholding tribal court finding after evidentiary hearing that senior level employee offered the opportunity to resign with a clean record or be terminated and possibly lose his gaming license was not coerced); McLean v. Brown, 23 Indian L. Rep. 6229, 6230-31 (Mashantucket Pequot Tribal Ct. 1995) (same).

106. Simplot v. Ho-Chunk Nation Dep't of Health, 23 Indian L. Rep. 6235, 6240 (Ho-Chunk Tribal Ct. 1996). This case, ordering terminated employees reinstated with back pay in politicized departmental reorganization context is discussed more fully at *infra* notes 246-48 and accompanying text.

107. *See* Cholka v. Ho-Chunk Gaming Comm'n, 23 Indian L. Rep. 6075 (Ho-Chunk Tribal

Center,[108] the Colville Administrative Court reinstated an employee terminated in violation of the tribe's Personnel Manual and the protections of due process in the Tribe's Law and Order Code, stating: "The court is very protective of employee rights and has in the past required programs to follow procedures very narrowly."[109]

Cases requiring interpretation of tribal statutes also raised difficult questions regarding the jurisdiction of tribal courts, waiver of sovereign immunity, the scope of the Indian Civil Rights Act, and the role of the tribal court in interpreting the tribe's constitution. These cases typically mix issues of tribal and federal law and require great judicial sensitivity both to the role of the court in the tribe's political system and public acceptance of tribal courts as justice-administering institutions. Because of these multiple sources of law and the potential high-profile of the cases, they will be discussed later.

3. The Law of Other Tribes

Tribal court opinions increasingly refer to the decisions of other tribal courts when seeking persuasive authority in a case of first impression. As noted above, some tribal codes direct tribal courts to consider the law of other tribes *before* considering state law. But even without such direction, many judges have begun to refer to the law of other tribes in a wide variety of cases. In *Lovermi v. Miccosukee Tribe*,[110] holding that the tribe had not waived its sovereign immunity to permit review of the tribal Personnel Board's decision upholding a termination of employment, the court first cited an earlier Miccosukee tribal court case but then turned to consider: "[A]dditional legal precedent from sister tribal courts to support [defendants'] argument. A review of [these cases] may shed some light and show how other tribal judicial systems have dealt with this issue."[111] These references seem particularly apt in cases, such as *Lovermi*, touching upon issues of great importance to all tribes, such as sovereign immunity[112] or the meaning of

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Ct. 1996) (reversing employee's suspension because of failure to give notice as required by Gaming Ordinance employment provisions); Creapeau v. Ho-Chunk Nation-Rainbow Casino, 23 Indian L. Rep. 6078 (Ho-Chunk Tribal Ct. 1996) (holding notice given to employee regarding suspension fulfilled the tribe's Personnel Procedures Manual); Simplot v. Ho-Chunk Nation Dep't of Health, 23 Indian L. Rep. 6235 (Ho-Chunk Tribal Ct. 1996) (ordering reinstatement of employees terminated in violation of the manual and due process). Brooks v. Yellow Cloud Residential Ctr., 23 Indian L. Rep. 6035 (Colville Admin. Ct. 1995) (ordering employee reinstated with back pay because of violation of Code of Conduct).

108. 23 Indian L. Rep. 6035 (Colville Admin. Ct. 1995) (holding employer must give employee notice of specific violation such that a reasonable person could have understood the accusation).

109. *Id.* at 6036.

110. 23 Indian L. Rep. 6090 (Miccosukee Tribal Ct. 1996).

111. *Id.* at 6091.

112. *See, e.g.*, Thompson v. Cheyenne River Sioux Tribe Bd. of Police Comm'rs, 23 Indian L. Rep. 6045, 6048 (Cheyenne River Sioux Ct. App. 1996) (citing with approval Colville

due process of law in the tribal context. In *Colville Confederated Tribes v. Wiley*,[113] the court considered a Ponca Tribal Court case discussing the meaning of due process, cautioning: "parties to this action should be cautious in evaluating due process in Anglo terms."[114] In a difficult political case, *Colville Confederated Tribes v. Meusy*, the court looked solely to other tribal court opinions in deciding whether the separation of powers doctrine should apply in the tribal context.[115] Tribal courts also consider the opinions of sister tribal courts, considering whether to endorse or distinguish them[116] on more mundane matters. Almost every tribal appellate court opinion I read referred to other tribal court opinions.[117] As more tribal court opinions are available, one may expect this reliance on other tribal court opinions to displace reliance on state decisions.

4. State Law in Tribal Courts: The Influence of State Law in Developing Tribal Law

Although many of the decided opinions refer to state or federal norms as persuasive authority, the courts often do not discuss the extent to which these norms are consistent with tribal customary law. Given that tribal courts continue to operate as institutions of assimilation as well as to reflect the assimilation of tribal people into the dominant culture, tribal courts looking for a solution to a knotty problem may automatically consider Western common law as expressing common-sense solutions to the problems of

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Confederated Tribes v. Stock West, 21 Indian L. Rep. 6075 (Colville Tribal Ct., 1994), interpreting similarly worded tribal sovereign immunity ordinance); Kizer v. Walker River Hous. Auth., 23 Indian L. Rep. 6214 (Inter- Ct. App. Nev. 1996) (adopting the rationale of Dubray v. Rosebud Hous. Auth., 12 Indian L. Rep. 6015 (Rosebud. Ct. 1985) in holding that a "sue and be sued" clause in a tribal ordinance creating a housing authority did not waive tribal sovereign immunity).

113. Colville Confederated Tribes V. Wiley, 23 Indian L. Rep. 6037 (Colville Tribal Ct. 1996) (Wynne, C.J.) (granting defendant's motion to dismiss a misdemeanor charge of possession of alcohol because defendant was prejudiced due to the insufficiency of the citation given him.

114. *Id.* at 6037 n.4.

115. Colville Confederated Tribes v. Meusy, 23 Indian L. Rep. 6223 (Colville Tribal Ct. 1996); *see also* Rave v. Reynolds, 23 Indian L. Rep. 6150, 6155 (Winnebago Sup. Ct. 1996).

116. *See, e.g.*, Baylor v. Confederated Salish & Kootenai Tribes, 23 Indian L. Rep. 6221 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (distinguishing Dupree v. Cheyenne River Hous. Auth., 16 Indian L. Rep. 6106 (Cheyenne River Sioux Ct. App. 1988) and refusing to adopt the federal rule permitting interlocutory appeals in certain circumstances); *see also* Colville Confederated Tribes v. Tatshama, 23 Indian L. Rep. 6211 (Colville Tribal Ct. 1996) (examining the tribal codes of tribes in the region to determine whether they provided for deferred prosecution).

117. *See, e.g.*, Colville Confederated Tribes v. Meusy, 23 Indian L. Rep. 6223, 6224 (Colville Tribal Ct. 1996) (citing Moran v. Council of the Confederated Salish & Kootenai Tribes, 22 Indian L. Rep. 6149 (Confederated Salish & Kootenai Tribes Ct. App. 1995) (interpreting tribal code provision authorizing court to interpret the law as including the power of judicial review).

everyday life. In such opinions it is difficult to determine whether the court made a separate assessment of whether those norms are consistent with the tribe's past traditions and present needs.

As noted earlier, some tribal codes still point the court toward state law. Nevertheless, even these code provisions may contain discretionary language. For example, the Salish & Kootenai statute provides for application of tribal law, federal law where necessary, and then notes that the tribal court "may" decide the case according to the laws of Montana. In several cases the court referred to Montana precedents but did not adopt them blindly. For example, *Lulow v. Peterson*[118] involved a claim for palimony by Robert Lulow, who argued that he and Delores Peterson had an implied-in-fact contract to pool resources during the years they lived together. They shared resources: he worked on her property, including seventy-five acres belonging to the children of her first marriage, which she managed; she worked in his business, Bob's Auto Mart, as a bookkeeper, and both of them helped to raise children from each of their previous families. After their six-year relationship ended, Mr. Lulow sued for compensation of up to $60,000 on several theories of express and implied contract. (Apparently Ms. Peterson had sold her house and five acres and the surrounding land owned by her children for $225,000). The trial court dismissed his claim, applying Montana case law establishing a presumption against finding intent to contract in this type of case. Noting that Montana had developed "reasonable, fair principles to apply to the domestic situation before the court,"[119] the court of appeals agreed with the trial court's adoption of the Montana presumption, but drawing on Montana law, the court held that the trial court erred in granting summary judgment with so many material issues of fact remaining regarding the parties' relationship. In short, although recognizing the difficulties in overcoming the Montana presumption against finding a contractual relationship, Judge Wheelis, writing for the court of appeals, remanded for further findings and a determination of whether the parties had an express or implied agreement or whether the court should impose one to compensate Mr. Lulow for his expenses in improving Ms. Peterson's property.

In *Bick v. Pierce*,[120] the court of appeals upheld a tribal jury damage award of $199,834.30 for injuries suffered by a tribal journalist in an automobile accident. The plaintiff's injuries were so substantial that even the defendants own expert witness testified that the plaintiff suffered permanent injury. In fact, the defendant's medical evidence was stronger for the plaintiff than the plaintiff's own doctor's testimony. In upholding the award of $150,000 for pain and suffering, Chief Justice Peregoy cited Montana precedents regarding measurement of damages for pain and suffering and

118. 23 Indian L. Rep. 6200 (Confederated Salish & Kootenai Tribes Ct. App. 1996).
119. *Id.* at 6201.
120. 23 Indian L. Rep. 6175 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

went into considerable detail in justifying the award as fair. The court noted that the plaintiff had forty-seven years of life expectancy and had been a healthy productive worker, earning $18 an hour as a journalist, but would now live in constant pain for the rest of his life. Applying a per diem analysis to demonstrate the reasonableness of the award, an analysis also used in Montana law, the court concluded that the compensation, though considerable, amounted to approximately $9 a day. It is this kind of careful explanation of damage awards that will do much to win legitimacy for tribal courts.

The Colville tribal courts also look to state law. Section 1.5.0.5 of the Colville Tribal Code permits a great deal of discretion in adopting procedures, stating "any suitable process or mode of proceeding may be adopted" if it is "conformable with the spirit of tribal law."[121] The tribal court has rejected application of state law in some cases after considering both Colville law and the law of other tribes. In *Colville Confederated Tribes v. Tatshama*,[122] for example, the defendant sought deferred prosecution, a provision for alternate treatment in lieu of prosecution permitted by the law of the State of Washington. The tribal court observed that the tribal code had no such provision and that deferred prosecution was normally a creature of statute. Nevertheless, since one could interpret the tribal code as permitting the court to adopt such a procedure on its own, the court noted that tribal codes of the region did not provide for deferred prosecution. Consequently, the court refused to adopt the Washington state deferred prosecution statutes as common law, holding that separation of powers concerns counseled against judicial adoption of deferred prosecution procedure absent any clear direction from the Council.[123]

In sum, even when tribal codes direct the decision-maker to state law as an appropriate source of legal norms, it does not appear that any of the tribes studied required the courts to apply state law. For example, the Mashantucket Pequot Tribal Code directing the courts to apply state law refers to state common law and procedure[124] until appropriate tribal rules are developed. Thus, tribal advocates should take care to argue that the particular norm urged

121. *See* Colville Confederated Tribes v. Tatshama, 23 Indian L. Rep. 6211, 6211 (Colville Tribal Ct. 1996) (quoting provision cited in text), compare *id.* (rejecting application of Washington State statutory scheme) *with* Colville Confederated Tribes v. Wiley, 23 Indian L. Rep. 6037, 6038 (Colville Tribal Ct. 1996) (noting the tribal court has adopted the Washington State two-step analysis of the sufficiency of criminal citations).

122. 23 Indian L. Rep. 6211 (Colville Tribal Ct. 1996).

123. *Id.* at 6212. The tribal council responded by enacting a deferred prosecution provision, but the court invalidated the provision in part on separation of powers grounds. *See infra* notes 260-66 and accompanying text.

124. *See* Busch v. Brown, 23 Indian L. Rep. 6246, 6246-47 (Mashantucket Pequot Tribal Ct. 1995) (noting that the tribal code requires Connecticut substantive and procedural rules to be applied until tribal rules are in place in ruling that a motion to dismiss is the appropriate procedure to contest subject matter jurisdiction).

on the court is not only the law of the particular state, but a good law that fits the tribal context as well.

5. Federal Law in Tribal Courts

As with the law of other jurisdictions, federal law may be applied because a tribal statute may point toward federal law. As noted above, the Winnebago Tribal Code requires application of tribal law, when federal law does not prohibit its application, then directs the courts to apply federal law, including federal common law, and the law of states or other jurisdictions which the tribal court finds compatible. Such tribal choice of law ordinances leave ample room for tribal court discretion and equal room for counsel to make arguments appealing to the context of the case and traditions of the tribe. Federal law can influence a tribal court opinion because it is a necessary part of a multilayered analysis, as when a difficult issue of tribal court jurisdiction over non-Indian parties or over particular subjects may begin with an examination of tribal law and end with an examination of federal law. Or, federal law can be a ready source of norms — especially procedural norms, but also norms concerning justiciability such as standing. In short, federal procedure, common law, constitutional law, or even statutory law may be applied as persuasive or mandatory authority in a case of first impression.

a) Federal Procedural Rules

Tribal courts frequently must address questions of first impression, often involving procedural matters. Attorneys practicing in state courts are well aware of the influence of the Federal Rules of Civil and Appellate Procedure on the development of state rules. Many state supreme courts have adopted verbatim some or all of the federal rules. Some tribal courts or tribal councils have also adopted uniform rules.[125] Rule 1(c) of the Cheyenne River Sioux Tribal Rules of Civil Procedure states:

> Any procedures or matters which are 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.[126]

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125. For example, the Coeur D'Alene Tribal Code provides that "the Coeur d'Alene Rules of Civil Procedure shall govern all civil proceedings in tribal court." *See* Coeur d'Alene Tribe v. AT&T Corp. 23 Indian L. Rep. 6060, 6065-66 (Coeur d'Alene Tribal Ct. 1996) (citing code and noting that COEUR D'ALENE R. CIV. P. 19 is "similar to Federal Civil Rule 19" in holding that states opposing the provision of telephone service to the tribe for a national lottery are not indispensable parties).

