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The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay

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THE CONTEXTUAL LEGITIMACY OF ADJUDICATION IN TRIBAL COURTS AND THE ROLE OF THE TRIBAL BAR AS AN INTERPRETIVE COMMUNITY: AN ESSAY

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I. INTRODUCTION

Tribal courts are the frontline tribal institutions[1] that most often confront issues of self-determination and sovereignty as well as the more routine legal business of processing name changes and routine divorce actions. They are the vanguard entity for advancing and protecting the right of tribal self-government, while at the same time they are charged with providing reliable and equitable adjudication in the many and increasing number of matters that come before them. In light of these burgeoning functions, tribal courts find themselves subject to increasing scrutiny from both the media[2] and the federal courts.[3]

Tribal courts can do little about the scrutiny—for it comes with the territory of prominence and extended growth—but they must continue to be cognizant of the unique problems that they face. This is especially true in the wake of their development as a window of opportunity through which many would assess the current status of tribal self-government and reservation well being in general. One of these notable, but unexamined, outcomes is the realization that part of their growing significance within Indian country is the concomitant increase in the number of individuals—both law-trained Indians and non-Indians and non-law trained tribal advocates—that appear before them. This growing number of practitioners

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1. *See, e.g.*, the United States Supreme Court's most recent statement in this regard in Iowa Mut. Ins. Co. v. LaPlante, 107 S. Ct. 971, 976 (1987), that "tribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development."

2. *See, e.g.*, Weiser, *Injustice at Rosebud*, Washington Post, Sept. 11, 1984, at A1; Schmickle & Buoen, *Indian Courts: Islands of Injustice*, Minneapolis Star and Tribune, Jan. 5, 1986, at 1A, Jan. 6, 1986, at 1A, Jan. 7, 1986, at 1A.

3. *See, e.g.*, Iowa Mut. Ins. Co., 107 S. Ct. 971; National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); for a general discussion of access to the federal courts, *see also* Pommersheim and Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D.L. REV. 553 (1986). Note also that the United States Supreme Court made it clear in both *National Farmers Union*, 471 U.S. 845, and *Iowa Mut. Ins.*, 107 S. Ct. 971, that tribal courts are to be the primary forum for adjudicating civil disputes that arise on the reservation.

along with the increasing volume and diversity of litigation in tribal courts raises significant questions of first impression about the nature and function of the tribal bar and the context in which it makes decisions.

It is the goal of this Article to review and to examine some of the contours and questions surrounding this emerging phenomenon within most tribal judicial systems. Part of this essay reviews the history of tribal courts, surveys the different types of tribal courts, and provides a sample of the diverse practice requirements that exist. It plumbs both the roots and contemporary settings of many tribal courts in order to illustrate underlying policy questions.

The analytical section of the Article treats the more abstract and critical questions of contextual legitimacy[4] of adjudication in tribal courts and whether a tribal bar functions as a significant interpretive community[5] that provides a reliable framework which helps to identify values and to define the parameters of legal advocacy and judicial decisionmaking within tribal court systems. In other words, it seeks to probe the issue of whether the tribal bar enhances contextual legitimacy and adequately functions to monitor and focus the nature of permissible legal argument and adjudication in tribal court.

Tribal courts—whether praised or vilified[6]—have never been analyzed from such a conceptual vantage point. However, these very elements are arguably the cardinal principles in determining the viability of tribal courts to advance important tribal values, as well as in rendering case by case justice in terms of reliability and fairness. Such a view has nothing to do with the adoption of non-Indian, state-like standards (whatever they might be), but rather has its roots in a commitment to understanding how justice and judicial self-realization are achieved in any legal system and how such worthy aspirations may be further advanced.

II. BACKGROUND AND HISTORY OF TRIBAL COURTS

Tribal courts in Indian country do not find their origins in any specific statutory authorization, but rather in the early administrative practice of the Bureau of Indian Affairs and in the subsequent and implicit authorization suggested by the Indian Reorganization Act of 1934.[7] This view,

4. This term looks to the social, historical, and cultural setting of judicial adjudication rather than, for example, the simple logical application of rules of law in order to measure the systemic viability and appropriateness of judicial decisionmaking. *See infra* note 64 and accompanying text.

5. *See generally* S. FISH, IS THERE A TEXT IN THIS CLASS? 13–17 (1980) describing interpretive communities as a community of practitioners whose responsibility is to determine the meaning of the text (particularly a literary text). These observations are also clearly pertinent to the role of the practicing bar as an interpretive community whose text is the law and legal experience.

6. *See supra* note 2 and D. GETCHES & C. WILKINSON, FEDERAL INDIAN LAW 376–94 (2d ed. 1986).

7. 25 U.S.C. §§461–62, 464–79 (1983); 25 U.S.C. §463 (Supp. 1987).

of course, does not consider the existence of tribal adjudicatory mechanisms[8] that may have pre-existed or existed in tandem with formally identified tribal courts. Such concerns are, however, often critical in examining the issue of legitimacy and are discussed later in this essay.

The 'need' for some form of tribal court system emanated from the perception of local and national non-Indian administrators in Indian country that some formal device was necessary to regulate law and order on the reservation.[9] Prior to the formal authorization from the Secretary of Interior in 1883 to establish Courts of Indian Offenses,[10] local agents resorted to a variety of expedients. The most common solution was for the agent himself to act as a judge, or to delegate the duty to one of his other subordinates or to a trusted Indian. This practice, though not statutorily authorized, was in line with the course of action suggested several times by earlier Commissioners of Indian Affairs and Secretaries of the Interior, who envisioned the local agents as justices of the peace.[11]

Despite these *ad hoc* practices throughout Indian country, the specific impetus for Courts of Indian Offenses seemed to come from the reform impulse of Secretary of Interior H.M. Teller who was appointed in 1882.[12] Commissioner Price compiled a set of rules for Courts of Indian Offenses, which were approved on April 10, 1883 by Secretary Teller and circulated to the agents.[13] These rules provided guidelines for court organization and procedure and an abbreviated criminal and civil code.[14] The only express qualification for prospective jurists was that they not be polygamists.[15] The range of jurisdictional authority was thought to be modelled after that of a Justice of the Peace in the state or territory where such a court was located.[16]

It was recognized from the first that there was, at best, a shaky legal foundation for these tribunals.[17] There was no statutory authorization for the establishment of such courts, only the generally acknowledged authority of the Department of the Interior to supervise Indian affairs.[18] Because there was no authorizing legislation defining the jurisdiction of the Courts

8. All tribes possessed, at some time, traditional methods for adjudicating disputes. *See, e.g.*, K. LLEWELLYN & E. HOEBEL'S classic study THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941). For more recent attempts in this vein *see, e.g.*, Zion, *The Navaho Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. IND. L. REV. 89 (1983).

