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Tribal Jurisprudence and Cultural Meanings of the Family

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I. INTRODUCTION

Clifford Geertz has observed that law is "a distinctive manner of imagining the real."[1] Geertz's use of the verb "imagining" conveys the idea that law is an agent of culture, an ongoing manifestation of a society's attempts to meet its changing needs, rather than a static

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1. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 184 (1983). Similarly, Jacques Lacan used the concept of imagination in his psychoanalytic theories, suggesting that that which one imagines forms part of one's concept of self. In Lacan's vision, the law helps construct the self, and the subject objectifies the self in law. *See* DAVID S. CAUDILL, LACAN AND THE SUBJECT OF LAW: TOWARD A PSYCHOANALYTIC CRITICAL LEGAL THEORY 67-69 (1997).

structure existing independent of culture.[2] "Culture," of course, can no longer be viewed as a monolithic personality characterizing a particular society. In our post-modern world, scholars have tried to avoid cultural descriptions that essentialize diverse groups of people or that overlook the tensions and contradictions within a particular "culture."[3] But the inseparability of law and culture today is beyond debate. Indeed, Robert Cover aptly described the connection: "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning .... Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live."[4] The narratives of law are not just reflective but also constitutive of the culture in which they are found.[5]

Through law, as a tool of culture, peoples can differentiate themselves from others and, in so doing, strengthen group identity. Rosemary Coombe has noted that "[c]ulture is the concept that consolidates and naturalizes distinctions between self and other, but it also *makes* others other. It constructs, produces, and maintains the differences it purports merely to explain."[6] When a separate culture exists within a dominant, larger culture, differences serve to reinforce the former's identity, and the differences may be celebrated and promoted for that reason. Indeed, if the survival of the minority culture is threatened — either internally or externally — its leaders may emphasize existing differences and find new ways of defining the minority culture as distinct.[7]

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2. According to Geertz, law is "local knowledge; local not just as to place, time, class, and variety of issue, but as to accent-vernacular characterizations of what happens connected to vernacular imaginings of what can." GEERTZ, *supra* note 1, at 215.
3. *See* Robert Brightman, *Forget Culture: Replacement, Transcendence, Relexification*, 10 CULTURAL ANTHROPOLOGY 509 (1995)(listing critical attitudes toward concept of culture in discipline of anthropology in last two decades).
4. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).
5. Geertz further explained,

> [L]aw rather than a mere technical add-on to a morally (or immorally) finished society, is, along of course with a whole range of other cultural realities from the symbolics of faith to the means of production, an active part of it .... Law ... is, in a word, constructive; in another, constitutive; in a third, formational.

GEERTZ, *supra* note 1, at 218.
6. Rosemary J. Coombe, *Contingent Articulations: A Critical Cultural Studies of Law*, *in* LAW IN THE DOMAINS OF CULTURE 32 (Austin Sarat & Thomas R. Kearns eds., 1998).
7. My colleague Leslye Obiora has written about this phenomenon at the international level. *See* L. Amede Obiora, *Feminism, Globalization and Culture: After Beijing*, 4 IND. J. OF GLOBAL LEGAL STUD. 355 (1997). The article addresses the impact of globalization on third world countries and suggests that the rise of fundamentalism is a response to the threatened homogenization of culture through international norms.

Today, a call for cultural renewal and resurgence can be heard clearly within the court systems of American Indian tribes. Weaving strands from native culture, tribal law, Western culture, and Anglo-American law, tribal judges are producing distinct tapestries of jurisprudence.[8] Tribal court opinions reveal efforts by their authors to imbue the evolving law with cultural meaning.[9] As the Chief Justice of the Ho-Chunk Nation Supreme Court put it, the use of tribal traditions and customs "is an aspect of tribal judiciaries which we must nurture and strengthen. It is a method of memorializing our traditions and customs while dispensing justice. And the use of traditions and customs legitimates them for the world outside of our tribal judiciaries."[10] In a similar vein, the Colville Court of Appeals recently remarked on the responsibility that rests on tribal judges: "[I]n our

8. Gloria Valencia-Weber has eloquently described the process of "adoption, adaptation, and appropriation" through which Indian tribes have drawn on an amalgam of non-Indian as well as Indian concepts of fashioning a unique jurisprudence. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 260-61 (1994). The process of selecting and applying tribal custom is, of course, delicate and requires great sensitivity from tribal judges. *See* Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot From the Field*, 21 VT. L. REV. 7, 26-28 (1996) [hereinafter Pommersheim, *Snapshot*]. According to Professor Pommersheim:

> Regardless of the final pattern, this pattern of stitching the cultural past into the judicial present has thoughtfully begun with both zest and caution. The process has set its eyes firmly on the objective of seeking to realize ancient values in contemporary settings: not as museum exercises, but so a people might flourish.

Id. at 27.

9. In that sense, tribal judges might be seen as representing the indigenous imagination. According to the gifted writer Sherman Alexie, survival for the American Indian requires "Anger x Imagination. Imagination is the only weapon on the reservation." SHERMAN ALEXIE, THE LONE RANGER AND TONTO FISTFIGHT IN HEAVEN 150 (1993). Similarly, for tribal judges, the pronouncement of rules that are compatible with the tribe's cultural markers may require imagination. Recognizing and celebrating this creative function of tribal jurisprudence, Gloria Valencia-Weber has characterized tribal courts as "the premier part of the indigenous nation's laboratory." Valencia-Weber, *supra* note 8, at 261; *see also* Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections From the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 479 (1999)[hereinafter Pommersheim, *Coyote Paradox*].

10. Mary Jo B. Hunter, *Tribal Court Opinions: Justice and Legitimacy*, 8 KAN. J.L. & PUB. POL'Y 142, 146 (1999). Similarly, Judge Lorene Ferguson of the Navajo District Court, whose docket includes criminal cases and family law disputes, has remarked that in her work, she must discover and apply Navajo customs and traditions, even though she operates within a judicial system that has been shaped largely by Anglo norms. She explains that the task of applying tribal custom is often complicated by the need to justify decisions on grounds that will be acceptable to outsiders. *See* Judge Lorene Ferguson, Keynote Address, International Society of Family Law, North American Regional Conference (June 12, 1999). The same point has been made by other tribal judges. *See, e.g.*, B.J. Jones, *Tribal Courts: Protectors of the Native Paradigm of Justice*, 10 ST. THOMAS L. REV. 87, 87, 92 (1997)(observing that tribal judges must incorporate tradition "in

court system the cultural approach has been eroded and largely replaced by the non-Indian court system. Because of this, it is the trial judge's heightened responsibility to maintain the cultural milieu of the proceedings before it."[11] Likewise, Indian law scholars are urging tribal courts to intensify their discovery and use of cultural traditions. In the powerful words of Gloria Valencia-Weber, tribal courts are a place where "legal warriors" can ensure the survival of a tribe's cultural heritage.[12] Frank Pommersheim has characterized tribal court jurisprudence as "an act of culture," and has urged tribal judges to educate their audience about basic tribal law and traditional tribal values.[13] More pointedly, Russel Barsh has warned tribal judges that they should redirect their attention from seeking external legitimacy to strengthening their internal authority "as representatives of distinctly indigenous, *tribal* conceptions of justice."[14]

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order to maintain internal credibility" while simultaneously utilizing the "anglo paradigms of justice" in order to appease the non-Indian judicial world).

11. Sonnenberg v. Colville Tribal Court, 26 Indian L. Rptr. 6073, 6074 (Conf. Tribes of Colville Res. Ct. App. 1999)(announcing "abuse of discretion" standard for review of tribal trial court orders imposing sanctions for untimely actions).

12. Valencia-Weber, *supra* note 8, at 256 (describing the "creative capacity of tribal courts, shown through the legal-warriors who use the old to make new and appropriate law").

13. Frank Pommersheim, *What Must be Done To Achieve The Vision of the Twenty-First Century Tribal Judiciary*, 7 KAN. J.L. & PUB. POL'Y 8, 13 (1997)[hereinafter Pommersheim, *What Must be Done*]. Pommersheim similarly characterizes tribal court jurisprudence as "narrative" through which the words chosen by tribal judges tell a story of sovereignty and the vindication of particular values. *Id.*; *see also* Pommersheim, *Coyote Paradox, supra* note 9, at 456 (describing the contours of a model tribal court jurisprudence as including culture, narrative, a literacy primer, "the extended hand," and a guide to standards of review). Similarly, a tribal judge for both the Sisseton-Wahpeton Tribal Court and for the Turtle Mountain Chippewa Tribal Court of Appeals has observed that "[t]ribal courts, perhaps more than any tribal institution other than educational programs, are in a unique position to rediscover tribal customs and traditions as a manner of resolving disputes and reintegrating those values into modern Indian life." B.J. Jones, *Welcoming Tribal Courts Into The Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV 457, 475 (1998)[hereinafter Jones, *Welcoming Tribal Courts*].

14. Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL'Y 74, 89 (1999). Barsh's article contains a survey of tribal court opinions across a variety of topics during a six year period. *See id.* at 77-81. Among the tribes surveyed, the Navajo Nation courts made the most use of traditional principles as an alternative paradigm of justice. *See id.* at 83. According to Barsh, the tribal judges of many other tribes were reluctant to use local tradition and culture and relied, instead, on principles of federal and state law. Barsh believes that assimilationist tendencies among tribal courts have weakened or obscured the possibilities of indigenous jurisprudence. *See id.* at 86. In his view, the proliferation of Western-trained, non-Indian judges in tribal courts has diminished the internal credibility of the tribal judicial system, and he would like to see tribes curtail their desire for legitimacy in Western terms. *See id.* at 89. Thus, one of Barsh's recommendations is that tribes make greater use of tribal

This Article explores the ways in which Indian tribal judges are constituting their tribe's unique culture through jurisprudential "weavings" in the realm of family dispute resolution.[15] Part II describes the history of tribal courts in this country and the contemporary characteristics of many such judiciaries. In addition, Part II highlights the vast differences among modern tribal courts, but also suggests that many tribes share common values regarding the cultural role of dispute resolution. Part III briefly explores the incorporation of custom and tradition into judicial decision making by tribal courts, including the methods by which traditions are proven and the difficulties inherent in a court's reliance on unwritten customary law. Finally, Part IV analyzes a range of published family law opinions from the judiciaries of diverse tribes, with an emphasis on issues as to which tribal law offers an approach or resolution that is distinct from that found in Anglo-American law. In particular, the prominent child-rearing role of the extended family in the tradition of many Indian tribes offers a vivid contrast with the dominant society's emphasis on parental autonomy — recently reaffirmed by the United States Supreme Court in *Troxel v. Granville*.[16] The Supreme Court's constitu-

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members as judges — "men and women who have learned [tribal norms] by living them." *Id.* at 86.

15. In contrast to the self-conscious attention to culture that one often finds in the opinions of tribal judges, the opinions of state and federal courts rarely acknowledge the constitutive dimension of adjudication. In Anglo-American jurisprudence, natural rights rhetoric may have given way to a rhetoric of rationality and efficiency, but the structure and style of written decisions still suggest that holdings are preordained by a legal standard that is implicitly removed from debate. *See* RICHARD A. POSNER, OVERCOMING LAW 109-44 (1995)(describing stylistic conventions of written adjudication in American law); Carol S. Steiker, *Pretoria, Not Peoria S v. Makwanyane and Another, 1995 (3) SA 391*, 74 TEX. L. REV. 1285, 1288 (1996)(contrasting the transparent jurisprudence of the South African Constitutional Court with American judges' "post-Realist anxiety" that has led either to formalism or to flat announcements of decisions without explanation); Larry Cata Backer, *Chroniclers in the Field of Cultural Production: Courts, Law, and the Interpretive Process*, 20 B.C. THIRD WORLD L.J. 291 (2000)(suggesting that, contrary to modernist views, courts function as chroniclers of cultural norms). While state and federal judges often acknowledge that the application of a certain rule to resolve a case will have an impact on society, such acknowledgements typically do not concede that the very act of adjudication itself is an act of culture-making. Instead, their judicial opinions assume a shared set of values and reach results that purport to best serve those values. For a discussion of this aspect of adjudication in the context of family law, see Carol Weisbrod, *On The Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989), noting complexity and diversity of messages conveyed by American family law. Ronald Dworkin's "Hercules" is perhaps the idealized image of such a judge — "a lawyer of superhuman skill, learning, patience and acumen" who can identify abstract and concrete principles to provide a coherent justification for his decision making, whether statutory or common law. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105 (1984).

16. 120 S. Ct. 2054 (2000), discussed *infra* notes 289-312 and accompanying text.

tional approach in *Troxel* and contrasting decisions from several tribal courts are explored in detail in Part IV.

I have written elsewhere about the complexities of tribal court jurisdiction and have argued for the recognition of a paramount tribal role in resolving custody disputes involving Indian children.[17] In those analyses, I have assumed that respect for the jurisdiction of tribal courts is important, in part, because of the unique cultural orientation that tribal courts bring to dispute resolution. This Article puts jurisdictional ambiguity aside and focuses instead on the substantive decision making of tribal courts. In other words, this Article goes beyond the assumptions in my previous work and asks whether tribal court adjudication is in fact different from dominant society adjudication in disputes involving children. This Article discusses selected opinions that reveal the judges' efforts to formulate a rule of decision that is consistent with their particular tribe's cultural constellation.

The law of family relations provides a rich area for study because it so visibly implicates cultural values and is the area most frequently associated in the case law with the perpetuation of tribal custom and tradition.[18] Indeed, tribes tend to view the regulation of family relations as lying at the core of tribal sovereignty.[19] Moreover, the con-

17. *See* Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051 (1989)(proposing a jurisdictional approach that gives deference to the tribal role in child custody litigation where sufficient connection between participants and tribe exists)[hereinafter Atwood, *Jurisdictional Ambiguity*]; Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power Over Children*, 83 MINN. L. REV. 927 (1999)(describing impact of majoritarian law on tribal jurisdictional rules in child custody disputes)[hereinafter Atwood, *Identity and Assimilation*].

18. *See* Barsh, *supra* at note 14, at 82-83 (in survey of tribal court opinions and sources of law, "traditional principles" were most frequently "invoked in cases involving property rights, family relationships, and due process"); Daniel L. Lowery, *Note — Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. INDIAN L. REV. 379, 402 (1993)(noting that among cases surveyed that applied Navajo common law, majority were in family law area); *see also* Billie v. Abbott, 16 Indian L. Rptr. 6021, 6024 (Navajo 1988)("Navajo domestic relations, such as divorce or child support, is an area where Navajo traditions are the strongest.").

19. As noted by the Navajo Supreme Court, regulation of internal family matters is at the "core of the tribe's 'internal and social relations.'" *Billie*, 16 Indian L. Rptr. at 6022. The court in *Billie* emphasized the essential role played by tribal courts in the perpetuation of tribal culture:

> Navajo statutes and case law reflect Navajo culture and the unique circumstances and needs of the Navajo people living on the reservation. State determinations of tribal domestic relations, no matter how narrow the intrusion, is [sic] always hostile to and in conflict with the needs of the Indian people .... A further danger is that state decisions on Navajo domestic relations may cause a decline in Navajo court authority over Navajos and over Navajo domestic relations.

Id. at 6023 (citations omitted). One year later, the court again remarked that "[r]egulation of marriages, an integral part of the Navajo Nation's right to govern

temporary Anglo-American law of parent-child relations is a dynamic template of social and cultural change and provides an illuminating basis of comparison. In tribal decisions, one can find a similarly dynamic jurisprudence situated within diverse cultural milieus. In the selected cases, both the substantive principles and the methodologies employed by the judges are often distinct from one another and from those within the dominant judicial system. The words employed in the tribal decisions suggest that the authors are acutely aware of their role in constructing and perpetuating culture.[20] Indeed, while the influence of dominant society law is ubiquitous, tribal court opinions reflect the judges' efforts to create a unique *tribal* jurisprudence.

Identifying and analyzing the contributions of tribal courts to the law of parent-child relations is valuable for multiple reasons. First, although interest is growing, there are still relatively few scholarly analyses of tribal court jurisprudence.[21] The Anglo-American world

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its territory and protect its citizens, should be free from the reach of state and foreign law. The Navajo Nation must regulate all domestic relations within its jurisdiction if sovereignty has any meaning." *In re* Francisco, 16 Indian L. Rptr. 6113, 6115 (Navajo 1989). A similar regard for the fundamental importance of tribal authority over the domestic relations of tribal members fueled the United States Supreme Court's decision in *Fisher v. District Court*, 424 U.S. 382 (1976), holding that the tribe had exclusive jurisdiction over a custody dispute between an Indian mother and Indian foster mother, each of whom resided on the reservation. Moreover, a clear message of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1923 (1994), is that tribal survival depends on the right of Indian tribes to determine the welfare of Indian children.

20. The self-conscious creation of culture that one finds in tribal court opinions demonstrates the expressive function of law, as described by Professor Milton Regan, among others:

> [L]aw does not simply establish incentives and disincentives for various forms of behavior. It also helps constitute a cultural world by investing it with moral meaning. It expresses what is valuable and what is not, what merits praise and what deserves blame, and what we may reasonably expect from one another .... In other words, law has the potential to serve as an element of socialization.

Milton C. Regan, Jr., *How Does Law Matter?*, 1 GREEN BAG 2d 265, 271 (1998). Although tribal judges seem fully aware of their role in constituting culture, sometimes the expressive function of law is lost on other lawmakers. *See* Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936 (1991).

21. While important legal scholarship about the work of tribal courts has appeared in recent years, the overall quantity of scholarship remains slim. For a description of case law generated by twenty Indian tribal courts over the course of a year, see Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998). Her study reveals the complexity of the issues faced by tribal judges, the sophistication of their legal analysis, and the interplay of customary and traditional law in the decisionmaking. *See id.* Another recent treatment of tribal opinions is Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 AM. J. COMP. L. 509 (1998)[hereinafter Cooter & Fikentscher, *Part II*]. Based on comprehensive field research and examination of

should not turn its back on the "extended hand"[22] that offers insights and contrasting philosophies from the tribal bench.[23] By its very difference, a tribe's view can illuminate unstated assumptions that inform dominant society adjudication. Moreover, a tribe's conception of the parent-child relation may differ markedly from the dominant society's vision, and tribal viewpoints about family dispute resolution may offer alternatives that could be adapted to the dominant society context.[24]

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tribal court decision-making, the study concludes that there is, indeed, a distinctive common law developing in tribal courts that draws on the social norms and customs of the particular tribe. *See id.* at 562-63; *see also* Robert Laurence, *Dominant Society Law and Tribal Court Adjudication*, 25 N.M. L. REV. 1 (1995)(contrasting between formalistic dominant-society law and tribal law in selected areas); Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligation: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1 (1993)(studying property, tort, family law, and contract issues in Navajo court opinions); Antoinette Sedillo Lopez, *Evolving Indigenous Law: Navajo Marriage-Cultural Traditions and Modern Challenges*, 17 ARIZ. J. INT'L COMP. L. 283 (2000)(recounting history of tribal customary marriage and impact of Anglo-American marriage norms); Valencia-Weber, *supra* note 8 (studying invocation of tribal custom and tradition by tribal judges); 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 Native and Anglo-American perspectives on domestic violence); James W. Zion & Elsie B. Zion, *Hozho'Sokee'-Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407 (1993)(exploring Navajo responses to family violence) Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17 (1997)(describing indigenous concepts of justice). In disciplines outside of law, the lack of scholarly analyses of tribal courts has also been noted. *See, e.g.*, Susan E. Grogan, *The Blackfeet Tribal Court*, 21 LEGAL STUD. F. 486, 496 (1997)(criticizing lack of interest among political scientists in the work of American Indian tribal courts).

The relative inaccessibility of tribal court decisions is one explanation for the dearth of scholarship about tribal jurisprudence. At present, a loose-leaf service known as the *Indian Law Reporter* publishes tribal opinions that are submitted to it, the Navajo Nation publishes its own opinions as the Navajo Reports, and a narrow computerized data base, "Okla. Trib.," exists on Westlaw covering tribal courts in Oklahoma. Others have decried the problem of inaccessibility and have pressed for greater dissemination of tribal opinions. *See* Newton, *supra*, at 289-295.

22. Pommersheim, *Coyote Paradox*, *supra* note 9, at 459. Pommersheim notes, conversely, that a tribe's failure to engage in such judicial dialogue will likely lead to greater willingness by dominant courts to ignore tribal court decision-making. *See id.*

23. In a revealing omission, the *Family Law Quarterly*, published by the American Bar Association, did not devote a single page to tribal jurisprudence in its recent millennial issue on family law. *See* ABA, *Millennium Issue: Family Law At The End of The Twentieth Century*, 33 FAM. L. Q. 435-863 (1999).

24. Occasionally, critics of Anglo-American family law have pointed to longstanding practices in American Indian communities to support particular reforms. *See, e.g.*, David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 831 (1999)(describing traditional Indian adoption practices as support for proposal for open adoption). Of course, tradi-

So long as outsiders remain ignorant of what is happening in tribal courts, the view of tribal courts as an inferior system of justice will continue.[25] As with most unknowns, greater knowledge of tribal court opinions should lead to greater respect for tribal jurisprudence.[26] Concomitantly, to the extent that Anglo-American judges exhibit knowledge of, and respect for, tribal courts' decision making, tribal judges may be more willing to engage in a productive dialogue and to share their adjudication with the world beyond reservations' borders.

II. TRIBAL COURTS

Tribal courts, as we know them today, are a modern invention often bearing a greater superficial resemblance to Anglo-American courts operating outside Indian country than to the judicial systems that operated within tribes historically. Although justice systems existed within tribes in pre-colonial times, much of what has been written about such systems is anthropological speculation. Nevertheless, a few generalized remarks are in order since modern day conclusions about indigenous justice are frequently embraced in the written decisions of tribal courts.

Most scholars agree that indigenous justice systems, whatever their form, were most likely shaped by the singular importance of group cohesion.[27] Dispute resolution itself may have been a unifying

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tional practices that are dependent on a particular tribe's world view cannot necessarily be transplanted to the non-Native context. *See* Carol E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1004-05, 1018-19 (1997). Insights gleaned from traditional practices, however, may benefit decision makers in non-Native courts.

25. *See* Frank Pommersheim & Terry Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D. L. REV. 553, 566-67 (1986).

26. Others have noted that when the work of tribal courts has been examined, the result is new-found respect for the strengths of tribal justice systems. *See* Newton, *supra* note 21, at 287-90 (observing that even investigations begun "with hostile intent have ended by stressing strengths of tribal courts," lack of pervasive bias, and need for funding). Interestingly, congressional hearings held at the behest of legislators in recent years seeking to curtail tribal authority have led more often to legislation designed to strengthen tribal justice systems. Most significant is the Indian Tribal Justice Act of 1993, 25 U.S.C. §§ 3601-3631 (1994). In the initial findings of the Act, Congress declared that "tribal justice systems are an essential part of tribal governments," that "traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes," and that tribal courts are inadequately funded. 25 U.S.C. § 3601. Unfortunately, Congress has not yet appropriated the funding promised by the Act. *See* Tom Tso, *Indian Nations and the Human Right to an Independent Judiciary*, 3 N.Y. CITY L. REV. 105, 112 (1998).

27. *See* SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENT 201-02 (1989); Steven M. Karr, *Now We Have Forgotten the Old Indian Law: Choctaw Culture and the Evolution of Corporal Punishment*, 23 AM. INDIAN L. REV. 409, 410 (1999).

force in the formation of communities, bands, or tribes among pre-literate Indians.[28] Moreover, dispute resolution may have been integrally linked to tribal identity: a person was identified "as a tribal member by identifying with the consensual group."[29] Even today the clan system within many tribes regulates the behavior of its members, determining "which group an individual may join for social activities, which political positions one may hold, whom one may marry, or what property one may own."[30] Many of the customary sanctions identified with indigenous justice reflect the importance of the tribal community, such as public ridicule or shaming, restitution, community service, withdrawal of citizenship rights, and temporary or permanent banishment.[31]

A tribe's cultural values inextricably determined its system of justice. Anthropological work among many American Indian tribes suggests that the goals of tribal dispute resolution historically were to

28. *See* Fredric Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 994-96 (1991).

29. *Id.* at 996. The Cheyenne, for example, viewed the killing of one tribal member by another as a sin that bloodied the Sacred Arrows and endangered the people, a crime against the nation. It has been observed that "[m]uch of the crystallization of Cheyenne community consciousness into political reality was due to the action of this social catalytic." K. N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY 132 (1941).

30. Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 131-32 (1995)(referring to the clan system among Pueblo communities). As Melton put it, "The interlocking relationships in tribal communities often determines the flow of how problems are handled." *Id.* at 132. Russel Barsh has similarly observed:

> At the Sun Dance with its circle of tipis, or the seating arrangements of a Wapenaki, Hodenosaunee or Pacific Northwest longhouse, each family and clan is distinct, and located in a fixed relationship to all the others. A system of "tribal" law aims to repair any breaches in the web of counterbalancing rights and duties, and necessarily relies on the cooperation of litigants.

Barsh, *supra* note 14, at 76.

31. *See* Melton, *supra* note 30, at 132. The restoration of harmony and balance manifested itself in the use of restitution as the traditional remedy for rape, robbery, seduction, theft, trespass, and homicide among the Navajo. *See* 2 DAN VICENTI, THE LAW OF THE PEOPLE: DINE' BIBEE HAZ'AANII 159 (1972); *In re* D.P., 3 Navajo Rptr. 255, 257 (Crownpoint Ct. 1982)(recognizing that restitution was traditional remedy that allowed offender to return to community by "making good his or her wrong"). Banishment from the tribe — the ultimate punishment — stripped the person of his fundamental identity as tribal member. LLEWELLYN & HOEBEL, *supra* note 29, at 133; *see also* Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 138 (1995)(observing that in traditional Apache society, "capital punishment" consisted of exile and that shame was the principal instrument of punishment). Banishment may have been a traditional punishment of the Tlingit tribe. *See* Karen Alexander, *Tlingits Split on Ruling*, SEATTLE TIMES, Sept. 14, 1995, at B1.

repair relationships and reestablish harmony in the community.[32] Traditional methods of dispute resolution were often mediative rather than adjudicative, with participation from various tribal members depending on the tribe, including chiefs, elders, clan members, medicine men, or blood relatives.[33] In a recent work, Professor Ragsdale has extrapolated from the basic values of the prehistoric Anasazi Indians to construct a model of Anasazi jurisprudence.[34] In Ragsdale's creative vision, Anasazi jurisprudence must have contained the elements of balance and harmony, community and collectivism, and a reverential regard for nature. Although we can speculate about notions of restitution and duties of reciprocity, the precise shape of that early jurisprudence remains unclear.