126. *See* Cheyenne River Sioux Tribe Bd. of Police Comm'rs v. Thompson, 23 Indian L. Rep. 6002, 6003 n.4 (Cheyenne River Sioux Ct. App. 1995).

Often tribal procedural codes or rules do not contain a collateral reference and are otherwise not very complete. Given the familiarity of many attorneys with the federal rules, it is not surprising that attorneys frequently assume tribal courts have adopted the federal rules. In many of the cases in the sample, tribal courts did apply the rules of federal civil or appellate procedure or the Federal Rules of Evidence to resolve questions not clearly covered by the tribal rule,[127] although often stressing that while the rules may function as important guidelines, the court is not bound to apply them.[128] The difference between a case in which the tribal court applies the tribal rule, albeit one based on the federal rule, and adopts a federal rule to resolve a particular issue is subtle, but important. A tribe adopting the federal rules may feel more inclined to follow the federal case law interpreting the rules; however, a court adopting a rule for convenience need not adopt every variation or case law gloss.

An example of judicial adoption of the federal rules is *Hall v. Tribal Business Council*,[129] involving the politically sensitive issue of the distribution of grazing unit leases, a scarce resource. Special Judge Pommersheim cited an earlier decision of the court stating that "[i]n light of the paucity in the tribal code on discovery (see ch. 2 § 7 [of the tribal code], the Court shall look for appropriate guidance from the Federal Rules of Civil Procedure and the attendant case law."[130] In light of this directive, the court in *Hall* decided "[f]or purposes of consistency" the federal rules "shall govern all aspects of this litigation unless they conflict directly with any tribal rule of civil procedure."[131] Applying FRCP 8(a)(2) to the adequacy of the plaintiffs' complaint, the court dismissed the allegations of fraud because the plaintiffs had made no statements of law or fact to support the claim, but held the complaint's allegations sufficient to state claims for violation of the Indian Civil Rights Act.[132]

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127. *See, e.g.*, Waters v. Colville Confederated Tribes, 23 Indian L. Rep. 6120 (Colville Ct. App. 1996) (adopting federal rules of evidence and attendant case law regarding hearsay and impeachment, while noting tribal council had expressed its intent that the court not adopt state law even where analogous); Confederated Salish & Kootenai Tribes v. Devereaux, 23 Indian L. Rep. 6099, 6100 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (applying Federal rule of Evidence § 606(b) and citing a federal case in discussing public policy behind the rule).

128. *See* Hitchcock v. Shaver Mfg. Co., 23 Indian L. Rep. 6137 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (discussing earlier decision by the court of appeals in the same case refusing to apply FRCP Rule 54 and thus permitting an appeal of the dismissal of the retailer in a products liability case in which the lower court had upheld jurisdiction over the manufacturer).

129. Hall v. Tribal Bus. Council, 23 Indian L. Rep. 6039 (Fort Berthold Dist. Ct. 1996).

130. *Id.* at 6040 n.5.

131. *Id.*

132. *Id.*; *see also* Baylor v. Confederated Salish & Kootenai Tribes, 23 Indian L. Rep. 6221, 6223 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (stating federal rules are "important guidelines" for the tribal court "in matters not specifically covered either by the Law and Order

In addition to federal rules, tribal courts have also adopted standards of review used in reviewing federal cases and analytical constructs utilized by federal trial courts. An example of a tribal court embracing federal law can be found in *Estate of Tasunke Witko v. G. Heileman Brewing Co.*[133] The defendants filed a motion to dismiss for lack of jurisdiction, which the trial court granted, without appearing to distinguish between personal and subject matter jurisdiction and without providing any guidance regarding the standard it had used to make its determination. The Rosebud Sioux Supreme Court adopted from case law of the United States Court of Appeals for the Ninth Circuit both the appellate standard of de novo review for jurisdictional questions of law and the proper analysis for jurisdictional questions by the tribal court on remand. To survive a motion to dismiss, the plaintiff must make a prima facie showing of jurisdiction. This burden is not tremendous because all facts are reviewed in the light most favorable to the plaintiff. An initial decision in plaintiff's favor, however, does not guarantee that the case will go forward to trial. If, after remand by the appellate court, additional questions of credibility or fact arise, the trial court has the discretion to hold a preliminary evidentiary hearing at which plaintiff must establish jurisdictional facts by a preponderance of the evidence. Failure to do so may result in dismissal. The Rosebud Supreme Court in embracing the federal circuit law noted both that the prevailing de novo standard seemed reasonable and fair and that neither party had objected.[134]

b) Jurisdiction and Justiciability

The extent of tribal court jurisdiction is a matter of federal as well as tribal law, involving as it does issues at the heart of the relationship between the federal government and Indian tribes. Most civil personal jurisdiction cases involving tribal members are resolved purely by reference to tribal statutes; personal jurisdiction over non-members cannot be resolved without reference to both tribal and federal law. The Supreme Court continues to take an activist role in asserting the authority to deny tribal courts jurisdiction over cases involving non-Indians and Indians not members of the governing tribe. Accordingly, a tribe which asserts jurisdiction in disputes involving these classes of litigants must adjudicate with the knowledge that a federal court

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Code or by the Rules of Practice in Civil Actions and Proceedings in the Tribal Court of the Confederated Salish & Kootenai Tribes"); Brehmer v. White Wolf, 23 Indian L. Rep. 6073, 6073 (Cheyenne River Sioux Ct. App. 1993) (citing Dupree v. Cheyenne River Hous. Auth., 16 Indian L. Rep. 6106 (Cheyenne River Sioux Ct. App. 1989) (adopting federal procedural structure with regard to interlocutory appeals)); Clown v. Coast to Coast, 23 Indian L. Rep. 6055, 6056 (Cheyenne River Sioux Ct. App. 1993) (citing FED. R. EVID. 103(a)(1) and FED. R. CIV. P. 46 regarding waiver of technical procedural errors not raised at trial).

133. 23 Indian L. Rep. 6104, 6106-07 (Rosebud Sioux Sup. Ct. 1996).

134. *See* Estate of Tasunke Witko v. G. Heileman Brewing Co., 23 Indian L. Rep. 6104, 6106-07 (Rosebud Sioux Sup. Ct. 1996).

may review the court's opinion to determine whether the court properly asserted jurisdiction. Since jurisdiction is an aspect of tribal sovereignty, the resulting federal court decision may result in a loss both to the tribe involved and for all Indian tribes. It is a heavy responsibility to shoulder for a tribal court trying to do justice in a particular case to realize that its opinion may not just be reversed by a federal court, but that the result may be a loss of tribal sovereignty for all tribes. But the Supreme Court's recent activist role in limiting tribal court jurisdiction has created a situation tribal courts cannot ignore.

The legal issues encompassed by the broad term "jurisdiction" are conceptually and analytically quite different. Personal jurisdiction focuses solely on the legality under tribal law and fairness of subjecting a particular defendant to the power of a court. Subject matter jurisdiction is normally concerned solely with the competency of a particular court to address a particular issue, such as whether a landlord-tenant case can be brought in superior court, and is normally a question of purely internal domestic statutory law. In the tribal context, however, the term "subject matter jurisdiction" has become a term of art describing federal common law doctrines limiting both the states' powers to adjudicate tribal cases[135] and the power of tribal courts to adjudicate cases involving non-tribe members.[136] Finally, legislative jurisdiction focuses on the applicability of the forum's law in a case otherwise within its jurisdiction. Legislative jurisdiction is a question of due process and focuses on the outer limits the constitution or federal law may impose on a sovereign's ability to apply its law to a case in which the parties and the events giving rise to the cause of action have only a minimal relationship to the forum. In sum, personal jurisdiction questions focus on fairness to the defendant, subject matter jurisdiction focuses on whether the case is in the proper court, and legislative jurisdiction focuses on the law applied.

In three of the cases studied, defendants contested tribal court personal and subject matter jurisdiction, and in at least one plaintiffs contested tribal court authority.[137] In *Strate v. A-1 Contractors*,[138] discussed below, the Supreme Court has conflated civil adjudicatory and regulatory jurisdiction. Nevertheless, because the issues are analytically and conceptually distinct and are often resolved without implicating federal common law, I will discuss personal and subject matter jurisdiction separately.

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

136. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding as a matter of federal common law that tribal courts lack criminal jurisdiction over non-Indian defendants).

137. Middlemist v. Member of Tribal Council of the Confederated Salish & Kootenai Tribes, 23 Indian L. Rep. 6141 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (requiring exhaustion of administrative remedies before challenging tribal Aquatic Land Conservation Ordinance).

138. 117 S. Ct. 1404 (1997).

(1) Personal Jurisdiction

Some tribal and state long-arm statutes identify situations in which an out-of-state (or off-reservation) defendant can be subjected to the forum, (think of this as the "rules" approach), while others are deliberately written broadly to invoke due process as an over arching standard without limiting the fact patterns that can bring an out-of-state defendant into state court (the "standards" approach). In tribes and states adopting the rules approach, some courts have interpreted restrictively worded long-arm statutes broadly, as merely enumerating examples rather than representing an exclusive list of appropriate exercises of jurisdiction.[139] Whether a court has interpreted its long-arm statute "correctly" is, of course, an issue of domestic law, unless the particular exercise of jurisdiction is unconstitutional. In short, long-arm statutes require a two-step interpretive process: the interpretation of the long-arm statute, a question of domestic law, and then the question whether the assertion of jurisdiction, which may be lawful under domestic law, violates due process. In a rules jurisdiction, the domestic law question may be a difficult one, requiring an analysis of the statutory language and applicable precedents. In a standards jurisdiction, one may answer that question easily, because the statute directs the court to proceed immediately to the due process question.

Two of the three cases raising personal jurisdiction issues required an analysis of the tribal long-arm statutes. The Rosebud Sioux Tribe's long-arm statute is of the "rules" variety: listing particular contacts with the forum creating jurisdiction. At the same time, the long-arm statute also states that the tribe will exercise its jurisdiction in these cases consistent with due process. While such a statute is open to a narrow interpretation, the Rosebud Sioux Supreme Court has interpreted the Tribe's Constitution and long-arm statute as indicating "the tribe's clear intent, consistent with notions of due process, to assert jurisdiction over nonresidents who, for example, commit tortious acts that have effects within the reservation."[140] In contrast to the Rosebud Sioux Tribal Code, the Coeur d'Alene Tribal Code adopts the "standards" approach, however, providing for jurisdiction over matters occurring within the reservation, "or involving any act affecting the Coeur d'Alene Tribe or the Coeur d'Alene Reservation or involving at least minimal contacts with the Coeur d'Alene Tribe or the Coeur d'Alene Reservation."[141]

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139. In other words some courts apply the negative implications principle of statutory construction, *expressio unius est exclusio alterius*, while others adopt the principle of *ejusdem generis* to hold that a list is merely a representative sample.

140. *See* Estate of Tasunke Witko v. G. Heileman Brewing Co., 23 Indian L. Rep. 6104, 6107 (Rosebud Sioux Sup. Ct. 1996) (quoting ROSEBUD SIOUX TRIBE LAW & ORDER CODE § 4-2-7 (1989).

141. *See* Coeur d'Alene Tribe v. AT&T Corp., 23 Indian L. Rep. 6060, 6061 (Coeur d'Alene Tribal Ct. 1996) (quoting COEUR D'ALENE TRIBAL CODE ch. 1-3.01.); *see also* Hitchcock v.

There appears to be a consensus among tribal courts that in analyzing the extent to which a tribe's exercise of personal jurisdiction is consistent with due process of law as required by the Indian Civil Rights Act and tribal constitutional and statutory civil rights provisions, the courts will interpret due process by reference to the United States Supreme Court's precedents. Even in cases in which the court is careful to note that it is not bound to interpret the term "due process" to "mirror" the interpretations given the phrase by the Supreme Court in all settings, on the issue what minimum contacts comport with fair play and substantial justice, the courts are either satisfied that the Supreme Court's analysis does justice in the tribal setting as well or conclude that these precedents have become binding federal common law for tribal courts. In a proper case a court could stretch the concept of due process a little beyond the Supreme Court precedents arguing for a construction of the idea of fundamental fairness that fits the tribal context.

On the other hand, in the non-Indian cases, caution seems to rule the day. Certainly there is a lot of wiggle room in the Supreme Court's precedents to make lawyerly arguments that personal jurisdiction is appropriate. In *Estate of Tasunke Witko v. G. Heileman Brewing Co.*, for example, the Rosebud Sioux Supreme Court held that the United States Supreme Court precedents delineating the contours of due process in the context of personal jurisdiction were binding on the court, because the question of "the proper extent of tribal court jurisdiction [is] ultimately a matter of federal (common) law and therefore as to matters of jurisdiction, federal standards — including 'minimum contacts' due process analysis — [are] applicable."[142]

The most controversial issue surrounding tribal courts involves the exercise of jurisdiction over non-Indians. The sampled cases indicate that the assumption of tribal court bias against non-Indians is simply not warranted. Cases involving non-Indians comprised a significant part of the sample. For example, in sixteen cases, the courts stated that one of the parties was not an Indian, and twenty-one additional cases most likely involved non-Indians.[143] In only three cases, however, was personal jurisdiction over non-Indians a significant issue. In each, the tribal court upheld personal jurisdiction over non-reservation defendants: *Hitchcock v. Shaver Manufacturing Co.*,[144] *Coeur*

Shaver Mfg. Co., 23 Indian L. Rep. 6137, 6138 (Confederated Salish & Kootenai Tribes Ct. 1996) (quoting LAW AND ORDER CODE OF THE CONFEDERATED SALISH & KOOTENAI TRIBE § 1(2)(a), asserting jurisdiction "to the fullest extent possible not inconsistent with federal law").