9. W. HAGAN, INDIAN POLICE AND JUDGES 104–07 (1966).

10. *Id.* at 104.

11. *Id.*

12. *Id.* at 107.

13. *Id.* at 109.

14. *Id.*

15. *Id.* at 110.

16. *Id.*

17. *Id.*

18. *See, e.g.*, Snyder Act, 25 U.S.C. § 13 (1983); 25 U.S.C. §§ 13(b)-13(e) (1986).

of Indian Offenses, the courts and police were often challenged. The usual reaction of the Commissioner of Indian Affairs in the face of a challenge was to try to avoid a showdown.[19] In this regard, there was unblemished success; no successful challenges were brought against the Courts of Indian Offenses.[20] Tribal courts remained fragile and volatile for all concerned.

The tasks of the Courts of Indian Offenses became vastly more complicated when the ravages of the allotment[21] process and the sale of "surplus"[22] tribal lands brought substantial numbers of non-Indians as permanent residents to the reservation. The bright line which separated white and Indian communities was obliterated. Jurisdictional dilemmas became apparent. Various questions arose, including: What courts had (or would accept) jurisdiction over whites, over Indian allottees, over mixed bloods? How would these courts be financed? These dilemmas are still not fully resolved today, almost one hundred years later.[23]

Despite the principal claim that the Courts of Indian Offenses were necessary to maintain law and order on the reservation, other motives were at work. For example, the 1892 revision provided "[t]hat if an Indian refuses or neglects to adopt habits of industry, or to engage in civilized pursuits or employments, but habitually spends his time in idleness and loafing, he shall be deemed a vagrant," and punished accordingly.[24] The "need" for law and order often meant a "need" for acculturation and assimilation. This notion of reform often sought to impose or instill

19. W. HAGAN, *supra* note 9 at 145.

20. *See, e.g.*, United States v. Clapox, 35 F. 575 (D.C. Or. 1888). *Clapox* has been cited with approval in every subsequent case upholding the legality of Courts of Indian Offenses. *See, e.g.*, Settler v. Yakima Tribal Court, 419 F.2d 486, 489 (9th Cir. 1969); Colliflower v. Garland, 342 F.2d 369, 373 (9th Cir. 1965); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 95 (8th Cir. 1956).

21. This process began with the Dawes Severalty Act, 25 U.S.C. §331 *et seq.* (1983), which was also known as the General Allotment Act of 1887, and had as its principal goal the break-up of the tribal tradition of communal ownership through the means of providing individual Indians with specific allotments ranging from 80–160 acres. The objective was to convert Indians into individual farmers and ranchers and thereby make them readily assimilable into the surrounding non-Indian farming and ranching communities. The policy failed dismally resulting mainly in the reduction of the nationwide Indian land base from 138 million acres in 1887 to 48 million acres in 1934. For an expanded description, *see generally* D.S. OTIS, THE DAWES ACT AND ALLOTMENT OF INDIAN LANDS (1973).

22. The Allotment Act also gave the Secretary of Interior authority to negotiate with any tribe whose members had all been allotted, or, where the President believed it to be in the tribe's best interest, to purchase the unallotted or 'surplus lands' land within the reservation. 25 U.S.C. §348 (1983). These lands were subsequently made available for non-Indians to homestead.

23. The persistent questions involving the dilemma of who has jurisdiction, that is whether the federal, tribal, or state government may claim bona fide authority over any given matter in Indian country, is an enduring and significant theme that permeates Indian law. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 281–386 (1982 Ed.), and D. GETCHES AND C. WILKINSON, FEDERAL INDIAN LAW 416–78 (2d ed. 1986).

24. W. HAGAN, *supra* note 9, at 120.

"proper virtues" in Indians and was particularly characteristic of federal policy during the period 1871-1928.[25]

Courts of Indian Offenses were established when the agent and Commissioner of Indian Affairs concluded they were practicable and desirable—that is for all Indians but the Five Civilized Tribes, the Indians of New York, the Osage, the Pueblos, and the eastern Cherokees, all of which had recognized tribal governments. The peak of their activity was reached around 1900 when about two-thirds of the agencies had their own courts.[26] Some agencies never established a court and others experimented with them only briefly.[27] The penurious appropriations of Congress for the courts limited the number that could function at any time. The Commissioner of Indian Affairs determined where the courts would be located. An Acting Commissioner in 1891 expressed this process and its unbounded discretion with the words "as it may appear the good of the Indian Service requires."[28]

Finally, the wheels of reform began to turn in Indian country. The late 1920's saw renewed public concern for the conditions on Indian reservations. Reports appeared that criticized white controlled land tenure patterns, growing poverty, and administrative abuse in Indian country.[29] The 1928 *Meriam Report*[30] initiated by Secretary of Interior Hubert Work is the best known of these, but it made no recommendations on the subject of law and tribal courts. The situation, the Report argued, varied too greatly from tribe to tribe.[31]

The Indian Reorganization Act of 1934[32] was the culmination of this reform movement. One of the sweeping changes it sought to accomplish was in the area of law and order on Indian reservations. John Collier, the then Commissioner of Indian Affairs, proposed a sweeping reform bill that dealt with four major areas: self-government, special education for Indians, Indian lands, and a Court of Indian Affairs.[33] The Collier proposal envisioned a dual system of tribal courts. The first level was to be organized under the self-government title of the proposed act.[34] Tribes

25. *See, e.g.*, D. GETCHES AND C. WILKINSON, *supra* note 23, at 111–22. For expanded treatment *see* F. PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 609–757 (1984); H. FRITZ, THE MOVEMENT FOR INDIAN ASSIMILATION 1860–1890 (1963).

26. W. HAGAN, *supra* note 9, at 109.

27. *Id.*

28. Acting Commissioner R. B. Belt as quoted in W. HAGAN, *supra* note 9, at 109.

29. Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 955–61 (1972); W. HAGAN, *supra* note 9, at 150.

30. INSTITUTE FOR GOV'T. RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION (1928).

31. W. HAGAN, *supra* note 9, at 150.

32. 25 U.S.C. §§ 461–62, 464–79 (1983); 25 U.S.C. § 463 (Supp. 1986).