In contrast to the foundation of pre-colonial tribal justice systems, most contemporary tribal courts trace their roots ironically to a federal program designed to eliminate tribalism. Although traditional methods of dispute resolution have prospered in a few tribes, most notably the Iroquois Peacemakers' Court and the religious courts of the Pueblos, modern tribal justice systems had their genesis in the Courts of Indian Offenses, established in the late nineteenth century as a part of the Bureau of Indian Affairs' assimilationist program for reser-

32. *See, e.g.*, CLYDE KLUCKHOHN & DOROTHY LEIGHTON, THE NAVAJO 85-86 (rev. ed. 1974)(reporting that Navajo custom emphasized reconciliation in family disputes); JOHN PHILLIP REID, A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION 30-31 (1970)(describing traditional Cherokee emphasis on maintaining communal harmony); PAUL A.W. WALLACE, THE WHITE ROOTS OF PEACE (1946)(recounting tradition of Great Law of Peace within Seneca Nation); JAMES WILSON, THE EARTH SHALL WEEP 54 (1999)(describing emphasis on reciprocity, balance, and restoration of equilibrium in traditional approaches to conflict among Northern tribes). According to one study of tribal justice systems, "[u]nder the traditional Indian [adjudicatory] system the major objective was more to ensure restitution and compensation that retribution. . . . In most instances the system attempted to compensate the victim and his or her family and to solve the problem in such a manner that all could forgive and forget and continue to live within the tribal society in harmony with one another." VINE DELORIA, JR. & CLIFFORD LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 111, 112 (1983).

33. *See* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287, 299 (1998)[hereinafter Cooter & Fikentscher, *Part I*]. Sharp differences exist between traditional mediation within indigenous dispute resolution and modern mediation within dominant justice systems. In particular, indigenous forms of mediation generally use an individual who is connected to the parties by familial or clan relationship rather than an "objective" outsider. Also, extended family members often participate in the traditional mediation process, and the desired outcome is heavily influenced by cultural norms, such as a tribal belief in the value of consensus, balance, and harmony. *See* Zion & Zion, *supra* note 21, at 424-25.

34. *See* John W. Ragsdale, Jr., *Anasazi Jurisprudence*, 22 AM. INDIAN L. REV. 393 (1998).

vations.[35] During that era, when the allotment system of the Dawes Act was waging its frontal attack on tribal identity,[36] these courts were operated by "hand-picked Indians" who served as police and judges.[37] The Courts of Indian Offenses, also known as "CFR courts" because they operated under guidelines set forth in the *Code of Federal Regulations*,[38] have been characterized by critics as "instruments of cultural oppression"[39] because of their use of criminal sanctions to impose dominant cultural norms on tribal peoples.[40] In particular, in an effort to assimilate the Indian people into both the religious and jurisprudential mainstream of American society, important Indian customs and spiritual practices were outlawed and violations were punished by the CFR courts.[41] Non-Indians could consent to civil jurisdiction but could not be compelled to appear in such courts against their will. Significantly, this restriction still appears in the present *Code of Indian Offenses*,[42] although such a categorical exclusion is plainly at odds with current understandings of tribal sovereignty.[43]

35. *See* DELORIA & LYTLE, *supra* note 32, at 113-116; Newton, *supra* note 21, at 291. The colonialist objective of these courts is made clear in the description by a nineteenth century federal judge:

> These "courts of Indian offenses" are not the constitutional courts provided for in section 1, art. 3, Const., which Congress only has the power to "ordain and establish," but mere educational and disciplinary instrumentalities by which the Government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.

United States v. Clapox, 35 F. 575, 577 (D. Or. 1888).

36. *See* The General Allotment Act of 1887, Ch. 119, 24 Stat. 388, (known as the Dawes Act because of its sponsorship by Senator Dawes); *see generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

37. *See* Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future*, 79 JUDICATURE 147 (1995).

38. Although Congress never expressly authorized these courts, their legality was initially sustained under the general authority of the Secretary of the Interior over Indian affairs. *Clapox*, 35 F. at 576-77. In light of later congressional appropriations of money and explicit mentions of the courts by statute, it is clear that Congress has ratified their existence. *See* Snyder Act, 25 U.S.C. § 13 (1994)(allowing for expenditure of congressional appropriations by the BIA for Indian courts and personnel); *see generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 333 (1982).

39. DELORIA & LYTLE, *supra* note 32, at 115.

40. *See* Newton, *supra* note 21, at 291.

41. *See* Myers & Coochise, *supra* note 37.

42. *See* 25 C.F.R. § 11.103 (1997).

43. While the Supreme Court has delimited tribal civil jurisdiction over nonmembers, see for example *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), it has consistently acknowledged that some measure of civil jurisdiction over nonmembers is essential to the concept of tribal sovereignty. *See, e.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987)(recognizing that civil jurisdiction of tribal courts may

At their zenith, the CFR courts operated on about two-thirds of all reservations and typically exercised civil as well as criminal jurisdiction over Indian defendants.[44]

The Courts of Indian Offenses continued as the instruments of the Bureau of Indian Affairs ("BIA") control until the 1930's when the failure of assimilation as federal policy was clear.[45] With the passage of the Indian Reorganization Act of 1934 ("IRA"),[46] the federal government, for the first time, gave its imprimatur to tribes to create and operate their own judicial systems.[47] The emergence of these modern tribal courts occurred hand-in-hand with the introduction of codified law on Indian reservations. Written laws, of course, were not a part of the legal culture of traditional Native societies. Tribal codes and constitutions are largely an innovation of the twentieth century, many appearing after the passage of the IRA. The IRA was part of the reform agenda of John Collier, Commissioner of Indian Affairs under President Roosevelt.[48] Through the IRA, Collier hoped to promote the values of social harmony and community that he had observed in various tribes, especially among the Pueblo of the Southwest, and he wanted the Act to provide a mechanism for tribes to function as governmental units within the larger society.[49] The statute, which fell vastly short of Collier's goals,[50] enabled tribes to organize their governments, draft their own constitutions, enact their own laws, and establish their own court systems. The BIA, however, did most of the drafting and produced "standard 'boilerplate' constitutions . . . based on federal constitutional and common law notions rather than on tribal custom."[51] These documents, in turn, were subject to the approval

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extend to non-Indians, and requiring litigant to exhaust tribal remedies before challenging tribe's jurisdiction in federal court); *see generally* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1 (1999)[hereinafter Frickey, *Judicial Divestiture*].

44. *See* DELORIA & LYTLE, *supra* note 32, at 115; James R. Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. PUB. L. 311, 321 (1969).

45. *See generally* JANET MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN 1887-1934 (1991).

46. Act of June 18, 1934, 25 U.S.C. §§ 461-479 (1994).

47. *See* 25 C.F.R. 11 (1997)(providing substantive and procedural law for tribal courts); *see generally* DELORIA & LYTLE, *supra* note 32, at 12-15.

48. *See* COHEN, *supra* note 38, at 333-34.

49. *See* ROBERT F. BERKHOFER, JR., THE WHITE MAN'S INDIAN 178-79 (1978); JOHN COLLIER, FROM EVERY ZENITH: A MEMOIR AND SOME ESSAYS ON LIFE AND THOUGHT 126, 176-84 (1963).

50. *See* BERKHOFER, JR., *supra* note 49, at 182-86 (explaining ways in which Congress eliminated themes of self-determination and cultural perpetuation from the Act and made tribal powers of self-government dependent on approval by the Secretary of Interior).

51. *Id.* at 149; Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 712 (1989).

of the Secretary of Interior, a signal of such subordinate status that some tribes, including the Navajo, rejected the Act.[52]

The model constitutions, interestingly, did not include any provision for separation of powers or a Bill of Rights, two omissions for which tribes have been unjustly criticized.[53] In subsequent years, certain tribes adopted a separation of powers ideology, either *de jure* or *de facto*, and their courts have exercised the power of judicial review.[54] The separation of powers doctrine, however, is not necessarily suited to every tribe's traditional conception of governmental power.[55] Indeed, some tribes, including the Navajo Nation, have never adopted a constitution. The omission of a Bill of Rights from the original BIA-drafted constitutions has been largely "corrected" by the enactment of the Indian Civil Rights Act ("ICRA").[56] The ICRA, in turn, generated vehement criticism from tribal spokespersons who resented the imposition of Anglo-American civil libertarian values upon Native societies.[57]

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52. During the two-year period provided by the IRA, during which tribes could indicate their acceptance of the federal reorganization, almost one-third of the total Indian tribes recognized at that point in time rejected the statutory plan. *See* DELORIA & LYTLE, *supra* note 32, at 100. Furthermore, even those tribes who organized under the IRA have undergone a gradual "metamorphosis" such that their contemporary governmental structures and legal systems are uniquely powerful. *Id.* at 105. The Navajo nation, widely viewed as possessing the most sophisticated tribal court system in the country, did not establish its modern judicial system until 1959. *See* Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 230 (1989)[hereinafter Tso, *Decision Making*].

53. *See* Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393, 396-97 (1991-92)[hereinafter Pommersheim, *Constitutional Adjudication*].

54. *See* A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 44-51 (1991)[hereinafter UNITED STATES COMMISSION ON CIVIL RIGHTS].

55. *See generally* Brandfon, *supra* note 28, at 1006-09 (noting that separation of powers is a concept alien to Indian society and that adoption of judicial review would shift power from tribal councils to tribal courts); *see also* Pommersheim, *Snapshot, supra* note 8, at 14-16.

56. *See* Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1994); SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COST OF SEPARATE JUSTICE (1978)(observing that the ICRA resulted from concern that Indians' civil rights were often denied by tribal courts); Pommersheim, *Constitutional Adjudication, supra* note 53, at 396-97.

57. *See, e.g., Rights of Members of Indian Tribes: Hearing on H.R. 15419 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong. 127 (1968)(statement of John S. Boyden on behalf of Ute and Hopi Tribes referring to "white man's justice"); *see generally Amendments to the Indian Bill of Rights: Hearing on Title II on the Civil Rights Act of 1968 Before the Subcomm. on Constitutional Rights of the Senate Comm. On the Judiciary*, 91st Cong. (1969); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 469-70 (1998).

While a number of Indian tribes created governmental structures independent of federal policy, most followed the design of the Indian Reorganization Act.[58] The IRA framework provided that tribal courts must obey the tribal constitution and apply laws enacted by the tribal council. Not surprisingly, because Indian tribes had to obtain permission from the Department of Interior to supplant the CFR structure with their own code, many tribes adopted codes modeled closely after the existing BIA guidelines.[59] Consequently, many of the constitutional and statutory provisions contained in modern tribal codes resemble laws adopted for the former Courts of Indian Offenses.[60] In the decades since the enactment of the IRA, as federal policy gradually moved from a focus on the termination and assimilation of tribes to the current approach of tribal self-determination,[61] numerous tribes have revised and expanded their written laws and refined their court systems to more clearly reflect their tribal identity.[62] Nevertheless, tribal courts still face challenges to their legitimacy from tribal members who view them as "white man's tools."[63]

58. *See* DELORIA & LYTLE, *supra* note 32, at 99-105. According to Charles Wilkerson, "[a]bout half of the tribes in the lower forty-eight states have constitutions approved by the Bureau of Indian Affairs (BIA) pursuant to the Indian Reorganization Act." CHARLES WILKERSON, AMERICAN INDIANS, TIME, AND THE LAW 7 (1987). Other tribes operate under independently drafted constitutions, and a few, such as "the Yakima and the Navajo, have no written constitutions at all." *Id.*

59. *See* Resnik, *supra* note 51, at 712-13; Jones, *Welcoming Tribal Courts, supra* note 13, at 470-71.

60. *See, e.g.*, 25 C.F.R. 11.103 (1997).

61. *See generally* COHEN, *supra* note 38, at 47 (dividing federal policy into discrete phases, including the Formative Years, the era of Allotments and Assimilation, the period of Indian Reorganization, the era of Termination, and finally the era of Self-Determination). Vine Deloria, Jr., offers an alternative historical perspective. In Deloria's view, federal Indian law began with a treaty-making period when the United States attempted to divest tribes of as much land as possible, followed by a "prolonged experiment in social engineering" during which the federal government tried to eliminate tribes by vesting private property in the hands of individual tribal members, followed by a period of self-government for tribes, and culminating today in a period of "negotiated settlements." Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 204-05 (1989).

62. For a description of the evolution of a tribe's judicial system from a Court of Indian Offenses to an independent tribal court, see *Cole v. Kaw Housing Authority*, 4 Okla Trib. 281, 290-92 (Kaw Nation Dist. Ct. 1995). *See generally* DELORIA & LYTLE, *supra* note 32, at 117-20; Brandfon, *supra* note 28, at 1009-11 (describing tribal courts' reliance on tribal customs as basis of decisions); Valencia-Weber, *supra* note 8, at 251-55 (describing tribal courts that have attempted to implement traditional dispute resolution methods).

63. FRANK POMMERSHEIM, BRAID OF FEATHERS 67 (1995). In Professor Pommersheim's view, "many tribal courts are vilified as 'white men's' creations flowing from the IRA and an entire federal history directed to assimilation." *Id.* Moreover, modern tribal governments have moved away from the traditional principles of heredity and consensus toward election of tribal leaders and majority rule, a

Today more than 200 federally recognized tribes have some form of judicial system qualifying as a "court," but the diversity among these many courts is enormous.[64] Some tribes operate two tiers of courts — tribal and appellate — and their codes set forth detailed rules governing appellate review.[65] Most prominently, the Navajo Nation, whose reservation is the largest and most populous in the United States, has a comprehensive and long-standing tribal court system.[66] Although the Navajo Court of Indian Offenses operated for the first half of the twentieth century, in 1958 the Navajos created the Navajo Judicial Branch as an independent tribal court system, albeit influenced by Anglo-American judicial models.[67] The Navajo judiciary consists of seven district courts, including a children's court and a peacemaker court within each district, as well as an appellate court, the Navajo Nation Supreme Court.[68] By contrast, in some tribes, the tribal council provides appellate review, and in others there is no appellate forum at all. In a few tribes, including many of the Pueblo communities in New Mexico, the tribal leader serves as the tribal judge, and court procedures are unwritten.[69] Among various Northwest and Plains tribes, inter-tribal courts of appeals have been created to handle appeals from individual tribal trial courts.[70] The

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change that has created inevitable confusion about legitimacy and authority. *See* Cooter & Fikentscher, *Part I, supra* note 33, at 319-21.

64. *See* UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, DIRECTORY OF TRIBAL JUDICIARIES (October 1996). One somewhat dated report estimated that there are 148 tribal courts and twenty-one Courts of Indian Offenses in the United States. *See The Duro Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing on HR 972 Before the House Committee on Interior and Insular Affairs*, 102nd Cong., 1st Sess. 9 (1991).

65. *See* O'BRIEN, *supra* note 27, at 291. For a description of the relationship between tribal trial courts and tribal appellate courts, see Pommersheim, *Snapshot, supra* note 8, at 8-10.

66. *See* Tso, *Decision Making, supra* note 52, at 227-31; UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 54, at 32-35.

67. *See* Tso, *Decision Making, supra* note 52, at 227; Tom Tso, *The Tribal Court Survives in America*, 25 JUDGES' JOURNAL 22, 53 (1986); *see generally* Stephen Conn, *Mid-Passage: The Navajo Tribe and Its First Legal Revolution*, 6 AM. INDIAN L. REV. 329, 332-36 (1978); Jayne Wallingford, *The Role of Tradition in the Navajo Judiciary: Reemergence and Revival*, 19 OKLA. CITY U. L. REV. 141, 144-46 (1994).

68. The caseload in the Navajo court system is significant. In the last quarter of 1998, the Navajo judiciary reported that more than 25,000 civil and criminal cases were pending in the Nation's court system. *See* JUDICIAL BRANCH OF THE NAVAJO NATION, FIRST QUARTER REPORT FOR FISCAL YEAR 1999, at 14 (reporting date for October through December 1998).

69. *See* UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, DIRECTORY OF TRIBAL JUDICIARIES 2-1 (1996)(listing numerous tribes from New Mexico in which tribal council sits as appellate court, including Acoma Pueblo, Cochiti Pueblo, Isleta Pueblo, Jemez Pueblo and Laguna Pueblo); UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 54, at 33-34.

70. These inter-tribal courts of appeals include the Northwest Intertribal Court System, the Inter-Tribal Court of Appeals for Nevada, the Northern Plains Inter-

persons who function as tribal judges also vary widely, with some tribes requiring their judges to be members who are fluent in the tribe's language while others willingly use non-Indians who are trained in Anglo-American law.[71] The persons who practice before the tribal courts also vary. In many tribes, individuals must be admitted to tribal court in accordance with local tribal ordinances setting minimum educational and other requirements.[72] In contrast to state and federal court, lay advocates are common.[73] Plainly, the variety of structures among tribal judiciaries precludes generalizations about "tribal courts" as a monolithic category.

The civil jurisdiction of modern tribal courts is a complex and evolving body of law, and an in-depth discussion of it is beyond the scope of this Article.[74] It is important to note, however, that a tribe's civil jurisdiction can be extended to disputes involving nonmembers. In contrast to the criminal jurisdiction of tribal courts — which has

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tribal Court of Appeals, and the Southwest Intertribal Court of Appeals. *See* UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, DIRECTORY OF TRIBAL JUDICIARIES (1996); *see also* UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 54, at 32-35.

71. Navajo judges, for example, must be members of the tribe, able to speak Navajo, and "have some knowledge of Navajo culture and tradition." *See* NAVAJO CODE tit. 7, § 354 (Supp. 1984-85). Similarly, the Blackfeet Tribe requires that tribal judges be members of the tribe. *See* Grogan, *supra* note 21, at 493 (referring to *Blackfeet Law and Order Code*). The Cheyenne River Sioux Tribe, on the other hand, has appointed at least two non-Indian law professors (albeit individuals who are respected Indian law scholars) to its court of appeals. *See* Eberhard v. Eberhard, 24 Indian L. Rptr. 6059 (Cheyenne River Sioux Ct. App. 1997)(majority opinion by Professor Robert Clinton of the University of Iowa College of Law, concurrence by Frank Pommersheim, of the University of South Dakota School of Law); Barsh, *supra* note 14, at 86 (criticizing the trend among American Indian tribes to use non-Indian lawyers as judges).

72. *See* ROSEBUD SIOUX TRIBE LAW AND ORDER CODE § 9-2-2(1984); CHEYENNE RIVER SIOUX LAW AND ORDER CODE § 1-5-3 (1978).

73. The Navajo Nation, for example, operates an advocate program through which Navajos who lack a law school education can practice in tribal courts. *See* Lowery, *supra* note 18, at 389 n. 41; *see also* Grogan, *supra* note 21, at 495 (describing Blackfeet Tribe's use of lay advocates and initial refusal to allow attorneys). One frequently sees references to lay advocates in tribal court opinions. *See, e.g., In re* Rick McArthur, 25 Indian L. Rptr. 6133 (Ho-Chunck Nation Sup. Ct. 1998); Cole v. Kaw Housing Authority, 4 Okla. Trib. 281, 290 (Kaw Nation Dist. Ct. 1995); *see generally* UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 54, at 1 n.3 (explaining that lay advocates are usually members of tribe who represent other members in tribal court for a small fee); Pommersheim, *Snapshot, supra* note 8, at 13 n.9.

74. For recent treatments of the topic, see WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 187-203 (3d ed. 1998); POMMERSHEIM, *supra* note 63, at 53-54, 81-82; Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1770-77(1997)[hereinafter Frickey, *Adjudication and Its Discontents*]; Frickey, *Judicial Divestiture, supra* note 43; Melissa Koehn, *Civil Jurisdiction, Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705 (1997).

been sharply delimited by Congress and the Supreme Court[75] — tribal civil jurisdiction can extend to claims against tribe members as well as non-members if the dispute sufficiently implicates tribal interests. Whether civil jurisdiction exists in any particular case depends on a somewhat murky jurisprudence generated by the Supreme Court that takes into account the factors of consent, geographic affiliation, and tribal membership.[76] In the most recent formulation from the Court, tribal civil jurisdiction may extend to nonmembers where the nonmember is involved in a consensual relationship with the tribe or where the nonmember's conduct poses a direct threat to the tribe's welfare.[77] Although enormous uncertainties exist as to the contours of a tribe's civil jurisdiction, the cases indicate that in the realm of family law, where tribes traditionally have enjoyed a prominent sover-

75. As a result of congressional enactments, the federal courts have criminal jurisdiction over inter-racial crimes committed on an Indian reservation. *See* 18 U.S.C. §§ 1152, 1153 (1994). In addition, the Supreme Court has held that tribes, as domestic dependent sovereigns, do not have criminal jurisdiction over non-Indians, see *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), or over nonmember Indians, see *Duro v. Reina*, 495 U.S. 676 (1990). *Duro*, however, was subsequently overturned by Congress in an affirmation of "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." *See* 25 U.S.C. § 1301(2)(1994); *see generally* Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767 (1993). For an early comprehensive discussion of tribal court criminal jurisdiction, see Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976). In a critical analysis of the Supreme Court's jurisprudence on tribal civil, criminal, and regulatory authority, Philip Frickey concludes that the Court "has exercised front-line responsibility for the vast erosion of tribal sovereignty." *See* Frickey, *Judicial Divestiture, supra* note 43, at 7. Significantly, an important recent decision from the Navajo Supreme Court has upheld the Navajo Nation's criminal jurisdiction over Russell Means, a member of the Oglala Sioux Tribe, and in so doing rejected an equal protection challenge to 25 U.S.C. section 1301(2). *See* Means v. District Court of Chinle Judicial Dist., 26 Indian L. Rptr. 6083 (Navajo 1999).

76. *See* Frickey, *Adjudication and Its Discontents, supra* note 74, at 1770-77 (criticizing incoherence of Supreme Court case law on tribal sovereignty and judicial jurisdiction, and concluding that Court is engaging in a weighted balancing of interests).

77. *See* Strate v. A-1 Contractors, 520 U.S. 438 (1997)(holding that tribal court lacked civil jurisdiction over tort claim against nonmember arising out of accident on state highway; defendant had no consensual relationship with tribe, and car accident did not pose sufficient threat to tribe's welfare to justify jurisdiction). For critical commentary on *Strate*, see, for example, Frickey, *Judicial Divestiture, supra* note 43, at 54-65; Laurie Reynolds, *"Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359 (1997); Phillip Allen White, Comment, *The Tribal Exhaustion Doctrine: "Just Stay on the Good Roads, and You've Got Nothing to Worry About,"* 22 AM. INDIAN L. REV. 65 (1997).

eign role, a tribe's civil jurisdiction may be at its strongest.[78] By their own tribal codes, moreover, tribes often assume the power to resolve domestic disputes between members and nonmembers.[79] Thus, the work of tribal courts in family disputes frequently reaches beyond members to Indians who are members of other tribes as well as to non-Indians.

Most modern tribal courts have developed court systems that blend traditional cultural practices with Anglo-American procedures. Tribal procedural codes, for example, often are patterned after the rules of procedure in effect in the courts of the state where the tribe is located.[80] Frequently these rules have been drafted by non-Indian lawyers for the benefit of the tribe, thereby allowing the tribe to achieve a measure of legitimacy in the eyes of the dominant society. In a manner reminiscent of the IRA-inspired constitutions, many tribes' codes of civil procedure, for example, look very much like what one finds in the forum state's statutes.[81] The use of Anglo-American legal models may be viewed both as an efficient way of organizing a court system and as a means of inspiring confidence in outsiders. On the other hand, a tribe's acceptance of Anglo-American standards entails some loss of tribal identity, and several Indian law scholars have urged

78. In *Fisher v. District Court*, 424 U.S. 382 (1976), for example, the Supreme Court held that a tribe had *exclusive* jurisdiction to determine custody of an Indian child in a dispute between the child's Indian mother and her Indian foster mother. Although *Fisher* involved only Indian parties, domestic relations disputes between Indians and non-Indians are often heard in tribal court. *See, e.g.*, Eberhard v. Eberhard, 24 Indian L. Rptr. 6059 (Cheyenne River Sioux Ct. App. 1997)(exercising divorce and custody jurisdiction over dispute between tribal member and non-Indian); Solomon v. Jantz, 25 Indian L. Rptr. 6251 (Lummi Ct. 1998)(holding that tribal court had jurisdiction over paternity and custody action against non-Indian father); In the Matter of Custody of S.R.T., 18 Indian L. Rptr. 6158 (Navajo 1991)(exercising jurisdiction over custody dispute between tribal member and non-Indian); Tafoya v. Ghashghaee, 25 Indian L. Rptr. 6193 (Pueblo of Pojoaque Ct. 1998)(holding that tribal court had jurisdiction over custody and support action against Iranian national father); *cf.* Davis v. Means, 21 Indian L. Rptr. 6125 (Navajo 1994)(exercising jurisdiction over paternity action against nonmember Indian); Lente v. Notah, 3 Navajo Rptr. 72 (Navajo 1982)(exercising divorce and custody jurisdiction in dispute between tribal member and nonmember Indian); *see generally* Atwood, *Fighting Over Indian Children, supra* note 17, at 1094-99.

79. *See, e.g.*, LAW & ORDER CODE OF THE CHEYENNE RIVER SIOUX TRIBE § 8-3-2 (1980)(requiring in divorce action that plaintiff be a resident of Reservation). For a description of common child custody jurisdictional approaches in tribal codes, see Atwood, *Identity and Assimilation, supra* note 17.

80. *See* Newton, *supra* note 21, at 294.

81. *See, e.g.*, CHEYENNE RIVER SIOUX TRIBE RULES OF CIVIL PROCEDURE, *quoted in* Lawrence v. Lawrence, 23 Indian L. Rptr. 6251, 6252 (Chy. R. Sx. Ct. App. 1996)(patterned after *Federal Rules of Civil Procedure*).

tribes to draw creatively on their traditions to enrich and distinguish their own systems of tribal justice.[82]

In just such an effort, many tribes across the country have added explicit provisions to their codes to reflect traditional cultural concerns[83] and have given renewed emphasis to informal or traditional dispute resolution methods.[84] One example is the family forum for domestic relations disputes among the Pueblo communities where intra-familial matters are resolved through family gatherings or talking circles facilitated by family elders.[85] Among the Warm Springs Tribes in Oregon, one can find customary sanctions such as whippings being

82. According to Deloria and Lytle, "[t]he greatest challenge faced by the modern tribal court system is in the harmonizing of past Indian customs and traditions with the dictates of contemporary jurisprudence." DELORIA & LYTLE, *supra* note 32, at 120; *see also* Barsh, *supra* note 14 (urging tribal judges to make greater use of cultural traditions in decision making); Deni Leonard, *Reintegration of Tribal Tradition Into Tribal Public Policy: A New Form of Tribal Government*, 7 NATIVE AM. L. DIG. 15 (1997)(calling for "proactive" tribal legislation to reintegrate traditional practices and beliefs into tribal government); 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); Pommersheim, *Coyote Paradox, supra* note 9, at 456-62 (describing a paradigm of tribal court jurisprudence that is culturally informed); Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 441 (1992)(envisioning greater use of traditional narrative and story to "liberate" tribal court jurisprudence from its history of colonization); 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)(recommending renewed emphasis on the Seneca tradition of Peacemaker in tribal dispute resolution).