142. *Hitchcock*, 23 Indian L. Rep. at 6108.

143. This is a conservative estimate, based on the following assumptions: that all of the Mashantucket Pequot tort and employment cases were brought by non-Indians (because there are so few tribal members) and that because some courts, such as Ho-Chunk Tribal Court, identify Indian plaintiffs, failure to do so by such a court in an employment case indicates the plaintiff is not an Indian.

144. 23 Indian L. Rep. 6137 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

d'Alene Tribe v. AT&T Corp.,[145] and *Estate of Tasunke Witko v. G. Heileman Brewing Co.*[146] *Hitchcock* was a products liability case, arising out of an accident caused by a defective hydraulic post-hole digger purchased from an off-reservation retailer, Triple W, in Montana, and manufactured by an Iowa corporation. The tribal trial court dismissed Triple W on the grounds that the retailer had insufficient contacts with the reservation unlike the manufacturer who can be presumed to intend to sell its products as widely as possible. Although the plaintiffs had alleged that Triple W advertised on the reservation and sold other products that are used on the reservation, the tribal court concluded that Triple W had insufficient contacts with the plaintiffs. The Confederated Salish and Kootenai Tribal Court of Appeals reversed the order dismissing Triple W, distinguishing *World-Wide Volkswagen Corp. v. Woodson*[147] as involving an isolated occurrence. Noting that the Triple W and the reservation are both located in Western Montana which shares the same economic base, Justice Wheelis's opinion concluded that "[i]t is not plausible to argue that equipment and materials sold within the land between the rocky Mountains, Idaho, and Canada is not intended for the use of any person living there."[148]

Coeur d'Alene Tribe v. AT&T Corp. involved a dispute between the tribe, AT&T and several states regarding the tribe's plan to institute a national lottery. The tribe had entered into a gaming compact with the State of Idaho, which had been approved by the Secretary of the Interior. In addition, the tribe's management agreement had been approved by the National Indian Gaming Commission. In the middle of its negotiations with AT&T and Sprint Communications for the provision of the 800 service needed for the lottery, ten states informed AT&T that in the opinion of their legal officers, the lottery was not legal. When AT&T informed the tribe that it needed to resolve the legal issues before submitting a bid, the tribe then sued AT&T in tribal court seeking an injunction requiring them to provide the services.[149] Relying on *Hanson v. Denckla*[150] and *Burger King Corp. v. Rudzewicz*,[151] the tribal court held that AT&T had purposefully directed its activities at the forum by negotiating with tribal representatives to provide services for over a year and had significant forum-related activities because it provided services

145. 23 Indian L. Rep. 6060 (Coeur d'Alene Tribal Ct. 1996).

146. 23 Indian L. Rep. 6104, 6108 (Rosebud Sioux Sup. Ct. 1996).

147. 444 U.S. 286 (1979) (holding Oklahoma court had no jurisdiction over an Audi distributor in New York for an accident occurring in the state while the plaintiffs were moving from New York to Arizona).

148. *Hitchcock*, 23 Indian L. Rep. at 6139.

149. Although the defendant moved to dismiss for lack of jurisdiction it appeared that AT&T was eager to get the issue settled, for it submitted a bid during the pendency of the tribal court action. *Coeur d'Alene Tribe*, 23 Indian L. Rep. at 6061.

150. 357 U.S. 235 (1958).

151. 471 U.S. 462 (1985).

throughout the reservation, thus requiring the defendant to litigate in the tribal court was reasonable.[152]

Although both *Hitchcock* and *Coeur d'Alene* would be easy cases were a state court the forum, *Estate of Tasunke Witko* presented a much closer case of personal jurisdiction. The administrator of the estate of Tasunke Witko, known as Crazy Horse in English, filed suit in Rosebud Sioux tribal court on behalf of the family against the creators and manufacturers of "The Original Crazy Horse Malt Liquor." The estate sought both money damages and traditional remedies for the appropriation of the name Crazy Horse without the permission of the family.[153] The case involved intellectual property and publicity rights, which have traditionally presented somewhat trickier jurisdictional analyses. The case has been written on extensively by others, including myself, so I will not go into it in detail here.[154] Because the defendants had not marketed their product in several states with Native populations, including North and South Dakota, they contested personal as well as subject matter jurisdiction. The trial court held that the defendants lacked the significant contacts essential to satisfy both the Rosebud Sioux Tribal Code and the Supreme Court minimum contacts analysis to determine whether an exercise of jurisdiction violated due process of law, because they had not marketed the product in South Dakota.

On appeal, the Rosebud Sioux Supreme Court reversed the tribal court en banc, finding both in personam and subject matter jurisdiction over the controversy.[155] Applying these precedents, the Court concluded that the administrator of the estate had made a prima facie showing that the defendant had conducted business on the reservation (by selling other products on the reservation), had some contact, albeit limited, with the estate's attorney, and continued to market the product once it became aware of the offense taken. In light of all the other activities of defendant targeted toward the forum, the Court suggested the plaintiff was trying to have it both ways by avoiding

152. *Coeur d'Alene Tribe*, 23 Indian L. Rep. at 6068 (granting motion for summary judgment in favor of plaintiff).

153. *Estate of Tasunke Witko*, 23 Indian L. Rep. at 6106. The estate sought equitable remedies and asked for monetary relief as well as traditional remedies for interference with the right of publicity, intentional infliction of emotional distress, defamation of the spirit and various other common law and federal causes of action.

154. *See* Nell Jessup Newton, *Memory & Misrepresentation: Representing Crazy Horse in Tribal Court*, 27 CONN. L. REV. 1003 (1995); Joseph William Singer, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 S.D. L. REV. 1 (1996); Jessica R. Herrera, *Not Even His Name: Is the Denigration of Crazy Horse Custer's Final Revenge?*, 29 HARV. C.R.-C.L. L. REV. 175 (1994). On the issue of appropriation in general, see Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 2 CAN. J. OF L. & JURIS. 249 (1993).

155. Joseph William Singer of Harvard and I filed an amicus brief on the issue of personal jurisdiction; Oliver Goodenough and Bruce Duthu filed an amicus brief on the question of regulatory jurisdiction.

marketing Crazy Horse malt liquor on the reservation. Noting that the product's label contained a prominent reference to "the Black Hills of Dakota . . . home of proud Indian nations," the Court concluded:

> Given the marketing and sale of similar — but non-offending — products in the forums this avoidance appears to be the most cynical ploy. Defendants exalt and target the forum where it taps a likely vein of customers, but studiously avoid marketing and sale in the forum itself because their conduct is potentially offensive and tortious there. It seems wholly unlikely that the due process clause can be made to countenance such distortion and manipulation and this court holds that it does not.[156]

In balancing the interests of the plaintiff, defendant, and forum, the court also noted that the tribal court was especially appropriate because many of the claims were based on tribal custom and common law that "as questions of first impression, will not be readily discerned or easily answered in a state or federal forum at a substantial cultural and geographical remove from the reservation forum."[157] Moreover, since under federal common law doctrine, the jurisdictional issues can be litigated in federal court, the court noted that "the tribal court is uniquely capable to 'provide other courts with the benefit of their expertise in such matters in the event of further judicial review.'"[158] The court reversed and remanded for trial on the merits.

(2) Subject Matter Jurisdiction

Even in a case in which a tribal court has personal jurisdiction, a second hurdle remains. Unique to Indian law is a doctrine permitting a challenge to jurisdiction in tribal court based on the status of the parties before the tribal court. Even in a case in which the tribe clearly has personal jurisdiction over the defendant, the tribe may not have subject matter jurisdiction over a non-member under the doctrine announced in *Oliphant v. Suquamish Tribe*,[159] and developed in a series of cases narrowing tribal regulatory authority over non-Indians, especially *Montana v. United States*.[160] A further discussion of this doctrine is necessary to prepare the uninitiated for the treatment of subject matter jurisdiction in the cases studied.

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156. *Estate of Tasunke Witko*, 23 Indian L. Rep. at 6110.

157. *Id.* at 6111.

158. *Id.* (quoting National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 857 (1985) (requiring federal courts to abstain from deciding extent of tribal court jurisdiction over non-Indian defendants until tribal courts have decided the issue)).

159. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding tribal courts lack criminal jurisdiction over non-Indian defendants).

160. Montana v. United States, 450 U.S. 544 (1981) (holding that the Crow Tribe lacks authority to regulate hunting and fishing on fee land within the reservation).

Essentially this line of cases reverses the presumption in favor of tribal court authority over activities taking place within reservations involving non-members. Instead of starting with the presumption that tribes enjoy all the authority possessed by other sovereigns except that abrogated by statutes or ceded in treaties, the *Oliphant* case added an exception that could end up swallowing the rule: cases in which exercise of authority would be "inconsistent with the tribe's status" as dependent sovereigns. The Court held that exercise of criminal jurisdiction was inconsistent with the historical understanding of the authority of Indian tribes over non-Indians and also raised questions about the fairness of subjecting non-Indians to tribal jurisdiction because of racial and cultural differences. *Montana*, *Brendale*,[161] and *Bourland*[162] extended this doctrine to tribal regulations of land use involving land held in fee by non-members of the tribe. In *Montana* the court announced that the tribes could overcome the presumption against tribal authority in these cases in two circumstances, the now-famous *Montana* exceptions:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[163]

The issue in *Oliphant* was criminal misdemeanor jurisdiction over non-Indians. In *National Farmers Union Insurance Cos. v. Crow Tribe*,[164] decided in 1985, the Supreme Court rejected the argument that tribes lacked *civil* jurisdiction over non-Indians as well. The court noted that while policymakers in all branches of government had uniformly assumed that tribes lacked such jurisdiction throughout the uneasy relationship of tribes and the

161. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989) (holding that tribe lacks authority to zone property owned by nonmembers in areas of reservation open to the public).

162. South Dakota v. Bourland, 508 U.S. 679 (1993) (holding Cheyenne River Sioux Tribe lacked authority to regulate hunting and fishing on land ceded to the government for a dam project).

163. *Montana*, 450 U.S., at 565-66 (citations and footnote omitted).

164. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) (requiring federal courts to abstain from deciding extent of tribal court jurisdiction over non-Indian defendants until tribal courts have decided the issue).

federal government, the opposite presumption had operated in favor of tribal court civil jurisdiction. While acknowledging that *Oliphant* had raised concerns about fair treatment in tribal courts in criminal cases, the Supreme Court distinguished civil cases as not involving the same fundamental issues of liberty as criminal cases. After *National Farmers* and *Iowa Mutual Insurance Co v. LaPlante*,[165] a case decided two years later, federal courts must stay their hands and defer to tribal courts, the courts with the greatest expertise in this area, to permit them to make the first determination of the scope of tribal jurisdiction by analyzing the applicable treaties, statutes, and tribal law. Non-Indians wishing to challenge tribal court jurisdiction based on the *Oliphant-Montana* claim that jurisdiction in a particular kind of case is "inconsistent with the dependent status" of tribes, may only take this issue to federal court after the tribal court has been given the first chance to decide the issue; however, the non-Indian may take the jurisdictional issue, although not the merits, to the federal court for review. In short, the *National Farmers* principle appears to restore the presumption in favor of tribal courts even in non-Indian cases in the civil adjudicatory context. As the Supreme Court stated in *Iowa Insurance*:

> Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute . . . . In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion.[166]

The *National Farmers* exhaustion rule as it is called, has had an important role in acquainting non-Indian attorneys with tribal court systems. Significantly, of the many cases forced into tribal court by this doctrine, only a few have appeared back in federal court. If these non-Indian plaintiffs and defendants had been treated uniformly unfairly, one would have expected many more challenges to the authority of the tribal courts in federal court after exhaustion of tribal remedies.

(3) Some Strate Talk

These issues arose to a significant extent in at least three of the tribal cases discussed. Those cases were decided before the Supreme Court decided *Strate v. A-1 Contractors*,[167] a case holding that tribal court subject matter jurisdiction does not extend to accidents between non-Indians occurring on state-maintained public highways within a reservation, but also containing

165. 480 U.S. 9 (1987) (extending *National Farmers* exhaustion to diversity cases involving non-Indian defendants).

166. *Iowa Mutual*, 480 U. S. at 18.

167. Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997).

broader language that may complicate tribal court litigation in the future. *Strate* will have an impact on two issues in future tribal court cases. First, it clearly requires application of the *Montana* test to the issue of subject matter jurisdiction. Second, the opinion provides an incentive to non-Indian litigants to avoid the exhaustion rule by arguing that exhaustion is unnecessary because the tribe plainly lacks jurisdiction.[168] Finally, the Court's interpretation of the *Montana* test will cause confusion, because although the Supreme Court's reading of the *Montana* principle is broad and its concomitant interpretation of the exceptions is narrow, one must consider the Court's language in the context of the unusual facts of the case.

To tease out the implications of *Strate*, I will first address these issues as they were resolved by tribal courts and then consider the application of the Supreme Court's opinion to these cases. In each of the three cases discussed above, the tribal court reached and resolved the question of subject matter jurisdiction. In *Hitchcock*, which involved an accident on tribal land, the Court resolved the issue with a simple citation to *Hinshaw v. Mahler*, a Ninth Circuit case decided before *Strate* upholding tribal court jurisdiction over an automobile accident occurring on a U.S. highway within the reservation.[169] In *Coeur d'Alene*, the Court relied on *National Farmers* and the importance of affording a tribal court forum the first opportunity to consider the issue under tribal and federal law. Nevertheless, the tribal court also applied the *Montana* test to the issue of subject matter jurisdiction and concluded that (1) federal law permitting damage actions against common carriers in federal court, being limited to damages claims, does not preempt the tribal case and (2) the denial of service to a gaming operation designed to bolster the economy of the tribe and operated with federal approval under a federal statute furthering the goals of "promoting tribal economic development, tribal self-sufficiency, and strong tribal government,"[170] met the second prong of *Montana*, the so-called "effects test" because of the impact on tribal economic security.[171]

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168. *Strate*, 117 S. Ct. at 1416 n.14 (stating that "[w]hen, as in this case it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct"). This language appears to be an invitation to non-Indian litigants to proceed directly to federal court, thus preventing tribal courts assessing the reach of their own jurisdiction.