33. V. DELORIA, JR. & C. LYTLE, THE NATIONS WITHIN 76–79 (1984).

34. *Id.* at 76.

would be able to continue their local court as either a Court of Indian Offenses or as a tribal court created through specific authorization in the tribe's constitution adopted pursuant the Indian Reorganization Act.[35]

At the same time, a national Court of Indian Affairs would be staffed with seven judges appointed by the President and subject to confirmation by the Senate. The court would always be in session and would be held in a number of different circuits. Each judge would be responsible for a particular region.[36]

The jurisdiction of this special Court of Indian Affairs was set out in Section 3 of the proposed legislation.[37] The Court would assume responsibility over the following matters: major criminal cases, cases where an Indian tribe or community was a party, cases involving questions of commerce where one litigant was an Indian and the other a non-Indian, civil and criminal cases involving a tribal ordinance where a party was not a member of the Indian community, questions involving Indian allotments where the rights of an Indian were involved, and issues involving the determination of heirs and the settlement of such things as estates, land partitions, and guardianships.[38]

According to some commentators, a number of provisions in the Court of Indian Affairs title would have changed the traditional concept of Indian justice rather significantly.[39] All federal guarantees to criminal defendants and the federal rules of evidence would apply. In essence, the court would duplicate the system of procedure and appeal that prevailed in the federal court system.[40] Of course, there was no Indian thinking or input considered in the drafting of the bill.[41] If things were not going well[42] on the reservation, improvement lay in the ratcheting up of applicable federal standards.[43]

Despite these familiar difficulties, the Collier Bill did go a long way in attempting to bring an improved sense of justice to Indian country. In addition to the powers already discussed, the proposed court could have removed cases from tribal and state courts and heard appeals from local

35. *See, e.g.*, ROSEBUD SIOUX TRIBAL CONS. art. IV § 1(k) (1935).

36. DELORIA & LYTLE, *supra* note 33, at 76.

37. *Id.*

38. *Id.* at 77.

39. *Id. See also* D. GETCHES & C. WILKINSON, *supra* note 23, at 128–29; F. POMMERSHEIM, BROKEN GROUND AND FLOWING WATERS 13–14 (1979).

40. DELORIA & LYTLE, *supra* note 33, at 77.

41. *Id.* at 78.

42. The notion of "things not going well" on the reservation is meant strictly in the non-Indian, dominant society sense, wholly unhinged from the local perspective of the tribe and its members.

43. For a more recent example, there is the controversy involving the adoption and implementation of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–03 (1983). *See* Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. SURVEY OF HUMAN RIGHTS LAW 49, 50 (1971).

tribal courts.[44] The Secretary of Interior was also authorized to appoint ten special attorneys to provide legal advice and representation to both tribes and individual Indians before the court.[45]

Not unexpectedly, as with much of the proposed Collier bill, this title generated a great deal of controversy during the legislative hearings.[46] The final enactment of the bill which became known as the Indian Reorganization Act (herein IRA) of 1934, or the Wheeler-Howard Act, bore faint resemblance to the original proposal.[47] The title dealing with the Court of Indian Offenses disappeared entirely.

Under the IRA, tribes were to draft their own constitutions, adopt their own laws, and set up their own court systems.[48] Regardless of the statutory provisions, most tribal constitutions were drafted by the Bureau of Indian Affairs without tribal input and consequently reflected little, if any, direct local concern.[49] As a result, there was no opportunity to formally reinstitute traditional law on the reservation,[50] even if it existed at the time.

These Bureau constitutions did not provide for any separation of powers and did not specifically create any court system. Most constitutions, rather facilely it seems, recognized a power in the tribal council—the elected legislative body—to "promulgate and enforce ordinances providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers."[51] Most tribal legislation also required the approval of the Bureau of Indian Affairs.[52] In recent years, a number of tribes have amended their constitutions to remove the Bureau of Indian Affairs approval power.[53] It is important to note, however, that the exercise of these tribal constitutional powers (whether by an IRA tribe or not) are not to be considered the exercise of federally delegated powers, but rather the exercise of a tribal sovereign authority which predates the United States Constitution.[54]

The current tribal codes of most tribes which serve to elucidate the

44. DELORIA & LYTLE, *supra* note 33, at 78.

45. *Id.*

46. *Readjustment of Indian Affairs: Hearings on H.R. No. 7902*, 73rd Cong., 2d Sess. (1934).

47. DELORIA & LYTLE, *supra* note 33, at 140–53.

48. 25 U.S.C. § 476 (1983).

49. DELORIA & LYTLE, *supra* note 33, at 173. *See generally* G. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT 1934–45 (1980).

50. *See, e.g.*, D. GETCHES, ED., NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, INDIAN COURTS AND THE FUTURE 7–13 (1978).

51. ROSEBUD SIOUX TRIBAL CONS. art. IV § 1(k) (1935).

52. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985).

53. *See, e.g.*, ROSEBUD SIOUX TRIBAL CONS. former art. IV § 2 (1935), repealed at art. IV § 1 (1985). This requirement did not, and does not, generally arise in a non-IRA tribal constitution. *See, e.g.*, Kerr-McGee Corp., 471 U.S. 195.

54. *See, e.g.*, Talton v. Mayes, 163 U.S. 376 (1896).

framework of tribal court activity are a combination of unique tribal law and adapted state and federal law principles. Apparent in the newer codes is a decided commitment to develop increased tribal statutory, including customary, law and an organized and reported body of tribal decisional law.

III. REQUIREMENTS TO PRACTICE IN TRIBAL COURTS

The legal requirements to practice before tribal courts are set legislatively by tribal councils. It is useful to note, however, that there are two broad categories of tribal courts. These categories are the "CFR"[55] courts, which are the successors to the Bureau of Indian Affairs' Courts of Indian Offenses, and all other tribal courts established pursuant to constitutional and legislative enactment of tribal legislative bodies. CFR courts are largely governed by federal administrative regulations and are therefore widely regarded as entities subject to extensive and excessive Bureau of

55. The term 'C.F.R.' refers to the Code of Federal Regulations. The pertinent regulations are found at 25 C.F.R. §§ 11.1—11.306 (1987). A specific listing of tribes with C.F.R. courts is found at 25 C.F.R. § 11.1(a) (1987) and includes the following:

(1) Omaha (Nebraska).
(2) Flandreau (South Dakota).
(3) Yankton (South Dakota).
(4) Wind River (Wyoming).
(5) Bois Forte (Minnesota).
(6) Red Lake (Minnesota).
(7) Cocopah (Arizona).
(8) Kaibab (Arizona).
(9) Hopi (Arizona) (Tribal court enforcement of special grazing regulations).
(10) Fallon (Nevada).
(11) Goshute (Nevada).
(12) Lovelock (Nevada).
(13) Te-Moak (Nevada).
(14) Yomba (Nevada).
(15) Duckwater Shoshone (Nevada).
(16) Kootenai (Idaho).
(17) Shoalwater Bay (Washington).
(18) Hoopa (California)(Jurisdiction limited to special fishing regulations).
(19) Anadarko Area Tribes (Western Oklahoma).
(20) Choctaw (Mississippi).
(21) Eastern Cherokee (North Carolina).
(22) Louisiana Area (Louisiana) (Includes Coushatta and other tribes in the State of Louisiana which occupy Indian country and which accept the application of this part; *provided* that this part shall not apply to any Louisiana tribe other than the Coushatta Tribe until notice of such application has been published in the FEDERAL REGISTER.)