83. *See* B.J. Jones, *Welcoming Tribal Courts, supra* note 13, at 466-67; Valencia-Weber, *supra* note 8, at 245-55 (identifying tribal laws, such as those of the Sitka, that are designed to facilitate the determination of tribal custom); Porter, *supra* note 82, at 253-59 (describing tribes' efforts to incorporate traditional peacemaking into their judicial systems). The current Mille Lacs Band Statutes, for example, describe the tribe's conception of law as reflecting traditional values:

> The theory of law of the Non-Removable Mille Lacs Band of Chippewa Indians is based upon a high regard for the concept of sha wa ni ma. . . . The purpose of sha wa ni ma is to keep the people together as one. This purpose is good for all people. It serves to balance the forces of life and brings stability to the people. To achieve this way of life, the laws of the Band shall be construed to balance the rights of the individual with the need to continue to co-exist in peace and harmony with one another.

MILLE LACS BAND OF CHIPPEWA INDIANS STAT. ANN. tit. 24, § 2003 (1996).

84. *See* DELORIA & LYTLE, *supra* note 32, at 113, 198-203 (noting greater informality of tribal court procedures, less reliance on strict rules of evidence, and greater emphasis on mediation than adjudication); *see also* Sandra Day O'Connor, *Lessons From the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1 (1997)(tribal legal systems incorporate traditional values and cooperative processes which can serve as models for Anglo-American courts).

85. *See* Melton, *supra* note 30, at 129 (stating that matters resolved through talking circles usually involve marital conflicts, juvenile misconduct, domestic violence, parental misconduct, or property disputes).

used as a community response to misconduct.[86] The use of community service as a sanction for wrongdoing — a form of traditional restorative justice — can be found on many reservations.[87] Another noted example is the Navajo Peacemaker Court, created in 1982 as a way of fostering and encouraging use of traditional Navajo justice methods.[88] The court was designed to formally institutionalize the customary mediation techniques of dispute resolution that were common among the Navajo before and after the federal government established courts on the reservation.[89] It employs non-adversary methods of community participation in achieving conflict resolution through, for example, "talking out," apology, and restitution.[90] The Navajos provide a peacemaker forum for each of the Nation's judicial districts to handle a wide variety of cases, including criminal actions, dissolution of marriage, child custody, and property disputes.[91] The Navajo experience has prompted other tribes across the United States to establish similar justice systems that carry forward traditional methods of dispute

86. *See id.* at 132.

87. *See id.* (referring to the Laguna).

88. *See* Raymond D. Austin, *ADR and the Navajo Peacemaker Court*, 32 JUDGES' JOURNAL 8 (1993). Austin explains that traditional Navajo justice embraced the goals of consensus and harmony through mediation and "talking things out." Also, the Navajo system views relatives as having an essential role in mediation — rather than the Anglo-American ideal of the neutral and impartial mediator. "Nalyeeh" — the process of restitution, restoration, and making a person whole for an injury—is another tenet of traditional Navajo dispute resolution. *Id.* at 10-11.

89. *See* James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983); Tso, *Decision Making*, *supra* note 52, at 227 n.3.

90. Parties who choose to resolve their dispute through the Peacemaker Court choose a peacemaker, or "naat'aanii," who is often a community or religious leader. That individual then guides the discussion between the parties and other concerned persons, including family members. *See* Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo Nation Code of Judicial Conduct*, 76 JUDICATURE 15, 17 (1992); Lowery, *supra* note 18, at 382-85; *see also* Zion, *supra* note 89. A case recently handled by the Peacemaker Court involved a family affected by alcoholism and incest. The official court report reveals the tone of peacemaking:

> The younger sibling of this family began a generational rivalry which caused the grandfather to come to the courts for help. After long hours of traditional teaching by and mediating with Peacemaker Tex Anderson, Jr., the family began to express forgiveness and a desire to reunite the family structure. Follow up counseling with the family is planned.

JUDICIAL BRANCH OF THE NAVAJO NATION, SECOND QUARTER REPORT FOR FISCAL YEAR 1999, at 38 (Jan.-March 1999).

91. *See* James W. Zion, *The Navajo Peacemaker Court*, 15-4/16-1 PERCEPTION 49 (1992). The percentage of cases in the Peacemaker Court that proceed to a quick resolution appears quite high. In the last quarter of 1998, for example, the Peacemaker Court received 305 new cases and resolved about 50% of them. *See* JUDICIAL BRANCH OF THE NAVAJO NATION, FIRST QUARTER REPORT FOR FISCAL YEAR 1999, at 19 (Oct.-Dec. 1998).

resolution.[92] As one tribal judge put it, "[t]he Peacemaker Court, which emphasizes the involvement of family and friends in dispute resolution, promotes tribal traditions and community harmony for a tribe that is reconstituting after a century of dislocation."[93]

Indian tribal courts, in their myriad forms, are an essential manifestation of tribal sovereignty and a tool for cultural survival. Tribal courts are in a unique position to carry forward core tribal values, including the complex meanings of family and clan, while accommodating the demands of contemporary society. Clearly, tribal judges are aware of their crucial role in perpetuating tribal values. Carey Vicenti, Chief Judge of the Jicarilla Apache Tribe, has remarked on that role:

> The real battle for the preservation of traditional ways of life will be fought for the bold promontory of guiding human values. It is in that battle that tribal courts will become indispensable. It is in the tribal court that the competing concepts regarding social order, and the place of the individual within the family, the clan, the band, and the tribe, will be decided.[94]

As more tribal courts choose to render their decisions in writing and more of these written decisions are disseminated by publication, those on the outside have an accessible window into the tribal jurisprudential world.

III. JUDICIAL RELIANCE ON TRIBAL CUSTOM AND TRADITION

American Indian tribes' capacity for innovation as a means of cultural survival is well known, and to many observers the tribal courts are demonstrating that same capacity through expressive adjudication.[95] Tribal judges choose from a multitude of sources of law in de-

92. For example, the Grand Traverse Band of Michigan established a Peacemaker Court in 1996. *See* Nancy A. Costello, Comment, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875 (1999). According to Costello, the goal of Native American peacemaking is "to restore dignity, to bring peace to the parties involved, and to sustain community health by repairing relationships damaged by conflicts." *Id.* at 878. That goal is accomplished through conciliation, talking, and listening, accompanied by a ceremonial burning of sweetgrass or sage. *See id.* at 887. Other contemporary versions of indigenous tribal justice systems include the Mohawks' Akwasasne Peacemaking Program, the Cheyenne Peace Chiefs Today, the Wind River Preservation Peacemakers, and the Salt River Pima-Maricopa, Shoshone and Arapaho Peacemaker Court. *See* Diane LeResche, *Editor's Notes*, 4 MEDIATION Q. 321, 324 (1993).

93. Michael Petoskey, Chief Judge of the Grand Traverse Band, *quoted in* Costello, *supra* note 92, at 888 (describing history of Grand Traverse Band).

94. Vicenti, *supra* note 31, at 137.

95. According to Gloria Valencia-Weber,

> [t]he law produced in tribal codes and courts does not necessarily retain the discrete elements from Anglo-American legal culture with the same meaning and value as in the contributor culture or jurisprudence. In . . .

ciding a particular case and, in so doing, discern and extend the tribe's cultural character.[96] Often, in relying on a particular strand of non-tribal doctrine, a tribal judge may imbue the doctrine with a distinct value or purpose that carries unique cultural meaning. The amalgam of sources can yield an analysis of the question before the court that not only is rich in cultural nuance but is self-consciously so. In *Naize v. Naize*,[97] for example, the Navajo Supreme Court upheld an award of modern spousal maintenance by looking to the customary practice of the husband at divorce who was expected to leave the family dwelling with only his personal possessions. The court, moreover, announced that the power to award spousal maintenance "is justified by the Navajo People's traditional teachings admonishing not to 'throw one's family away.'"[98] Unlike the unannounced cultural overlay so often found in the jurisprudence of majoritarian courts, tribal court opinions typically identify the cultural basis and, indeed, celebrate it.

For most Indian tribes, the "common law" of the tribe is not a heritage of written judicial precedents but, rather, the customs and traditions that formed the legal framework of tribal society.[99] These were historically unwritten, passed on by oral tradition and collective memory.[100] Similarly, in the early development of the English common law, judges likewise drew upon unwritten custom in announcing rules

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> tribal law . . . there is an innovative result that is consistent with a pervasive characteristic of the indigenous nations: the capacity to change as an evolving culture.

Valencia-Weber, *supra* note 8, at 256-57.

96. According to former Chief Justice Tso of the Navajo Supreme Court:

> A close look at the Navajo Tribal Government would reveal many characteristics that appear to be Anglo in nature. Actually, many concepts have their roots in our ancient heritage. Others are foreign to our culture but have been accommodated in such a way that they have become acceptable and useful to us.

Tso, *Decision Making*, *supra* note 52, at 231; *see also* Valencia-Weber, *supra* note 8, at 256 (praising creative capacity of tribal courts, shown through work of "legal-warriors," who use the old to make new and distinctly Indian law).

97. 24 Indian L. Rptr. 6152 (Navajo 1997)(customary law directed that if a marriage ended, the man was to leave with his personal possessions, and the rest of the property stayed with the wife and children).

98. *Id.*

99. *See In re* C.D.S. & C.M.H., 17 Indian L. Rptr. 6083, 6084 (Ct. of Indian Offenses for Del. Tribe of W. Okla 1988)(taking judicial notice of traditional role of grandparents and upholding grandparent visitation despite absence of written tribal law on subject; observing that Indian custom is mainly oral).

100. *See* POMMERSHEIM, *supra* note 63, at 103-112 (describing power of language, narrative, and myth in tribal culture); DELORIA & LYTLE, *supra* note 32, at 82. Observing that most tribes did not have written documents as governmental guidelines, Deloria and Lytle point out that the Iroquois Constitution was a notable exception. According to their study, "[t]he Iroquois Constitution was written on the sacred wampum belts made of sea shells and displaying a particular pattern, which, when held in a ceremony and used in the recitation of the Great Law, was acknowledged by all as the instrument of Iroquois nationality." *Id.*

of decision. According to Blackstone, the customs from which the English common law evolved came from a multitude of countries and groups within those countries, including Romans, Saxons, Danes, and Normans, producing a body of laws of a "compounded nature."[101] In the present-day context of American Indian tribal courts, however, the decision makers draw not only from tribal custom but also from contemporary Native and non-Native legal sources and are explicitly aware of their constitutive role in perpetuating culture.[102]

The use of custom and tradition by tribal judges has undoubtedly occurred since the first modern courts were organized, but formal and explicit reliance on tribal custom has clearly increased in recent years in the reported decisions of many tribes.[103] In some tribes, the councils have amended tribal codes to require their courts to determine and follow tribal custom. For example, the Navajo Tribal Code now requires that tribal courts apply Navajo "common law," or customary law, unless prohibited by applicable federal law,[104] and the Navajo Supreme Court has held that certain customs amount to the

101. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 64 (Dawson ed. 1966); *see also* Valencia-Weber, *supra* note 8, at 244-45 (comparing development of English common law with tribal common law).

102. *See* Mary Jo B. Hunter, *Tribal Court Opinions: Justice and Legitimacy*, 8 KAN. J. L. & PUB. POL'Y 142 (1999). The author, a judge for both the Ho-Chunk Nation and the Winnebago Tribe, views tribal custom and tradition as an important aspect of tribal decision making which tribal judges "should nurture and strengthen." *Id.* at 146. She further explains, "[The use of tribal custom and tradition] is a method of memorializing our traditions and customs while dispensing justice. And the use of traditions and customs legitimates them for the world outside of our tribal judiciaries." *Id.*

103. The words of the Saginaw Chippewa Tribal Court are typical: "The Saginaw Chippewa Tribal Court, while based on an Anglo system of justice, nevertheless, attempts to incorporate traditional tribal values, symbols, and customs into its decision making." Fisher v. Pigeon, 24 Indian L. Rptr. 6258, 6258 (Saginaw Chippewa Trib. Ct. 1996). Interestingly, the Navajo Court of Appeals, later to become the Navajo Supreme Court, initiated a Navajo Common Law Project in the early 1980s. Through the Project, the court hoped to produce a definitive treatise on Navajo common law, collect oral histories of the Navajo, and renew efforts to use Navajo common law in court decisions. *See* Lowery, *supra* note 18, at 382 n.5.

104. NAVAJO NATION CODE tit. 7, § 204(a) (1977)("In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws of customs of the Navajo Nation not prohibited by applicable federal laws."). Likewise, the Pascua Yaqui Tribe recognizes custom as a source of law in its constitution. *See* CONSTITUTION OF THE PASCUA YAQUI TRIBE OF 1987, art. VIII, § 2 ("The jurisdiction of the courts shall extend to all cases in law and equity arising under this constitution and the laws, traditions, customs or enactments of the Pascua Yaqui Tribe."). Yet another approach can be found in the Havasupai tribal code, which directs the tribal court to apply "in the following order: The Constitution and By-Laws of the Tribe, this Code, the ordinances and/or resolutions of the Tribe, and Tribal customs/traditions." HAVASUPAI TRIBAL CODE § 2.3 (1978). If no such law is available, this code authorizes the application of common law, state law, the law of other tribes, and federal law. *See id.*

equivalent of an unwritten constitution and are part of Navajo "higher law" or "beehaz'aanii."[105] Where codified by tribal code, the available sources of law frequently are prioritized such that tribal law and federal law are paramount to state law.[106] In other tribes, tribal judges themselves have announced the sources of law that will guide the decision-making.[107] These express directives to take tribal custom into account reflect a growing sense across Indian country that tribal survival requires conscious development of a tribe's distinct cultural heritage.[108] Nevertheless, tribal judges understandably resist creating legal doctrine out of whole cloth and often look to state law concepts for guidance, while recognizing that the laws do not govern of their own force.[109]

The identification of relevant tribal tradition or custom is not without its problems. The Navajo Court of Appeals addressed the concept of "custom" in *Lente v. Notah*,[110] acknowledging the difficulty inherent in relying on custom to provide a rule of law. In the court's view, a

105. Bennett v. Navajo Bd. of Election Supervisors, 18 Indian L. Rptr. 6609, 6011 (Navajo 1990); *see also In re* Estate of Wauneka, 5 Navajo Rptr. 79, 82 (1986)("Custom takes priority even if it conflicts with our rules of probate."); Begay v. Navajo Nation, 15 Indian L. Rptr. 6032, 6034 (Navajo 1988)(noting that due process is both a Navajo tradition and a right guaranteed by the Navajo code).

106. The Navajo Tribal Code, for example, makes application of state law optional and subordinate to tribal and federal law. *See* NAVAJO NATION CODE tit. 7, § 204(c) (1997). Similarly, the Kaw Nation tribal code provides that tribal courts may look to state law when tribal customs and usages, federal laws and regulations, and tribal ordinances do not address an issue. *See* KAW NATION LAW AND ORDER CODE, ch. VI, § 2, Law Applicable in Civil Actions, *quoted in* Cole v. Kaw Housing Authority, 4 Okla. Trib. 281, 291 (Kaw Nation Dist. Ct. 1995). Likewise, the Winnebago tribal rules gives supremacy to the constitution, statutes, and common law of the tribe not prohibited by federal law. *See* WINNEBAGO RULES OF CIVIL PROCEDURE § 2-111, *quoted in* Bird v. Ortiz, 24 Indian L. Rptr. 6204, 6205 (Winnebago Tribal Ct. 1996); *see also* PASCUA YAQUI TRIBAL CODE § 9.2D.

107. The Hopi Tribal Court, for example, has held that the customs, traditions, and culture of the Hopi Tribe are mandatory authorities, while federal law, state law and the common law are only persuasive. *See* Hopi Tribe v. Mahkewa, 25 Indian L. Rptr. 6144 (Hopi Ct. App. 1995); Hopi Indian Credit Assoc. v. Thomas, 27 Indian L. Rptr. 6039 (Hopi Ct. App. 1998)(identifying as mandatory authority the Hopi Constitution, Hopi ordinances and resolutions, and Hopi customs, traditions and culture).

108. At least one scholar believes some American Indian tribal judges may be reluctant to explicitly rely on traditional or customary law, and he is quite critical of their reticence. *See* Barsh, *supra* note 14, at 81-82 (describing tribal court opinions in which judges relied on federal and state precedents after making "ritualized declarations that tribal laws and traditions are paramount").

109. *See In re* S.N.J., 24 Indian L. Rptr. 6036, 6037 (S. Ute Tribal Ct. 1996)(following the child support guidelines in use in the state of Colorado which, although not controlling in the tribal court, provided "a reasonable and rational basis for assessing child support").

110. 3 Navajo Rptr. 72 (1982).

custom must be a practice and not solely a belief,[111] but it conceded that custom can vary throughout the Navajo Nation, it can be the subject of honest disagreement among tribal members, and particular customs can fall out of use.[112] The process of choosing the applicable law may often include arguments about the legitimacy, meaning, and appropriateness of the use of custom in a particular case.[113] The approaches one finds within tribal court opinions include the taking of judicial notice of a particularly well-established tradition,[114] consultation with an elder or a committee of elders, expert witness testimony, and even exploration into anthropological writings about the tribe.[115]

111. *See id.* at 80.

112. *See id.* at 79-80.

113. *See* Pommersheim, *Snapshot, supra* note 8, at 27. In *DuMarce v. Heminger*, 20 Indian L. Rep. 6077 (N. Plns. Intertr. Ct. App. 1992), for example, the two justices in the majority and the concurring justice disagreed about the prerequisites for a traditional adoption, or ecagwaya, in the Sisseton Wahpeton Tribe.

114. *See, e.g., In re* C.D.S., 1 Okla. Trib. 200, 204-06 (Ct. of Indian Offenses for Delaware Tribe of W. Okla. 1988)(taking judicial notice of unique relationship existing between Indian grandparents and grandchildren, despite absence of written tribal law). One study of Navajo common law found that the most prevalent method of identifying custom was through judicial notice. *See* Lowery, *supra* note 18, at 395-96.

115. In a 1987 opinion, the Navajo Supreme Court, for example, enumerated various methods by which the Nation's customary or "common" law could be established:

> Navajo custom and tradition may be shown . . . through recorded opinions and decisions of the Navajo courts or through learned treatises on the Navajo way; it may be judicially noticed; or it may be established by testimony of expert witnesses who have substantial knowledge of Navajo common law in an area relevant to the issue before the court. Where no question arises regarding custom or usage, the court need not avail itself of experts in the Navajo culture . . . . Thus, if a custom is generally known within the community, or if it is capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned, it is proven.

In re Estate of Belone v. Yazzie, 5 Navajo Rptr. 161, 165 (1987)(citations omitted). The court also suggested that where the existence of a particular custom remains in dispute, an informal pretrial conference with several appointed expert witnesses should be held. *See id.* at 167. According to the court, the experts should reach a consensus about the custom rather than having a court choose among various experts' conflicting testimony. *See id.* In the same opinion, the court announced a preference for the term "Navajo common law" over "custom." *Id.* at 165. According to the court, the term "common law" emphasizes that "Navajo custom and tradition is law and more accurately reflects the similarity in the treatment of custom between Navajo and English common law." *Id.* For a discussion of the establishment of custom by Navajo standards, see Lowery, *supra* note 18, at 397-99. *See also* Hood v. Bordy, 18 Indian L. Rptr. 6061, 6063 (Navajo 1991)(noting that tribal court must determine whether particular custom is generally accepted and applicable to parties in case). The Hopi court has announced guidelines for the introduction of custom at trial, including the giving of prior notice, an offer of sufficient evidence, and a demonstration of the custom's relevance to the issues before the court. *See* Hopi Indian Credit Assoc. v. Thomas, 25 Indian L. Rptr. 6168, 6169-70 (Hopi Ct. App. 1996). For other tribes' approaches, see *In re Rick McArthur*, 25 Indian L. Rptr. 6133 (Ho-Chunk Nation Sup. Ct.

On occasion, tribal courts look beyond their own tribes to the known traditions of other tribes or even of Indian peoples generally in order to identify a theme of indigenous law to guide their decision making.[116]

Because tribal courts are relatively young institutions, litigants often find that the custom or tradition relevant to a particular issue is not clearly known or articulated within the relevant community.[117] Indeed, tribal officials themselves may be in disagreement about a particular custom,[118] and the lack of recorded opinions makes reliance on precedent difficult.[119] Thus, the inherent unpredictability of the rule of decision may be seen as a drawback of tribal court adjudication.[120] On the other hand, as tribal jurisprudence evolves and ac-

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1998)(indicating that under Ho-Chunk Nation Judiciary Act of 1995, supreme court may seek guidance from tribal elders in Ho-Chunk Nation Traditional Court on issues of relationships and necessity of recusal of tribal judge); *Bird v. Ortiz*, 24 Indian L. Rptr. 6204 (Winnebago Tribal Ct. 1996)(noting that when doubts arise as to particular customs, tribal courts should seek advice of elders and counselors familiar with customs and usages). *See generally* Pommersheim, *Snapshot, supra* note 8, at 26-27.

116. *See, e.g.*, Goldtooth v. Goldtooth, 3 Navajo Rptr. 223, 225-26 (Navajo D. Ct. 1982)(considering traditions of Inuit culture); *In re* Matter of C.D.S. & C.M.H., 17 Indian L. Rptr. 6083, 6084 (Ct. of Indian Off. for Del. Tribe of W. Okla. 1988)(considering "unique relationship that exists between Indian grandparents and Indian grandchildren" and "common knowledge in Indian country that both the maternal and paternal grandmothers traditionally play a very significant role in the Indian family").

117. *See, e.g.*, Sonnenberg v. Colville Tribal Ct., 26 Indian L. Rptr. 6073, 6074 (Conf. Tribes of Colville Res. Ct. App. 1999)(explaining that tribe's "relatively young court system" frequently confronts questions of first impression regarding judicial process); Cole v. Kaw Housing Authority, 4 Okla. Trib. 281, 290-91 (Kaw Nation Dist. Ct. 1995)(noting that tribal courts in general are often "relatively new or newly reestablished, and do not have well-settled bodies of law and codes to guide them. . . Frequently, litigants can draw upon only a handful of lawyers and advocates familiar with 1) tribal court procedures; 2) tribal custom and law; and 3) federal tribal sovereignty").

118. The difficulty of reaching a consensus on tribal tradition is illustrated by the decision in *In re Estate of Thomas*, 15 Indian L. Rptr. 6053, 6054 (Navajo 1988), where the court overruled an earlier decision on the ground that the earlier case had not fully applied Navajo custom to a case of intestacy. See also *In re Marriage of Francisco*, 16 Indian L. Rptr. 6113 (Navajo 1989), where the Navajo Supreme Court and the tribal council seemed in tension regarding the status of common law marriage. The court held, pursuant to Navajo custom and despite ambiguous codified law, that common law marriage was not entitled to recognition within the Navajo Nation. *See id.* In dicta, the court made clear that unlicensed Navajo traditional marriages would nevertheless be entitled to recognition. *See id.* at 6115. For an insightful discussion of *Francisco*, see Sedillo-Lopez, *supra* note 21.

119. *See* Cooter & Fikentscher, *Part I, supra* note 33, at 326-27 ("Indian common law evolves orally and informally.").

120. *See* Lente v. Notah, 3 Navajo Rptr. 72, 79-81 (1982)(noting the risks inherent in trying to ascertain and apply particular tribal customs in court); Wallingford,

quires an accessible record in the form of written opinions and recognized principles, the problem of inconsistency or unpredictability should diminish.[121]

In one instructive decision, the Winnebago Tribal Court had to resolve an equal protection challenge to the tribe's allegedly gender-biased sexual assault laws. In *Winnebago Tribe v. Bigfire*,[122] the court reasoned that it should not accept the federal constitutional standard for gender discrimination without exploring the compatibility of that standard with tribal culture and tradition. Because the parties had not supplied the court with any information about tribal traditions with respect to gender distinctions, the court asked the tribal historian for advice.[123] That individual submitted a written response, included verbatim in the decision, describing Winnebago traditions regarding marriage, incest, and rape.[124] Nevertheless, the court concluded that it still lacked sufficient information to declare whether or not gender distinctions in general are acceptable under Winnebago tradition.[125] On the facts before it, however, the court concluded that the prosecution of the male was not discriminatory since there was ample evidence of force or coercion by the male against his female victim.[126] The case demonstrates the growing recognition that tribal constitutions and codes should be interpreted against a backdrop of the tribe's culture and tradition. Clearly, litigants before the Winnebago tribal court would be well-advised to thoroughly research Winnebago custom before advancing their legal arguments in the tribal court. The decision also makes explicit that, for certain matters, tribal tradition may be difficult if not impossible to ascertain.

Where particular traditions relevant to a discrete issue are not known or do not exist, tribal courts sometimes draw on general cultural values in shaping new doctrines and answering questions of first

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supra note 67, at 152-53 (pointing out the unsystematic nature of tribal common law).

121. According to Valencia-Weber,

> [i]ncreasingly, the need to codify, document, and publish is recognized because the development of a law system provides the benefits of precedent, predictability, and notice to those subject to the law .... Achieving regularity through publication and codification of custom helps legitimate the tribal courts and allay the fears of nonmembers about tribal courts.

Valencia-Weber, *supra* note 8, at 249.

122. 25 Indian L. Rptr. 6229 (1998).

123. *See id.* at 6239.

124. *See id.*

125. *See id.* at 6233.

126. *See id.* at 6231 ("The facts show that consent between the parties was not an issue; therefore charging only one party with violating the statute in this instance is permissible.").

impression.[127] Certain fundamental cultural values seem to be shared by many North American tribes, including, for example, an emphasis on cohesion and harmony within family units and within the larger community, a belief in the interconnection of people and the natural world, a recognition of the need for balance between people and the natural world, and an acknowledgement of spiritual forces.[128] Although any attempt to generalize carries the risk of essentializing, and in some cases, romanticizing the American Indian, Native scholars themselves have concurred in many of the broad descriptions of tribal culture. According to Ada Pecos Melton, the indigenous justice paradigm is holistic, fluid, comprehensive, and inclusive — in contrast to the American justice paradigm, which she sees as vertical, adversarial, fragmented, and formalistic.[129] Professor Christine Zuni, a member of the Isleta Pueblo and a tribal judge,[130] has created a similar list of attributes of Navajo justice systems, identifying indigenous justice as non-adversarial and restorative, with paramount emphasis on the restoration of peace in the community rather than on individual rights.[131] Likewise, Deni Leonard, member of Confederated Tribes of the Warm Springs Reservation, describes the spiritual renewal that he sees as key to tribal survival:

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127. *See, e.g.*, Bird v. Ortiz, 24 Indian L. Rptr. 6204 (Winnebago Tribal Ct. 1996)(relying on tribal tradition of healing and preventing friction within tribal community to order respondent to file answer to motion for modification of custody).

128. *See, e.g.*, LLEWELLYN & HOEBEL, *supra* note 29, at 165-68 (categorizing Cheyenne law of killing to reveal emphasis on community peace, ritual, and supernatural forces); RAYMOND FRIDAY LOCKE, THE BOOK OF THE NAVAJO 46-50 (5th ed. 1992)(describing Navajo spiritual beliefs as premised on the view that "[t]he Universe . . . is an orderly system of interrelated elements, an all-inclusive unity that contains both good and evil"); WILSON, *supra* note 32, at 24-28 (describing common belief among most Indian cultures that everything in the universe is interconnected and interdependent and possessed of a spiritual force that can affect all living things); Roman Bitsuie, *Native Americans, the Land and the Future*, 7 NATIVE AM. L. DIG. 33, 33 (1997)("Harmony with the land and with nature are an integral part of Native American culture and self-identity"); Leonard, *supra* note 82, at 15-16 (explaining belief of indigenous people that "everything on Mother Earth is connected, and everything is sacred").