169. *Hitchcock*, 23 Indian L. Rep. at 6138 (citing Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994) (upholding tribal subject matter jurisdiction over a wrongful death claim arising out of an on reservation accident)).

170. *Coeur d'Alene*, 23 Indian L. Rep. at 6067 (quoting the Indian Gaming Regulatory Act codified at 25 U.S.C. § 2701(4) (1994)).

171. *Coeur d'Alene*, 23 Indian L. Rep. at 6062. In tribal court, the defendant had also argued unsuccessfully that the states protesting the provision of service were indispensable parties to the litigation under the tribal court's version of Rule 19, which tracks the federal rule. Idaho, which had entered into a gaming compact with the tribe, had not protested the proposed national lottery.

In *Estate of Tasunke Witko*, the Rosebud Sioux Supreme Court rejected the application of the *Montana* test to civil adjudicatory jurisdiction. Noting that the *Montana* line of cases each involved regulatory jurisdiction over non-Indian owned fee land,[172] the Court read *National Farmers* and *Iowa Insurance* as the governing cases. According to the Court, these cases reaffirmed that *Oliphant* (and hence *Montana*) did not apply to tribal civil jurisdiction and further established a presumption in favor of tribal civil jurisdiction over nonmembers.[173] Nevertheless, the Court was careful to argue in the alternative that even were *Montana* to be applied, the defendant's conduct met both prongs of the proviso. First, the consensual relation prong of the *Montana* test was met, according to the Court, because the plaintiff had alleged the defendant was exploiting the name Crazy Horse for commercial gain and viewing the case through this lens, the gist of defendant's wrong was refusing to enter into a consensual agreement. Permitting jurisdiction for cases arising out of consensual agreements, yet denying jurisdiction to those in which a defendant had refused to negotiate, would "constitute the most arid formalism and insofar as the trial court so reasoned it is hereby rejected."[174] With regard to the second prong, the Court focused on the health and welfare of the tribe, concluding that providing a forum for tribe members injured by off-reservation conduct is vital to the tribe's health and welfare.[175]

As noted above, *Strate* requires application of the *Montana* test to questions of civil adjudicatory jurisdiction, but the question remains *which* issues of adjudicatory jurisdiction? Unfortunately the opinion is somewhat internally contradictory. The first part of the opinion stresses continually that the decision is a narrow one, applying only to a "public highway maintained by the State under a federally granted right-of-way over Indian reservation land."[176] The court begins by phrasing its holding as follows:

> tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question. We express no view on the governing law

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After resolution of the issue in tribal court, the state of Missouri sued in state court attempting to block the tribe from permitting Missouri residents from accessing the tribe's lottery web site. The tribe successfully removed the case to federal court which is presently considering a motion to dismiss by the tribe. Missouri *ex rel.* Nixon v. Coeur d'Alene Tribe, No. 97-0914-CV-W-6, 1997 U.S. Dist. LEXIS 14980 (W.D. Mo. Sept. 29, 1997).

172. Estate of Tasunke Witko v. G. Heileman Brewing Co., 23 Indian L. Rep. 6104, 6111 (Rosebud Sioux Sup. Ct. 1996).

173. *Id.* at 6112.

174. *Id.*

175. *Id.*

176. *Strate*, 117 S. Ct. at 1407.

> or proper forum when an accident occurs on a tribal road within a reservation.[177]

One may read the phrasing of this holding to create a "right-of-way" exception to add to the list of cases in which the *Oliphant* and *Montana* line of cases apply, essentially reversing the presumption in favor of tribal court jurisdiction. Although not mentioned in the Supreme Court's opinion, allegations contained in an amicus brief filed by the American Trucking Association, the American Automobile Association, and the Burlington Northern Railroad may well have influenced the Court.[178] The amicus brief described a Crow tribal court wrongful death case resulting in a jury verdict of negligence in the death of three women at a railroad crossing and awarding damages of $250 million. The brief contained lurid descriptions of the proceedings in tribal court, in which a Crow judge allegedly lectured the jury venire on the past sins of Burlington Northern and suggested that this was the case in which to exact retribution. The facts of this case, which is not reprinted in the *Indian Law Reporter*, are contested, to say the least,[179] and the defendant has yet to complete the appeal process provided in the Crow system, in part because the defendant has been attempting to use the federal courts to overturn the tribal trial court. The Ninth Circuit denied the railroad's request for an injunction against further tribal court proceedings, applying the exhaustion doctrine.[180] The Supreme Court granted certiorari and remanded for reconsideration in light of *Strate*.[181] Of course if there were procedural irregularities in the tribal trial court, one would hope the Crow appellate court would correct them as well as take a good look at what appears to be an excessive damage award. Yet if the railroad crossing is a state or federally maintained public right of way, the railroad will be able to avoid the tribal court completely. This result seems particularly unfortunate in a case in which the defendant has an ongoing relationship with the tribe and a past history including many accidents resulting in the death of tribal members.

In short, even a "public right of way" exception to tribal court jurisdiction undercuts tribal sovereignty in the interest of preventing the occasional misguided result, which can be overturned on appeal or remedied in federal

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177. *Id.* at 1408.

178. Amicus Brief for the American Trucking Associations, Inc., the American Automobile Association, and Burlington Northern Railroad Company, in Support of Respondents, Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) (No. 95-1872), *available in* 1996 WL 711202.

179. For a thorough description of the background of the case and a description of the positions of both sides, see Bill Ibelle, *Indian Court Awards $250 Million for Deaths of Native Americans: Railroad Claims Fair Trial Impossible With All-Crow Jury*, LAWYERS WEEKLY USA, Jan. 13, 1997, at B8.

180. Burlington Northern R.R. v. Estate of Red Wolf, 106 F.3d 868 (9th Cir. 1996), *amended*, 1997 U.S. App. LEXIS 6599.

181. Burlington Northern R.R. v. Estate of Red Wolf, 139 L. Ed. 2d 5 (U.S. 1997) (vacating and remanding for reconsideration in light of *Strate*).

court by application of a contextually sensitive standard rather than a blanket exception. *Strate* will provide an invitation to resist jurisdiction in such cases as *Bick v. Pierce*,[182] discussed earlier, as a model of judicial care in explaining the basis for the award of significant damages (close to $200,000). The tribal court defendant in *Bick*, who was not a member of the Confederated Salish and Kootenai Tribe, apparently did not contest jurisdiction, or if he did, did not appeal the question. Yet after *Strate*, these cases will be taken out of tribal hands, at least when the highway is maintained by the state or federal government, an issue not even considered relevant in *Bick*.[183]

Yet *Strate* may well have an impact beyond the narrow confines stressed at the beginning of the opinion. For although announcing a blanket exception in narrow terms, the Court nevertheless concluded that the *Montana* presumption applies to *all* exercises of civil adjudicatory jurisdiction in tribal courts. Thus, although a given exercise of civil adjudicatory jurisdiction may not involve an accident on a public highway, tribal courts must still assess the impact of *Montana* on their jurisdiction. As noted above, *Montana* can permit a contextually sensitive assessment of tribal court jurisdiction.

Unfortunately, however, the Court read the second *Montana* exception narrowly. This exception focuses on effects on political integrity, economic security and health and welfare of the tribe. The tribe argued in *Strate* that providing a forum for accidents resulting from conduct, such as driving carelessly, that could endanger the community alone provides a sufficient tribal interest. The Supreme Court signaled its intent not to let the exception swallow the rule, relying on broad language in *Montana* limiting a tribe's inherent authority to "what is necessary to protect tribal self-government or to control internal relations"[184] and invoking the examples used in *Montana* of situations involving jurisdiction solely over tribal members. After giving this limited reading to the second *Montana* exception, the Court's application of this exception to the facts was extremely cursory — the Court merely asserted that "requiring A-1 and Stockert [the driver] to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or the welfare of the (Three Affiliated Tribes).'"[185]

Surely tribal court judges struggling to make sense of *Strate* will stress that the Court's *Montana* analysis depended solely on the fact that the case involved a "commonplace" automobile accident. But the Court's down-playing of tribal interest in a case involving a plaintiff who, though not a tribal

182. 23 Indian L. Rep. 6175 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

183. *See* Bick v. Pierce, 23 Indian L. Rep. 6175 (stating merely that the accident occurred "on the Flathead reservation").

184. *Strate*, 117 S. Ct. at 1409 (quoting *Montana*, 450 U.S. at 565-66).

185. *Id.* at 1416 (quoting *Montana*, 450 U.S. at 566).

member, was married to a tribal member, had adult children who were enrolled, lived on the reservation and clearly regarded herself as a member of the tribal community is most troublesome. A careful reading of the case seems to indicate that even if the plaintiff were a member of the tribe, the result would be the same, for the court states its narrow holding in terms of the status of the defendant and not that of the plaintiff. In short it is the defendant's status as a nonmember, judicial concern that he not have to defend in "an unfamiliar court" that seems to have greater sway with the Court. Are there more exceptions to the *National Farmers* and *Iowa Insurance* presumption of tribal civil adjudicatory jurisdiction to come?

Strate will force tribal judges to distinguish cases involving non-Indian defendants based on whether the claim is "commonplace" or more uniquely suited to a tribal forum. Therefore, if anything is left of the second *Montana* exception in the context of tribal adjudicatory jurisdiction after *Strate*, then the *Estate of Tasunke Witko*, in which the claim was based on tribal traditional law should have passed the test. Nevertheless, the Eighth Circuit has interpreted *Strate* broadly as foreclosing adjudicatory jurisdiction over activities or conduct of non-Indians occurring outside their reservations.[186] On the other hand, one could say that *Coeur d'Alene* represents the "commonplace" federal statutory law — the reach of the Indian Gaming Regulatory Act. If the Supreme Court were to accept this argument, then tribal court jurisdiction in cases involving the interpretation of federal law could be curtailed.

Finally, *Strate* establishes that the federal courts may entertain appeals of jurisdictional question before trial on the merits, because this was the posture in which *Strate* reached the Supreme Court. In *Coeur d'Alene*, AT&T did not appeal to federal court, and it must be stressed that not all non-Indian parties in tribal court will challenge tribal court authority either in the tribal trial court or in the federal system. Certainly AT&T seems to have been a somewhat reluctant defendant even in tribal court, desirous as it was of obtaining a lucrative contract from the tribe. Arguably permitting federal court review of the jurisdiction issue is bad policy in a case involving the interpretation of tribal law, especially tribal customary and common law, such as *Estate of Tasunke Witko*. In that case, the trial court stated without analysis that the common law of the tribe permitted a claim for interference with the right of publicity, a claim derived from the common law developing in several states. Yet the plaintiff sought relief based on tribal customary law relating to respect for the dead, which the estate termed "defamation of the spirit." In a case so intimately tied to tribal norms, it would seem to defeat the purpose of *National Farmers* by denying the tribal court the opportunity to explain the

186. Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 1998 U.S. App. LEXIS 405, *8 (8th Cir., Jan. 14, 1998)

tribal interest in a case before federal review. Nevertheless, as noted above, the Eighth Circuit has held the tribal court has no further jurisdiction.[187]

(4) Justiciability

Doctrines of standing, ripeness, and mootness are treated in constitutional law as issues arising from the Constitution's requirement that the federal courts adjudicate only "cases or controversies." Unlike federal courts, tribal courts are not mandated by the tribal constitutions, at least the "boilerplate" constitutions prepared by the BIA as models and adopted by many tribes organizing governments complying with the Indian Reorganization Act. Thus many tribal courts are created by tribal ordinance and some of these ordinances may not contain a "case or controversy requirement." In the past twenty years, many tribes have adopted new constitutions,[188] often addressing the role of tribal courts in the constitutional system. Some tribes' constitutions, like that of the Ho-Chunk Nation, create tribal courts and contain a case or controversy requirement.[189] Given the many differences in the statutory and constitutional role of the tribal court in the tribal system, attorneys should be careful before raising justiciability questions in tribal court. Several cases in the sample raised issues of ripeness or mootness.[190] In *Coeur d'Alene Tribe v. AT&T Corp.*,[191] the tribal court rejected a ripeness argument made by the defendant on the ground that there was no case or controversy under the tribal constitution.

Standing doctrines, particularly, have made their way into tribal court, probably because these doctrines also embody prudential and process concerns appealing to the tribal judiciary.[192] For example, as noted above, the Winnebago Supreme Court in *Rave v. Reynolds* borrowed freely from federal common law with respect to standing but only after noting that the federal law applied only by analogy and could vary to suit the needs of the tribe.

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187. *Id.*

188. *See* St. Regis Mohawk Tribe v. Basil Cook Enter., 23 Indian L. Rep. 6172 (St. Regis. Tribal Ct. 1996) (noting tribe had adopted a new constitution in 1995); Coalition for Fair Gov't II v. Lowe, 23 Indian L. Rep. 6181 (Ho-Chunk Tribal Ct. 1996) (noting tribe enacted its present constitution on September 17, 1994).

189. *See infra* note 256.

190. *See, e.g.*, Coeur d'Alene Tribe v. AT&T Corp., 23 Indian L. Rep. 6060 (Coeur d'Alene Tribal Ct. 1996) (ripeness); Colville Confederated Tribes v. Coleman, 23 Indian L. Rep. 6188 (Colville Ct. App. 1996) (dismissing issue resolved through stipulation as moot).

191. 23 Indian L. Rep. 6060, 6066 (Coeur d'Alene Tribal Ct. 1996).

192. *See* Rave v. Reynolds, 23 Indian L. Rep. 6150, 6158 (Winnebago Sup. Ct. 1996) (noting that because the tribe has adopted an adversary process, it is appropriate to adopt standing requirements which ensure that issues will be fully developed by parties who have a stake in the outcome). Standing doctrines are often invoked merely to establish that the plaintiff has standing. *See, e.g.*, Palmer v. Millard, 23 Indian L. Rep. 6094, 6097 (Colville Ct. App. 1996) (relying on Warth v. Selden, 422 U.S. 490 (1975) in finding the owner of dogs destroyed by the tribal police had standing to seek equitable relief for a violation of tribal civil rights).