Note also the disparaging description of C.F.R. reservations at 25 C.F.R. § 11.1(b) (1987) which states that "[I]t is the purpose of the regulations in this part to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law."

Indian Affairs control and influence. These regulations, however, contain no provisions relevant to admission to practice before such courts and therefore such authority falls to the particular tribal council, subject, of course, to approval of the Secretary of Interior.[56]

25 CFR § 11.1(e) provides that "nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of Interior, they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe."[57] For example, the Yankton Sioux Tribe that operates a CFR court is considering an amendment to its tribal code that anyone who wishes to be admitted to practice before the Yankton Sioux Tribal Court may be admitted upon motion in writing by order of the Chief Judge. The relevant requirements state:

> Any person who is a member in good standing of the bar of any state of the United States, is of good moral character, and demonstrates to the Court a thorough knowledge of the Code, the Rules of the Yankton Sioux Tribal Court and Federal Laws and Regulations applicable to the Yankton Sioux Tribe, and some knowledge of the culture and traditions of its members, is eligible to apply for admission to general practice in this court. Any person who is eighteen years of age or older, has not been convicted by a felony, or a misdemeanor in the past year, is of good moral character and demonstrates a thorough knowledge of this Code, the Rules of the Yankton Sioux Tribal Court, and knowledge of the culture and traditions of the Yankton Sioux People, is eligible to apply for admission to general practice in this court as lay counsel or lay advocate.[58]

These not atypical requirements broadly delineate the common threads and considerations for practice before any tribal court. "Professional" attorneys are usually admitted to tribal practice if they are members in good standing of the bar of any state or federal court.[59] Lay counsel or

56. 25 C.F.R. § 11.1(e) (1987).

57. *Id.*

58. Proposed amendment to the Yankton Sioux Tribal Code Title 4 § 15.15 (1980). There are no current requirements in the Yankton Sioux Tribal Code concerning admission to practice before the tribal court.

59. *See, e.g.*, Blackfeet Tribal Code Ch. 9 Rule 10(A) (1974) ("[a]dmitted to practice before the highest court of a state or before the Supreme Court of the United States. . . ."); Flathead Tribal Code Ch. 1 § 9 (1960) ("[a]ny professional attorney appearing before the Tribal Court must be a member in good standing of the Montana Bar Association."); Fort Belknap Tribal Code Ch. 2 § 12 (1976)("[a]ny attorney admitted to practice before the highest court of a state or before the Supreme Court of the United States is eligible for admission to practice in the Fort Belknap Tribal Court."); Standing Rock Sioux Tribal Code § 1(601)(a) (1985) ("[a]ny attorney at law who is a member in good standing of any state or federal court shall be eligible for admission to practice before the tribal

tribal advocates are usually admitted to practice if they are tribal members of good moral character.[60] Despite the requirements of knowledge of culture and tradition that are sometimes mentioned, these elements, to my knowledge, are never actually tested. No tribe currently administers its own bar examination for either professional attorneys or lay advocates although some tribes are in the process of developing such requirements.[61]

Admission to tribal practice also generally creates fees and dues obligations. These fees may be either in the nature of one time fees or annual

court."); Mescalero Apache Tribal Code Ch. 13-2-1 (1983) ("[e]ach attorney who wishes to practice before the Tribal Court must submit an application to practice to the Tribal Council President. Said application shall be accompanied by certificates from the Clerks of the Supreme Court of any state and the United States District Court for the District of New Mexico.") Note, interestingly, this same section limits practice to "criminal cases only, and where otherwise specified"; Pueblo de Acoma Tribal Code Ch. 3.12.5 (1984) ("[a]ny attorney who is a member of the New Mexico State Bar, or any attorney certified and eligible to practice before the courts of any other State or the United States is eligible to be admitted to practice.") Note that Ch. 3.12.4 provides that "[i]n all civil matters, professional attorneys may not appear unless specifically authorized to do so by the Tribal Council."

60. *See, e.g.*, Blackfeet Tribal Code Ch. 9 Rule 10(B) (1974) ("[t]he court may admit to practice on such terms and conditions as appear appropriate, a lay advocate who shall be a member of the Blackfeet Tribe. . . ."); Flathead Tribal Code Ch. 1 § 9 (1962) ("[a]ny member proposing to represent another member of the Tribe, before the Tribal Court, must be of good moral character and must not have been convicted of a felony, or of a misdemeanor for a year last past his proposed appearance before the Tribal Code."); Fort Belknap Tribal Code Ch. 2 § 12 Rule 10 (1976) ("[t]he court may admit to practice on such terms and conditions as appear appropriate, a lay advocate who shall be a member of the Gros Ventre or Assinibone Tribes of the Fort Belknap Indian Community."); Standing Rock Sioux Tribal Code § 1(61)(b) (1985) ("[a]ny Indian of the Reservation shall be admitted to practice before the court as a lay counselor upon application."). Mescalero Apache Tribal Code Ch. 13-1-1 (1983) ("[a]ny enrolled member of the Mescalero Apache Tribe may represent any person before the Tribal Court, providing that said representative is not a member of the Tribal Council, A tribal Judge, or employee of the court."); Pueblo de Acoma Tribal Code Ch 3.1.2 (1983) (["a]ll lay counsel . . . may be admitted to practice upon approval of application in writing by order of the chief judge, provided he or she is an enrolled member of the Pueblo of Acoma.") Note that there is explicit recognition of the right to represent litigants in civil cases. Pueblo de Acoma Ch. 3.11.1(a) (1983).

Note that some tribal codes permit lay advocate status to individuals who are not tribal members. *See, e.g.*, Fort Belknap Tribal Code Ch. 2 § 12 Rule 10 (1976) and Blackfeet Tribal Code Ch. 9 Rule 10(C) (1974) ("[t]he court in its discretion may admit any other person to appear before it as an advocate, upon successful completion of an application and questionnaire on tribal law prepared by the Chief Judge. . . ."); Crow Creek Tribal Code Ch. 2 (1980) ("[a]ny Paralegal, Legal Assistant, Tribal Court Advocate, Legal Intern or other employee of a professional law firm who is directly supervised by a professional attorney admitted to practice before the Court shall be eligible for admission to practice before the Court.").