129. *See* Melton, *supra* note 30, at 128-29. Melton identifies a number of other contrasting features, including the fact that under American justice practice, representation of litigants typically is carried out by strangers. In the indigenous justice paradigm, on the other hand, representation by extended family members is common. *See id.*

130. *See* Robert B. Porter, *The Tribal Law and Governance Conference: A Step Towards the Development of Tribal Law Scholarship—Introduction*, 7 KAN. J. L. & PUB. POL'Y 1, 5 (1997)(describing Prof. Zuni's tribal affiliation).

131. *See* Zuni, *supra* note 21, at 28. Russel Barsh takes the position that Indian tribal justice does not always favor the collective over the individual. In his view, when comparing tribal justice systems with Anglo-American jurisprudence, "[t]he balance between individual conscience and upholding state authority tends to be struck closer to the individual end of the scale [within the tribal conception of justice]." Barsh, *supra* note 14, at 86.

> A return to the spiritual recognition of the Natural World Order lies at the center of the development of a new system of Tribal government which preserves, protects, and sustains a renewed Earth Force. This renewal of the Earth Force will ensure the healing of the air, water, land, plants, and animals and will protect the natural hierarchy of life as a continuing and nurturing element of all future generations.[132]

Similarly, for the Pueblo Indians of New Mexico, who trace their roots to the Anasazi, the concepts of harmony, balance, unity, and reciprocity have been identified as central to their traditional belief systems.[133] It is not surprising that a tribe's cultural norms, such as the Navajo principle of *"K'e,"* receive emphasis in modern judicial opinions that rely on customary law.[134] Moreover, a tribe's traditional values may be apparent not only in the substantive decision making of its courts, but also in the structure of tribal government.[135]

The growing willingness of tribal courts to engage in written adjudication, through which the bases of judicial decisions are articulated, is itself a break with the oral traditions of indigenous North American peoples.[136] Some tribes have resisted publishing their court decisions out of a culturally rooted discomfort with publicly disseminating the

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132. Leonard, *supra* note 82, at 24.

133. *See generally* Ragsdale, *supra* note 34 (drawing on archaeological and historical sources to suggest certain salient characteristics of Anasazi jurisprudence).

134. In *Ben v. Burbank*, 24 Indian L. Rptr. 6001 (Navajo 1996), for example, the court drew upon the traditional Navajo principle of *K'e* in deciding a question of contract law. The court explained that

> *K'e* recognizes 'your relations to everything in the universe,' in the sense that Navajos have respect for others and for a decision made by the group. It is a deep feeling for responsibilities to others and the duty to live in harmony with them. It has to do with the importance of relationships to foster consensus and healing. It is a deeply felt emotion which is learned from childhood.

Id. at 6001. The court relied on *K'e* in refusing to entertain a statute of limitations defense to a claim based on an oral contract between family members.

135. The Pueblo tribes, for example, have formed dual systems of government—traditional/religious and secular. *See* SHARON O'BRIEN, AMERICAN TRIBAL GOVERNMENTS 170-80 (1989). In contrast, the Hopi system of villages, with its complex division of jurisdiction and powers, reveals a notion of decentralized governance that is integral to the Hopi culture. *See* Ovah v. Coochyouma, 21 Indian L. Rptr. 6085, 6087 (Hopi Tribal Ct. 1993)(describing, in context of paternity action, "inherent sovereignty" of Hopi villages regarding matters that may be "uniquely resolved in a traditional manner"). For an argument that Indian tribes should consider adopting a form of judicial review that incorporates tribal tradition, see Brandfon, *supra* note 28, at 1015-16.

136. *See, e.g.*, DELORIA & LYTLE, *supra* note 32, at 81-82 (noting that many tribes used stories and anecdotes rather than written documents to incorporate their political and social norms); WILSON, *supra* note 32, at xxvii (describing the central importance of spoken narrative — through stories, myths, and legends — in the lives of the non-literate, pre-contact Native peoples); Triloki Nath Pandey, *Zuni Oral Tradition and History*, in ZUNI AND THE COURTS 15-20 (E. Richard Hart ed., 1995)(describing Zuni methods of storing knowledge as custodians of oral tradition).

names and details of private disputes.[137] Similarly, Frank Pommersheim has suggested that there may be "extrajudicial concerns about the impact of converting (at least in part) the *oral* custom into the *written* decision, the plural into the singular, and the dynamic into the potentially static."[138] Clearly, such concerns are valid and are, perhaps, best taken into account by tribal judges themselves. In their decision-making, tribal judges can work to keep their own jurisprudence dynamic and responsive to the changing world while at the same time integrating consistent cultural themes into that jurisprudence. The increase in written decisions in the last decade can be seen not only as a concession to acquire legitimacy in the eyes of dominant society, but also a recognition that benefits may accrue to tribal members from the greater use of written court decrees. When tribal decisions are accessible and known, suspicions of outsiders as well as insiders may be allayed. For those seeking comfort in the doctrine of *stare decisis*, the availability of a record of prior decisions is essential. Moreover, decisions identifying and explaining cultural markers of a particular tribe surely enhance the self-awareness of tribal members.[139] Further, one can view the written jurisprudence of tribes as the "'extended hand' of respect and willingness to engage in judicial dialogue."[140] To the extent that tribal judges are facilitating the public dissemination of their words, state and federal court judges as well as lawyers and legal scholars should take advantage of the opportunity to learn from their work.

IV. TRIBAL CULTURE AND THE RESOLUTION OF FAMILY DISPUTES

This Part focuses on the role of cultural identity in tribal court opinions in the realm of family law—and, in particular, the law of parent/child relations—to discern insights from the myriad of tribal judges who have encountered such cases in their courts. The written decisions produced in tribal courts, whatever their structural differences, provide a unique insight into indigenous justice concepts. This is not an anthropological excursion; I do not pretend to have acquired a cultural understanding of each tribe whose decisions are under dis-

137. *See* Interview with Hon. Violet Lui Frank, San Carlos Apache Tribal Court, in Tucson, Ariz. (March 15, 2000)[hereinafter Interview with Hon. Violet Lui Frank].

138. Pommersheim, *Snapshot, supra* note 8, at 27.

139. *See* Wallingford, *supra* note 67, at 152 (stating that written Navajo judicial opinions can serve to educate tribal members and non-members alike, since many younger tribal members may be unfamiliar with tribal traditions).

140. Pommersheim, *Coyote Paradox, supra* note 9, at 459.

cussion nor have I engaged in field research.[141] Rather, I examine written tribal court opinions from the perspective of a non-Indian teacher of family law to identify differences in perspective and approach to the important work of resolving disputes over children. By comparing the efforts of tribal courts and state courts in responding to conflicts within the family, I hope to show how tribal judges, through creative reliance on cultural themes, have produced some distinct and promising solutions to familiar human problems. Although I have drawn from diverse tribal courts, the opinions of the Navajo judiciary dominate. Because the Navajo began publishing their court opinions at an earlier date than other tribes, there is a more extensive written record for that tribe than for others.[142] Moreover, the Navajos have been leaders in the movement to incorporate tribal tradition and custom in their jurisprudence.[143]

A. Cultural Representations of the Parent-Child Relationship

Tribal court decisions, though often achieving results similar to those found in the majority courts, can reveal fundamentally different world views, and in many of the tribal decisions, one sees a representation of the parent-child relationship that diverges markedly from the traditional Anglo-American vision. The insights of Gloria Valencia-Weber are germane: "The legal reasoning based on custom can . . . 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."[144] Tribal courts, like state courts, endorse the hallmark of "best interests of

141. For a provocative recent study of tribal common law in an anthropological mode, see Cooter & Fikentscher, *Part I, supra* note 33, and Cooter & Fikentscher, *Part II, supra* note 21.

142. *See* Navajo Nation v. Platero, 19 Indian L. Rptr. 6049, 6050 (Navajo 1991); Stephen Conn, *Mid-Passage—The Navajo Tribe and Its First Legal Revolution*, 6 AM. INDIAN L. REV. 329, 368-70 (1978). The Navajo Nation has published Navajo court opinions in the Navajo Reporter since 1969. *See* Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231, 240-41 n.44 (1987).

143. In 1981, the chief justice of the Navajo courts began a project to determine how best to incorporate Navajo customary law into the tribal court decision-making process. *See* Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo Nation Code of Judicial Conduct*, 76 JUDICATURE 15, 16 (1992). Since that time, Navajo judges have initiated discussions of tribal common law throughout the United States and in several foreign countries. *See* Raymond D. Austin, *ADR and the Navajo Peacemaker Court*, 32 JUDGES J. 8, 11 (1993). In addition, the Navajos have been active in disseminating information about their Peacemaker Court. *See id.* For a detailed examination of the Navajo courts' efforts to define and perpetuate cultural traditions relating to Navajo customary marriage, see Lopez, *supra* note 21, at 292-301.

144. Valencia-Weber, *supra* note 8, at 250.

the child" in resolving custody disputes,[145] but the meaning of that standard in tribal courts sometimes incorporates elements that one would be unlikely to encounter in state systems. Moreover, while both tribal courts and state courts profess to place paramount importance on the interests of children in custody determinations, both systems attend to additional but somewhat divergent concerns.

Tribal judges, at times, announce their decisions in terms that are meant to distinguish the tribal approach from the perceived approach of state courts. The Navajo Nation Supreme Court, for example, in *Alonzo v. Martine*,[146] pointedly declared: "Navajos do not view children as property or possessions, but value them as individuals in a community."[147] In upholding the tribal court's power to award back child support, the court in *Alonzo* emphasized that "[t]here is a fundamental Navajo belief that children are wanted and must not be mistreated in any way."[148] A tribe's concern for its children may not be simply a matter of altruism or *parens patriae* responsibility. American Indian tribes recognize that children are their path to the future and, thus, their key to cultural survival. In the simple words of the *Alonzo* court, "Navajo children are the Navajo people's future."[149] In a different case, the Navajo Supreme Court explained more fully:

> [Children] have special status as members of Indian tribes, and they are eligible for the protection of those tribes and their traditional social structures .... There is no resource more vital to the continued existence and integrity of the Navajo Nation than our children. Consequently, we have a special duty to ensure their protection and well-being.[150]

145. *See, e.g.*, Clark v. Friedlander, 25 Indian L. Rptr. 6154 (Conf. Tribes of Colville Res. Ct. App. 1998)(reversing award of custody by default judgment because trial court did not consider best interests of child or tribal custom); Bird v. Ortiz, 24 Indian L. Rptr. 6204, 6206 (Winnebago Tribal Ct. 1996)(noting that tribal courts have consistently applied "best interests" standard in custody cases); T.C. v. L.C., 4 Okla. Trib. 90 (Dist. Ct. of Sac and Fox Nation 1994)(applying the "best interests" standard in modification of custody proceeding); Nez v. Nez, 19 Indian L. Rptr. 6123 (Navajo 1992)(remanding divorce decree for findings of fact to show that best interests of children were considered); Spotted Tail v. Spotted Tail, 19 Indian L. Rptr. 6032 (Rosebud Sioux Tribal Ct. App. 1989)(recognizing that applicable tribal court standard for determination of custody is best interests of child).

146. 18 Indian L. Rptr. 6129 (Navajo 1991).

147. *Id.* at 6129.

148. *Id.*

149. *Id.*

150. *In re* Custody of S.R.T., 18 Indian L. Rptr. 6158, 6160 (Navajo 1991). The same court again stated this principle strongly in a recent case: "Children are viewed as the future, ensuring the existence and survival of the Navajo people in perpetuity." Burbank v. Clarke, 26 Indian L. Rptr. 6078, 6079 (Navajo 1999)(holding that a minor does not become emancipated solely by the fact of becoming a parent).

Other tribes similarly embrace the notion that tribal children are vital to the survival of the tribe.[151]

The centrality of children in many tribal cultures does not have an exact counterpart in Anglo-American jurisprudence. Indeed, some critics argue that American family law blatantly marginalizes the interests of children.[152] In state courts, the resolution of family disputes involving children has often focused on a construction of parental rights and obligations against a backdrop of state policy, leaving some critics with the impression that children's interests are subordinate to other concerns.[153] Moreover, several principles of federal constitutional law in the realm of family law have seemed to rest

151. The *Cherokee Nation Children's Code*, for example, provides that it is to be construed "[t]o protect the interest of the Cherokee Nation in preserving and promoting the heritage, culture, tradition and values of the Cherokee Nation for its children." CHEROKEE NATION CHILDREN'S CODE § 1(E)(1993). As expressed by the Mille Lacs Band of Chippewa Indians, "[T]here is no resource that is more vital to the continued existence and integrity of the Band than our children and our elders and all the people who comprise the Non-Removable Mille Lacs Band of Chippewa Indians." TRIBAL CODE OF MILLE LACS BAND OF CHIPPEWA INDIANS Tit. 8, § 1 (1996). The principles articulated by the tribes were embraced by Congress in the Indian Child Welfare Act when it announced as a finding that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3)(1994).

152. *See, e.g.*, Andrea Charlie, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267 (1987)(criticizing child custody decisions because of their focus on parents rather than children and the influence of personal and cultural bias); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 15-16 (1994)(reciting evidence of societal and legal hostility to children); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993)(urging law reforms to bring children's voices into dispute resolution).

153. *See generally* Katherine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294 (1988)(arguing that parental responsibility, often construed as resting on "exchange and individual rights," should be instead based on concepts of "benevolence and responsibility"); Fitzgerald, *supra* note 152 (stating that constitutional and family law jurisprudence fails children by structuring child support and custody cases as conflicts between state interests and adult individual rights without giving children formal role in dispute resolution); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 6-8 (1986)(arguing that needs and interests of children are too often submerged below other societal interests); Janet Leach Richards, *Redefining Parenthood: Parental Rights Versus Child Rights*, 40 WAYNE L. REV. 1227 (1994)(noting that law too often protects parental rights against the rights of children); Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815 (1999)(arguing that needs of children can be served by perfecting best interests standard rather than abandoning it). Interestingly, one scholar contends that Anglo-American law lacks any clear rationale for parent responsibility. *See* Gregory A. Loken, *Gratitude and the Map of Moral Duties Toward Children*, 31 ARIZ. ST. L.J. 1121 (1999). Loken proposes a moral duty of gratitude as a theoretical justification for parental responsibility toward children. *See id.* at 1173-1203.

on an unrealistic perception of children's circumstances.[154] One need not endorse the view that Anglo-American law is overtly hostile to children to recognize that the child in Anglo-American law occupies a role that is often qualitatively distinct from the child's role in tribal jurisprudence. At the very least, one can surmise that the cultural importance of children among Indian tribes may inform tribal court adjudication in ways that distinguish it from adjudication in the state court systems.

An early child custody decision handed down by then Judge Tom Tso of the Navajo district court portrays the child-centered nature of Navajo culture. In *Goldtooth v. Goldtooth*,[155] the court had before it a custody battle between a Navajo father and a Hopi mother. In resolving the contest, the court consulted Native and non-Native sources to support its decision to award joint custody of the children to the parents.[156] The sources included a standard treatise on family law, a psychological study documenting new trends in child custody, known elements of Navajo culture and tradition, and court opinions discussing the traditions of other tribes.[157] In its explanation of the role of Navajo culture, the court stated:

> [I]n Navajo culture and tradition children are not just the children of the parents but they are children of the clan. In particular, children are consider [sic] members of the mother's clan. While that fact could be used as an element of preference in a child custody case, the courts [sic] wants to point out that the primary consideration is the child's strong relationship to members of an extended family .... Therefore the court looks to that tradition and holds that it must consider the childrens' [sic] place in the entire extended family in order to make a judgment based upon Navajo traditional law.[158]

The court went on to approve a joint custody award as a way of ensuring the children's contact with both parents and the extended families. In emphasizing the value of such an award from the child's perspective, the court pointedly noted that it would "enforce the childrens' [sic] rights in custody and . . . only incidently provide for the rights of the parents, where they are in harmony with those of the children."[159]

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154. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989)(holding that putative biological father has no constitutional right to establish paternity of child born into existing marriage); DeShaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189 (1989)(holding that state has no affirmative duty under fourteenth amendment to protect child from parental violence unless child is in state's custody or control); *see generally* Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659 (1990).

155. 3 Navajo Rptr. 223 (Window Rock D. Ct. 1982). I am indebted to Judge Lorene Ferguson for her insightful discussion of the *Goldtooth* decision in her keynote address at the 1999 International Society of Family Law North American Regional Conference. *See* Ferguson, *supra* note 10.

156. *See Goldtooth*, 3 Navajo Rptr. at 224-27.

157. *See id.*

158. *Id.* at 226.

159. *Id.* at 227.

In dicta, the court suggested that under certain circumstances, a child's interests might require that custody be awarded to someone other than a legal parent.[160] In its final order, the court decreed that physical custody of the children should follow past actual physical custody patterns and that the parents should develop the joint custody plan together.[161] The court plainly desired to protect the children's sense of continuity and to minimize disruption. In this regard Judge Tso foreshadowed what has come only recently to Anglo-American law. The policy recommendation that a custody disposition should approximate past caretaking practices has surfaced most explicitly within the last few years as a proposal from the American Law Institute.[162]

Interestingly, *Goldtooth* was decided in 1982, a time when the concept of joint custody was just beginning to find acceptance within state legislatures and judiciaries.[163] Unlike some state counterparts, Judge Tso did not doubt the propriety of joint custody as a permissible custodial disposition, and he remarked on the belated recognition of joint

160. *See id.* at 226. The Navajo court discussed at length and with evident approval a custody dispute from a court in Quebec, Canada, involving a child who had been cared for by his Inuit grandparents pursuant to a traditional Native adoption. The court granted legal custody to the mother, physical custody to the grandparents, and visitation to the father. *See* Deer v. Okpik, 4 Canadian Native L. Rep. 93 (Cour Supérieure de Quebec 1980), *cited with approval in Goldtooth*, 3 Navajo Rptr. at 225-26; Lente v. Notah, 3 Navajo Rptr. 72, 76 (1982)(explaining that tribal judges "will look to the welfare of the child before the rights of a natural parent").

161. *See Goldtooth*, 3 Navajo Rptr. at 228. After the court entered its order in *Goldtooth*, the parties were unable to agree upon a plan for implementation of joint custody. *See* Pavenyouma v. Goldtooth, 5 Navajo Rptr. 17, 17 (1984). Without further hearings, the trial court made a split custody award of the minor children. That order was reversed by the Navajo Court of Appeals because of the lower court's failure to follow appropriate procedures for modifying custody. *See id.* at 18-19. Moreover, rather than remanding the case to the trial court, the appeals court took the unusual step of announcing specific guidelines for implementing the original joint custody award and of setting child support amounts. Its action derived from an evident concern for the children: "Considering the length of time the matter has been pending, the Court finds that it is in the best interests of the parties and the minor children that litigation in this matter come to an end." *Id.* at 20.

162. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.09 (Tentative Draft No. 3, 1998)[hereinafter ALI, TENTATIVE DRAFT NO. 3]; AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.09 (Tentative Draft No. 4, 2000)[hereinafter ALI, TENTATIVE DRAFT NO. 4](proposing standard of custodial allocation based on parties' proportionate share of past caretaking functions). The basic principle underlying the ALI proposal was first articulated by Elizabeth Scott. *See* Elizabeth S. Scott, *Pluralism, Parental Preferences, and Child Custody*, 80 CAL. L. REV. 615 (1992).

163. *See, e.g., In re* Marriage of Weidner, 338 N.W.2d 351 (Iowa 1983)(discussing evolution of joint custody).

custody within "Anglo-European society."[164] Rather, Judge Tso assumed that all alternatives were acceptable, so long as the chosen disposition served the interests of the children and was consistent with Navajo tradition. The Navajo Court of Appeals subsequently approved of Judge Tso's reasoning, praising his "brilliant analysis of the relationship between the principles of joint custody and traditional Indian family modes."[165]

Consistent with the cultural primacy of children among Indian tribes, many child custody opinions rendered by tribal courts reveal a child-centered orientation that places the child's interests above the rights of other parties. In some cases, the child's rights trump the potentially adverse procedural rights of the parents. In *Yazzie v. Yazzie*,[166] for example, the Navajo Supreme Court refused to allow a father to advance his defense that he had not been properly served with process in a child support modification proceeding.[167] The record showed that the father had received actual notice.[168] In rejecting the father's contention, the court creatively intertwined two strands of Navajo culture—the customary duty of support and a traditional interpretation of notice—but it began its discussion by emphasizing the primacy of the child's rights:

> The child's best interests are paramount. Allowing the father to avoid his obligation to his child due to a nonprejudicial, procedural error is contrary to the common law of the Navajo people. Under Navajo custom, "a father of a child owes the child . . . the duty of support." . . . Under Navajo common law, a crier for a Naat'aanii would give oral notice to those interested in a problem. When the people arrived to "talk things out," it would be very unusual for someone to say the discussion cannot proceed because notice was not given in a particular way. So long as a person had fair and sufficient notice of the proceeding, that was all that was required.[169]

Thus, in deciding that a formal defect in notice did not vitiate the father's duty of support, the court drew upon tribal tradition while emphasizing the central place of the child in the dispute.

Another area revealing contrasting philosophies of parenthood is adoption. Adoption, never a part of the English common law, was legislatively recognized in the United States during the nineteenth cen-

164. Judge Tso wryly remarked that "Anglo-European society is increasingly discovering ways which we have know for centuries." *Goldtooth*, 3 Navajo Rptr. at 226. He made a similar observation in a later writing:

> Now Anglo courts recognize the concept of joint custody of children and the role of the extended family in the rearing of children. Navajos have always understood these concepts. We could have taught the Anglos these things one hundred and fifty years ago.

Tso, *Decision Making*, *supra* note 52, at 227.

165. Pavenyouma v. Goldtooth, 5 Navajo Rptr. 17, 19 (1984).

166. Navajo Rptr., No. SC-CV-29-94 (1994).

167. *See id.* at 3-4.

168. *See id.* at 3.

169. *Id.* at 4 (citations omitted).

tury, and the early adoption statutes authorized the transfer of children by deed from one set of parents to another.[170] In modern American law, adoption is the formal creation of legal parenthood and, in general, pre-existing parental rights have been extinguished — either by consent or involuntary termination.[171] As succinctly explained by Professor Clark, "[a]s a result of the adoption decree the legal rights and obligations which formerly existed between the child and his natural parents come to an end, and are replaced by similar rights and obligations with respect to his new adoptive parents."[172] The all-or-nothing status of parenthood in Anglo-American law has traditionally precluded the recognition of lingering ties between the adopted child and the birth family once the adoption is final. This doctrine manifests itself in a variety of ways, most prominently in recent years in the continued refusal of a majority of state courts to enforce visitation agreements entered into between adoptive parents and birth parents, despite compelling evidence in individual cases that such visitation would be in the best interests of the child.[173] Conversely, the bonds that a child has formed with an intended adoptive family may be disregarded under Anglo-American law if the adoption

170. *See* Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956).

171. *See, e.g.*, ARIZ. REV. STAT. § 8-106 (Supp. 1999-2000)(Consent to adoption); *see generally* HOMER H. CLARK, LAW OF DOMESTIC RELATIONS 855-62 (2d ed. 1988).

172. CLARK, *supra* note 171, at 850.

173. *See, e.g.*, Adoption of Vito, 728 N.E.2d 292 (Mass. 2000)(holding that trial court order for post-adoption visitation with biological mother was clearly erroneous since it rested solely on child's speculative future need to develop racial identity); State *ex rel.* Kaylor Bruening, 684 N.E.2d 1228, 1230 (Ohio 1997)(holding that approval of stepparent adoption terminates biological mother's rights, divesting domestic relations court of jurisdiction to proceed on biological mother's visitation request); *In re* M.M., 619 N.E.2d 702, 712 (Ill. 1993)(holding that public guardian could not condition consent to adopt on adoptive parents' willingness to permit visitation, even though visitation with biological siblings would be in child's best interests); *In re* Adoption of C.R. Topel, 571 N.E.2d 1295, 1299 (Ind. 1991)(holding that visitation agreement vitiated father's consent since parent cannot relinquish all rights but attempt to retain right to visit child); *In re* Custody and Visitation of Jeffrey A., 584 N.W.2d 195 (Wis. App. 1998)(holding that adoption after termination of birth mother's rights defeats maternal grandparents' equitable claim for visitation). *But see* Michaud v. Warwick, 551 A.2d 738 (Conn. 1988)(holding that trial court may enforce post-adoption visitation agreement with birth mother, subject to finding that visitation is in child's best interests). Significantly, even in the new Uniform Adoption Act, a controversial proposal because of its perceived diminution of parental rights, see Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345 (1996)(describing "divisive" and "arduous" task of drafting Act), post-adoption visitation with a birth parent is authorized *only* in the context of stepparent adoption. *See* UNIF. ADOPT. ACT § 1-105 (providing that legal adoption terminates relationship between child and former parent, except in stepparent adoption context); UNIF. ADOPT. ACT. § 4-113 (permitting enforcement of post-adoption visitation between child and former parent in stepparent adoption context).

is set aside. In the well-publicized case of Jessica DeBoer[174] and others like it,[175] children were removed from adoptive homes to be returned to birth parents with whom they had no psychological relationship. To critics, such cases are a tragic demonstration of the Anglo-American judicial system's insistence on an exclusive and excluding construction of legal parenthood, a judicial posture that may ignore the reality of a child's emotional ties with caregivers.[176]

In general, tribal courts appear to embrace a more fluid concept of child rearing in which biology and formal adoption are not the only routes to the obligations and responsibilities of parenthood. Although biology is of critical importance to the kinship ties within many tribes,[177] child rearing responsibilities may be allocated in ways that extend beyond biological parents. In some cases, that viewpoint comes across in discussions of traditional Native adoption. In *DuMarce v. Heminger*,[178] for example, an intertribal court of appeals described traditional adoption as it was understood by the Sisseton Wahpeton Sioux tribe. According to the court, through "ecagwaya adoption," or traditional adoption, the voluntary placement of a child with another family may evolve with the passage of time into an adoption, giving the adoptive parents certain rights without terminating the parental rights of the birth parents. In the language of the tribal code, "Ecagwaya is to raise or to take in as if the child is a biological child."[179] The allocation of rights and responsibilities as between the birth parents and the adoptive parents is to be based on "[the child's] best interests and where the child's sense of family is."[180] In distin-

174. *See In re* B.G.C., 496 N.W.2d 239 (Iowa 1992)(nullifying adoption of infant girl who had lived for first two years of life with adoptive parents, because of inadequate notice to biological father); *see also* DeBoer v. Schmidt, 509 U.S. 1301 (1993)(Opinion of Stevens, J., Circuit Justice)(denying stay of Michigan order in same case, stating that best interests standard cannot override rights of fit biological parents).

175. *See, e.g., In re* Baby Girl T., 715 A.2d 99 (Del. Fam. Ct. 1998); Petersen v. Rogers, 445 S.E.2d 901 (N.C. 1994).