Moreover, the court appealed to indigenous traditions of consensus decision-making as a basis for an arguably broader conception of standing than might be countenanced in federal court in holding that voters, citizens, and an association of concerned citizens could challenge a tribal election.[193]

As noted above, the application of federal standing doctrines in a particular tribal context may be unnecessary and may unduly restrict the opportunity for someone to air grievances. The Colville Tribal Court has applied federal standing doctrine in a case in which a less restrictive standard might have more properly fit the tribal context. In *Colville Confederated Tribes v. Timentwa*,[194] Judge Collins held that the defendant lacked standing to raise legal arguments in defense of the people who had signed agreements promising to assure that he would appear in court for his trial. The court applied United States Supreme Court precedents as persuasive, though not binding precedent.[195] The court held that the defendant's attorney had not made any showing that the defendant would suffer an immediate injury if the judgment of forfeiture was entered against his assurance signers.[196] Whether the defendant's arguments on the merits of why the signers should not have to forfeit bail, the court might well have permitted defendant's counsel to raise the issue on behalf of his relations had the court not adopted the restrictive standards of federal standing doctrine in which third parties can rarely raise the rights of others not before the court.[197]

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193. *See Rave*, 23 Indian L. Rep. at 6157. The court also argued in the alternative that even if federal standing doctrine were applicable in the Winnebago court, federal cases permitted expanded third-party standing in challenges to election procedures. *Id.* at 6159.

194. 23 Indian L. Rep. 6011 (Colville Tribal Ct. 1995) (Collins, J.) Without discussion, the Court applied the federal doctrine, merely stating that because the court must apply the laws of the Colville Tribes, it can only do so through the adjudication of cases or controversies. *Id.* at 6189.

195. *Timentwa*, 23 Indian L. Rep. at 6012. Although the discussion in Hoffman is not entirely clear, a later opinion by the Colville Court of Appeals panel of which Judge Collins was a member, stated that the tribal courts are not bound by the "limitations applicable to the federal courts through article III of the United States Constitution." Colville Confederated Tribes v. Coleman, 23 Indian L. Rep. 6188 (Colville Ct. App. 1996).

196. Apparently there was some discussion in court about the parties' relationship, but the opinion does not clarify the nature of the relationship. *Timentwa*, 23 Indian L. Rep. at 6012.

197. The court seemed to be concerned not to encourage defendants to enter into "unenforceable suretyship agreements" with PAA signers. This concern could be that the tribal code requires the PAA signers to be personally liable, without any recourse against the defendant on the theory that such a personal stake would impel them to work very hard to get the defendant to appear. *See id.* On the other hand, it is possible the court's reference is an elliptical reference to the tribe's statute of frauds, for such statutes typically contain a requirement that suretyship contracts be in writing to be enforceable and it is clear from the discussion that there was no written agreement between the defendant and the PAA signers. If this is the court's reasoning then it is misguided, because an agreement between a surety and the principal debtor for reimbursement is not within the typical statute of frauds provision as a "promise to answer for the debt of another."

c) Federal Law as the Rule of Decision

Tribes have asserted jurisdiction over cases involving interpretation of federal statutes on the theory that absent explicit congressional language making federal courts the exclusive forums, tribal courts are just as able, or sometimes better situated, to interpret federal law as federal and state courts. This does not mean the plaintiff always obtains a forum for a case based on federal law. As mentioned above, the Colville Tribal Court dismissed a tort claim against tribal police officers operating under a 638 contract on the grounds that the FTCA provided the exclusive remedy.[198] In *Estate of Tasunke Witko v. G. Heileman Brewing Co.*,[199] the Rosebud Sioux Supreme Court upheld the trial court's dismissal of a claim against the off-reservation defendants based on the Federal Indian Arts & Crafts Act because the federal law does not create a private cause of action, but instead relies on administrative enforcement. In *Dempsey v. Department of Public Health & Human Services*[200] the Confederated Salish and Kootenai Tribal court applied federal common law to decide that it had no authority to review state administrative proceedings dealing with Medicaid overcharges, even though the physician was an enrolled member of the tribe providing medical services to many tribal members. The lower court had upheld jurisdiction on the grounds that the tribal court had authority to interpret and enforce the contract the physician had entered into with the Medicaid program under *Williams v. Lee* and its progeny, because a state administrative determination would "[I]nfring[e] on the right of reservation Indians to make their own laws and be ruled by them."[201] Justice Wheelis, writing for the court of appeals, reversed the lower court on the grounds that the Medicaid statute was a "governing Act of Congress,"[202] creating a comprehensive system of rights and remedies premised on enforcement by a single state agency. The fact that the physician had signed a contract binding him to federal and state law, including state administrative rules, also weighed against tribal jurisdiction. In so doing, the court adopted an approach to preemption of tribal law followed in some, though not all federal circuits and criticized by some commentators as not required by Supreme Court precedents. Whether the decision in *Dempsey* is correct, it is a thoughtful opinion, and with greater attention given to the applicability of federal laws of general application to

198. *See supra* note 7 and text.

199. 23 Indian L. Rep. 6104 (Rosebud Sioux Sup. Ct. 1996).

200. 23 Indian L. Rep. 6101 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

201. Williams v. Lee, 358 U.S. 217, 220 (1959) (holding state court lacks jurisdiction over an action for debt incurred at a trading post operated by a non-Indian brought against a Navajo tribal member).

202. *Id.* at 223.

Indian reservations,[203] tribal court opinions taking the contrary view may well emerge.

On the other hand, two tribal courts in the sample have firmly rejected arguments that because a particular federal law is complicated or has never been invoked in tribal court, tribal courts lack adjudicatory jurisdiction. First, the estate of Tasunke Witko alleged that the marketers of Crazy Horse malt liquor engaged in false advertising in violation of the Lanham Act, a federal law that regulates trademarks.[204] The Rosebud Sioux Supreme Court, while noting that the resolution of the plaintiff's standing to raise a Lanham Act violation had not yet reached fruition, nevertheless held that the Estate had alleged sufficient facts to survive a motion to dismiss.[205] Second, the Coeur d'Alene Tribal Court interpreted the Indian Gaming Regulatory Act (IGRA) despite a claim by the defendant that the IGRA vests exclusive jurisdiction in the federal courts. This case, discussed earlier in the context of jurisdiction, held that the Tribe's national lottery did not violate the IGRA, for it was conducted pursuant to a tribal-state compact approved by the Secretary of the Interior and a tribal ordinance of which the National Indian Gaming Commission approved.[206] The Court also considered and rejected AT&T's argument that it was justified in withholding service under a federal statute requiring common carriers to withhold service to facilities violating Federal, state, or local law. In particular, AT&T argued that the national lottery violated a federal criminal law sanctioning "betting or wagering."[207] The court disagreed, interpreting the federal criminal statute as designed to control betting on sports events and thus harmonizing the law with IGRA.

Finally, the Indian Civil Rights Act is a federal statute applicable in tribal court.[208] Nevertheless, in interpreting this federal law, the courts increasingly look to tribal tradition, as noted above. In addition tribal civil rights cases are also based on tribal constitutions and civil rights acts. These cases are discussed separately below.

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203. For treatments of this issue, see Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (1994); Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991).

204. 15 U.S.C. § 1125(a) (1994).

205. *See* Estate of Tasunke Witko v. G. Heileman Brewing Co., 23 Indian L. Rep. 6104, 6113 (Rosebud Sioux Sup. Ct. 1996).

206. *See* Coeur d'Alene Tribe v. AT&T Corp., 23 Indian L. Rep. 6060, 6068 (Coeur d'Alene Tribal Ct. 1996).

207. *Id.* (citing 18 U.S.C. §§ 1084(a), (d) (1994)).

208. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) (holding that Congress has the authority to do so, but the Indian Civil Rights Act does not waive tribal sovereign immunity for suits against the tribe).

IV. The Hard Cases: Sovereign Immunity, Civil and Political Rights, and Non-Indian Parties

A. Sovereign Immunity

Sovereign immunity is a mixed constitutional, statutory and common law rule in federal courts. The doctrine is premised on the need to protect government coffers from what could be ruinous damage suits. In the pithy words of Judge Quinn of the Ho-Chunk Tribal Court, "It is the legislative and executive branches that deal with the nation's finances on a daily basis. It is not long ago that the only thing standing between the nation and bankruptcy was sovereign immunity."[209] Tribal courts' analysis of sovereign immunity, while a matter of tribal law, is infused by an appreciation for the federal common law regarding this doctrine. Nevertheless, tribes differ in the extent to which they adopt various federal common law doctrines. To oversimplify the analysis, I will describe this process as involving three steps. First, it is necessary to determine to what extent the tribe both claims sovereign immunity and waives it by the tribe's constitution, by tribal ordinance, or as a matter of tribal common law.[210] It is important to understand that some tribes extend sovereign immunity further than the federal government. For example, the Cheyenne River Sioux Tribe Law & Order Code § 1-8-4 extends the tribe's sovereign immunity to officers and employees, while the federal doctrine is understood as limited to the government or agencies of the government. As a result, parties can sue federal officers acting in their individual capacities for money damages in certain circumstances.[211] Recent federal court cases have held that tribes have the authority on their own to waive sovereign immunity,[212] although in *Jones v. Chitimacha Tribe*, Chief Judge Dela Houssaye opined that tribes may not waive sovereign immunity without congressional authorization, but found that authorization in the Indian Gaming Regulatory Act.[213] Although supported by 1940 opinion of the

209. Kingsley v. Ho-Chunk Nation, 23 Indian L. Rep. 6113, 6117 n.3 (Ho-Chunk Tribal Ct. 1996) (Quinn, J.).

210. Smith v. Confederated Salish & Kootenai Tribes, 23 Indian L. Rep. 6256, 6257 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (holding tribe possesses common law immunity).

211. *See, e.g.*, Butz v. Economou, 438 U.S. 478 (1978) (holding federal executive officers lack absolute sovereign immunity from lawsuit in their individual capacities).

212. *See* Wichita & Affiliated Tribes v. Hodel, 788 F.2d 765, 772 (D.C. Cir 1986) (collecting cases from four circuits agreeing that tribes can waive sovereign immunity).

213. Jones v. Chitimacha Tribe of Louisiana, 23 Indian L. Rep. 6225, 6226-28 (Chitimacha Ct. App. 1996). After finding congressional authorization for a tribal waiver, the court held that the tribal-state compact contained an express waiver of sovereign immunity up to the limits of the tribe's liability coverage. Although the tribe's constitution contained strict language that "[n]othing in these Codes shall be construed as consent of the Tribe to be sued," *id.* at 6226, the Court held that the tribal-state compact, which had been ratified by the tribal council and the general membership in an election (as is the practice with all tribal ordinances), was sufficient

Supreme Court,[214] this conclusion is not inevitable. Rather, most tribal courts assume that the tribe's inherent sovereignty includes the authority to waive sovereign immunity and certainly, permitting suits in tribal court would seem consistent with tribal policies of strengthening tribal courts and promoting self-determination in general.

Next, to determine what actions come within the waiver, one must study the tribal statutes carefully to determine to what extent the tribe has waived its sovereign immunity from suit in tribal court. Some tribal requirements are stricter than federal requirements. For example, the Cheyenne River Sioux Tribe Law and Order Code requires "a resolution or ordinance specifically referring" to sovereign immunity.[215] These statutory waivers are typically construed strictly[216] and are often regarded as jurisdictional.[217] Some tribes like the Fort Berthold Tribe, specifically waive sovereign immunity for Indian Civil Rights Act cases, but limit that waiver to injunctive or declaratory relief.[218] If a tribe has adopted a tort claims act, for example, it may have also adopted the many exceptions contained in federal or state tort claims acts. Like many states, tribal sovereign immunity ordinances may also limit damages. A frequent limitation is to the limits of the tribe's insurance policy.[219] The Mashantucket Pequot Tribe has adopted a provision limiting

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to waive immunity for claims arising out of Class III gaming. The Court also read the compact broadly to encompass not only persons injured at the casino but anyone whose injuries arise out of the operation of the casino, but nevertheless turned to Louisiana law providing immunity to vendors serving liquor for injuries caused by intoxicated patrons.

214. *See* United States v. U.S. Fidelity & Guar. Co., 309 U.S. 506, 512 (1940).

215. *See, e.g.*, Thompson v. Cheyenne River Sioux Tribe Bd. of Police Comm'rs, 23 Indian L. Rep. 6045, 6047-48 (Cheyenne River Sioux Ct. App. Ct. App. 1996) (quoting CHEYENNE RIVER SIOUX TRIBAL LAW & ORDER CODE § 1-8-4 and holding that the tribal employment ordinance does not waive sovereign immunity to review employment commission's decisions because the ordinance does not specifically use the term "sovereign immunity").

216. *See* Kizer v. Walker River Hous. Auth., 23 Indian L. Rep. 6214 (Inter-Tribal Ct. App. Nev. 1996) (holding that a "sue and be sued" clause in a tribal ordinance creating a housing authority did not waiver tribal sovereign immunity). This interpretation appears to be the consensus view. *Id.* at 6214-15.

217. *See, e.g.*, Jenkins v. Mashantucket Pequot Gaming Enter., 23 Indian L. Rep. 6015 & n.1, 6016 (Mashantucket Pequot Tribal Ct. 1993) (quoting tribal waiver ordinance and relying on federal and state law requiring strict construction of waivers of immunity). The tribe must raise sovereign immunity as an affirmative defense, however, or be held to have waived it. *See* Creapeau v. Ho-Chunk Nation-Rainbow Casino, 23 Indian L. Rep. 6078, 6080 (Ho-Chunk Tribal Ct. 1996) ("The issue of sovereign immunity was not raised as an affirmative defense and thus was waived.").