61. *See, e.g.*, Rosebud Sioux Tribal Code Title 9, Ch. 2 § 4 (1985) (requiring attorney candidates to take the tribal bar examination.). However, no such bar examination has yet been given, although at the request of the Chief Tribal Judge I have had students doing advanced research to develop possible questions for the bar exam. Attorneys are still admitted to tribal practice based on the requirement they be an active member in good standing of the South Dakota State Bar or certified to practice before the highest court of any other state or the Supreme Court of the United States as set forth in the same section of the Code. Note also that the Pueblo de Acoma Tribal Code Ch. 3.12.5 (1984) also has a bar examination requirement but as of September, 1987, it too has not been implemented. *But see also* the Navajo Nation Bar Association By-Laws § IIIA (1978) which require taking and passing the Navajo Nation Bar Examination as a condition for membership in the Association.

dues. Fees for professional attorneys range anywhere from $5 to $250, while fees for lay advocates range from $0 to $50.[62]

IV. THE CONTEXTUAL LEGITIMACY OF ADJUDICATION IN TRIBAL COURTS

The title of this essay suggests the importance of two critical terms, namely "contextual legitimacy" and "interpretive community" as key canons in helping to understand the nature and quality of adjudication in tribal courts. Each term will first be defined and examined and then brought to bear in the tribal court context.

The concept of contextual legitimacy represents a particular gloss on the fundamental concept of formal legitimacy. In the United States legal system, this demand for (formal) legitimacy has traditionally rested on the pristine view that judges should decide cases in accordance with the law. Most conventionally and simply stated, this has meant that any judicial decision must logically follow from the authoritative legal rule or rules, and not, for example, from personal or other values which are not validated by the law.[63] This classic formulation has been seriously criticized as inadequate to explain the relationship of judicial adjudication to the larger legal and political system of which it is a part. Further criticism argues that the legal and political system cannot be adequately understood apart from its social, historical, and cultural context.[64]

It is this notion of contextual legitimacy that looks to the social, historical, and cultural setting of judicial adjudication that produces a most fruitful framework for examining tribal courts and tribal court adjudication. Tribal courts need to be viewed within this wide focus in order to better understand what social and cultural values are actually becoming embedded in these young systems. This is necessary to avoid a sterile analysis that looks to a narrow consideration about the application of rules of law unhinged from the larger concerns of tribal integrity and culture.

The concept of "contextual legitimacy" is a post-formalist view that

62. *See, e.g.*, Rosebud Sioux Tribal Code Title 9, Ch. 2 § 2 (1985) (attorney admission fee $100); Blackfeet Tribal Code Ch. 9 Rule 10(A) (1974) (attorney admission fee $25); Fort Belknap Tribal Code Ch. 2 § 12 Rule 10 (1976) (attorney admission fee $25); Sisseton-Wahpeton Tribal Code Ch. 32 § 2 (1982) (attorney admission fee $5); Mescalero Apache Tribal Code Ch. 13-2-1(E) (1983) (attorney annual fee $250); Pueblo de Acoma Tribal Code Ch. 3–12–6(e) (1983) (attorney annual fee $50). As for tribal advocates, *see, e.g.*, Sisseton-Wahpeton Tribal Code Ch. 32 § 2 (1982) (tribal court advocate fee $5); Rosebud Sioux Tribal Code Title 9, Ch. 2 § 2 (1985) (tribal court advocate fee $50). It is important to note that many codes do not specifically identify or discuss fees and dues obligations though it is reasonable to expect dues and fee requirements to exist and be set by the appropriate tribal legislative authority.

63. S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 169 (1985). This section of the essay draws substantially on the analytical framework set forth in this appealing work.

64. *Id.* at 187–88.

suggests the meaning of legitimacy shifts from a concern for antecedent legitimating foundations, such as the logical application of rules of law, to a demand for a legal and political system which on the whole enjoys and merits the allegiance of the people. The propriety and integrity of adjudication therefore depends on their contribution to the legitimacy of the legal and political system in its social, historical, and cultural context.[65]

Contextual legitimacy in this view has two interrelated components, namely the obligation and the desire to abide by the law within a legal and political system that merits people's fidelity and affirmation. Whether this obligation is generally recognized by the people is a question of social fact. Whether the desire exists to abide by the law is more a normative question. Yet neither aspect taken alone is sufficient to establish contextual legitimacy, and the two together imply a tension between the search for a more orderly and just society and the requirements of a constitutional democracy.[66]

Although much of this undoubtedly sounds arcane, I believe it has significant import in examining tribal court systems. One of the dilemmas that permeates tribal courts is this whole notion of legitimacy. Certainly there are (or have been) identifiable segments of most tribes that refuse to consider tribal courts legitimate. In this regard, many tribal courts are vilified as "white men's" creations flowing from the IRA and an entire federal history directed to assimilation. The courts are seen as instruments of outside forces and values that are not traditional and therefore not legitimate.

On the other hand, there are segments of most tribal populations (and local non-Indian populations) who view tribal courts as illegitimate because they fall, or appear to fall, far below recognized state and federal standards in such matters ranging from the institutional separation of powers to the provision of civil due process and enforcement of judgments. These combined forces often threaten the viability of tribal courts as legitimate justice rendering mechanisms.

Legitimacy becomes illegitimacy when large numbers of people in fact cease to recognize an obligation to abide by law or judicial decisions with which they disagree. This is further aggravated in the tribal context when the tribal government, itself, may refuse to abide by tribal court decisions or submit to tribal court jurisdiction.[67] Needless to say, real claims of illegitimacy have been made throughout United States legal history, ranging from the colonial claim of illegitimacy under the con-

65. *Id.* at 199.
66. *Id.* at 199–200.
67. *See, e.g.*, Pommersheim and Pechota, *supra* note 3, at 564–67.

tinued rule of the British crown to the large scale civil disobedience of segregationist laws in the South during the 1960's. Nevertheless, these wrenching claims have been weathered with the assistance of large doses of modification and reform.

It has been suggested that the normative aspect of contextual legitimacy depends on whether the system as a whole adequately contributes to a more orderly and just society in light of contemporary circumstances and evolving notions of justice.[68] Such a view does not deny the importance of change and reform but holds that such claims not challenge the legitimacy of the system as a whole.[69] It is here, I believe, that tribal courts find themselves most delicately placed. The increase in the bona fide legitimacy of tribal courts is (and has been) inextricably bound to their amenability to change and reform that increases the net perception of the development of a more orderly and just system and society. This enhanced perception has actively drawn from both streams—traditional and progressive—of discontent.

What then, one might ask, are some examples of this growing legitimacy of tribal courts? Numerous examples exist and include such things as the increase of law trained Indian people within many systems, tribal and constitutional code revision, the nascent development of traditional and customary law, and the continued recognition of tribal courts by the United States Supreme Court[70] as viable and important forums for resolution of reservation based claims involving both Indians and non-Indians.