176. *See, e.g.*, Elizabeth Bartholet, *Blood Parents vs. Real Parents*, N.Y. TIMES, July 13, 1993, at A19; Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 969 (1994)(referring to Baby Jessica case as a "disaster" based on procedural problems); David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 42 ARIZ. L. REV. 753 (1999)(proposing form of open adoption to avoid tragedy of Baby Jessica).

177. *See* Davis v. Means, 21 Indian L. Rptr. 6125 (Navajo 1994). In *Davis*, the Navajo Supreme Court approved of mandatory blood chromosomal testing to definitively identify a child's biological father. The court reasoned, in part, that the child's identity as a tribal member as well as a member of a particular clan would depend on an accurate identification of the child's biological father. *See id.* at 6127; *infra* notes 356-58 and accompanying text.

178. 20 Indian L. Rptr. 6077 (N. Plains Intertribal Ct. App. 1992).

179. SISSETON WAHPETON SIOUX TRIBAL CODE § 39-03-24.

180. *Id.*

guishing traditional adoption from the adoption laws of most states, the tribal appeals court noted that under Anglo law parents' rights must be terminated before an adoption can take place, parents' rights are protected as fundamental under the federal constitution, and termination of parental rights is conditioned on a finding of unfitness.[181] The ecagwaya adoption, on the other hand, allows for an adoption without terminating the birth parents' rights and envisions some degree of continued involvement in the child's life by the birth parents.[182]

Similarly, the Navajo common law concerning adoption reveals marked contrasts with the conventional law of adoption prevalent in the states. In *In re Interest of J.J.S.*,[183] the tribal district court granted the adoption of a neglected child by a member of the child's extended family. Judge Tom Tso explained that "[t]he American Law of Adoption thinks in terms of duties. Natural parents have duties towards their children, and when those duties are breached, then the law will take the children away from the natural parents and give them to other parents."[184] According to Tso, "Navajo concepts are different" and stem from different sources.[185]

> The Navajo Common Law is not concerned with the termination of parental rights or creating a legalistic parent and child relationship because those concepts are irrelevent [sic] in a system which has obligation to children that extend beyond the parents. Therefore, upon the inability of the parents to assist a child or following the occurrence of a family tragedy, children are adopted by family members for care which may be temporary or permanent, depending upon the circumstances.[186]

Traditional Navajo adoption, as described by Judge Tso, is grounded on the cultural premise that children belong to more than just the parents. In Navajo custom, extended families and clans have an obligation to care for children whose parents are unable to do so.[187] Under Judge Tso's formulation, "[t]he mechanism [for traditional adoption] is informal and practical and based upon community expectation founded in religious and cultural belief."[188] Navajo adoption, accord-

181. *See DuMarce*, 20 Indian L. Rptr. at 6078. Interestingly, on the facts before it the court found no ecagwaya adoption because of the adversarial nature of the relations between the parties and the involvement of the court. For a valid ecagwaya adoption, the parties would have had to maintain amicable relations without adversary court proceedings. *See id.* at 6079.

182. *See id.* at 6078. Other tribes likewise recognize forms of traditional Native adoption. *See, e.g., In re* S.J.S., 4 Okla. Trib. 466, 475 (Cheyenne-Arapaho Sup. Ct. 1995)(noting that tribal law recognizes statutory adoptions as well as "traditional adoptions under tribal custom and common law").

183. 4 Navajo Rptr. 192 (Navajo D. Ct. 1983).

184. *Id.* at 193.

185. *Id.*

186. *Id.* at 195.

187. *See id.*

188. *Id.*

ing to Tso, is not concerned with the exchange of legal parents but is "based on need, mutual love and help."[189] Traditional adoption, then, in certain tribes is viewed as a relationship established over time. Often rooted in need, it is a transfer of parental responsibilities where a child's birth parents are unable or unwilling to provide adequate care, but the adoption typically will not bar continued contact with the birth parents. In contrast to the formalism of many state court cases on adoption, the descriptions from tribal courts link traditional adoption with the Native concept of collective responsibility for the welfare of tribal children.[190]

Another potential contrast in the law of many states and that of many tribes lies in the imposition of certain categorical barriers to adoption by state law. In the state context, strong judicial and legislative opposition to adoption by lesbians and gay men has remained a barrier to such adoptions until recent years.[191] Prior to the mid-1980s, adoption by an openly gay, lesbian, or bisexual person was a rarity, with most courts invoking the evils of social stigma and improper role models to hold that the privilege of adoption should be withheld from the gay and lesbian population.[192] For a myriad of reasons, the resistance to adoption by gays and lesbians diminished considerably in the last fifteen years.[193] Nevertheless, while few states in the United States currently impose an absolute statutory ban against lesbian and gay adoption in the context of single-parent adoptions,[194]

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189. *Id.*

190. A further example can be seen in the Pascua Yaqui Code, where the tribe has made explicit its desire to continue a child's ties with his or her biological parents:

> Adoptions under this Code shall be in the nature of "open adoptions." The purpose of adoptions is not to permanently deprive the child of connections to, or knowledge of, the child's natural family. The purpose of adoptions shall be to give the adoptive child a permanent home.

PASCUA YAQUI JUVENILE CODE § 15.1 (1992). The Code goes on to enumerate specific rights, such as the child's "absolute right, absent a convincing and compelling reason to the contrary, to information and knowledge about his natural family and his tribal heritage," and a "right to reasonable visitation with" the biological parents and extended family, unless compelling reasons exist to the contrary. *Id.*

191. *See generally* David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 536-41 (2000).

192. *See generally In re* the Appeal in Pima County Juvenile Action B-10489, 727 P.2d 820, 830 (Ariz. Ct. App. 1986)(affirming trial court's refusal to certify bisexual man as fit to adopt and reasoning that to rule otherwise would be inconsistent with state's criminalization of homosexual behavior); *In re* Opinion of the Justices, 530 A.2d 21 (N.H. 1987)(upholding statutory ban prohibiting homosexuals from becoming foster or adoptive parents).

193. *See generally* JOAN HEIFETZ HOLLINGER, 1 ADOPTION LAW AND PRACTICE § 3.06[6]; Chambers & Polikoff, *supra* note 191, at 539-41.

194. *See, e.g.*, N.H. REV. STAT. ANN. §§ 170 B:2-B:4, 170 F:2-F:6, 161:2 (1994); *In re* Opinion of the Justices, 530 A.2d 21 (1987)(holding that proposed state law bar-

adoption by same-sex couples or by the same-sex partner of a legal parent remains unavailable under the laws of most states.[195] When rejecting such petitions, state courts frequently assume a literalist stance and rely on statutory restrictions requiring two applicants wishing to jointly adopt as a couple to be lawfully married.[196] Moreover, the widely-publicized efforts in Hawaii and Vermont to legitimate same-sex unions may have triggered a counter-trend among state legislatures to resurrect prohibitions against adoption by lesbians and gay men.[197] Thus, in adoption regulation as well as other areas of family law, decision makers may use their power to enforce majoritarian sexual norms.[198]

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ring homosexuals from adopting or being foster parents would not be unconstitutional).

195. *See, e.g., In re* Adoption of C.C.G., 2000 WL 1672904 (Pa. Super. Ct. 2000)(holding that male partner of adoptive father could not adopt the latter's children unless termination of the latter's parental rights first occurred); *In re* Angel Lace M., 516 N.W.2d 678 (Wis. 1994)(holding that life partner of unmarried mother could not adopt child without terminating mother's parental rights because of statutory requirements). Although several state courts have validated adoptions by the same-sex partner of a child's biological parent, *see, e.g., In re* Evan, 583 N.Y.S. 2d 997 (Sup. Ct. 1992)(upholding adoption of child by biological mother's same-sex partner); Adoption of B.L.V.B., 628 A.2d 1271, 1274 (Vt. 1993)(holding that the intent of state's statutory adoption law supported adoption by same-sex partner of biological mother), adoption petitions by same-sex couples have not fared as well. *See* HOLLINGER, *supra* note 193 § 3.06[6](describing same-sex couple adoption of unrelated child as "vexing"). *But cf. In re* M.M.D., 662 A.2d 837 (D.C. 1995)(allowing same-sex partner of adoptive parent to adopt child).

196. *See, e.g., In re* Angel Lace M., 516 N.W.2d 678, 686 (Wis. 1994)(denying lesbian partner of birth mother the right to adopt since the statute would require termination of mother's rights); *In re* Adoption of T.K.J., 931 P.2d 488 (Colo. Ct. App. 1996)(stating that the statutory definition of stepparent refers to marital partners only); *see generally* HOLLINGER, *supra* note 188 § 12.03[1].

197. Since 1995, proposals to ban adoption by lesbians and gay men have been introduced in several state legislatures in an effort to counter a perceived national move towards acceptance of gay families. *See* Chambers & Polikoff, *supra* note 191, at 539-41; Scott D. Ryan, *Examining Social Workers' Placement Recommendations of Children with Gay and Lesbian Adoptive Parents*, 81 FAM. IN SOC'Y 517 (2000)(noting recent legislative proposals across United States to ban gay men and lesbians from adopting children). In Mississippi and Utah, for example, the legislatures recently enacted laws that effectively prohibit adoption by lesbian or gay couples. *See* S.B. 3074, Ch. 535, 2000 GEN. LAWS OF MISS.; UTAH CODE ANN. § 78-30-1 (Supp. 2000).

198. State court opinions denying physical custody to a parent on the basis of the parent's perceived sexual immorality suggest that state judges sometimes resolve custody disputes on the basis of punitive bias rather than on the basis of a neutral assessment of the child's best interests. *See, e.g.,* ALI, TENTATIVE DRAFT NO. 3, *supra* note 162, at 15 (custody decision making on the basis of parental morality usually reflects prejudice rather than a rational assessment of the child's welfare); *id.* at § 2.14 (proposing that extramarital conduct of parent should not be considered except upon a showing of harm to child, in order to prevent courts from exaggerating significance of conduct of which they disapprove). For illustrative recent cases involving issues of sexual morality, see *V.A.E. v. D.A.E.*, 873

In contrast to the approach of many state courts and legislatures, some tribal communities may be more receptive to adoption by gays and lesbians. The topic of sexual conventions among Indian tribes is clearly beyond the scope of this Article, but there is evidence of a greater tolerance in many tribal societies for ambiguity in gender-identification. Historically, an Indian child's biological gender did not necessarily determine whether the individual would ultimately function as male or female, although male and female roles may have been sharply defined in many tribes.[199] Scholars have commented about the fluidity of gender boundaries among certain tribes as illustrated by the social acceptance of the "berdache," or a man who often dressed as a woman, performed women's work, and was sexually oriented toward men, and the "amazon," or a woman who dressed as a man, primarily performed men's work, and was sexually oriented toward women.[200] In many of the tribes in which a berdache tradition existed (including such diverse groups as the Navajo, Mohave, Lakota, Arapaho, and Omaha), the berdache held a position of spiritual significance and was viewed as capable of functioning as a mediator between the sexes as well as between the psychic and the physical worlds.[201] In-

S.W.2d 262 (Mo. App. 1994)(holding that trial court did not err in considering mother's heterosexual affair which produced a child as factor in custody decision). *Merriam v. Merriam*, 799 P.2d 1172 (Utah 1990)(holding that trial court did not abuse discretion in weighing mother's infidelity against her); *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985)(holding that trial court erred in awarding custody to father where record showed that father was engaged in "active homosexual relationship in same residence as child"); *Jarrett v. Jarrett*, 400 N.E.2d 421 (Ill. 1979)(holding that trial court did not err in removing custody from mother after mother's boyfriend moved in with her and her children).

199. *See* WILL ROSCOE, THE ZUNI MAN-WOMAN 22-24 (1991)(noting that in Zuni tradition, an older child or adolescent could choose a gender role that differed from his or her biological gender without social disapproval).

200. *See id. at* 194 (describing life history of a nineteenth century Zuni berdache and exploring meaning of gender in Zuni society); WALTER L. WILLIAMS, THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE 11 (1986)(discussing various berdache traditions in diverse Native American societies); Evelyn Blackwood, *Sexuality and Gender in Certain Native American Tribes: The Case of Cross-Gender Females*, 10 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 11, 27 (1984). According to Walter Williams, until the twentieth century the term "berdache" was used to refer only to males who assumed a feminine role. He asserts that "[f]emale gender variation was recognized in a number of cultures, but it had a separate and distinct status of its own." WILLIAMS, *supra*, at 11. Both Williams and Roscoe take the position that the berdache occupied a special gender status that was neither male nor female. Williams wrote that "American Indian cultures, through the berdache tradition, do provide alternative gender roles. Indians have options not in terms of either/or, opposite categories, but in terms of various degrees along a continuum between masculine and feminine." WILLIAMS, *supra*, at 80; *see also* ROSCOE, *supra* note 199, at 22 (suggesting that Zuni berdaches occupied an alternative gender, a status the Zunis call Ihamana).

201. *See* WILLIAMS, *supra* note 200, at 25-30. Williams reports that in many tribes, the berdache role signified an individual's proclivities as a dreamer and a vision-

terestingly, one scholar has reported that berdaches often took on parental roles for orphaned children or children from overcrowded families through traditional Native adoptions.[202] Of course, simply because the berdache and amazon[203] may have occupied a position of esteem and reverence within certain tribal societies does not mean that tribal courts today necessarily would accept gay men and lesbians as potential adoptive parents. Nevertheless, the presence of such traditions in a particular tribe does suggest that the tribe's cultural heritage includes a greater acceptance of gender variance than that of the Anglo-American world.[204]

I have found no codified tribal law that addresses the question of sexual orientation in child custody disputes or in adoption, although references to "morality" are not uncommon in tribal law.[205] On the other hand, at least one tribal court opinion addressing adoption by a same-sex couple displays no concern for the sexual orientation of the prospective adoptive parents. In *In re the Adoption of Ashley Felsman*,[206] the Confederated Salish and Kootenai tribal court of appeals reviewed a trial court decree approving the adoption of two children by a lesbian couple. The adoptive parents, who had been recommended by the deceased biological mother (also a lesbian), were deemed by the trial court to be "competent and qualified" to adopt, and "fit to provide a home environment for the healthy development of the children."[207] The trial court also noted that the prospective adoptive

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ary, and the berdache was often thought to possess shamanistic or other spiritual powers. *See id.* at 25, 41.

202. *See id.* at 54-57.

203. Less scholarship has been devoted to the amazon tradition than to the berdache, but cross-gender traditions did exist among American Indian women, and there is evidence that becoming an amazon was respected as a choice of the female herself. *See* WILLIAMS, *supra* note 200, at 233-51 (describing various forms of gender variance among Native women, including the Yuma *kwe'rhame*, the Mohave *hwame*, and the Warrior Women of the Great Plains tribes); *see generally* Paula Gunn Allen, *Lesbians in American Indian Cultures*, 7 CONDITIONS 67 (1981).

204. As Williams put it,

> [w]e can look to institutions like the berdache for new ways of thinking about sexual variance, love between persons of the same sex, and flexibility in gender roles . . . . We can use the American Indian concept of spirituality to break out of the deviancy model, to reunite families, and to offer special benefits to society as a whole.

WILLIAMS, *supra* note 200, at 275.

205. *See, e.g.*, HUALAPAI TRIBAL CODE § 3.27 (1996)(stating that noncustodial parent has presumptive right to visitation unless there is finding of danger to, *inter alia*, child's "moral" health); PASCUA YAQUI TRIBAL CODE § 10.24 (1992)(same); LAW & ORDER CODE OF THE UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION UTAH § 5-3-9 (1988)(requiring the court to consider the "demonstrated moral standards" of each party in determining custody).

206. 23 Indian L. Rptr. 6086 (Confederated Salish & Kootenai Tribal Ct. 1996).

207. *Id.* at 6087.

parents were "willing to provide the children with the unique values of Indian culture."[208] Although the appeals court reversed because of the trial court's failure to hold an evidentiary hearing on a competing adoption petition, neither the appellate court nor the lower court discussed the matter of sexual orientation other than noting the lesbian identity of the appellees. Unlike the judicial reaction to comparable petitions in the state judiciaries, both the appellate court and the trial court treated the same-sex status of the prospective adoptive parents as legally irrelevant. It has been suggested, moreover, that many tribal judges may view a litigant's sexual orientation as essentially a private matter, beyond the scope of proper inquiry in a court setting.[209]

Tribal courts may construe the parent-child relationship differently from Anglo-American courts in yet another respect. The responsibilities of parenthood, Native and non-Native alike, include the obligation to provide adequate medical care for children. That obligation, however, may be differently interpreted by a tribal court where a question of spiritual healing is involved. In state courts, a parent's rejection of allopathic treatment for a seriously ill child in favor of alternative medical treatment or spiritual healing will often result in a judicial finding of neglect, at least where medical experts provide evidence that the generally-accepted allopathic approach has a high probability of success with little risk to the child.[210] State statutory law sometimes provides that the practice of spiritual healing alone cannot be the basis of a finding of child neglect,[211] but such statutes

208. *Id.*

209. Interview with Hon. Violet Lui-Frank, *supra* note 137; *cf.* WILLIAMS, *supra* note 200, at 126 (observing that homosexuality, while accepted as one of many personality elements in berdachism, is viewed as essentially private matter).

210. *See, e.g.*, State v. Jensen, 633 P.2d 1302 (Or. App. 1981)(placing child in state custody and ordering medical treatment of child's hydrocephalus over parents' desire to treat child's condition with prayer); State v. Hamilton, 657 S.W.2d 425 (Tenn. App. 1983)(declaring a child suffering from Ewing's Sarcoma a dependent, and ordering medical treatment over father's religious objections to treatment); *see generally* Jennifer L. Hartsell, Comment, *Mother May I . . . Live? Parental Refusal to Life-Sustaining Medical Treatment for Children Based on Religious Objections*, 66 TENN. L. REV. 499 (1999)(examining constitutional implications of religious-treatment exemptions under state law); Walter Wadlington, *Medical Decision Making For and By Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311 (describing evolution of state intervention in medical treatment decisions for children and noting greater willingness by modern state courts to intervene).

211. *See, e.g.*, OKLA. STAT. tit. 21, § 852 (1988)(finding of child endangerment cannot rest solely on parent's use of spiritual treatment, but medical care must be provided where permanent physical damage could result). In *State v. McKown*, 475 N.W.2d 63 (Minn. 1991), *cert. denied*, 502 U.S. 1036 (1992), the court construed a statutory scheme providing that reliance on spiritual treatment and prayer did not in itself constitute child neglect. The parents, who had been indicted for manslaughter following the death of their child, argued that criminal prosecution was barred in light of the statutory provisions governing spiritual treatment. *See id.*

are driven by religious freedom concerns rather than a shared belief in the effectiveness of spiritual healing. Ironically, the free-exercise concerns of such statutes may collide with another facet of the First Amendment, the Establishment Clause.[212]

In tribal courts, in contrast, a litigant may encounter greater receptivity to the use of spiritual healing for children so long as the chosen methods comport with the tribe's traditions.[213] Significantly, tribal governments often incorporate a religious dimension,[214] and the Indian Civil Rights Act does not include a counterpart to the First Amendment's mandate for separation of church and state.[215] In *In re T.M.M.*,[216] the Inter-Tribal Court of Appeals of Nevada reviewed a case that had run an arduous course in the Walker River Paiute juvenile tribal court. There, a Paiute mother had sought to treat her child, who suffered from Hodgkins lymphoma, with a variety of spiritual

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at 66-67. The court held that the neglect statutes did not preclude criminal prosecution, but the ambiguity in the statutory scheme failed to put the parents on notice that their conduct might subject them to criminal liability. *See id.* at 67. Criminal prosecution was thus barred under the due process clause. *See id.* at 67-69; *see generally* James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996)(arguing that religious exemptions violate children's equal protection rights).

212. *See, e.g.*, Walker v. Superior Court, 763 P.2d 852, 873-78 (Cal. 1989)(Mosk, J. concurring), *cert. denied*, 491 U.S. 905 (1989)(suggesting that California's spiritual treatment exemption in child neglect law should be struck down as unconstitutional under establishment clauses of state and federal constitutions); Commonwealth v. Twitchell, 617 N.E.2d 609, 614 (Mass. 1993)(acknowledging but refusing to reach constitutional issues raised by state's spiritual treatment statute).

213. Tribal codes may explicitly acknowledge a spiritual healing practice. The Pascua Yaqui Tribe, for example, has authorized medical treatment by tribal order where a child's life is at risk, but it requires the tribal court to give consideration to spiritual treatment:

> In making this order the Court shall give due consideration to any treatment being given the child by prayer through spiritual means alone or through other methods approved by Tribal customs, traditions or religious, if the child or his parent . . . are adherents of a bona fide religious denomination that relies exclusively on this form of treatment in lieu of medical treatment, or practices in fact the Tribal customs, traditions or religion upon which they rely for such treatment of the child.

PASCUA YAQUI TRIBAL CODE § 11.1(c) (1992).

214. Because of the theocratic nature of many tribal governments, Congress did not include a prohibition against the establishment of religion; in the Indian Civil Rights Act. *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, supra note 54, at 44-51.

215. *See* 25 U.S.C. § 1302 (1994). The ICRA does include a "free exercise" provision. *See id.* at (1) (stating that no tribe shall "make or enforce any law prohibiting the free exercise of religion").

216. 24 Indian L. Rptr. 6176 (Inter-Tribal Ct. App. Nev. 1997), *reviewing In re* T.M.M., 24 Indian L. Rptr. 6005 (Walker River Juv. Ct. 1996); *In re* T.M.M., 24 Indian L. Rptr. 6039 (Walker River Juv. Ct. 1996).

methods in lieu of conventional allopathic medicine. In considering whether the child should be declared a ward of the juvenile court, the tribal judges expressed a deep respect for traditional healing methods. "Traditional Northern Paiute Indian doctors," the juvenile court stated, "have had a centuries [sic] long and successful history within our Northern Paiute Nation when their medical advice and treatment is sought soon enough, and they have played an integral role in our communities and are essential to this tribe's continued existence as a sovereign."[217] In the view of the juvenile court, however, the mother's chosen treatments were not traditional Northern Paiute treatments; rather, they included acupuncture, the use of healers from the Wintu tribe of northern California, and various forms of naturopathy.[218] Reasoning that non-Paiute forms of treatment were not "medical care" within the meaning of tribal law, the court explained that the mother had failed to establish that her preferred treatments were aligned with tribal custom.

> [The mother] seems to confuse being "Native American" with being "Northern Paiute."
>
> . . . .
>
> The mere fact that a Native American or one or two members of the Walker River Paiute Tribe may use the services of Wintu healers is not controlling on this court or capable of being the basis for a finding of tribal common law (custom, tradition and usage).[219]

Thus, the juvenile court insisted that the mother base her claim on Northern Paiute traditions.[220] Indeed, the court made clear that it was interested only in traditions specific to the Walker River Tribe and not those of other Northern Paiute tribes.[221] Finding a sufficient basis for a wardship, the court ordered that the child be placed in the custody of the tribe's social services department to receive "equally traditional Northern Paiute and conventional white medical treatment."[222]

Interestingly, the tribal appeals court viewed the case somewhat differently. The appellate court accepted the mother's reliance on "Indian medicine," without requiring her to establish its legitimacy under Northern Paiute tradition.[223] The appellate court wrote:

> We find that the evidence in this case does not support a conclusion of medical care deprivation because the mother has always proceeded in a manner designed to provide such care according to Indian custom and traditions.
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> . . . .

217. *In re* T.M.M., 24 Indian L. Rptr. 6005, 6006-07 (Walker River Juv. Ct. 1996).
218. *In re* T.M.M., 24 Indian L. Rptr. 6035, 6044 (Walker River Juv. Ct. 1996).
219. *Id.* at 6048.
220. *See id.* at 6048-49.
221. *See id.* at 6049 ("What is the law within one Northern Paiute tribe's lands is . . . not, necessarily, the laws of another Northern Paiute tribe.").
222. *Id.* at 6045.
223. *See In re* T.M.M., 24 Indian L. Rptr. 6176, 6176 (Inter-Tribal Ct. App. Nev. 1997).

> . . . [M]edical care, as defined for this case, means that traditional Indian medicine is an alternative to allopathic medicine, and that the mother and child have a strong belief in, and preference for, traditional Indian medicine. That preference must be respected, barring conclusive evidence of its lack of efficacy.[224]

The various opinions generated by the dispute in *T.M.M.* reveal two tribal courts — the tribal juvenile court and an inter-tribal appellate court — struggling with their desire to protect a child's welfare while also recognizing the legitimacy of both conventional "white medicine" and traditional healing methods. The final appellate decision deferring to the mother's choice of "traditional Indian medicine" placed the burden on those opposing her choice to establish the inefficacy of the selected treatment. That endorsement of traditional healing methods, amounting to a presumption of efficacy, contrasts sharply with the often grudging attitudes towards non-allopathic healing methods one encounters in the state courts. The *T.M.M.* dispute clearly illustrates that a court's construction of the responsibilities of parenthood are grounded in culture. Moreover, the disagreement between the tribal juvenile court and the court of appeals points out an uncertainty regarding the degree to which traditional healing must bear the imprimatur of a particular tribe to acquire legitimacy. The very existence of the tension indicates that the Northern Paiute cultural understanding of parenthood is dynamic. Thus, the *T.M.M.* dispute shows, as well, that tribal courts can play a key constitutive role in defining the cultural norms.

B. Motherhood and Fatherhood

In the state courts, the familiar history of child custody law stands in marked contrast to the approaches of many tribal courts. The child in early English common law was subject to the married father's superior authority as a function of patriarchy and was treated much like a piece of chattel.[225] The father had an absolute right to ownership and control over his minor legitimate children and was entitled to sole le-

224. *Id.* Although the court found that there was no evidence of neglect on the part of the mother, the wardship of the child remained in effect for the reason that, by the time the case came before the appeals court, the mother was the subject of a state criminal prosecution for child neglect and would be unable to perform the obligations of parenthood. *See id.*

225. According to Blackstone:

> The legal power of a father—for a mother, as such, is entitled to no power, but only to reverence and respect; the power of a father, I say, over the persons of his children ceases at the age of twenty-one . . . . Yet, till this age arrives, the empire of the father continues even after his death; for he may by his will appoint a guardian to his children.
>
> 1 WILLIAM BLACKSTONE, COMMENTARIES *453.

gal custody in the event of parental separation.[226] Mothers, according to Blackstone, were entitled to "no power, but only reverence and respect."[227] Through reform efforts by women's rights advocates, Anglo-American law gradually moved to a model premised on protection of the child's interests through the guise of the "tender years" doctrine.[228] That doctrine idealized the nurturing role of women, at least for young children,[229] and was redolent of the "separate spheres" ideology that permeated much of the thinking about the sexes at the turn of the century.[230]

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226. In the early nineteenth century, divorce courts in the United States routinely awarded children to their fathers, and only rarely did a judge defy common law tradition to award custody to a mother. *See generally* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 76-81 (1995); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH CENTURY AMERICA 235 (1985); MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994).