218. Hall v. Tribal Bus. Council, 23 Indian L. Rep. 6039, 6043 (Fort Berthold Dist. Ct. 1996) (Pommersheim, J.) (quoting THREE AFFILIATED TRIBAL CONST. art. IV, § 3(b) "grant[ing] the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act, 25 U.S.C. § 1301 [sic], including the award of injunctive relief only"); *see also* Palmer v. Millard, 23 Indian L. Rep. 6094 (Colville Ct. App. 1996) (holding Tribal Civil Rights Act waives sovereign immunity for injunctive and declaratory relief).

219. *See, e.g.*, Jones v. Chitimacha Tribe, 23 Indian L. Rep. 6225 (Chitimacha Ct. App.

damages to the actual damages suffered plus one-half of the actual damages for pain and suffering.[220]

Second, if the tribal council has not waived sovereign immunity, it is necessary to determine whether the *tribal court* has adopted any of the federal common law ameliorating doctrines, such as the *Ex parte Young*[221] doctrine permitting suits against federal officers seeking purely injunctive or declaratory relief and not affecting title to land, or *Bivens* actions for constitutional torts applied in Indian Civil Rights Actions.[222] The Ho-Chunk Tribal Court has held that while the tribal constitution provides that officers and employees are immune for actions taken in the scope of their duties, equitable relief is available for actions taken beyond the scope of their duties.[223] Many, but not all,[224] of the tribal courts studied follow the *Ex parte Young* doctrine, including the Winnebago Supreme Court in *Rave v. Reynolds*.[225] The *Rave* opinion contains an extensive review of tribal court cases and argues that tribes should distinguish between sovereign immunity, which does not normally attach to tribal officers, and official immunity, which

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1996) (tribal-state compact limits damages to limits of insurance policy); Kingsley v. Ho-Chunk Nation, 23 Indian L. Rep. 6113, 6117 & n.3 (Ho-Chunk Tribal Ct. 1996) (noting limitation to $2000 for back pay in employment cases and urging the legislature to increase the amount in light of the tribe's changed circumstances).

220. *See* Towpasz v. Mashantucket Pequot Gaming Enter., 23 Indian L. Rep. 6032 (Mashantucket Pequot Tribal Ct. 1994) (quoting Mashantucket Pequot Tribal Ordinance 011092-01, § 5(d) and noting that because plaintiffs medical expenses were limited to $57, his pain and suffering damages, if proven, would be negligible).

221. 209 U.S. 123 (1908).

222. Smith v. Confederated Salish & Kootenai Tribes, 23 Indian L. Rep. 6256, 6257 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (holding that tribal officers and employees can be sued for money damages for ICRA violations but have a good faith immunity, and relying on federal cases regarding official immunity in cases alleging constitutional torts). This case illustrates that the market works to provide incentives against tribal actions affecting a great deal of non-members. When the Lake County representative provided the one vote needed to defeat the tribe's efforts to obtain retrocession of jurisdiction from the State of Montana, the tribe removed its tribal bank accounts from local banks and authorized the tribe to participate in a voting rights/redistricting lawsuit. In addition, the tribal council countenanced distribution of a list of tribal businesses and the chairman made radio advertisements entreating consumers to support tribal businesses. Although Smith was a member of the tribe, this was not widely known. Although she asked that her name not be included, her name was published on the list. Unfortunately, as might be expected in the case of a highly allotted reservation, the tribal businesses lost customers. She brought suit against the tribe, but by the time the appellate court heard the appeal the economic sanctions had been lifted. Apparently the tribal initiative had worked perfectly perversely: non-Indians boycotted the tribal businesses.

223. Simplot v. Ho-Chunk Nation Dep't of Health, 23 Indian L. Rep. 6235 (Ho-Chunk Tribal Ct. 1996).

224. *See* Lovermi v. Miccosukee Tribe, 23 Indian L. Rep. 6090 (Miccosukee Tribal Ct. 1996) (dismissing suit for wrongful termination against tribe, officers, and agencies without discussing *Ex parte Young* exception with regard to tribal officers).

225. *See* Rave v. Reynolds, 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996) (announcing an emerging consensus among tribal courts and collecting cases).

provides a defense for officers to limit or avoid money damages in certain circumstances.[226] One suspects Chief Justice Clinton's background as a Federal Courts professor impelled him to attempt to straighten out a thorny and confusing area of Indian law. In addition, the court has gone beyond the federal doctrine, by permitting declaratory and injunctive relief against tribal *agencies* as well as officers, criticizing the United States Supreme Court's refusal to extend the doctrine to agencies as unduly formalistic.[227]

The third inquiry is whether Congress has abrogated the tribe's sovereign immunity from lawsuit. Some courts, like the Intertribal Court of Appeals of Nevada sitting in a case arising from the Walker River Paiute Tribe, have asserted that the ICRA by its own force becomes a part of the tribe's constitution and abrogates tribal sovereign immunity, at least for declaratory and injunctive relief in tribal court.[228] Many tribes have waived sovereign immunity for injunctive or declaratory relief in civil rights cases.[229]

B. Political Cases: Civil and Political Rights

1. Civil Rights

Of the eighty-five cases submitted to the *Indian Law Reporter*, twenty-two[230] raised civil rights questions. In eleven cases the tribal courts agreed

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226. *Id.* at 6161-64.

227. Thompson v. Cheyenne River Sioux Tribe Bd. of Police Comm'rs, 23 Indian L. Rep. 6045, 6049 (Cheyenne River Sioux Ct. App. 1996). The opinion contains a very scholarly exegesis on tribal sovereign immunity; the fact that two law professors with expertise in Indian law sit on the court of appeals may account for this scholarly tone.

228. Kizer v. Walker River Hous. Auth., 23 Indian L. Rep. 6214, 6215 (Inter-Tribal Ct. App. Nev. 1996); *cf.* Hall v. Tribal Business Council, 23 Indian L. Rep. 6039, 6043 (Fort Berthold Dist. Ct. 1996) (relying on constitution's waiver of sovereign immunity for ICRA cases).

229. *See, e.g.*, Palmer v. Millard, 23 Indian L. Rep. 6094, 6097 (Colville Ct. App. 1996) (noting that the tribal code waives sovereign immunity only for due process or equal protection claims).

230. Coeur d'Alene Tribe v. AT&T Corp., 23 Indian L. Rep. 6060 (Coeur d'Alene Tribal Ct. 1996) (determining that exercise of long-arm jurisdiction under tribal statute does not violate due process); Cholka v. Ho-Chunk Gaming Comm'n, 23 Indian L. Rep. 6075 (Ho-Chunk Tribal Ct. 1996) (affirming fine imposed upon employee for violating gaming statute, but reversing his suspension because the Commission had failed to give him proper notice of hearing and of the nature of his violation in violation of the tribal constitution's due process clause, and ordering the Commission to distribute a copy of the Gaming Ordinance (containing employment policies) to every employee lounge of every class II and class III gaming establishment so as to provide notice in the future); Coalition for Fair Gov't II v. Lowe, 23 Indian L. Rep. 6181 (Ho-Chunk Tribal Ct. 1996) (granting preliminary injunction restraining the election board from holding a special election to fill the seats of three tribal council members removed from the general council, noting probability of success on the merits of the allegation that removal violated the Constitution's requirement of notice and an opportunity to respond to charges of malfeasance before removal); Colville Confederated Tribes v. Wiley, 23 Indian L. Rep. 6037 (Colville Tribal Ct. 1996) (granting defendant's motion to dismiss a misdemeanor charge of possession of alcohol in an area where alcohol was prohibited on the grounds that defendant was prejudiced due to the insufficiency of the citation given him; citation did not state the essential elements of the charge

against him nor did it appraise him of the conduct which allegedly constituted a violation and therefore violated due process guarantees of the Tribal Code and the ICRA); Dorff v. Dorff, 23 Indian L. Rep. 6081 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (denying father in child support modification case an opportunity to appear pro se for an evidentiary hearing by long distance telephone even though the court had allowed him to do so at an earlier settlement conference violated due process); Hall v. Tribal Bus. Council, 23 Indian L. Rep. 6039 (Fort Berthold Dist. Ct. 1996) (holding that Tribal council must accord applicants for grazing units procedural due process, ordering the Council to meet in a special session to consider the plaintiffs' appeals, and further providing that any council member who has an interest in obtaining such permits are not to participate while dismissing plaintiffs' claim that not disqualifying tribal council members or their families from receiving grazing units violated equal protection on the grounds that making grazing units available to all was reasonable); Frost v. Southern Ute Tribal Council, 23 Indian L. Rep. 6135 (Southern Ute Tribal Ct. 1996) (denying motion for TRO to prevent council from instituting removal proceedings on grounds that enacting regulations governing removals after plaintiff was served with notice of removal is not a substantive action violating the guarantee against *ex post facto* laws in the ICRA and that the institution of removal action does not impermissibly single plaintiff out in violation of equal protection or deny him due process even if previous tribal council member convicted of a crime had not been removed); Hitchcock v. Shaver Mfg. Co., 23 Indian L. Rep. 6137 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (holding exercise of tribal jurisdiction over off-reservation defendant comports with the due process guarantees in the Tribal Code and the ICRA); Kizer v. Walker River Hous. Auth., 23 Indian L. Rep. 6214 (Inter-Tribal Ct. App. Nev. 1996) (holding that the ICRA waives tribal sovereign immunity from suit for claims of violation of due process and remanding for resolution of question whether termination of employment violated due process); Mississippi Band of Choctaw Indians v. Ben, 23 Indian L. Rep. 6119 (Miss. Choctaw Crim. Tribal Ct. 1996) (denying defendant council member's motion to dismiss criminal charges for unauthorized possession of documents noting that as member of council that enacted law defendant had notice of the law and the charges do not otherwise violate due process or equal protection); Palmer v. Millard, 23 Indian L. Rep. 6094 (Colville Ct. App. 1996) (destruction of appellant's dogs did not violate procedural due process; history of violence during previous 2 years and tribal ordinance providing that vicious dogs could be seized and destroyed put appellant on notice); Rave v. Reynolds, 23 Indian L. Rep. 6021 (Winnebago Tribal Ct. 1995) (invalidating tribal election on grounds tribal ordinance providing for "one person/one caucus" violated Winnebago Constitution's right of free speech and assembly), *rev'd*, Rave v. Reynolds, 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996) (holding tribal ordinance may not be wise but does not violate the tribal constitution); Simplot v. Ho-Chunk Nation Dep't of Health, 23 Indian L. Rep. 6235 (Ho-Chunk Tribal Ct. 1996) (invalidating termination of employees as violating procedural due process clause of the Ho-Chunk Constitution's Bill of Rights as well as the right to petition for redress of grievances, ordering employees reinstated with back pay and noting that the next phase of the employee's lawsuit will consider employee's claims of racial discrimination in violation of equal protection); Smith v. Confederated Salish & Kootenai Tribes, 23 Indian L. Rep. 6256 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (granting motion to dismiss ICRA claim on grounds sovereign immunity not waived, but noting that plaintiff can bring a suit against tribal officers if she can show Council policies violate federal law or the ICRA); Southern Ute Indian Tribe v. CHB, 23 Indian L. Rep. 6204 (Southern Ute Tribal Ct. 1996) (denying motion to dismiss charges against juvenile on grounds right to speedy trial not violated and noting that defendant's counsel had caused delay by requesting pre-trial conference); *In re* Estate of Tasunke Witko v. G. Heileman Brewing Co., 23 Indian L. Rep. 6104 (Rosebud Sioux Sup. Ct. 1996) (holding that application of tribal long-arm statute to off-reservation defendants does not violate the due process clauses of the Rosebud Sioux Constitution or the ICRA); Walker River Paiute Tribe v. Jake, 23 Indian L. Rep. 6204 (Walker River Tribal Ct. 1996) (dismissing criminal complaint without

with the party raising a civil rights claim. Many tribes have incorporated the ICRA into the tribal constitution[231] or the law and order code;[232] others have not, especially tribes that have not amended their constitutions since 1968, when Congress enacted ICRA. Thus, the issue can be discussed as a matter of tribal constitutional or statutory law,[233] of the ICRA alone,[234] or both.[235] Tribal courts need not give the same definition to the "majestic generalities"[236] of the ICRA's equal protection or due process clauses or the

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prejudice for procedural irregularities and for failure to bring defendant before a magistrate within 48 hours in violation of the ICRA warrant and probable cause provisions); Walker River Paiute Tribe v. Miller, 23 Indian L. Rep. 6207 (Walker River Tribal Ct. 1996) (dismissing complaints for lack of probable cause as required by the ICRA); Waters v. Colville Confederated Tribes, 23 Indian L. Rep. 612 (Colville Ct. App. 1996) (reversing conviction in domestic violence case on grounds of prosecutorial misconduct violating the due process and confrontation clauses of the ICRA and the Colville Tribe Civil Rights Act); Clown v. Coast to Coast, 23 Indian L. Rep. 6055 (Cheyenne River Sioux Ct. App. 1993) (holding that debt collection proceedings as a whole in a trial court in which neither party was represented by counsel violated the defendant's due process rights in violation of the ICRA and establishing guidelines to ensure due process in similar cases in the future); Brooks v. Yellow Cloud Residential Center, 23 Indian L. Rep. 6035 (Colville Admin. Ct. 1995) (employee termination without adequate notice of the nature of his violation violated due process); Colville Confederated Tribes v. Seymour, 23 Indian L. Rep. 6008 (Colville Ct. App. 1995) (affirming convictions for four misdemeanor offenses holding that due process under both the CTCRA and the ICRA includes the right not to be convicted while incompetent, but finding the trial judge's denial of the defendant's motions to continue trial and order a mental health exam or by determining defendant's competency to stand trial was not an abuse of discretion).

231. *See* Simplot v. Ho-Chunk Nation Dep't of Health, 23 Indian L. Rep. 6235 (Ho-Chunk Tribal Ct. 1996).

232. *See* Brooks v. Yellow Cloud Residential Ctr., 23 Indian L. Rep. 6035, (Colville Admin. Ct. 1995) (relying on due process and equal protection provisions of the Colville Tribe Law & Order Code).