A recent vivid example demonstrating the growth and development of legitimacy involves the following experience. During a recent visit[71] to the Rosebud Sioux Tribal Court, Associate Judge Sherman Marshall, who is a law trained, bilingual member of the Rosebud Sioux Tribe, addressed students of my Indian law class. In the course of his presentation, Justice Marshall stated several times that he believed it was part of his job (but obviously not in his job description) to travel to the twenty tribal communities scattered over the most rural parts of the reservation to discuss what the tribal court was and what it was doing. Mr. Marshall understood full well that the success and legitimacy of the court depends, in significant part, on the understanding and support of community people—many of whom know little about tribal court or have had negative and dispiriting experiences with it. Legitimacy, at the grass roots level, is not a given, but rather the bedrock of much necessary but unappreciated toil. It is not

68. S. BURTON, *supra* note 63, at 202.

69. *Id.* at 187–88.

70. *See, e.g.*, Iowa Mut. Ins., 107 S. Ct. 971; National Farmers Union, 471 U.S. 845; Santa Clara Pueblo, 436 U.S. 49.

71. A visit with my Indian law class to the Rosebud Sioux Tribal Court in October 1986.

only the message but also the messenger. It is important to note that a young, law-educated tribal member who is bilingual and bicultural is an emblematic figure, poised between two worlds, bringing the best message of both.

A second experience from the field trip provides an important example about the nature of legitimacy in the framework of the hearing of an actual case. In this instance, Justice Marshall was hearing a small claims matter between a grandmother and her daughter concerning the alleged failure of the daughter to pay the grandmother for taking care of her children.[72] Both parties were tribal members and were unrepresented as is the norm in both tribal and state small claims proceedings.

Mr. Marshall requested the plaintiff to tell her story. She began and went on for sometime in a seemingly long and circular narrative. Mr. Marshall spoke to her several times briefly in Lakota, the tribal language of the Rosebud Sioux. She answered in Lakota and went on mixing English and Lakota. When she finally finished, he asked several direct questions necessary to making appropriate findings of fact. He then proceeded in the exact same manner to address and listen to the defendant. He concluded by informing the parties that he needed additional documentation and after he received it, he would make a prompt decision.

It was readily apparent that an unusual rapport was established between the judge and the parties. They could speak without interruption (a cultural prerogative of elders) and in their first language. Contextual legitimacy was palpable; yet the entire case and its hearing raised ongoing questions about the nature of legitimacy in tribal settings.

The process of striving for legitimacy is far from over and must continue as a dynamic force in Indian country. Many questions remain, including: those involving the development of traditional and customary law, the separation of powers, authentic appeal, and the enforcement of individual civil rights within the tribal context. In particular, the example cited above illustrates the need to discover the best possible means for resolving disputes that are primarily cultural, rather than strictly legal, in nature. Yet, as always, the core of legitimacy rests with the people themselves. Without their support and understanding, there can be little hope for continued advancement and growth.

A review of the elements of legitimacy of the dominant legal system

72. The roots of this dispute are more cultural than financial. The plaintiff indicated that she had brought this action not so much for the alleged money owed but to seek redress for the (cultural) wrong she suffered. As an elder and grandmother she felt an important cultural rule was violated when her daughter came and simply removed her children who were staying with the grandmother without obtaining the grandmother's endorsement and consent for their return. The nature of the dispute raises significant questions about whether there is or should be some other non-legal, but culturally consonant way, to mediate the conflict.

as a whole also provides a fruitful comparison. The legitimacy of the legal system better merits the support of the people if it includes components that serve three functions related to stable features of the social, historical, and cultural context: (1) a professional community to run and watch the system on a case-by-case basis, (2) institutions that operate at some distance from majoritarian politics, and (3) a legal conversation that uses legal reasoning in the search for a more orderly and just society to augment lawmaking processes that reflect majoritarian and other political preferences.[73]

A. Professional Community

What is the nature of the "professional" community that runs and watches the legal system on a case-by-case basis? Most tribal codes permit the admission of two quite different groups to the community of recognized practitioners, namely law trained individuals (i.e., Indian and non-Indians who are law school graduates and admitted to practice in some state or federal jurisdiction) and tribal advocates (i.e., tribal members admitted to tribal practice generally without any education or examination requirement).[74]

The issue here is how these groups come together, or can come together, to form a community helping to carry out an important legitimating function. Some suggestions for strengthening the tribal court legal community include the development of a tribal bar examination, the provision of tribally sponsored CLE (Continuing Legal Education) programs, and the adoption and enforcement of a tribal ethics code. The development and implementation of a tribal bar examination aids in securing a professional community that *shares* a common *legal* and *cultural* understanding of the procedural and substantive (including tradition and custom) legal matrix that governs in tribal court. A tribal bar examination, in addition to furthering basic tribal legal community competence in accordance with tribally developed standards, serves to advance legitimacy by assisting in the fulfillment of the expectation of responsible self-government. It reflects an exercise of autonomous power that is credible and necessary to maintain and to increase parity with other sovereigns within (and even without) the federal system. The implementation of a tribal bar exam requirement illustrates institution building that does not simply mimic or rely on state developed credentials or requirements.

Secondly, the notion of tribal bar sponsored CLE programs would augment professional community competence and understanding of new

73 S. BURTON, *supra* note 63, at 230.

74. *See supra* notes 58–61 and accompanying text.

legal developments, especially within the context of federal Indian law and local tribal law changes. In the latter category, programs involving such topics as the development of tribal tradition and customary law, the enforcement of judgments, and client counseling would seem particularly appropriate.[75] CLE programs would also provide one of the few opportunities for tribal bar members to come together informally and to socialize in order to form a face to face community with a better understanding of each other as *individuals* participating in a community of common endeavor.

A third area of importance is that of ethics and the development of an effective ethics code and enforcement program to deal with those few individuals who do not comport with tribally sanctioned standards. The ethics code must not only establish appropriate standards of representation but also provide the necessary administrative machinery to hear complaints and, if necessary, apply corrective sanctions.[76] Any professional community worthy of the name must have the ability to maintain standards of integrity and safeguard the interests of litigants from the gross improprieties of their legal representatives. The legal community, in general, has been subject in recent years to growing criticism from the general public because of its seeming inability and/or unwillingness to adequately police its own members. Tribal bars ought not let themselves get caught in that web of criticism and mistrust.

These three elements, if pursued in a vigorous and timely manner, can do much to advance the development of a well trained, qualified, up to date, and self policing organization to which litigants and the entire community can entrust the day to day monitoring of the legal system. Such efforts would further augment the strength and vitality of the message that Justice Marshall and other tribal judges would be able to take to the community.