227. 1 WILLIAM BLACKSTONE, COMMENTARIES *453. For a discussion of the entrenched resistance to mothers' rights in custody disputes in England through the first half of the 19th century, see Danaya C. Wright, DeManneville v. DeManneville: *Rethinking the Birth of Custody Law Under Patriarchy*, 17 L. & HIST. REV. 247 (1999).

228. By the beginning of the twentieth century, a majority of state courts adhered to the "tender years" doctrine, implementing the presumption that mothers, unless shown to be unfit, should be awarded custody of young children. *See generally* Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423 (1976). The doctrine had antecedents in early cases finding mothers to be better suited for the care of young children by natural law. *See id.* at 410; *see also* Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916)("[m]other love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care even more than a father's.").

229. In some states, the doctrine had a counterpart in which fathers were the presumptive custodians when a child reached an age suitable for occupational training. In *Porter v. Porter*, 518 P.2d 1017 (Ariz. Ct. App. 1974), for example, the court explained: "As between parents adversely claiming the custody of guardianship . . . other things being equal, if the child is of tender years, it shall be given to the mother. If the child is of an age requiring education and preparation for labor or business, then to the father." 518 P.2d at 1019 (quoting ARIZ. REV. STAT. § 14-846(B)(repealed in 1974)).

230. The notorious words of Justice Bradley, concurring in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873), reveal the thinking of that era:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Id. The separate spheres ideology surfaced in twentieth century case law as well. *See* Muller v. Oregon, 208 U.S. 412 (1908)(holding that Oregon's workday hour-limitation for female employees was justified on the basis of women's natural

The tender years doctrine attracted an enormous following through much of the twentieth century, and studies indicate that it still influences the thinking of judges and parents as a practical matter.[231] In the 1970s, however, the formal law of child custody began to change. In that decade, women's rights advocates were actively challenging many state-sanctioned sex role stereotypes and, concomitantly, the United States Supreme Court began to apply heightened scrutiny to instances of sex discrimination in state and federal legislation under federal equal protection principles.[232]

Not surprisingly, constitutional assaults on the sex-based tender years doctrine inevitably made their way into court, and a majority of courts hearing such challenges found that the maternal preference was invalid and reflected "outdated stereotypes."[233] In its place, most states today rely on a gender-neutral "best interests" standard, generally supplemented by a list of factors to guide the family court's exercise of discretion.[234] The inherent subjectivity and indeterminacy of

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physical limitations, their role in childbearing, and their natural dependency on men).

231. *See generally* ELEANOR E. JACOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD 268 (1992)(reporting that about 70% of divorcing parents in sample population agreed to primary physical custody in the mother); Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 471 (1979)(reporting that mothers receive custody in 88-90% of divorces). At the same time, critics have pointed out that a societal presumption favoring women can give rise to expectations about mothers that can disadvantage a woman who fails to satisfy the prototype of a good mother. *See* ALI, TENTATIVE DRAFT NO. 3, *supra* note 162, §2.14, at 238; Nancy D. Polikoff, *Gender and Child-Custody Determinations: Exploding the Myths, in* FAMILIES, POLITICS AND PUBLIC POLICY: A FEMINIST DIALOGUE ON WOMEN AND THE STATE 185 (Irene Diamond ed., 1983).

232. *See* Craig v. Boren, 429 U.S. 190 (1976)(striking down state law that provided lower drinking age for women than for men); Frontiero v. Richardson, 411 U.S. 677 (1973)(striking down federal law giving male armed forces personnel automatic dependency allowance for their wives but requiring service women to prove husbands were dependent to get allowance); Reed v. Reed, 404 U.S. 71 (1971)(striking down overt gender criterion in appointment of administrators of intestate decedents' estates).

233. *See, e.g,* Pusey v. Pusey, 728 P.2d 117, 119-20 (Utah 1986)(reliance on gender as determining factor in custody case would violate Fourteenth Amendment and would perpetuate outdated stereotypes); State *ex rel.* Watts v. Watts, 350 N.Y.S.2d 285 (Fam. Ct. 1973)(applying tender years presumption would deprive father of right to equal protection).

234. The child custody provision of the Uniform Marriage and Divorce Act, which lists five factors for courts to consider in determining a child's best interests, has served as a model for much state legislation. *See* UNIF. MARRIAGE & DIV. ACT. § 402; 9A V.L.A. 159 (1998)(Table of Jurisdictions Wherein Act Has Been Adopted). For a description of state laws that provide criteria for applying the best interests standard, see ALI, TENTATIVE DRAFT NO. 3, *supra* note 162, § 2.09, Reporter's Notes, cmt. a, at 150-59. As state legislatures respond to pressures from various interest groups, they often add to the list of factors to further guide the discretion of trial judges. In Arizona, for example, the basic child custody

the best interests test has fueled criticism from many quarters, including feminist concerns that the standard disadvantages women.[235] In response to the many critiques, a minority of states have attempted to constrain the discretion of their trial judges with some form of presumption or preference. In a few states, high courts have announced a presumption favoring the primary caretaker parent,[236] while in other states the legislatures have adopted presumptions of varying strengths favoring joint custody or "shared parenting" arrangements.[237]

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statute now sets out a list of nine factors to be considered by courts, in addition to several negative constraints in cases where there is evidence of domestic violence or substance abuse. *See* ARIZ. REV. STAT. § 25-403 (Supp. 1999-2000).

235. For a classic critique of the inherent subjectivity of the best interests standard, see Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975); *see also* Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 16 (1987)("[B]est interest principle is usually indeterminate when both parents satisfy minimal fitness."); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986)("The 'best interests' standard is a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge .... Its vagueness provides maximum incentive to those who are inclined to wrangle over custody, and it asks the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt to be most distorted by the stress of separation and the divorce process itself"). Among feminists, Martha Fineman has argued that the best interest standard fails to recognize the primary caretaking role of women and gives too much control to experts from the social sciences. *See* MARTHA FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 79-94 (1991). Mary Becker has taken the feminist position one step further to endorse a maternal presumption, based in part on the unique emotional closeness and intimacy between mother and child. *See* Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992).

236. The West Virginia Supreme Court first articulated a primary caretaker presumption in *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981) as a replacement for the tender years doctrine. Under *Garska*, the primary caretaker of a young child was the presumptive custodian unless shown to be unfit as a parent. *See id.* at 360. As of January 1, 2000, the West Virginia legislature replaced *Garska's* approach with a modified primary caretaker presumption patterned after the ALI proposal, described *infra* at note 237. *See* W. VA. CODE § 48-11-206 (1999). Although the primary caretaker presumption has been popular among commentators and a few courts, it has not received widespread acceptance among state legislatures. *Compare* Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985)(adopting primary caretaker presumption), *with* MINN. STAT. ANN. § 518.17 (Supp. 1997)(declaring that primary caretaker may not be used as presumption in determining best interests of child); *see generally* Gary Crippen, *Stumbling Beyond the Best Interests of the Child: Reexamining Child Custody Standard—Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990).

237. *See* FLA. STAT. ANN. § 61-13(2)(b)(2) (1997)(creating rebuttable presumption of "shared parental responsibility"). The statutes of several states contain a presumption or preference for joint custody where parents are in agreement. *See,*

In the tribal world, the evolution of child custody law has different origins. In many tribal cultures, contrasting perceptions of motherhood and fatherhood have ancient roots. In the traditions of tribes that identify as matriarchal, fathers did not have equal standing with the mothers in custody disputes following break-up of the parents' relationship.[238] In *Polingyouma v. Laban*,[239] for example, the Hopi court of appeals recognized that under Hopi custom "a child is born into her mother's clan, lives with the mother's household and receives ceremonial training from the mother's household."[240] In *Polingyouma*, the appeals court remanded a joint custody decree so that the trial court could consider whether the award of alternating physical custody between mother and father violated Hopi custom.[241] Similarly, according to Navajo custom, a man marries into a woman's clan, and primary child rearing responsibilities fall upon the mother and

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e.g., CAL. FAM. CODE § 3040 (1994)(creating presumption that joint custody is in best interests of child where parents have agreed to such an arrangement). Other states have endorsed a preference in favor of joint custody that can be overcome by a preponderance of evidence in favor of an alternative custody award in accordance with the child's best interests. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.26a(1) (Supp. 1995)(findings required if joint custody not awarded). For a description of the various state law approaches to joint custody, see ALI, TENTATIVE DRAFT No. 3, *supra* note 162, § 2.09, Reporter's Notes, cmt. a, at 152-53. The American Law Institute has recommended a presumption that custody be allocated to approximate the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation, if the parents cannot otherwise agree on a parenting plan. *See id.* at § 2.09.

238. Matrilineal tribes include the Navajo, the Dakota, the Iroquois, and many of the Pueblo tribes. *See* PAULA GUNN ALLEN, THE SACRED HOOP 209 (1986); GRETCHEN BATAILLE & KATHLEEN MULLIN SANDS, AMERICAN INDIAN WOMEN, TELLING THEIR LIVES (1984); Genevieve Chato & Christine Conte, *The Legal Rights of American Indian Women, in* WESTERN WOMEN: THEIR LAND THEIR LIVES (Lillian Schlissel et al. eds., 1988); I AM THE FIRE OF TIME: THE VOICES OF NATIVE AMERICAN WOMEN 3 (Jane B. Katz ed., 1997). Many Native peoples, of course, do not adhere to a strictly matrilineal view of membership or property ownership. In the Santa Clara Pueblo, for example, a child of a male member married to a non-member is automatically a member of the Pueblo, while the child of a female member who similarly marries outside the tribe is denied membership. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)(holding that Pueblo's alleged denial of equal protection through application of its membership rules was not reviewable in federal court under Indian Civil Rights Act). For a discussion of the conflict between formal tribal law and tribal tradition in the Santa Clara Pueblo, see Chato & Conte, *supra*. The *Martinez* decision has generated a rich literature about the perceived clash between the values of gender equality and tribal sovereignty. *See, e.g.*, Catharine A. MacKinnon, *Whose Culture? A Case Note on* Martinez v. Santa Clara Pueblo, *in* FEMINISM UNMODIFIED 63-69 (1987). Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

239. 25 Indian L. Rptr. 6228 (Hopi Ct. App. 1997).

240. *Id.* at 6228.

241. *See id.*

her siblings.[242] In both Navajo and Zuni tradition, the wife can "divorce" the husband by placing his possessions at the hogan's door.[243] In that matrilineal view of marriage, the husband leaves the marital relationship only with what he originally brought to it.[244] Likewise, in Western Apache custom, matrilocal residence was one of many indicia of a system that bound a husband to his wife's extended family.[245] Navajos as well as Apaches have reported that "the father is not family."[246] A White Mountain Apache judge explained that, at least in traditional families, she will generally assign custody to the biological mother or, if the mother will not take custody, to the maternal grandparents.[247] In one recent field study, moreover, the researchers found that tribal officials among the Pueblo tribes frequently endorsed a view of child custody that favored the mother's family.[248] Today, however, one rarely finds an explicit gender bias in the child custody provisions of tribal codes.[249] More often one finds the gender-neutral "best interests" standard.[250] Nevertheless, a cultural heritage strongly favoring mothers over fathers surely casts its influence on the actual disposition of custody disputes in tribal courts.[251]

242. *See* Cooter & Fikentscher, *Part II, supra* note 21, at 541-45.

243. *See id.* at 540-41.

244. *See id.* at 541-45.

245. *See* Jennie Joe et al., *Changing American Indian Marriage Patterns: Some Examples From Contemporary Western Apaches, in* TILL DEATH DO US PART 5, 9 (Sandra Lee Browning & R. Robin Miller eds., 1999).

246. Cooter & Fikentscher, *Part II, supra* note 21, at 541.

247. *See id.* at 544.

248. The "tender years" presumption, favoring maternal custody for young children, does show up in a few tribal codes. *See, e.g.,* LAW & ORDER CODE OF THE UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION UTAH § 5-3-9 (1988)(requiring tribal court to consider "the natural presumption that the mother is best suited to care for young children" in making custody awards); LAW AND ORDER CODE OF HAVASUPAI INDIAN TRIBE § 3.24(E) (1978)(stating that where natural father has not acknowledged paternity in writing or married natural mother, then natural mother shall have custody of children). Were such provisions to appear in a state statute, the gender categorization would surely be vulnerable to challenge under modern equal protection jurisprudence. *See supra* notes 232-33 and accompanying text.

249. *See, e.g.,* CONFEDERATED TRIBES OF THE COLVILLE RESERVATION LAW & ORDER CODE § 13.4.10 (1979)(requiring tribal court to determine custody in accordance with the best interests of the child and, secondarily, the traditions and customs of the Colville Indian people).

250. *See* Cooter & Fikenstcher, *Part II, supra* note 21, at 543 (according to Hopi judge, Hopi custom is to give children to mother's family, "but custom will be bent in best interests of child"). Tribal judges affirm on an anecdotal basis that mothers are generally the presumptive parental custodian in tribal court, in light of tribal tradition. *See* Telephone Interview with Hon. Lucilda Valenzuela, Tohono O'odham Tribal Court Judge, (Feb. 29, 2000); Interview with Hon. Violet Lui Frank, *supra* note 137.

251. *See* Cooter & Fikenstcher, *Part II, supra* note 21, at 544 n.80.

In some tribes, modern equality guarantees that have been added to tribal codes may be interpreted to preclude the continued reliance on customary gender preferences in the custody realm. Within the Navajo Nation, for example, two court opinions decided in consecutive years yielded conflicting views about the vitality of the traditional Navajo view of maternal priority in custody contests. In 1982 the Navajo Court of Appeals recognized the Navajo tradition favoring maternal custody. In *Lente v. Notah*,[252] the court addressed a custody dispute between a Navajo father and a Comanche mother. Because of notice problems, the appeals court reversed the trial court's award of custody to the father, and in remanding for a hearing, the appellate court set out guidelines for resolving the custody contest.[253] In response to the mother's argument that Navajo custom required an award of custody to her, the court addressed the proper role of custom in resolving child custody disputes.[254] "Traditionally the father and child lived with the mother's family," the court explained, "and the child was said to 'belong' to the mother's clan."[255] Thus, Navajo children customarily went with their mother in the event of a divorce. "There are exceptions to this general rule," the court stated, "but they are said to be rare and . . . must be approved by everyone concerned, especially the head mothers."[256] Nevertheless, the appeals court emphasized that a given custom may not apply under the circumstances of a particular case.[257] In the case before, it, for example, the court noted that the Comanche mother and Navajo father might not have expected that customary law would apply to them—thus implying that parties' expectations about custom are relevant.[258] In addition, the court stated that district judges should consider the impact on the child of a disruption in existing custody—a factor which, in the case at bar, favored the father.[259]

Lente thus affirmed the existence of Navajo customary law favoring maternal custody, a tradition that may inform tribal court resolutions of custody disputes—whether in the district courts or before a Peacemaker. At the same time, *Lente* clearly indicated that particular customary laws will not govern every dispute and may be especially inappropriate in cases involving a non-Navajo mother. Moreover, other concerns, such as the need to protect the child's sense of continuity in placement, may outweigh the role of custom. Under *Lente,* the customary preference for mothers in custody disputes is "but one

252. 3 Navajo Rptr. 72 (1982).
253. *See id.* at 78-79.
254. *See id.* at 79-81.
255. *Id.* at 80.
256. *Id.* at 81 (citations omitted).
257. *Id.*
258. *See id.*
259. *See id.* at 76-77.

of the many factors" a trial judge must consider, and under certain circumstances the judge "may be justified in disregarding old ways."[260]

One year after deciding *Lente*, the Navajo Court of Appeals again addressed the question of the proper standard to govern custody disputes between parents under Navajo law. In *Help v. Silvers*,[261] the court rejected any presumption that would favor mothers over fathers, including the "tender years presumption," noting that the Navajo Equal Rights guarantee precludes such a rule.[262] Without mentioning *Lente*, the court announced that under the equal rights guarantee:

> there can be no legal result on account of a persons [sic] sex . . . . For this reason, there can be no presumption that a young child should be in the care of the mother. . . .
>
> . . . .
>
> . . . It is the relationship that is important, not a mere rule-of-thumb, and the child's age is important only in consideration of its relationship to the parents.[263]

In so holding, the court of appeals tacitly rejected the mother's argument that the tender years presumption was supported by Navajo custom and tradition.[264] Thus, *Help* stands for the principle that customary presumptions favoring mothers may give way to express guarantees of gender equality that have been adopted more recently by tribes.

In tribes where strong internal guarantees of gender equality do not exist, it is doubtful that a successful challenge to a customary gender preference could be brought under (external) federal law. A matrilineal or patrilineal tradition within a tribe is not vulnerable under the federal constitution since tribes, which are neither federal entities nor state actors, are not subject to the civil rights commands of the Constitution.[265] The Indian Civil Rights Act, however, does establish

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260. *Id.* at 81. Interestingly, a custody opinion by a district court in the same year did not allude to the customary law of maternal preference. *See* Goldtooth v. Goldtooth, 3 Navajo Rptr. 223 (Window Rock D. Ct. 1982); *see also supra* notes 155-63 and accompanying text (discussing *Goldtooth*).

261. 4 Navajo Rptr. 46, 48 (1983).

262. The Navajo Equal Rights Amendment, adopted in 1980, provides: "Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex." NAVAJO NATION CODE tit. 1, § 9 (Equity 1984-85), *quoted in Help*, 4 Navajo Rptr. at 48. Interestingly, in the resolution adopting the amendment, the tribal council reaffirmed that "[t]he tradition and culture of the Navajo Nation has always emphasized the importance of the woman in Navajo society" and that "Navajo culture and society is both matrilineal and matrilocal." Navajo Tribal Council Res. CF-9-80 (1980), *quoted in* NAVAJO NATION CODE tit. 1, § 9 (Equity 1984-85).

263. *Help*, 4 Navajo Rptr. at 48.

264. *See id.*

265. The Supreme Court a century ago made clear that Indian tribes were not instrumentalities of the federal government. *See* Talton v. Mayes, 163 U.S. 376

its own equal protection guarantee. The Act provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."[266] Nevertheless, most gender disparities under tribal law will not be reviewable in federal court under the Indian Civil Rights Act in light of the decision in *Santa Clara Pueblo v. Martinez*.[267] In *Martinez*, the Supreme Court held that a gender distinction in the tribe's definition of tribal membership favoring males over females was not actionable under the ICRA in federal court.[268] Examining legislative history, the Court concluded that Congress had intended to create a limited federal remedy — that of habeas corpus — for violations of the ICRA.[269] The Court explained that "Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of 'preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people.'"[270] Because it is unlikely that a dissatisfied custody litigant could fashion his or her claim into a federal habeas corpus petition, *Martinez* effectively closes the federal courts to ICRA-based claims in the child custody context.[271]

(1896)(stating that the Fifth Amendment to the U.S. Constitution is not applicable to tribal courts). Lower courts have consistently followed that precedent in immunizing tribal action from constitutional challenge. *See, e.g.,* Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), *cert. denied,* 358 U.S. 932 (1959)(stating that the Fifth and Fourteenth Amendments are not applicable to legislative actions of Indian tribes).

266. 25 U.S.C. § 1302(8) (1994).

267. 436 U.S. 49 (1978); *see supra* discussion at note 238.

268. *See id.* at 52.

269. *See id.* at 61.

270. *Martinez*, 436 U.S. at 66-67 (quoting Summary Report II). The remedial section of the ICRA states that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian Tribe." 25 U.S.C. § 1303 (1994). The habeas corpus remedy, then, is ordinarily invoked by a criminal defendant whose liberty is being restrained by action of the tribe.

271. Habeas corpus petitions are sometimes used to test the legality of child custody orders within the state courts. *See, e.g.,* Korol v. Korol, 613 P.2d 1016 (Mont. 1980); McNeal v. Mahoney, 574 P.2d 31 (Ariz. 1977). Moreover, at least one tribal court has concluded that habeas corpus is a proper vehicle for challenging a custodial placement of a child. *See In re* L.F., 24 Indian L. Rptr. 6015 (Confederated Salish and Kootenai Tribes of the Flathead Reservation Ct. App. 1996). In the federal system, however, the Supreme Court has held that a writ of habeas corpus is not available to challenge a state court's custodial placement of a child. *See* Lehman v. Lycoming County, 458 U.S. 502, 516 (1982). In light of the Supreme Court's construction of the scope of federal habeas corpus and the Court's emphasis in *Martinez* on protecting tribal autonomy, most lower federal courts similarly have refused jurisdiction over ICRA habeas corpus petitions challenging tribal court child custody decrees. *See, e.g.,* Poodry v. Tonawanda Band of

Consequently, a party challenging tribal action on the basis of gender bias under the ICRA or the tribe's own constitution or code must do so in tribal court. The difficulty facing such a litigant is that tribal judges may view the ICRA as subordinate to the values of tribal self-government and cultural autonomy. If the tribe's customary law endorses gender classifications with respect to particular matters, the tribal court would be unlikely to view the ICRA as a higher authority.[272] Indeed, in *Martinez*, the Supreme Court itself emphasized that the ICRA's equal protection provision "differs from the constitutional equal protection clause in that it guarantees 'the equal protection of *its* [the tribes] *laws*' rather than of '*the laws*.'"[273] Thus, the wording of the ICRA reflects a congressional desire to accommodate the unique needs of tribal governments. Moreover, a defense of sovereign immunity in tribal court may defeat any claim of sex discrimination under the ICRA.[274]

With respect to a tribe's internal law, some tribal courts may follow the lead of the Navajo court in *Help* and reject all gender preferences in accordance with a newer tribal norm of gender equality. Nevertheless, it is clear that tribal courts can creatively construe their constitutional mandates and need not adhere to accepted federal constructions.[275] As recognized by the Winnebago tribal court, for example, "Winnebago constitutional guarantees are different in both substance and origin from either the ICRA or the Bill of Rights. The equal protection and Due Process Provisions . . . of the Winnebago Constitution shall be interpreted with flexibility and as *culturally ap-*

Seneca Indians, 85 F.3d 874, 892 (2d Cir. 1996), *cert. denied*, 519 U.S. 1041 (1996); Sandman v. Dakota, 816 F. Supp. 448, 451 (W.D. Mich. 1992), *aff'd mem.*, 7 F.3d 234 (6th Cir. 1993); Goslin v. Kickapoo Nation District Court, No. 98-4107SC, 1998 WL 1054223 at *1 (D. Kan. Dec. 2, 1998). *But see* DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510 (8th Cir. 1989)(habeas action under ICRA available to non-Indian parent to challenge jurisdiction of tribal court in custody dispute, but exhaustion of tribal remedies was first required).

272. *See* Winnebago Tribe of Nebraska v. Bigfire, 24 Indian L. Rptr. 6232, 6233 (Winnebago Tribal Ct. 1997); *see also* discussion *supra* notes 122-25 and accompanying text (discussing *Bigfire*).

273. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 n. 14 (1978)(emphasis in original).

274. The Winnebago Tribal Court, for example, refused to entertain an ICRA claim against tribal officials for alleged sex discrimination. In *Bigfire*, the court reasoned that the tribe had not adopted the provisions of the ICRA as tribal law, that Congress in enacting the ICRA had not abrogated tribal sovereign immunity, and that "any ICRA interpretations by this Court are also subject to Winnebago community common law standards." *Bigfire*, 24 Indian L. Rptr. at 6235.

275. Professor Pommersheim has urged tribal courts to exploit the opportunity to engage in "pathbreaking" constitutional adjudication by tailoring their interpretations to reflect the cultural identity of the tribe. *See* Pommersheim, *Constitutional Adjudication, supra* note 53, at 410-12.

propriate to the Winnebago tribe."[276] Thus, because tribal courts often assume broad interpretive authority, categorical distinctions between mothers and fathers for purposes of custody decision making in tribal court may not be vulnerable to challenge—at least where the distinctions are firmly rooted in tribal custom and there is no overriding internal equality mandate.

C. The Role of Extended Family Members

A singular feature of Anglo-American law that contrasts sharply with the approach of many American Indian tribes is the characterization of parenthood as a rights-based exclusive status.[277] In majoritarian jurisprudence, the view that a child can have only one mother and one father is imbued with a natural law heritage.[278] Under this tradition, a child's legal parents—so long as they can satisfy a minimal standard of fitness and so long as the family is intact—have near-absolute responsibility for the child's welfare.[279] Parental rights—judicially constructed in the United States as fundamental liberty interests entitled to protection under the Due Process Clause—have figured prominently in conflicts over children. In a long line of cases, the Supreme Court has viewed child rearing and the right to maintain parent-child relations as falling within a sphere of fundamental liberty interests protected from undue state interference by the Due Process Clause.[280] In this jurisprudence, the Court has char-

276. *Bigfire*, 24 Indian L. Rptr. at 6236 (emphasis added).

277. *See* Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879 (1984); Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637 (1993); Barbara Bennett Woodhouse, *Hatching the Egg: A Child Centered Perspective on Parents' Rights*, 14 CARD. L. REV. 1747 (1993).

278. As Justice Scalia so aptly put it in his plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989), "California law, like nature itself, makes no provision for dual fatherhood." In that case, the Court upheld the legal presumption under state law that a man married to a child's biological mother is the child's father as against the constitutional challenge of a putative father seeking the opportunity to establish paternity. Scalia noted that "our traditions have protected the marital family . . . against [intrusion from third parties]." *Id.* at 124.

279. For a discussion of the rationales for giving broad and exclusive autonomy to parents, see generally Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

280. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 267 (1983)(holding state's failure to give notice to unwed father of pending adoption of child did not violate due process where father had no relationship with child and could have ensured notice by participating in putative father registry); Stanley v. Illinois, 405 U.S. 645, 645-48 (1972)(holding that due process and equal protection clauses were violated where state statute presumed unwed father, but not unwed mother or married parents, to be unfit until he could prove otherwise); Prince v. Massachusetts, 321 U.S. 158, 166 (1944)(recognizing that "the custody, care and nurture of the child reside first in the parents"); Pierce v. Society of the Sisters, 268 U.S. 510, 534

acterized the rights to conceive and to raise one's children as "essential,"[281] and "far more precious . . . than property rights."[282] Thus, within Anglo-American law, the traditional protection of parental rights is a potential constitutional roadblock whenever the State, through its *parens patriae* power, intrudes into the parent-child relationship by overriding parental choice.

Consistent with the vision of parenthood, the common law did not recognize rights of custody or visitation for grandparents or other third parties.[283] Under this traditional approach, state courts routinely denied requests for visitation or custody from outsiders on the basis of parental prerogative.[284] In the last twenty years, however, the traditional deference to parental authority under state law has diminished, albeit unevenly. With respect to awards of custody, the laws of most states still require that outsiders establish a risk of actual harm to the children in order to overcome the traditional deference to parental authority.[285] Visitation petitions by non-parents, on the other hand, are granted more frequently today than in the past, largely because of legislative reforms spearheaded by grandparent-ad-

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(1925)(striking down law that barred parents from sending children to private school on ground that it "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of [their] children"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)(noting that liberty interest under Fourteenth Amendment includes freedom "to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children"); *see generally* Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975 (1988)(describing ambiguity and inconsistency in law governing rights of parents); Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 294-95 (1995)(noting that resistance to state intervention in families has deep cultural roots).