233. *See* Elmer R. Rusco, *Civil Liberties Guarantees under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 290 (1989) (noting the many differences in coverage of tribal civil rights ordinances and constitutional provisions).

234. *See, e.g.*, Walker River Paiute v. Jake, 23 Indian L. Rep. 6204, 6206 (Walker River Tribal Ct. 1996) (applying the ICRA as mandatory law).

235. *See, e.g.*, Colville Confederated Tribes v. Seymour, 23 Indian L. Rep. 6008 (Colville Ct. App. 1995) (affirming misdemeanor conviction after analyzing the defendant's due process rights under both the tribal civil rights ordinance and the ICRA). The defendant had argued that the trial court abused its discretion in denying defendant's motions to continue trial and order a mental health exam and by determining defendant's competency to stand trial. In affirming the lower court, the appellate court held that the due process right to fair trial includes a right not to be convicted or sentenced while incompetent, but also considered state common law with regard to competency determinations and federal due process cases as guidelines. Rave v. Reynolds, 23 Indian L. Rep. 6021, 6023-24 (Winnebago Tribal Ct. 1995) (*Rave I*) (noting Winnebago Constitution incorporates the ICRA and contains a clause protecting free speech and assembly).

236. The phrase is Justice Jackson's and the full quotation is particularly apt in translating the bill of rights for the tribal context: "True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century is one to disturb self-confidence." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 639

more specific provisions such as the rights of free speech and association. Some tribal courts continue to resolve these issues by reference solely to Supreme Court precedents without a discussion of the applicability of these precedents to the tribe's particular context,[237] but there is a definite trend by tribal courts to assert that the tribe has leeway in interpreting these provisions.[238]

Hall v. Tribal Business Council[239] is illustrative. In *Hall*, the Fort Berthold District Court noted that in the context of Indian land, tribal member applicants for grazing unit leases have a due process right "to be treated culturally and legally with dignity and appropriate fairness," traditions that "are central to the history of the Three Affiliated Tribes."[240] Because these traditions create a legitimate expectation for all tribal members that they will be eligible for grazing leases, the *Hall* court held that this tradition created a property interest triggering the fair procedures required by the due process clause.[241]

(1943) (Jackson, J.) (invalidating a state board of education rule requiring students to salute the flag as violating the First and Fourteenth Amendments to the U.S. Constitution).

237. *See* Walker River Paiute Tribe v. Jake, 23 Indian L. Rep. 6204, 6206 (Walker River Tribal Ct. 1996) (holding that since the warrant and probable cause provisions of the ICRA are based on the fourth amendment to the U.S. Constitution, Supreme Court precedent requiring that defendant be promptly brought before a neutral magistrate for a probable cause determination is binding on tribal courts).

238. Of the tribal courts studied who reached this question, the courts of the Colville, Cheyenne River Sioux, Three Affiliated Tribes of the Fort Berthold Reservation, Rosebud Sioux, Winnebago, and Ho-Chunk tribes concluded that the tribal courts need not follow the U.S. Supreme Court precedents "jot-for-jot."

239. Hall v. Tribal Bus. Council, 23 Indian L. Rep. 6039 (Fort Berthold Dist. Ct. 1996).

240. *See id.* at 6042.

241. *Id.* The Burger and Rehnquist Courts tightened up procedural due process analysis considerably by requiring a finding that the petitioner has been deprived of a constitutional or state-created liberty or property interest in order to be entitled to any procedural due process. *See* Board of Regents v. Roth, 408 U.S. 564 (1972) (requiring property interest to be a legitimate claim of entitlement grounded in state law); Paul v. Davis, 424 U.S. 693 (1976) (holding that reputation alone is not a sufficient liberty interest unless damage to reputation has a tangible result, such as loss of property). Certainly tribal courts need not be as strict and could, for example, adopt a much more flexible procedural due process analysis permitting consideration of whether procedures are fair whenever a petitioner asserts a relationship with the government such that denial of fair procedures might interfere with her liberty interest broadly defined. The Supreme Court's concern not to turn every public employment decision into a federal case should not prevent tribes from being open to procedural due process claims in tribal courts. Other tribal courts have adopted the "liberty-property" requirement. *See* Rave v. Reynolds, 23 Indian L. Rep. 6150, 6168 (Winnebago Sup. Ct. 1996) (holding that candidates disqualified by caucuses held in violation of tribal election rule had no expectancy interest under tribal law in a position on the ballot, relying on federal cases requiring establishment of interference with liberty or property interest); Simplot v. Ho-Chunk Nation Dep't of Health, 23 Indian L. Rep. 6235, 6240 (Ho-Chunk Tribal Ct. 1996) (adopting *Roth* analysis, but finding personnel manual created expectations of continued employment qualifying as a property right).

Even in cases in which the tribal court ultimately decides to adopt the Supreme Court's precedents, it generally will note that it is not bound to follow this precedent but chooses to do so because the case before it fits the precedent. In *Clown v. Coast to Coast*, the Cheyenne River Sioux Tribe held that the proceedings in the trial court, when taken as a whole, violated plaintiff's due process rights in violation of the ICRA.[242] The court noted that although the procedures in tribal civil cases where parties represent themselves may be less formal than otherwise and may be based on an inquisitorial, rather than adversarial format, parties must still be treated fairly and equally and be given a full, fair and meaningful opportunity to be heard.[243] The defendant debtor, a member of the tribal council, had represented himself *pro se*, as had the plaintiff. The court of appeals noted that the trial court had become too embroiled in questioning the defendant and concluded that the number of errors effectively deprived the plaintiff of due process rights. In dicta, the *Clown* Court established a laundry list of guidelines applicable to subsequent cases to protect *pro se* litigants.[244]

Finally, in some opinions, tribal courts put the burden on counsel to object to the Supreme Court precedents. Generally, these courts will apply the Supreme Court precedents if counsel does not argue that the court should interpret a tribal civil rights clause differently from the Supreme Court's interpretation of the federal constitution. Such was the approach of the Winnebago Court of Appeals in *Rave*.[245]

Civil rights cases most often involved due process issues, with a few cases raising equal protection issues and one a free speech and assembly issue. *Simplot v. Ho-Chunk Nation Department of Health*[246] is particularly noteworthy, because the Nation's Department of Health dismissed the plaintiffs, non-Indians, based upon an oral reorganization plan that had apparently issued from the Tribal President's office. The non-Indian employees argued that abolishing their positions while leaving the positions of Indian colleagues intact violated procedural due process and equal protection. Chief Trial Judge Butterfield granted summary judgment for the plaintiffs, holding that the Department denied the plaintiff employees due process when it did not follow any of its own policies with regard to reorganizations, did not inform the plaintiffs about bumping rights, and barred the employees from pursuing an administrative process.[247] The court ordered

242. Clown v. Coast-to-Coast, 23 Indian L. Rep. 6055 (Cheyenne River Sioux Tribal Ct. App. 1993).

243. *Id.* at 6058.

244. *Id.* at 6058-59. The guidelines included requirements that the court explain the nature and procedural course of the proceedings, indicate to the parties their right to question witnesses, present their own case, and to have the court itself question witnesses. *Id.*

245. *See generally*, Rave v. Reynolds, 23 Indian L. Rep. 6021 (Winnebago Tribal Ct. 1995).

246. 23 Indian L. Rep. 6235 (Ho-Chunk Tribal Ct. 1996).

247. *Id.* at 6243. The reorganization had been ordered by the tribal president. Since the

the plaintiffs to be reinstated, their sick leave and seniority restored, and awarded each of them the damages permitted ($2000) under the limited waiver of sovereign immunity in the tribe's employment ordinance. Significantly, Judge Butterfield ordered the payment of these damages out of the President's budget. Judge Butterfield also pointedly noted that if the employees were successful in proving racial discrimination other monetary relief may be available.[248]

2. Political Cases

I use the term "political cases" broadly, to include cases adjudicating the rights of tribal members as citizens, such as voting rights, and those involving the structure of government, or clashes between branches of government, but not to sweep in all cases that may be political in the sense that the court's ruling may be controversial.

The opinions studied contained many political cases, with the main opinions discussing: (1) the authority of the judiciary to review legislative acts; (2) the separation of powers between the legislature and the courts; and (3) election disputes. These opinions indicate that to the extent tribes have incorporated separation of powers into their constitutions or judicial ordinances, tribal courts are addressing questions about the appropriate role of the tribal councils and the courts and asserting the power of judicial review.

Judicial review is a relatively new phenomenon in tribal courts.[249] Most tribal constitutions did not contain provisions separating and dividing powers, but created a council system of government modeled more on municipal governments than state or federal governments.[250] Under this system, the Council may have executive, judicial and legislative powers.[251] The Tribal Chair is an elective position, but is also the chair of the council, taking part

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employees' salaries were covered by 638 contracts, the court held that lack of funds could not have been the reason for the layoff. *Id.* at 6242. The trial had been bifurcated, with the racial discrimination claims set to be resolved in the next phase of the trial. *Id.* at 6236.

248. In Phase II of the trial dealing with the discrimination claim, the court will determine the extent to which the Department of Health waived sovereign immunity for racial discrimination claims in its 638 contract with the Indian Health Service. *Id.* at 6243.

249. The first case asserting judicial review was *Halona v. MacDonald*, 1 Navajo Rptr. 189 (1978), in which the Navajo Court asserted judicial review even though the tribe has no written constitution. *See* Alvin J. Ziontz, *After Martinez: Indian Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1, 20-25 (1979) (discussing the background and aftermath of this path-breaking case).

250. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 16, at 36-37 (noting the tribes' reliance on the dictates of the BIA and the concern about lack of resources to maintain separate departments).

251. *See* Ziontz, *supra* note 249, at 10-33 (describing central role of tribal council and noting that the BIA constitutions provided for creation of tribal judiciaries only if the council so decided).

in enacting legislation. Tribal judges are usually appointed by the councils, although they are elected in some tribes. Critics of tribal courts often point to the fact that tribal courts may lack the authority to invalidate tribal legislative or executive action. The trend in tribal court development, clearly favored by the Congress and the Bureau of Indian Affairs, is to insulate tribal judges from reprisals through contracts for a term, terminable only for cause, and providing for judicial review of legislative acts.[252]

Several of the reported cases addressed the duty of the court to interpret the law. In *Thompson v. Cheyenne River Sioux Tribe Bd. of Police Commissioners*,[253] the trial court had remanded to the Police Commission to obtain Tribal Council interpretation of an ambiguous ordinance. The question was whether the ordinance's barring employment of police officers with arrest records applied to detention officers. The court of appeals reversed, holding the remand violated separation of powers principles of the Tribal Constitution. The Court noted that the tribal courts should not avoid their obligation to decide the law because statutory interpretation is the very "essence of the judicial function."[254] Even without such a statute, however, tribes have taken a leaf from Justice Marshall's opinion in *Marbury v. Madison*[255] to interpret the tribal constitution,[256] tribal statutes,[257] or tribal traditions[258] as

252. These criticisms have come from within and without. For example, in 1978 a comprehensive study of tribal courts by the National American Indian Court Judges Association reported that the constitutions of only three out of 23 courts surveyed provided for separation of powers. INDIAN COURTS AND THE FUTURE, *supra* note 52, at 40. The Report called for greater independence of the tribal judiciary. *Id.* at 115. The 1991 Report of the Civil Rights Commission also concluded that an independent judiciary was crucial to the development and acceptance of tribal courts by Indian people as well as outsiders. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 16, at 44-51. It is notable that this Commission, widely regarded as hostile to tribal justice systems, specifically urged Congress not to impose separation of powers or judicial review on the tribal governments because of the need for flexibility among tribes and the lack of funding for tribal judiciaries. *Id.* at 51.

253. 23 Indian L. Rep. 6045 (Cheyenne River Sioux Ct. App. 1996).

254. *Id.* at 6051. The appellate court also voiced separation of powers concerns, noting that the tribal court's deference to the Council could be viewed as an attempt to coerce the Council into taking action, which would interfere with the proper sphere of the Tribal Council's authority.

255. 5 U.S. (1 Cranch) 137 (1803).

256. *See* Coalition for Fair Gov't II v. Lowe, 23 Indian L. Rep. 6181, 6184 (Ho-Chunk Tribal Ct. 1996). The Ho-Chunk Tribal Court nowhere cited *Marbury v. Madison*, but relied on the tribal constitution's supremacy clause and a clause providing that the General Council of the Tribe has authority to reverse decisions of the judiciary in non-constitutional cases only as imposing upon the courts the "responsibility of interpreting the constitution." The Ho-Chunk Tribal Court also relied on a classic Marshallian argument from consequences by stating: "[T]o give the interpretation urged by the defendant would essentially destroy the constitution by holding that the constitution means whatever the general council [sic] says it means." *Id.*; *cf. Marbury*, 5 U.S. at 178-180 (listing the parade of horribles resulting if the Congress could enact clearly unconstitutional laws). The Ho-Chunk Constitution does contain clear authority for judicial review, however. *See* Simplot v. Ho-Chunk Nation Dep't of Health, 23 Indian L. Rep. 6235, 6237 (Ho-Chunk Tribal Ct. 1996) (quoting Ho-Chunk Nation Constitution, art. VII, § 6(b)

providing for judicial review.

Although tribal courts in some opinions merely flexed their muscles,[259] so to speak, by noting that the judiciary possessed the power to invalidate tribal ordinances, two of the cases, *Colville Confederated Tribes v. Meusy*,[260] and *Rave v. Reynolds*,[261] invalidated tribal ordinances, although the later case was overturned on appeal,[262] and one imposed procedures for distributing grazing unit leases on the Tribal Council.[263] In *Meusy*, the tribal court invalidated a legislative response to an earlier tribal court opinion, *Colville Confederated Tribes v. Tatshama*,[264] refusing to grant deferred prosecution to criminal defendants on the grounds that the court could not create deferred prosecution, a creature of statute, without violating the Colville Constitution's

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("[t]he Trial Court shall have the power to declare the laws of the Ho-Chunk Nation void if such laws are not in agreement with this Constitution."); *see also* Colville Confederated Tribes v. Meusy, 23 Indian L. Rep. 6223, 6224 n.3 (Colville Tribal Ct. 1996) (relying on the court's constitutional authority to "interpret and enforce the laws" as providing for judicial review and asserting "if, after careful research and consideration an entire law, or a portion thereof, is found to be constitutionally invalid, this court will not hesitate to render an opinion to that effect").