Such efforts, of course, take time, money, and commitment. Yet time is plentiful, the cost is not prohibitive, and the commitment to improve-

75. Few, if any tribes, put on their own CLE programs. There is some training (principally for tribal judges) provided by such national tribal groups as the National American Indian Court Judges Association (NAICJA). Local training for tribal judges and tribal court advocates is often provided by Indian legal services programs such as the DNA-People's Legal Services program in Navaho country and Dakota Plains Legal Services program in the Dakotas. States occasionally have CLE programs on Indian law topics. However, no CLE program effectively brings together the full spectrum of tribal practitioners including judges, attorneys, and tribal advocates.

76. Some tribes do have tribal code provisions delineating broad criteria for suspension or dismissal. *See, e.g.*, Rosebud Sioux Tribal Code Title 9 Ch. 2 §§ 8–9 (1985) (suspension for contempt or acting in an unethical or improper manner); Sisseton-Wahpeton Sioux Tribal Code Ch. 32 § 5 (1982) (disbarment or suspension for false swearing, conviction of a felony, disbarred by a federal or state court, conduct unbecoming an officer of the court, and failure to act as counsel for a defendant upon assignment by the court). Very few codes identify a detailed administrative procedure to be followed.

ment certainly exists on most reservations. It is more a matter of placing these efforts in the necessary pipeline of tribal priorities in order to insure the necessary tribal legislative, executive, and judicial commitment to these endeavors.

B. Institutions Outside Majoritarian Politics

The second component of legitimacy concerns the existence of legal institutions that operate at some distance from majoritarian politics and seek to resolve the dilemma that majoritarian views standing alone cannot produce legitimacy for all segments of a society or tribe. For example, during large parts of American history, majorities have been able to enslave or oppress substantial minority communities including Blacks, women, and Native-Americans. The legal system and the professional community operating within it—however imperfectly—have often been able to maintain and vindicate the rights of individuals and groups to be treated equally and fairly under the law.

The legitimacy of the system is particularly enhanced if it provides for the protection of rights and the advancement of justice for individuals or groups who are unable to protect their basic rights and interests through majoritarian politics. Litigation and adjudication thus provide a meaningful alternative to disobedience, which manifests a rejection of legitimacy.[77]

Such a view raises poignant questions in the context of tribal court systems. This dilemma involving individual and group rights is particularly acute when considering the nature of the rights sought to be recognized within tribal systems. The controversy over the Indian Civil Rights Act (herein ICRA) of 1968[78] is particularly instructive. In that controversy, the notion of strong individual rights that could be enforced against the majority government was alien to the tradition and custom of many tribes where the group, not the individual, is primary.[79] The Act was further criticized as another example of the unilateral imposition of federal standards[80] that abridged tribal sovereignty.

These elements of controversy came to a head and were, at least, partially addressed by the United States Supreme Court in *Santa Clara Pueblo v. Martinez*.[81] *Martinez* made it clear that tribal courts were the appropriate forums for adjudication of individual claims concerning such

77. S. BURTON, *supra* note 63, at 212. For an interesting example concerning the occupation of Wounded Knee on the Pine Ridge Indian Reservation *see* DELORIA & LYTLE, *supra* note 33, at 213–14.

78. 25 U.S.C. §§ 1301–03, 1321–26, 1341 (1983).

79. *See, e.g.*, Coulter, *supra* note 43, at 49–50.

80. *Id.*

81. 436 U.S. 49.

ICRA individual guarantees as due process and equal protection. Other federal court decisions held that tribal courts would be accorded some leeway in determining the exact substantive content of these provisions.[82]

Many tribal courts have not yet arrived at an accommodation of these dictates and continue to avoid the force of the *Martinez* decision through the continued use of the shield of sovereign immunity.[83] This legal device prevents any resolution of claims involving individual rights on their merits and further inhibits the growth of legitimacy. The matter is not easily resolvable, but some observations and suggestions seem in order.

Tribal councils and other decisionmakers are increasingly faced with this dilemma of individual rights. There is a need to fashion remedies in tribal court that allow for some resolution of individual claims against the tribe, but there is also a need to balance bona fide tribal concern with allowing relief that might grind tribal activity to a halt or impoverish tribal coffers. The prospect of unlimited or paralytic injunctive relief justifiably concerns many tribes, particularly when there may be limited access to tribal or federal appellate review. Accommodation and the fashioning of limited relief in the form of declaratory judgments, limited monetary recovery, and modest injunctive relief would serve to constitute a viable starting point.

The twin specters surrounding continued inaction on this issue are the prospect of an aggravated perception of illegitimacy by tribal members and further imposition of federal standards encroaching on tribal sovereignty. Tribes need to continue, and in some cases to begin, moving cautiously forward to avoid either or both of these inimical results.

This is particularly necessary in light of the additional problem suggested by the separation of power concerns. Most tribal constitutions do not provide for separation of powers[84] and the tribal courts are direct legislative creatures subject to complete defeasance and manipulation (including the removal of personnel) by tribal councils. Such situations are not ordinarily conducive to neutral adjudication on the merits. Many tribes are sensitive to this problem and have moved to a policy of *de facto,* if not *de jure,* separation of powers.[85] The separation of powers

82. *See, e.g.,* Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976); Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation, 507 F.2d 1079 (8th Cir. 1975); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Conroy v. Frizzell, 429 F. Supp. 918 (D.C.S.D. 1977).

83. *See, e.g.,* Pommersheim and Pechota, *supra* note 3, at 578. *But see also* Taylor, *Modern Practice in Tribal Courts,* 10 U. PUGET SOUND L. REV. 231 (1987) for a somewhat different view.

84. No IRA tribal constitutions and very few, if any, non-IRA tribal constitutions provide for separation of powers. This seems to reflect a major oversight by the federal drafters from the Bureau of Indian Affairs and the Justice Department whose handiwork dominates most tribal constitutions. *See also* Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985).

85. This observation is based on personal experiences with tribal courts in South Dakota and interviews with (former) Judge Sambroak of the Rosebud Sioux Tribal Court, Judge Marshall of the Rosebud Sioux Tribal Court, Judge Rousseau of the Sisseton-Wahpeton Tribal Court, and Judge Greaves of the Cheyenne River Sioux Tribal Court.

issue can be, at least in the short run, resolved by such a *de facto* approach, and therefore, not hinder the commitment to developing augmented legitimacy. Nevertheless, more detailed and thoughtful approaches are needed to meet the persistent, long-term need for legitimacy that rests, in part, on the institutional integrity of the tribal judiciary.

C. Legal Reasoning

The third element contributing to contextual legitimacy involves a commitment to legal reasoning as a potent device for securing a more orderly and just society and developing a body of law to complement the lawmaking of majoritarian elected officials.[86] The force of legal reasoning in daily adjudication is an important idea, for it raises the question of the appropriate kind of legal reasoning to be advanced in tribal courts.