281. *Meyer*, 262 U.S. at 399.

282. May v. Anderson, 345 U.S. 528, 533 (1953).

283. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *434-47 (describing parent-child relationship as existing by virtue of natural law and observing that state's right to intervene in family matters is limited to protecting parent-child relationship).

284. *See* Succession of Reis, 15 So. 151, 152 (La. 1894); *see generally* J.F. Rydstrom, Annotation, *Visitation Rights of Person Other Than Natural or Adoptive Parents*, 98 A.L.R. 2d 325 (1964).

285. *See, e.g.*, T.S. v. M.C.S., 747 A.2d 159, 166 (D.C. 2000)(holding that the trial court erred in awarding custody to grandparents over parent's objection in divorce action, since award to nonparent may occur only after formal neglect proceeding); Ponsford v. Crute, 202 N.W.2d 5 (Wis. 1972)(holding that, in custody dispute between biological father and maternal grandparents, trial court was obligated to award custody to father after determining him to be fit and able to care for child). For a description of various contemporary approaches to the preference for legal parents over third parties in custody disputes, see Carolyn Kass, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045 (1996).

vocacy groups.[286] Currently, all fifty states have enacted legislation authorizing grandparent visitation rights within widely varying frameworks.[287]

Because these visitation statutes allow courts to order contact with grandparents or other third parties over parental objection, numerous constitutional challenges to the laws have been brought in recent years by parents seeking to block the requested visitation.[288] Just such a challenge ultimately led to the United States Supreme Court's 2000 decision in *Troxel v. Granville*[289] where the Court reaffirmed the Constitution's protection for parents' rights but did not provide a single unifying constitutional approach. Thus, the future of many states' nonparental visitation laws remains uncertain. In *Troxel* the high court of Washington struck down that state's third party visitation statute on substantive due process grounds.[290] There, the paternal grandparents had sought visitation with their granddaughters after the death of their son, the children's father.[291] Under state law, any person seeking visitation had only to establish that visitation would be in the children's best interests in order to overcome the parents' objections.[292] The biological mother and her husband[293] did not op-

286. In several states, it should be noted, courts found inherent authority to grant visitation petitions by non-parents. *See, e.g.*, Ponsford v. Crute, 202 N.W.2d 5, 9 (Wis. 1972).

287. For a list of the nonparental visitation statutes of all states, see *Troxel v. Granville*, 120 S. Ct. 2054, 2064 n* (2000). *See generally* ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 743 (3d ed. 1995); Edward M. Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall?*, 25 FAM. L.Q. 59, 59-60 (1991). These statutes often condition grandparent visitation not only on a showing that visitation would be in the child's best interests but also on a showing that, because of death or divorce, the child in question is not living in an intact family. *See, e.g.*, ARIZ. REV. STAT. § 25-409 (2000). A recent survey found that twenty statutes expressly covered cases where one parent has died. *See* Stephen Elms Averett, *Grandparent Visitation Right Statutes*, 1999 BYU J. PUB. L. 355, 357-61 (1999). Another recent study suggests that states are increasingly requiring a showing of harm to the child to justify overriding a parental objection to grandparent visitation. *See* Joan Catherine Bohl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm*, 48 DRAKE L. REV. 279 (2000).

288. Courts in several jurisdictions have struck down these visitation statutes as an unconstitutional invasion of parental authority. *See, e.g.*, Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996); Brooks v. Parkerson, 454 S.E.2d 769 (Ga. 1995), *cert. denied*, 516 U.S. 942 (1995); Simmons v. Simmons, 900 S.W.2d 682 (Tenn. 1995); Williams v. Williams, 485 S.E.2d 651 (Va. App. 1997). Conversely, several jurisdictions have sustained such statutes. *See, e.g.*, King v. King, 828 S.W.2d 630, 632 (Ky. 1992); Sightes v. Barker, 684 N.E.2d 224, 231 (Ind. App. 1997).

289. 120 S. Ct. 2054 (2000), *aff'g* Smith v. Stillwell, 969 P.2d 21 (Wash. 1998).

290. *See Smith*, 969 P.2d at 21.

291. *See id.* at 23.

292. Significantly, in *Smith* the statute at issue was not limited to grandparents but extended to "any person" and allowed visitation at "any time," requiring only that

pose visitation altogether but instead sought to limit the grandparents' contact with the children to one day per month. The state trial court awarded visitation to the grandparents that was more extensive than the parents desired, finding that the children's best interests would be served by such an order.[294]

The Washington Supreme Court struck down the visitation statute as facially unconstitutional, reasoning that a parent's right to rear his or her children without state interference was both a "fundamental 'liberty' interest protected by the Fourteenth Amendment" as well as a fundamental privacy right inherent in the Constitution.[295] The court emphasized that the heightened constitutional protection for parents' rights required a compelling state interest in order to justify such an intrusion on parental authority:

> Short of preventing harm to the child, the standard of "best interest of the child" is insufficient to serve as a compelling state interest overruling a parent's fundamental rights. State intervention to better a child's quality of life through third party visitation is not justified when the child's circumstances are otherwise satisfactory. To suggest otherwise would be the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each child with the "best family."[296]

Thus, the court concluded that the Washington statute, by failing to require a showing of harm to the children, exceeded the constitutional limits of the state's *parens patriae* authority.[297]

The Supreme Court affirmed the Washington high court in a decision that produced six different opinions, none of which commanded a majority of the Justices. Although the points of disagreement were numerous, all Justices except Scalia agreed that the Due Process Clause protects parents' rights to make decisions concerning the upbringing of their children, including the question of grandparent visi-

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the visitation serve the best interest of the child. *See* 969 P.2d at 24 (quoting WASH. REV. CODE § 26.10.160(3) (1977)).

293. The husband adopted the children during the pendency of the case. *See* 120 S. Ct. at 2058.

294. *See* 969 P.2d at 23-24.

295. *Id.* at 28.

296. *Id.* at 30-31. The general framework of the constitutional protection for parents was summarized by the Washington Supreme Court in *Smith v. Stillwell*:

> The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man" . . . . "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, [and] the Equal Protection Clause of the Fourteenth Amendment.

Id. at 28.

297. The court held that "as written, the statutes violate the parents' constitutionally protected interests." 969 P.2d at 23.

tation.[298] In a plurality opinion, Justice O'Connor began by recognizing that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests."[299] The fundamental liberty interest at issue in *Troxel* was the well-established "interest of parents in the care, custody, and control of their children."[300] According to O'Connor, the "breathtakingly broad" Washington statute infringed on that fundamental parental right by effectively allowing any third party seeking visitation to subject a parent's decision to state court review on a best interest standard.[301] The plurality opinion emphasized that the mother's choice as to visitation was given no deference under the statute, even though she had not been found to be an unfit parent.[302] Indeed, O'Connor pointed out with disapproval that the trial court seemed to embrace a presumption favoring visitation, thus placing the burden on the mother in a manner that was at odds with the Court's precedents and with other nonparental visitation statutes around the country.[303] Moreover, the plurality faulted the trial court for disregarding the mother's initial willingness to agree to more limited visitation.[304] According to the plurality, the constitutional protection for parental authority means that a fit parent's choice about visitation was entitled to "at least some special weight" in any proceeding brought by a nonparent.[305] The plurality was unimpressed with the findings of potential benefit to the children announced by the trial court to support the award of visitation.[306] In light of the trial court's

298. *See* 120 S. Ct. 2054, 2074 (Scalia, J., dissenting). In a brief opinion emphasizing the now-discredited substantive due process roots of "unenumerated parental rights," Scalia made clear that he was opposed to the "[j]udicial vindication of 'parental rights' under a Constitution that does not even mention them." *Id.*

299. 120 S. Ct. at 2060 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

300. *Id.* (citing to extensive precedent ranging from *Meyer v. Nebraska*, 262 U.S. 390 (1923), to *Glucksberg*).

301. 120 S. Ct. at 2061.

302. *See id.*

303. "The judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interests of her daughters." *Id.* at 2062. Justice Stevens, in dissent, disputed the notion that the trial judge had used a presumption favoring the grandparents' visitation. *See id.* at 2063 n.3 (Stevens, J., dissenting).

304. The plurality noted that the trial court "gave no weight to [the mother's] having assented to visitation even before the filing of any visitation petition" and pointed out that "many other States expressly provided by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party." *Id.* at 2063.

305. *Id.* at 2062.

306. The trial court offered two formal findings in support of its order: the grandparents were part of a loving extended family, and the children would benefit from spending "quality time" with the grandparents. *Id.* at 2063.

slender findings, its use of a presumption favoring grandparent visitation, and its failure to give significant weight to the mother's initial offer of visitation, the plurality concluded that the Washington statute as applied to the facts before it was unconstitutional.[307] "[T]he Due Process Clause," O'Connor wrote, "does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made."[308]

Because of the "sweeping breadth" of the Washington law, the plurality opinion found it unnecessary to address the core holding of the Washington high court—that under the Due Process Clause, all nonparental visitation statutes must require a showing of harm or potential harm to the child. Thus, that bright-line ruling did not attract a majority of the Justices, although both Souter and Thomas, who concurred separately, would have struck down the statute as facially invalid for falling short of the Court's precedents.[309] On the other hand, *Troxel* does establish that a parent's liberty interest under the Due Process Clause bars the State from overriding parental wishes on questions of visitation and, a *fortiori* custody, without sufficient justification. What constitutes sufficient justification remains to be decided on an ad hoc basis, but the various opinions suggest that a mere best interest standard provides inadequate protection for parents'

307. *See id.* at 2064. Interestingly, two of the three dissenters in *Troxel* criticized the plurality's use of an "as applied" standard, primarily because the Washington appellate courts had not yet applied the law to the pending cases but had relied on an analysis of facial invalidity. Both Stevens and Kennedy argued that the Court should have upheld the statute as facially valid and remanded to give the state courts a chance to apply the law. *See id.* at 2068-70 (Stevens, J., dissenting); *id.* at 2075 (Kennedy, J., dissenting). Kennedy maintained that the Court should have reached, rather than avoided, the question whether a law providing for non-parental visitation rights under a "best interests" standard could ever be constitutional. In his view, such laws could be constitutional if applied to people who had acted "in a caregiving role over a significant period of time," whether a grandparent or other third party. *Id.* at 2077. Stevens, in a similar vein, warned against any rule that would give parents arbitrary power over their children and urged the Court to "reject any suggestion that when it comes to parental rights, children are so much chattel." *Id.* at 2072.

308. *Id.* at 2064.

309. Justice Souter concluded that the Washington statute was facially invalid since it authorized "'any person' at 'any time' to petition and to receive visitation rights subject only to a free-ranging best-interests-of-the-child standard." *Id.* at 2066 (Souter, J., concurring). According to Souter, the "repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by 'any party' at 'any time' a judge believed he 'could make a 'better' decision' than the objecting parent had done." *Id.* at 2066-67. Similarly, Justice Thomas in a cursory opinion took the position that the state law was unconstitutional because it did not require a compelling governmental interest to override a parent's liberty. *See id.* at 2068 (Thomas, J., concurring).

rights and that a presumption favoring nonparental visitation would almost certainly fail.

Under *Troxel*, the federal Constitution subordinates the voice of the collective — the State — to a parent's individual rights.[310] *Troxel* implements a familiar constitutional norm that protects individual liberty against undue intrusions sponsored by the will of the majority.[311] While the Justices were divided as to the precise scope of the constitutional protection given to parental rights, all but Justice Scalia agreed that parental authority in matters of child rearing is protected as a "fundamental right" under the Due Process Clause.[312] Thus, the revered place of the nuclear family in Anglo-American jurisprudence gives parents a singular voice, and, concomitantly, treats a child's grandparents or other relatives as constitutional interlopers when they are drawn into conflict with a parent.

In contrast, analysis of the rights of parents *vis a vis* extended family members may begin from a different foundation in many tribal courts. There the voice of the collective — the Tribe — is a powerful force of cultural identity and survival that may trump the individual parent's choice in child rearing. In the traditions of many Indian tribes, kinship systems — including uncles, aunts, grandparents, and other extended family members — play an essential role in the care and education of children.[313] While parents might assume responsibility for the basic guidance of the child, extended family members

310. Justice Scalia in *Troxel* had great difficulty with precisely this anti-majoritarian aspect of any recognition of constitutional due process rights of parents. He feared that the Court was "ushering in a new regime of judicially prescribed, and federally prescribed, family law," and he viewed the expanded role of the federal judiciary with trepidation. *Id.* at 2075 (Scalia, J., concurring). He said, "I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantage of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people." *Id.*

311. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1414-20 (2d ed. 1988).

312. *See* 120 S. Ct. at 2060 (plurality opinion); *id.* at 2066 (Souter, J., concurring); *id.* at 2068 (Thomas, J., concurring); *id.* at 2076 (Kennedy, J., dissenting). Even Justice Stevens apparently agrees that "parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest – absent exceptional circumstances – in doing so without the undue interference of strangers to them and to their child." *Id.* at 2071 (Stevens, J., dissenting). Stevens, however, emphasized that parental rights – far from absolute – are limited by the existence of an actual relationship with a child and are linked to the presence of "some embodiment of family." *Id.* at 2072.

313. The role of extended families in child rearing among American Indian tribes was one of the cultural norms that many state authorities ignored in the decades preceding the Indian Child Welfare Act when Indian children were removed from their Indian caregivers in massive numbers. *See* H.R. REP. No. 95-1386, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

often have distinct child-rearing responsibilities.[314] Among many southwestern tribes, "grandparents are the disciplinarians of the children in the family,"[315] and according to Blackfoot tradition, it is not uncommon for grandparents to raise one of their grandchildren.[316] In the Jicarilla Apache Nation, "maternal aunts are considered mothers to all maternally-related nieces and nephews,"[317] while among the Comanche a child's paternal aunt assumes child rearing responsibilities when the mother is unavailable.[318] These traditions of kinship care necessarily inform the decision making of tribal judges when the claims of parents and nonparents conflict.

Tribal courts vary in their approach to custody and visitation disputes involving extended family members, but one often finds an explicit appreciation for the cultural role of a child's relatives and a marked willingness among tribal judges to protect that role. Some tribes have enacted specific grandparent visitation provisions as part of their tribal code. The Rosebud Sioux Tribe, for example, has given its tribal court the power to grant reasonable rights of visitation to grandparents with or without a petition from the grandparents, so long as the court finds that visitation is in the best interests of the children.[319] In other tribes, the tribal courts have ordered visitation with extended family members even though no code provision authorizes it. For example, in *In re C.D.S.*,[320] the Court of Indian Offenses for the Delaware Tribe of Western Oklahoma took judicial notice of "the unique relationship that exists between Indian grandparents and grandchildren, and the need for maintenance of these contacts, despite the fact there is no written tribal law on the subject."[321] The court further observed that grandparents are crucial vehicles for passing on knowledge of tribal tradition:

> Since this is an Indian family, where grandparents often times provide the necessary guidance in traditional tribal customs, history, and culture, and function as the central part of the family, the court would find it difficult to completely ignore the need to maintain and foster such important relation-

314. *See generally* Lorie M. Graham, *"The Past Never Vanishes:" A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 4-10 (1998-99)(discussing the role that the Native American community plays in the rearing of its children).

315. UNITED STATES DEP'T OF HEALTH AND HUMAN SERVICES, STRENGTHENING THE CIRCLE: CHILD SUPPORT FOR NATIVE AMERICAN CHILDREN 38 (1999)[hereinafter STRENGTHENING THE CIRCLE].

316. *See* BEVERLY HUNGRY WOLF, THE WAYS OF MY GRANDMOTHERS 195 (1980).

317. STRENGTHENING THE CIRCLE, *supra* note 315, at 38.

318. *See In re* K.A.W., 2 Okla. Trib. 338 (Comanche Child. Ct. 1992)(holding that where a minor child lived with her paternal aunt for an extended period of time, the paternal aunt stands "in the place of a parent").

319. *See* CODE OF ROSEBUD SIOUX TRIBE § 2-1-21 (1985).

320. 17 Indian L. Rptr. 6083 (Ct. of Indian Offenses for Delaware Tribe of W. Okla. 1988).

321. *Id.* at 6084.

> ships. The fact that the children in this case have lived with the petitioner for a significant period of their childhood, is a weighty factor in reaching this conclusion.[322]

Although the court referred to the increasing recognition of grandparent visitation rights in state courts,[323] its decision was based primarily on its view of the unique role of Indian grandparents:

> [I]t is common knowledge in Indian Country that both the maternal and paternal grandmothers traditionally play a very significant role in the Indian family. . . . Based upon traditional tribal custom, the court concludes that a grandparent may, in appropriate instances, have the right to visitation especially where the children have lived with the grandparent for a significant period of time and continued contact would not be detrimental to them.[324]

The court's approach to the question of grandparent visitation contrasts with the posture of most state courts. The absence of a tribal code provision authorizing grandparent visitation did not preclude the court from granting such visitation, since it relied instead on unwritten tribal custom. In addition, the court's explanation suggests that a grandparent who has had a significant caretaking role, *vis a vis* the children in question, acquires a presumptive right of contact that the court will honor unless there is a showing of detriment to the child. That receptivity to grandparent contact rests in part on recognition of the vital role that the grandparent will have in fostering the child's sense of tribal identity and knowledge about the tribe's customs and traditions.[325] State laws, in contrast, typically require the grandpar-

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322. *Id.*

323. *See id.* (describing evolution of state law).

324. *Id.* On the facts before it, the court found that grandparent visitation was particularly appropriate because of the grandmother's role in caring for the children previously. *See id.* In a supplemental order, the court decided on a three-day per month visitation schedule for the grandmother, observing that "the grandparent in this case is not a non-custodial parent, thus the full visitation requested . . . is not warranted." *Id.* at 6085. At the same time, the court reasoned that the period of visitation should be greater than it would otherwise be "since the petitioner . . . functioned more as a parent to these children." *Id.*

325. Court opinions from other tribes similarly show that relationships between children and members of their extended family are deeply embedded in tribal culture. In *Wike v. Tarasiewicz*, 14 Indian L. Rptr. 6020 (Rosebud Sioux Tribal Ct. 1987), for example, the court had to resolve a custody dispute between biological parents in which two state courts had rendered opposing custody orders. The tribal court concluded that the father, a member of the Rosebud Sioux tribe, should have custody, and that a contrary state court judgment could be disregarded as a matter of comity because the state forum had acted without jurisdiction. *See id.* at 6021-22. In addressing the best interests of the children, the court emphasized that continued contact with their grandparents and other relatives living on the reservation would benefit the children. According to the court, "tribal members enjoy the extended family kinship as in this instance. This system provides for support and nurturing by members of the family in addition to the parents. For example, the grandparents, aunts, uncles and other members of the family are part of the extended family network." *Id.* at 6022.

ent to prove that visitation would be in the child's best interests,[326] and *Troxel* suggests that grandparent visitation statutes should not place the burden of proof on the parent as a matter of constitutional law. State law, moreover, is generally silent as to any role the grandparent might have in helping the child maintain a sense of cultural heritage.

The Native respect for extended family members sometimes has extended beyond visitation to an outright award of physical custody to the relative over the objections of parents.[327] In one case, the tribal court for the Sac and Fox Nation cited the continuing acrimony between the parents as a reason for awarding temporary custody to the child's paternal grandmother.[328] In a similar vein, the Rosebud Sioux Tribal Court of Appeals pointedly suggested such a solution to the trial court after expressing disapproval of the parents' excessively negative evidence.[329] An extended discussion of tribal tradition with re-

326. *See supra* notes 285-87 and accompanying text. At least one short-lived state statute did create a rebuttable presumption favoring grandparent visitation, but the law was struck down as an unconstitutional invasion of parental rights. *See* Hoff v. Berg, 595 N.W.2d 285 (N.D. 1999)(invalidating statute which granted grandparent visitation rights unless the court found that visitation was not in the best interest of the child). In light of *Troxel*, the *Hoff* decision was well-founded.

327. For example, in *In re K.A.W.*, 2 Okla. Trib. 338 (Comanche Child. Ct. 1992), the court, while not reaching the merits of the custody dispute, addressed the question of tribal court jurisdiction in a contest between a paternal aunt and a biological mother. In upholding the jurisdiction of the tribal court, the court noted that the child had been living with the aunt for several years and had acquired the aunt's reservation-based domicile, even though there had been no parental abandonment. The court stated,

> [w]e gain further support for our holding from the application of Comanche tribal custom. . . Comanche custom provides that a child's paternal aunt assumes the immediate role of mother when the child's mother is not available. Thus, under tribal custom, . . . [paternal aunt] has legal custody of K.A.W. and [paternal aunt's] domicile controls.

In re K.A.W., 2 Okla. Trib. at 353; *cf. In re* D.D., 22 Indian L. Rptr. 6020 (Port Gamble S'Klallam Ct. App. 1994)(reversing trial court's award of guardianship to child's father because of court's failure to provide maternal grandmother fair hearing on her bid for guardianship).

328. *See* T.C. v. L.C., 4 Okla Trib. 90 (Sac & Fox D. Ct. 1994). The district court noted the detrimental impact on the child of the parents' continual fighting and found both parents "unsuitable" for custody. The frustration of the judge was apparent: "The bottom line after considering the various factors, I believe, in this case, is the present least detrimental alternative and the child's right to be free from the stress of warring parents." *Id.* at 98. Although the award to the grandmother was not grounded expressly in tribal custom, the court did state that the custody provisions of the tribal code were "sufficient for the court to award custody of a minor child to a third party when the parents are unsuitable." *Id.*

329. *See* Spotted Tail v. Spotted Tail, 19 Indian L. Rptr. 6032 (Rosebud Sioux Tribal Ct. App. 1989). In that case, the parents bitterly contested custody of their children by focusing on one another's allegedly "immoral" conduct. The trial court awarded custody to the children's mother, but the appellate court reversed and remanded for a new trial in an opinion that revealed its displeasure with the

spect to the role of relatives as potential custodians appears in *Deer v. Okpik*.[330] There a Quebec court considered a custody dispute over the young son of a Mohawk father and Inuit mother. Although not a tribal court itself, the Quebec court's reasoning has been expressly endorsed by the Navajo judiciary.[331] The facts showed that the child had been living with his maternal grandparents so that his mother could pursue work as a translator. The Quebec court found that although an "adoption" by the grandparents had taken place in accordance with Inuit custom, that did not signify an abandonment by the mother. In considering the welfare of the child, the court noted that he was integrated into Inuit culture and would suffer were he to be uprooted. The court also pointed out that any resolution of the dispute should be in harmony with Inuit custom and tradition. In its order, the court decreed that the child should continue to live with the grandparents but awarded legal custody to the mother with visitation rights in the father.

The Navajo district court in *Goldtooth* described *Deer* at some length and expressed approval of its reasoning. The Navajo court stated in part:

> While recognizing the natural law rights of the parents, the [*Deer*] court held, in reasoning adopted by this court, that the dominant principle to guide the court is always that the interests of the child are *the* principal factor to be considered . . . . To look at an award to either natural parent would be to disrupt the child's integration into the Inuit culture. While the court concluded that the parents could not be blamed for their conduct, it found that the best interests of the child required that he remain with his Inuit grandparents.[332]

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tenor of the proceedings below: "[A]n inquiry in which the parties concentrate on demeaning each other's actions misses the critical point, namely that it is the trial court's job to determine what is truly in the best interests of children." *Spotted Tail*, 19 Indian L. Rptr. at 6032. In announcing guidelines for the trial court, the appeals court pointedly suggested that placement with relatives be considered:

> The trial court should also authorize the receipt of testimony from neighbors and members of the extended family, particularly . . . the maternal grandmother . . . . [I]t is well within the framework of Lakota tradition and custom that placement be made, if appropriate, with a member of the extended family, particularly when that individual has provided substantial care and nurture to any of the children.

Id. In *Spotted Tail*, the grandmother had unsuccessfully sought to intervene in the custody litigation. Although the appeals court did not address her motion for intervention, the court's advice to the trial judge emphasized the cultural importance of her participation at least as a witness, and the need for the judge to consider the grandmother as a potential custodian.

330. 4 Can. Native L. Rptr. 93 (Cour Supèrieure de Quebec, Div. de law Famille 1980).

331. *See* Goldtooth v. Goldtooth, 3 Navajo Rptr. 223, 225-26 (Window Rock D. Ct. 1982).

332. *Id.* at 226 (emphasis in original).

In *Deer*, the court awarded physical custody to the child's grandparents over the objection of his legal parents, even though no misconduct by the parents was established. In addition to the finding that a change of physical custody would be detrimental to the child, the customary role of grandparents in Inuit tradition informed the court's thinking. The strong endorsement of the *Deer* court's reasoning in *Goldtooth* suggests that the Navajo judge would be equally receptive to grandparent custody under similar circumstances.

The question of *Troxel's* potential impact on tribal court adjudication is worth exploring. *Troxel* establishes beyond debate that an order from a state court granting visitation or custody to a nonparent over the objection of a fit parent may be vulnerable as an unconstitutional intrusion on parental authority — more specifically, as a deprivation of a parent's liberty interest under the Due Process Clause of the Fourteenth Amendment.[333] In contrast, the constitutional constraints on state action do not exist as such in the tribal forum. Although tribal court rulings in theory are limited by the due process and equal protection guarantees of the Indian Civil Rights Act,[334] tribal courts may interpret those provisions to accommodate tribal tradition[335] and their judgments are effectively unreviewable in the federal courts except by way of a criminal habeas corpus petition.[336] In other words, where tribal custom or tradition supports a particular resolution of a family dispute before a tribal court, the court is unlikely to change its resolution in response to a due process challenge under the federal act.[337]

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333. *See supra* notes 289-312 and accompanying text.

334. *See supra* notes 249-57 and accompanying text.

335. *See generally* Christian M. Freitag, *Putting* Martinez *to the Test: Tribal Court Disposition of Due Process*, 72 INDIAN L.J. 831, 848-58 (1997)(collecting court opinions from diverse tribes that emphasize essential role of tribal custom in interpreting due process clause of ICRA); *see also* Tom v. Sutton, 533 F.2d 1101, 1103 (9th Cir. 1976)(noting that terms such as "due process" and "equal protection" as used in ICRA may have different meaning that the same terms in the United States Constitution); Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 238 (9th Cir. 1976)(noting that equal protection provision of ICRA may be interpreted so as not to impair tribal practice or custom); *In re* The Sacred Arrows, 3 Okla. Trib. 332, 337-38 (Cheyenne-Arapaho D. Ct. 1990)(stating that tribal courts should not "merely simulate the state and federal courts in interpreting and applying tribal laws" but should incorporate "centuries of customs and traditions").

336. *See supra* notes 247-76 and accompanying text (discussing implications of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)).

337. *See* Winnebago Tribe of Nebraska v. Bigfire, 24 Indian L. Rptr. 6232, 6235 (Winnebago Tribal Ct. 1997)(holding that tribal court interpretations of Indian Civil Rights Act are necessarily subject to tribal community common law standards and not common law developed by foreign sovereign)(discussed *supra* at notes 122-25 and accompanying text).