257. *See, e.g.*, Rave v. Reynolds, 23 Indian L. Rep. 6150, 6160 (Winnebago Sup. Ct. 1996) (quoting tribal code provision granting courts authority to review legislative actions alleged to violate the Constitution or the ICRA).

258. *See e.g.*, Colville Confederated Tribes v. Meusy, 23 Indian L. Rep. 6223, 6224 n.3 (Colville Tribal Ct. 1996) (citing an earlier Colville tribal court case establishing court had authority to review tribal statutes even before the tribal Constitution had been amended to provide for separation of powers and citing *Marbury v. Madison*). The Navajo Court adopted the principal of judicial review in *Halone v. McDonald*, known as the *Marbury v. Madison* of the Navajo Nation. *See* Ziontz, *supra* note 249, at 20-25.

259. *See e.g.*, Watts v. Sloan, 23 Indian L. Rep. 6033 (Navajo Sup. Ct. 1995). In deciding that the two-year tort statute of limitations should apply for legal malpractice and dismissing the claim as untimely, the Navajo Supreme Court noted that the tribal council has provided that a cause of action for legal malpractice against an attorney employed by the Navajo Nation may lie only when authorized by a Council committee, and noted pointedly that "there may be a problem with a political body addressing the legal question of whether a cause of action should lie." *Id.* at 6034.

260. 23 Indian L. Rep. 6223 (Colville Tribal Ct. 1996) (invalidating the Tribe's deferred prosecution ordinance because by dictating that the Court shall grant deferred prosecutions when they are presented by the tribe, the ordinance is an unconstitutional violation of separation of powers principles in the Colville Constitution).

261. 23 Indian L. Rep. 6021 (Winnebago Tribal Ct. 1995) (invalidating tribal election on grounds tribal ordinance providing for "one person/one caucus" violated Winnebago Constitution's right of free speech and assembly).

262. Rave v. Reynolds, 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996) (holding tribal ordinance may not be wise but does not violate the tribal constitution) (Rave I).

263. *See* Hall v. Tribal Business Council, 23 Indian L. Rep. 6039 (Fort Berthold Dist. Ct. 1996) (holding the distribution violated the due process provision of the ICRA and ordering the tribal council to hold a special session to consider the plaintiffs' appeals of the denials of their permits and that tribal members with an interest in obtaining permits be barred from participation).

264. 23 Indian L. Rep. 6211, 6212 n.8 (Colville Tribal Ct. 1996).

separation of powers provisions.[265] After the tribal council responded by providing for deferred prosecution, the court held that the council had gone too far in the other direction by requiring the court to grant deferred prosecution when requested by the tribal prosecutor because the resolution did not permit the court any discretion in an inherently judicial arena and thus authorizes the tribal council to determine the outcome of a case. The court thus invalidated the tribal resolution as impermissibly intruding on the authority of the judiciary under the Colville Constitution.[266]

Opinions of tribes with separation of powers provisions in their constitutions addressed other separation of powers principles.[267] Several opinions referred to the political question doctrine, a doctrine requiring federal courts to abstain from deciding issues committed by the text of the constitution to a coordinate branch of government for final decision. This argument was raised in two election cases, *Rave v. Reynolds*,[268] and *Coalition for Fair Government II v. Lowe*,[269] and a case challenging the removal of a tribal officer, *Frost v. Southern Ute Tribal Council*.[270] Like their federal counterparts, tribal courts considering this doctrine have rejected its application to prevent the court from adjudicating cases with political issues. Furthermore, the issue of whether a particular issue in fact raises a political question doctrine issue requires an interpretation of the tribal constitution peculiarly within the court's province.[271]

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265. *Id.*

266. *Meusy*, 23 Indian L. Rep. at 6225.

267. The Mississippi Choctaw Criminal Court was asked to create a legislative immunity for acts of council members within council chambers in a case in which a council member had been indicted for unauthorized possession of casino documents which had, apparently, been given to council members to examine in a council meeting on the condition that they would be immediately returned after review. The court refused to create an immunity and held that the law barring theft of official documents applies to all members of the tribe. *See* Mississippi Band of Choctaw Indians v. Ben, 23 Indian L. Rep. 6119 (Miss. Choctaw Crim. Tribal Ct. 1996). The court does not discuss the tribal constitution, however, but relied on the absence of any provisions in the law granting immunity, thus showing a hesitation to overstep the judicial role).

268. 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996).

269. 23 Indian L. Rep. 6181 (Ho-Chunk Tribal Ct. 1996).

270. 23 Indian L. Rep. 6135 (Southern Ute Tribal Ct. 1996).

271. *See* Coalition for Fair Gov't II v. Lowe, 23 Indian L. Rep. 6181 (Ho-Chunk Tribal Ct. 1996) (rejecting the argument that the General Council, the tribe's legislative body, comprised of all tribal members, has the paramount power over all branches and the sole right to determine what constitutes malfeasance for purposes of removing a council member from office, noting that the Ho-Chunk Constitution gives the judiciary sole power to interpret the constitution). The Ho-Chunk Tribal Court rejected the political question doctrine as a "prudential rule established by the U.S. Supreme Court to govern its dealings with the U.S. Constitution [and] not binding on the Ho-Chunk Nation's interpretation of the Ho-Chunk Constitution." *Id.* At 6185. *But see* Frost v. Southern Ute Tribal Council, 23 Indian L. Rep. 6135, 6136 (Southern Ute Tribal Ct. 1996) (denying motion for temporary restraining order to prevent council from instituting removal proceedings, but noting that if in removal hearing the council accords the council member appropriate procedures, the court will not review the merits as the question is "entirely within the

The most interesting political cases, however, are those arising in the context of election disputes or allegations of impropriety against tribal officers.

Rave v. Reynolds[272] has been mentioned several times in this survey. These cases involved a challenge to a tribal council election in which a tribal council member, who was also a candidate for an upcoming election, made a motion for and voted in favor of disqualifying other candidates for the same election. In the first case, a special (pro tem) court invalidated a section of a tribal ordinance which stated that "[n]o one person shall attend or vote at more than one Caucus,"[273] as violative of the Winnebago Constitution's guarantee of free speech and assembly. The court also established a conflict of interest standard for tribal council members who are candidates in upcoming elections. Most significantly, the Court declared invalid the election result for having involved a possible conflict of interest and ordered a new election.[274] The day after the Court issued its order, the courthouse was destroyed by fire.

The Winnebago Supreme Court reversed. The Supreme Court's discussion of tribal sovereign immunity has been noted above.[275] On the merits, the Court applied an intermediate standard of review to assess the argument that the "one vote-one caucus" rule violated the freedom of association clause of the Indian Civil Rights Act. Under this analysis, the court concluded that the rule, although open to abuse and unwise, fell short of violating the Winnebago constitution and further held that the Council Member's participation in the vote to disqualify the candidates from the tainted caucus did not violate the procedural rights of the removed candidates under the due process clause. An innovation employed by the Supreme Court was to provide a syllabus of this complicated opinion, thus making the points in the opinion more accessible to the tribal community.

Coalition for a Fair Government II v. Lowe[276] involved an attempt to remove several council members during a very short-held quorum of the Ho-Chunk Tribe. The Tribe's General Council is comprised of all eligible voters,

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discretion of the tribal council").

272. 23 Indian L. Rep. 6021 (Winnebago Tribal Ct. 1995), *rev'd*, Rave v. Reynolds, 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996).

273. *Id.* at 6024 (quoting Winnebago Tribal Ordinance No. 5, § 1(E) (1994)).

274. *Id.* at 6025.

275. *See supra* note 214 and accompanying text. The Winnebago Supreme Court held that the lower court did not have jurisdiction to declare the election result invalid because of the elected council member's burglary conviction because the Tribal Code provided for the writ of *quo warranto* as the exclusive method of removing a tribal officer not seated in conformity with tribal law. Since the 30 days had passed within which the writ could be filed, the tribal court could rule on the legality of council actions, but could not order the removal of a tribal official. *Rave*, 23 Indian L. Rep. at 6160. The Court also interpreted amendment XV of the Tribal Constitution as not disqualifying someone from serving on the tribal council who had been convicted of a crime before election to office. *Id.* at 6171-72.

276. 23 Indian L. Rep. 6181, 6182 (Ho-Chunk Tribal Ct. 1996).

of whom 20% must be present in order to constitute a quorum. Apparently it has always been difficult for the Council to maintain a quorum and since the percentage was raised from 10 to 20% in the 1994 Constitution, a quorum has rarely been achieved. According to the court, no General Council has held a quorum for more than one hour, until the meeting at which a vote was taken to remove three members of the Council.[277] The Ho-Chunk Supreme court granted a preliminary injunction to postpone the special election called to fill the council members' seats, finding that the ousted council members had a likelihood of success on the merits that their removal violated due process.[278]

In *Frost v. Southern Ute Tribal Council*,[279] the tribal court denied a council member's application for a motion for a temporary restraining order to prevent the tribal council from beginning removal proceedings against him. The council member argued that he could only be removed for commission of a felony after taking office, which had not occurred and that the council's enacting regulations governing notice and procedures to be applied in removal cases *after* he was served with notice of removal violated the ex post facto provision of the ICRA and his right to due process. The Southern Ute tribal court rejected these arguments, relying first, on language in article V of the Southern Ute Constitution providing for discretionary removal of a council member upon the affirmative vote of four tribal council members, and, second, that enacting procedures for removal after he was given notice did not violate the guarantee against ex post facto laws in the ICRA or otherwise deny him due process.

3. The Rights of Non-Indian Parties

As noted above, critics of tribal courts make the basic assumption that non-Indians, in particularly white people, will not get a fair trial in tribal courts. One method by which Indian tribes seek to establish their legitimacy in the eyes of non-Indians is by adopting Western structures and processes and by treating outsiders fairly in whatever process is applied.

As this paper demonstrates, most tribal courts are largely indistinguishable in structure and process from state and federal courts. Some tribes have adopted courts that are in almost every respect identical to state courts for cases primarily involving non-Indians. The gaming tribes in the sample have chosen this path not only because of the great number of non-Indian participants and the envy and distrust of some neighboring communities, but also as a way to gain trust and confidence from surrounding jurisdictions. While adopting many of the state court system rules and structures, however, these tribes have created court systems that serve tribal interests by limiting damages (common in many state courts) and by refusing to adopt Anglo court

277. *Id.*
278. *Id.*
279. 23 Indian L. Rep. 6135 (Southern Ute Tribal Ct. 1996).

procedures that are not deemed helpful, such as the jury system for civil trials.

Tribes operating Westernized courts may also operate alternate systems of justice. Robert Porter urges tribes to focus more energy on recreating traditional court systems but to retain westernized court systems for cases involving non-Indians.[280] Some tribes have begun creating or recreating traditional court systems, such as the Navajo Peacemaker court. The Mohegan Tribe is in the process of setting up a Council of Elders, for example. In addition many informal nonjudicial dispute mechanisms exist in tribes and operate without burdening or invoking the formal tribal court system.

The second way to gain legitimacy is to treat outsiders fairly. My survey of these eighty-five cases indicates that tribal court judges work hard to make the tribal judicial system fair for all parties appearing before them. There have been and will be cases in which non-Indian parties are mistreated by the process; tribal judges are not immune from the rule that all judges are human. In this admittedly limited sample, however, the tribe does not always win against the individual, and the tribal member does not always defeat the non-Indian.

It would probably surprise Mr. Gamache and Senator Gorton that non-Indians are plaintiffs or defendants in eighteen of the cases studied and probably parties in nineteen others. Yet these non-Indian parties were treated fairly. In *Simplot v. Ho-Chunk Nation*, the court ordered non-Indian employees reinstated because their termination violated the Indian Civil Rights Act. In *Bartell v. Navajo Nation*, the court's ruling favored the insurance company defendant by limiting the damages that could be assessed. Non-Indians collect debts owed by Indian debtors in tribal courts, even when those debtors are members of the tribal council, *Clown v. Coast to Coast.* Tribal people also win, such as a journalist who was awarded $200,000 in damages for permanent injuries suffered in an automobile accident, *Bick v. Pierce.*

Conclusion

As with many other issues in Indian Law, the public opinion of tribal courts can be distorted by ignorance. Although federal and state courts often err in decision making, these errors are often overlooked and explained away by the old adage — hard cases make bad law. While the verdict in the O.J. Simpson trial was decried by many as an extreme injustice, no one argued that the California judicial system should be abolished.

Condemnation before adjudication, however, comes easy for critics of tribal courts as exemplified by Senator Gorton's and Mr. Gamache's biased and unsubstantiated reactions to tribal courts and their decisions. As demonstrated

280. Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997).

through this relatively small sample of tribal court cases, the tribal courts, although forced to engraft Western legal principles onto their consensual form of decision making, have been highly successful in doing so. In part, this is because they are sensitive to the potential loss of their independent adjudicatory systems if they were to overstep the boundaries placed upon them by the Congress and the courts, and in part because they have had to become adept at melding the traditions and customs of their cultures with those legal principles guiding the majority culture. Unlike their critics, tribal courts do not dismiss the well-reasoned opinions of the majority culture's courts but choose, instead, to use these Western principles with their own customary and traditional norms.

This ability to combine the principles of the majority and minority cultures is one that the dominant society should respect and honor. Unfortunately, this respect is not possible without these opinions being available to scholars, legislators, courts, and majority and minority communities. Not only will a wider distribution and coverage of tribal court opinions serve to eradicate misconceptions, it may also serve to allow for a critical dialogue with these opinions without eradication of the courts themselves.