On the other hand, the ICRA has been successfully invoked in at least one case to require the return of a child to his father in an action against the maternal grandparents. In *In re L.F.*,[338] a tribal appeals court entertained a father's habeas corpus petition after the tribal family court had given physical custody to the grandparents. Although the court ultimately upheld the father's claim, it did point out that the due process guarantee of the ICRA is different from the Due Process Clause of the Fourteenth Amendment of the federal constitution.[339]

> The state decisions are reflective of different culture and traditions. In the culture of the Tribes, extended families play a much greater role in raising children. The rights of such extended family members will not necessarily be subordinate to natural parents when those extended family members have been rearing a child in their home or when they can offer more continuity of care than a parent who has not played a major role in parenting.[340]

Thus, the court recognized the need to interpret the due process provision of the ICRA in the context of tribal culture, and it made clear that parents' rights, *vis a vis* extended family members, do not carry the same meaning in a tribal context as they do in the nontribal world. Nevertheless, the court in *L.F.* granted the father's petition because the child had been in the actual physical custody of the father on the reservation and had been doing well before the tribal court changed the child's custody to the grandparents.[341] Under the circumstances, no cultural tradition supported an award of custody to the grandparents. The basic reasoning of *L.F.*, however, indicates that an award of custody or visitation to a grandparent in conformance with a tribe's customary practices would not be subject to an ICRA challenge by a dissatisfied parent.

In sum, visitation and custody requests by nonparents in tribal courts are construed through a distinct cultural lens. A tribal tradition of involving extended family members in child rearing may strongly influence any judicial response to an intra-familial dispute and may lead to the tribal court's use of a presumption favoring the extended family member. In state courts, on the other hand, *Troxel* has reaffirmed the dominant culture's protection of the nuclear family and, more specifically, the autonomy of parents. While tribal laws likewise respect parents' rights, as shown in *In re L.F.*, tribal courts applying tribal custom and tradition can sometimes override parental authority in order to give effect to a culturally-grounded role for grandparents or other relatives.

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338. 24 Indian L. Rptr. 6015 (Conf. Salish and Kootenai Tribes of Flathead Reservation Ct. App. 1998).

339. *See id.* at 6016.

340. *Id.*

341. *See id.*

D. Cultural Identity and the Protection of a Child's Interests

Reforms of child custody substantive standards in state courts provide another point of contrast with the child custody jurisprudence manifested in several tribal court opinions. Today, the debate among policy makers within state systems is, in part, about the choice between open-ended discretionary decision making, on the one hand, and rule-based decision making through the use of presumptions, on the other.[342] Advocates for an open-ended model argue that trial judges should be unfettered by preexisting preferences so that they can individualize their decision making to best serve children. In their view, trial judges should always consider a panoply of factors because the determination of child custody is a complex and sensitive matter.[343] Advocates of a presumption model, in contrast, start from a position of skepticism about a court's actual ability to choose competently between warring parents. Those who favor presumptions seem to focus more on process values than on the substantive choice reflected in the presumption. Process values, for example, include the notion that presumptions will reduce litigation, encourage settlement, and minimize the destructive impact of litigation on the participants. That a particular presumption may serve a substantive goal — such as creating an ex ante incentive to invest time and energy in parenting[344] — is less important than the choice of a presumption in the first place.

Among the tribal courts that have addressed the issue, on the other hand, the debates do not appear to be cast in the same terms. Resolution of a child custody dispute is not only about the protection of a child's interests *vis a vis* his or her parents but also the child *vis a vis* the tribe. Tribal courts often view themselves as uniquely suited to safeguard the tribe's interest in maintaining relations with the

342. *See* ALI, TENTATIVE DRAFT No. 3, *supra* note 162, at 1-7; Ira Mark Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. REV. 855, 857-71 (1999)(describing relative disadvantages of unguided trial court discretion in family law cases and reasons for preferring rule-based decision making). The influential early study of discretionary adjudication in child custody cases was that by Robert Mnookin. *See* Mnookin, *supra* note 235, and other authorities cited therein. The debate between rule-based adjudication and discretion, of course, is not limited to the family law arena. *See* Lee Anne Fennel, *Between Monster and Machine: Rethinking the Judicial Function,* 51 S.C. L. REV. 183 (1999).

343. *See* Mnookin, *supra* note 235, at 250-51 (describing child custody determinations as "person-oriented" decisions that entail examination of "the attitudes, dispositions, capacities, and shortcomings of each parent").

344. *See* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615 (1992)(proposing a presumption that custody should be allocated according to past parental roles); *cf.* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984)(recommending primary caretaker presumption on grounds of fairness to parents).

child and in fostering the child's sense of tribal identity.[345] Thus, particular tribal codes may refer to the child's cultural education as a factor to consider in adjudicating a custody dispute.[346] Likewise, even without such a code provision, tribal courts have noted the importance of a child's cultural heritage in resolving a dispute. The Cheyenne River Sioux Court of Appeals has observed, for example, that in evaluating placements under the best interests standard, the tribal court must consider the "cultural appropriateness of the placement," including "the appropriate familiarization of the child with Lakota customs, traditions and practices."[347] Similarly, in a custody contest between a Pueblo mother and an Iranian national father, the Pueblo of Pojoaque tribal court noted that it is "uniquely suited to safeguard the essential tribal relations between the child, the Pueblo and the non-American father."[348] This concern for tribal survival inevitably informs tribal judges' decision making. As a result, feuding custody contestants in a tribal court often try to assure tribal judges that they will maintain contact with the tribe and promote the child's sense of his or her Indian heritage.[349] The sparse case law from tribal courts does not establish that the tribal interest in cultural protection amounts to a presumption favoring the contestant most likely to provide the child with cultural guidance, though in some courts it might. Whether or not the role of cultural affiliation influences actual results in tribal custody contests, available published opinions make clear that at least some tribal courts take seriously their responsibility to foster a sense of cultural identity in children who are tribal members.

345. *See, e.g.*, Solomon v. Jantz, 25 Indian L. Rptr. 6251 (Lummi Nation Trib. Ct. 1998)(stating that Lummi tribal court has jurisdiction over non-Indian defendant in paternity and custody action, based on tribe's unique interest and competence in protecting Indian child); Tafoya v. Ghashghaee, 25 Indian L. Rptr. 6193 (Pueblo of Pohoaque Tribal Ct. 1998)(acknowledging that only the Pueblo can properly assess cultural and social standards relevant to child custody dispute); *cf.* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 52-53 (1989)(stating that the policy underlying Indian Child Welfare Act is that tribes have unique interest in Indian children that is distinct from but on par with that of parents).

346. *See, e.g.*, COLO. RIVER TRIBES DOMESTIC RELATIONS CODE preamble (1995)(stating that Code should be construed to "give full consideration to religious and traditional preferences and practices of children during disposition of a matter"); LUMMI CODE OF LAWS § 11.4.02(g)-(h) (1974)(stating that tribal court in determining child custody must consider tribal affiliation of parties and extent of participation of parties in tribal cultural activities); *see generally* Atwood, *Identity and Assimilation*, *supra* note 17, at 965-66.

347. Miner v. Banley, 22 Indian L. Rptr. 6044, 6045 (Cheyenne River Sioux Ct. App. 1995).

348. *Tafoya*, 25 Indian L. Rptr. at 6195.

349. *See, e.g.*, *In re* Adoption of Ashley Felsman, 23 Indian L. Rptr. 6086, 6087 (Conf. Salish and Kootenai Tribes of Flathead Res. Ct. of App. 1996)(finding that prospective adoptive parents were "willing to provide the children with the unique values of Indian culture.").

In contrast, the desire to protect an Indian child's cultural identity is not a common theme in dominant society courts. Indeed, the hearings on the Indian Child Welfare Act ("ICWA") documented the historical prevalence among state court judges of the opposite motive—the desire to *obliterate* the cultural identity of Indian children.[350] While the ICWA mandated an end to the problem of forced cultural assimilation in the child welfare context,[351] the Act by its own terms does not apply in the context of interparental custody disputes.[352] Moreover, *Palmore v. Sidoti*[353] has given rise to the concern that the protection of an Indian child's cultural heritage in state court might be construed as impermissible racial discrimination. Thus, in reported child custody cases from state courts involving Indian children, one rarely finds state judges referring to the protection of cultural identity as an explicit consideration.[354]

The tribe's interest in a child's Indian heritage takes on a unique importance in paternity actions. For an Indian child, paternity may have fundamental significance for the child's literal identity as an In-

350. *See generally Indian Child Welfare Act of 1977: Hearing on S.1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. 538, 603 (1977)(showing tabular comparative data for foster and adoptive placements of Indian and non-Indian children); *Indian Child Welfare Program, Hearings Before the Subcommittee on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93rd Cong., 2d Sess. 17-21 (1974)(describing unwarranted removals of Indian children from their homes by state and private child welfare agencies); Russel Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287 (1980).

351. The Act includes core provisions designed to protect the jurisdiction of tribal courts in child welfare proceedings involving Indian children, see 25 U.S.C. §§ 1911-14, 1918 (1994), as well as substantive standards to establish priority for placements in Indian homes, see 25 U.S.C. §§ 1915-16 (1994).

352. *See* 25 U.S.C. § 1903(1) (1994)("child custody proceeding" within meaning of Act does not include award of custody to parent in divorce proceeding). Relying on the guidelines published by the Bureau of Indian Affairs, Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,587 (1979), courts have interpreted section 1903(1) to also exclude disputes between unmarried parents from the operation of the Act. *See, e.g., In re* Defender, 435 N.W.2d 717 (S.D. 1988).

353. 466 U.S. 429 (1984)(holding that state trial judge violated equal protection guarantee when he changed custody of infant child from biological mother to biological father solely on basis of mother's interracial marriage).

354. For a tellingly cautious discussion of cultural identity by a state court, see *Jones v. Jones*, 542 N.W.2d 119 (S.D. 1996). There, the court affirmed the trial court's award of custody to an Indian father in a dispute between him and the non-Indian mother. The court took care to point out that the trial judge had relied on the father's willingness to expose his children to their Indian heritage and not on the father's or children's race *per se*. The court explained: "We hold that it is proper for a trial court, when determining the best interests of a child in the context of a custody dispute between parents, to consider the matter of race as it relates to a child's ethnic heritage and which parent is more prepared to expose the child to it." *Id.* at 123-24.

dian. Tribal membership may turn on the biological fact of paternity in particular circumstances or a child's paternal lineage may determine clan membership.[355] In *Davis v. Means*,[356] for example, the Navajo Supreme Court addressed the question of whether the trial court had properly ordered the parties to submit to blood testing to determine paternity. In upholding the order for mandatory testing, the court explained that a determination of paternity is essential for reasons that extend beyond the nuclear family to grandparents, aunts, uncles, and clan relationships.[357] The court reasoned that the child must know his father's clan to avoid incestuous relationships when he comes of age and also because "Navajo children are 'born for' their father's clan" with attendant duties and obligations. Moreover, "[k]nowing one's point of origination . . . is extremely important to the Navajo People, because only then will a person know which adoonee (clan) and dine'e (people) the person is. Those precepts are essential to a Navajo's identity and must be known for Navajo religious ceremonies."[358] The court wove into its analysis the importance under Navajo common law of achieving communal and familial balance, remarking that establishing paternity with reasonable certainty was essential for the family to achieve stability and harmony. Thus, the concept of tribal and clan identity fueled the need for accurate paternity testing, and the Navajo emphasis on restoration of harmony bolstered the court's resolve to authorize paternity testing.

E. Matters of Process

The process of adjudication in particular tribal courts may differ in significant respects from the process of adjudication in the dominant society's courts. Traditional dispute resolution in some tribes, as noted earlier, may be characterized by non-adversarial, conciliatory, and consensus-oriented methods, including mediation, healing circles, and the observance of rituals designed to lend solemnity and meaning to the process.[359] Also, the Native emphasis on repairing relation-

355. Indian identity, of course, not only signifies membership in a cultural and political group but is also a prerequisite to entitlement to an array of federal government benefits. *See* B.J. Jones, *In Their Native Lands: The Legal Status of American Indian Children in North Dakota*, 75 N.D. L. REV. 241, 267 (1999).

356. 21 Indian L. Rptr. 6125 (Navajo 1994).

357. The court explained:

> The Navajo maxim is this: "It must be known precisely from where one has originated." . . . The maxim focuses on the identity of a person (here the child) and his or her place in the world, and is a crucial component of the tenet of family cohesion.

Id. at 6127.

358. *Id.*

359. *See supra* notes 84-93 and accompanying text. Of course, one must be wary of overstating the conciliatory qualities of tribal justice, since Indian interests would be disserved by presupposing that a particular form of dispute resolution is

ships is antithetical to the Anglo-American standard of adversarial representation in the family law realm. Tribal judges have sometimes explicitly disapproved of overly zealous advocacy in child custody litigation because of the deleterious impact of hostility on the participants.[360]

According to Judge Carey Vicenti, many domestic relations cases on the Navajo reservation are now funneled to the Navajo Peacemaker Court, which incorporates healing practices and Navajo religion into the problem-solving process.[361] All parties must agree to a referral to the Peacemaker Court, and according to observers, its mediation-based structure that includes relatives and communities members works particularly well for resolving family disputes.[362] Such characteristics of Navajo Peacemaking reflect a profound contrast in orientation when compared with the dominant society's paradigm of adversarial litigation and adjudication by a disinterested decision maker. Significantly, in the family law arena, many state courts in the last decade have embraced alternative dispute resolution ("ADR") techniques.[363] The widespread requirement of mandatory mediation under state law in child custody disputes,[364] for example, derives from the perception that adversarial litigation inflicts a harm on all participants in a conflict over children,[365] that a mediated solution is more likely to engender compliance from the participants,[366] and that the mediation process is less traumatic for the participants than the typi-

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appropriate for tribal sovereigns. *See* Laura Nader & Jay Ou, *Idealization and Power: Legality and Tradition in Native American Law,* 23 OKLA. CITY U.L. REV. 13 (1998)(noting that idealizations of "harmonious" Native justice systems are used as strategy by government and industry to coerce Indian nations into accepting radioactive waste through negotiated settlements).

360. *See, e.g., In re* J.S., 4 Okla. Trib. 187, 189-90 (Muscogee (Creek) Nat. S. Ct. 1994)(expressing concern with "over abundant representation" and noting court's desire not to encourage advocates "to go overboard with their representation of their [child] clients").

361. *See* Vicenti, *supra* note 31, at 141.

362. Interview with Judge Violet Lui Frank, *supra* note 137.

363. According to one survey in 1998, about one-fourth of all states mandate mediation for custody and visitation issues, while somewhat fewer than one-half allow courts to use discretion in regard to requiring the parties to participate in mediation. *See* ALI, TENTATIVE DRAFT No. 3, *supra* note 162, § 2.08, Reporter's Notes, cmt. b, at 99-100.

364. For examples of such an approach, see Rule 8.7 RULES OF THE PIMA COUNTY SUPERIOR COURT, STATE OF ARIZONA, codified at ARIZONA RULES OF COURT (1999); CAL. FAM. CODE § 3170 (2001).

365. *See generally* JANET R. JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE (1997).

366. *See* Nina R. Meierding, *Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Private Mediated Agreements,* MEDIATION Q., Winter 1993, at 157 (noting high satisfaction levels and agreement compliance with voluntary divorce mediation).

cal "mud-slinging" contest in a formal court setting.[367] It should be noted, of course, that traditional mediation in a tribal court may differ significantly from mediation as it is practiced in the state courts. In particular, tribal mediation is generally conducted by community leaders or elders and often requires that family members participate in the conciliation process.[368]

To some Indian observers, the advent of ADR methods in family court in the state systems is a belated recognition of principles that Indian tribes have always accepted.[369] Likewise, therapeutic jurisprudence, defined as the study of the role of the law as a therapeutic agent,[370] might be viewed as a late-twentieth century Anglo-American version of the long-standing emphasis in Native societies on healing and restoration. Scholars of therapeutic jurisprudence, for example, have explored the therapeutic implications of mediation[371] as well as the anti-therapeutic role of the adversary system in domestic relations cases.[372] The non-adversarial methods used in some tribal courts, both traditional and modern, could enlighten those state officials who are interested in improving the current Anglo-American system of dispute resolution for family law cases, whether through a therapeutic jurisprudential orientation or otherwise.[373]

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367. *See* Ellen Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155 (1998).

368. *See generally* Philmer Bluehouse & James W. Zion, Hozhooji Naat'aanii: *The Navajo Justice and Harmony Ceremony*, MEDIATION Q., Summer 1993, at 327 (noting differences between Navajo mediation and arbitration and general Anglo-American models of mediation and arbitration); Zion & Zion, *supra* note 21, at 423-25 (noting that Navajo mediators are interventionist in orientation in order to apply Navajo moral values to the conflict and that Navajo mediation involves not only the parties but also their families and clan, who can speak for the parties if necessary). For an example of a conciliation order that extends to families, see *In re Marriage of Allison*, 3 Navajo Rptr. 199 (Window Rock D. Ct. 1982)(Conciliation Order).

369. Melton, *supra* note 30, at 133 (observing that "[w]hile mainstream society is in the midst of shifting from a retributive justice model to a restorative one, many tribes are strengthening their indigenous paradigm.").

370. *See generally* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996); THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990); Symposium, *Introduction to Therapeutic Jurisprudence*, 41 ARIZ. L. REV. 263 (1999).

371. *See, e.g.*, Waldman, *supra* note 367.

372. *See* Jane Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 86 (1997)(arguing that adversary system is inappropriate for determination of "best interests" standard in child custody cases).

373. Similarly, federal court spokespersons have suggested that the federal courts would do well to look to traditional tribal courts for ADR methods. *See, e.g.*, Hon. J. Clifford Wallace, *A New Era of Federal-Tribal Court Cooperation*, 79 JUDICATURE 150, 152 (1995)(urging federal courts to consider the Navajo Peacemaker courts' emphasis on talking things out, consensus, restitution, and forgiveness).

One ongoing controversy among both tribal and state officials is whether mediation is an appropriate method of dispute resolution where evidence of domestic violence exists.[374] The objections to mediation derive primarily from concerns that the presence of violence in a relationship precludes equality of bargaining power and that informal dispute resolution may lead to further victimization of the victim.[375] While the topic is clearly beyond the scope of this Article, the controversy highlights the differences between mediation in the state systems and various forms of traditional mediation among tribes. In the tribal context, some commentators have argued that Native styles of mediation may be better suited for situations involving domestic violence than are the mediation techniques commonly used in the state systems. James Zion, Solicitor General for the Navajo Nation, for example, has identified four distinguishing characteristics of Navajo mediation: the Navajo peacemaker (or "naat'aanii") is not a neutral and detached figure but, instead, is often an elder or relative with a strong conviction about domestic violence as an evil; the process involves not only the parties but also their families and clan; the process, based on "talking things out," helps balance the bargaining position of the participants; and the peacemaker has an unlimited range of options for concluding the dispute.[376] Another commentator has suggested that Peacemaking has both strengths and weaknesses as an informal adjudicative model for cases involving domestic violence.[377] The point here is that tribal dispute resolution offers nonadversarial techniques

374. For a summary of the debate among state law reformers, see generally ALI, TENTATIVE DRAFT No. 3, *supra* note 162, at 94-107; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991)(arguing against mandatory mediation because it disempowers the subordinated party). Among the states that mandate mediation for child custody cases, most jurisdictions do not apply the requirement where domestic violence or child abuse has occurred. *See* ALI, TENTATIVE DRAFT No. 3, *supra* note 162, at 103-04. The ALI, it should be noted, has taken a stand against mandatory mediation. *See id.* § 2.08. For a general discussion of tribal approaches to the problem of domestic violence, see 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); Zion & Zion, *supra* note 21.

375. *See* ALI, TENTATIVE DRAFT No. 3, *supra* note 162, at 102-05.

376. Zion & Zion, *supra* note 21, at 424. Similarly, Professors Valencia-Weber and Zuni have praised a domestic violence program operating on the Oglala Sioux reservation known as the Sacred Shawl Society. The Sacred Shawl Society utilizes community members for intervention and counseling and "provides a cultural context in which to deal with domestic violence." Valencia-Weber & Zuni, *supra* note 21, at 128.

377. *See* Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999). Coker contends that while Peacemaking has many strengths that can enhance autonomy for battered women, it also has problems. Among other concerns, she suggests that some women may feel coerced into participation, agreements may be difficult to enforce, and some peacemakers have a pro-marriage bias that discourages separation.

that are different from other non-tribal methods; consequently, criticisms aimed at the growing use of ADR methods within the state systems may not apply to these traditional forms of tribal dispute resolution.

The remedial terms of orders emanating from tribal courts may differ significantly from the terms of orders in the state courts. These differences reflect the tribes' cultural concern for restoration of harmony, repair of relations, and balance. Ada Pecos Melton has described the role of apology in indigenous justice systems as a key component of restorative justice:

> Verbal accountability by the offender and the offender's family is essential to express remorse to the victim's family. Face-to-face exchange of apology and forgiveness empowers victims to confront their offenders and convey their pain and anguish .... Observing and hearing the apology enables the victim and family to discern its sincerity and move toward forgiveness and healing.[378]

Thus, the use of an apology in the child custody context parallels its use in the criminal context as a means of achieving balance and family harmony.[379]

In the written record of tribal jurisprudence, tribal courts in child custody disputes occasionally include an apology by one parent to another as a part of the court-ordered remedy. In *Platero v. Mike*,[380] the Navajo Supreme Court reviewed a tribal court's judgment of contempt against a mother who had blocked court-ordered visitation of the parties' children with the father. Among other sanctions, the trial court required that the mother be confined until she apologized to the father, a remedial order that the supreme court upheld on appeal.[381]

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378. Melton, *supra* note 30, at 132.

379. For a discussion of the importance of remorse in the Apache culture, see Vicenti, *supra* note 31. According to Vicenti, the Apache culture "values remorse as a state of mind to be accomplished by a perpetrator. An act of contrition is often considered necessary to give an open demonstration to the sense of remorse felt by the perpetrator." *Id.* at 138-39. It should be noted that in the field of therapeutic jurisprudence, writers have explored the potentially therapeutic role of apology. *See* Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, *in* LAW IN A THERAPEUTIC KEY; DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, *supra* note 370; Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1177-78 (1997)(exploring the transformative power of apology and suggesting that apology can be viewed as corrective ritual performed by two subjects in order to redress power imbalance).

380. 22 Indian L. Rptr. 6097 (Navajo 1995).

381. *See id.* at 6098. The trial court additionally required the mother to attend parenting classes as a condition of release. Moreover, that court summarily changed custody of the children to the father because of the mother's failure to cooperate. The Supreme Court reversed as to the parenting education provision and the change of custody, finding that such orders were unwarranted since nothing in the record indicated that parenting classes would address conflict between the parents or that a modification of custody would be in the best interests of children. Similarly, judges of the Laguna and Acoma tribes have described a

In sum, the methods of dispute resolution in tribal courts, like substantive rules of decision making, inevitably give form to and are informed by tribal culture. In resolving family conflicts, the conciliatory or meditative traditions of many tribes are particularly prominent. These traditions stand in marked contrast to the adversarial methods that, until the last decade, were the hallmark of state domestic relations litigation. Indeed, the recent innovations in Anglo-American dispute resolution that aim for more "therapeutic" processes often draw on principles of restorative justice that have long been a part of dispute resolution among many tribes.

V. CONCLUSION

Almost without notice from those outside Indian country, contemporary tribal courts are generating a diverse and creative jurisprudence. Tribal judges seem increasingly aware of the constitutive role of adjudication in promoting tribal culture. Indeed, there is a growing insistence by many judges that tribal traditions should inform their decision making whenever they approach a question of first impression. In the realm of family law, the work of the tribal judges examined in this Article plays a vital role not only in sustaining the tribe's core values but also in shaping those values where the cultural precedents are unclear. In addition, through the dissemination of written opinions, tribal courts communicate their values to members and non-members alike.

As shown in Part IV, tribal jurisprudence is not a static and unimaginative chronicle of judgments; to the contrary, tribal court opinions reveal a dynamic process of adjudication in which decision makers weave cultural narratives into the resolution of disputes. Thus, an issue of liability for back payments of child support prompts an explanation about the role of children in the Navajo family and clan.[382] A question about the propriety of an award of joint custody triggers a description of the extended family in Navajo society.[383] A child dependency case results in a court's exegesis on the importance of spiritual healing in the tribe's traditions.[384] Tribal court decisions

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traditional approach to dispute resolution that requires the wrongdoer to apologize to the victim, to compensate the victim, and to "make it up" to the community through service. *See* Cooter & Fikentscher, *Part I, supra* note 33, at 324.

382. Alonzo v. Martine, 18 Indian L. Rptr. 6129, 6129 (Navajo 1991)("Navajo children are the Navajo people's future, and they must have support to take their equal places in the overall Navajo society.").

383. *See* Goldtooth v. Goldtooth, 3 Navajo Rptr. 223 (Window Rock D. Ct. 1982), discussed *supra* at notes 154-62 and accompanying text.

384. *See In re* T.M.M., 24 Indian L. Rptr. 6005 (Walker River Juv. Ct. 1996)(holding that required medical care under tribal code includes traditional Northern Paiute healing methods as an alternative to allopathic medicine); discussion *supra* notes 210-15 and accompanying text.

can yield an alternative construction of child, parent, family, and sovereign power.

In this Article, I have identified some of the ways in which tribal decision making involving children may reveal a world view that differs from that of the dominant society. A tribe's cultural outlook may manifest itself in jurisprudential themes regarding the cultural primacy of children in the community, the obligations of parenthood, or the central importance of tribal identity in resolving family disputes about children. In particular, the traditional role of the extended family in child rearing among many tribes has figured prominently in child custody disputes, and tribal courts have had to resolve conflicting claims of parents and grandparents.[385] In many such cases, the tribal court portrays the grandparent as a cultural insider — the special elder who can assume child rearing responsibilities according to custom and can imbue the child with a sense of cultural heritage. In contrast, in Anglo-American jurisprudence, as demonstrated most recently by the Supreme Court's decision in *Troxel*, the grandparent is an outsider whose intrusion into the nuclear family is subject to strict constitutional oversight.[386] While the due process claims advanced in *Troxel* can also surface in tribal court disputes by way of the Indian Civil Rights Act, tribal courts will not necessarily subordinate tribal custom to the dictates of the ICRA. The result is a fluid interplay of customary and contemporary norms about the family.

Clearly, many tribal courts are beginning to compile a jurisprudential record, but that record is largely unknown to non-Indian scholars. This Article has attempted to give visibility to the published opinions of tribal judges in family law and to suggest points of contrast with dominant society norms. By attending to the words of tribal judges, the non-Native audience can learn about different ways of conceptualizing and healing breaches in family relations and can begin to see their own approaches in a broader perspective. As Milner Ball has observed, "[n]on-Indians have much to receive from Indians across the distance of their difference."[387] Knowledge of the "other," one hopes, also enhances self-knowledge.

385. *See supra* notes 320-32 *supra* and accompanying text.
386. *Troxel* is discussed *supra* at notes 289-312 and accompanying text.
387. Milner Ball, *Constitution, Court, Indian Tribes*, 21 AM. BAR FOUND. RES. J., Winter 1987, at 1, 7.