The recognized standard and style of legal reasoning that is appropriate for tribal court adjudication must be determined. The importance of identifying such a standard and style is to identify a sufficient *common ground* for advocates and judges that permits intelligent consideration of the issues before the court in any particular case. Without such common ground, reasoned adjudication and adequate representation of litigant's claims are unlikely. This is not to suggest that the legal reasoning (and attendant values) must be like those of the dominant legal system. Instead, there must be an adequate agreement and understanding of the kind of legal reasoning that is appropriate in a tribal court context.

It is therefore critical that in the attempt to fairly resolve disputes in tribal courts the parameters of proper reasoning and argument be better demarcated. It is essential to delineate, for example, what is the permissible, the preferred, or the expected style of argument (and applicable authority) and what is its identifiable form. This notion of how to best articulate the manner in which to develop argument and to create the resulting judge made law is critical in developing legitimacy within the tribal legal community, itself. Tribal practitioners, law trained and not, must act and argue in concordance with an understanding and belief in the legitimacy and proper category of their advocacy.

In contrast to the other aspects of contextual legitimacy, legal reasoning does not lend itself to any particular commitment to reform or change, but only to developing growing sensitivity and refinement as to what is actually permitted, and what ought to be encouraged in tribal court argument. In other words, what is needed is a commitment to the development and the emergence of an interpretive community.

V. THE TRIBAL BAR AS AN INTERPRETIVE COMMUNITY

The legal community as a whole plays a significant role in guiding the

86. S. BURTON, *supra* note 63, at 232.

adjudication of cases as they come before the courts. In this respect, the legal community serves as an interpretive community;[87] that is a community of practitioners who largely determines what is permitted and what is normative in the context of arguing and developing the law in the process of adjudication. This interpretive community plays several important roles in guiding the adjudication of cases in the established state and federal systems. At least two of these roles raise important questions about the nature of developing adjudication in tribal courts.

One role is that of establishing the nature and style of permissible argument in actual cases. The second more intangible, but no less critical, role is in identifying, if not actually defining, the central values of the legal system. As to these concerns, it has been suggested that:

> What distinguishes the legal community from other interpretive communities is the presence of order and justice at the center of our webs of beliefs about law, the principles of legitimacy, stare decisis, and legislative supremacy near the center, and the commitment to legal reasoning in bringing these values and principles to bear in particular cases.[88]

The function of the legal community as an interpretive community is therefore, in part, to define the acceptable parameters of the legal reasoning brought to bear in deciding cases. These recognized conventions include: 1) the language of legal discourse, 2) the practice of developing argument through legal research, and 3) the commitment to the rule of law.[89] The presence of these conventions also constrains judges to rule and decide cases within this generalized framework. The importance of these precepts is that they establish sufficient common ground to allow members of the legal community to present claims in such a manner that may be intelligently understood, debated, and decided.

Such rules are necessary in order to insure litigants that their claims will be clearly understood and that they stand on equal footing with all other participants in the system. It is in this regard that tribal court adjudication is often uncertain as to the appropriate legal conventions of discourse, argument, and authority. The question is how does one argue (and then decide) cases in tribal court. What is the proper or accepted method for arguing cases? Without development of this framework, unnecessary uncertainty may become pervasive. Attorneys, tribal advocates, and tribal judges must all know what the nature of proper argument is within a tribal court. Without it, justice and fair representation are not possible.

87. *See, e.g.*, S. FISH, *supra* note 5, at 13–17.
88. S. BURTON, *supra* note 41, at 209.
89. *Id.* at 96.

The easy answer is to say, of course, that it is no different from what is expected in state or federal court. Yet I do not think this is by any means the accepted consensus. If tribal courts are different (e.g., by cultural choice or by their relative youth), how is the nature of legal argument different? Tribal courts, for example, are often described as less formal than state or federal courts.[90] But what does that mean? Obviously, many cases handled by any court, particularly local state and tribal courts, are quotidian and a matter of routine. In the routine cases, less formality has no great significance, but in contested cases it is different. In such circumstances, does less formal mean less rigorous, requiring less procedural precision in terms of the admissibility of evidence? Does less formal mean there is a lower expectation or standard for the marshalling of coherent substantive argument? Or, does less formal mean less rigid constraints in seeking fairness and justice, or less concern with the artificial and often extrinsic rule of law?

More broadly, is conventional legal reasoning too narrow and restrictive in that it rules out important tribal knowledge and wisdom, such as in the realm of spiritual metaphysics and community insight? This is not, of course, as extreme as it seems when thinking about native societies that do not necessarily recognize or accept the secular/sectarian, rational/spiritual dichotomies taken for granted in the dominant society.

The point of all this is not which (including any of the many possibilities not mentioned) of these approaches is better or more preferable, but rather the necessity of developing agreement of what is required within the interpretive community. In other words, the need is to insure litigants, whether Indian or non-Indian, of a guarantee to have a meaningful opportunity to be heard and to have a meaningful day in court. Meaningful should be defined in both of the key senses of the form *and* content of their claims and argument.

In short, legal argument in actual cases depends on what members of the legal community let pass without objection as acceptable legal reasoning for the purposes of a case.[91] Newly created tribal bars must therefore strive to identify and to articulate these canons. This is not something that is necessarily easily done, but it is more likely to occur if attention is directed toward it. It is also more likely to emerge or become apparent if tribal bars come together more frequently and more directly to address these and other related matters. This is particularly true when tribal advocates who are not law trained, but are members of the tribal bar, play a significant role in providing representation before tribal courts including tribal appeals courts.

90. *See, e.g.*, V. DELORIA, JR. & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 193–202 (1983).
91. S. BURTON, *supra* note 63, at 209.

One of the functions of legal education, apart from substantive training, is socialization into the profession, which involves explicit and implicit training in what and how to argue cases. Tribal advocates, in this respect, need exposure to these realities. Or, if the nature of acceptable advocacy in tribal forums is contrary to this training, law trained individuals need to be disabused of that part of their tradition.

Part of this notion of the role played by an interpretive community is especially important in the context of building and developing tribal institutions. By any measuring device, formal tribal courts—most of which were established sometime after passage of the IRA—are young, developing institutions. Part of the benefit of such relative youth is the ability to chart the future on one's own terms. Tribal courts are in the process of becoming; they are not calcified into any particular mold.

An interpretive community aids in this ongoing process to forge and to clarify the values that underlie the process of adjudication and the legal system as a whole. For example, the values of order and justice are most often mentioned in this kind of description of the dominant legal system.[92] Are tribal legal systems committed to the same web of values in the same proportion or are there equal concerns for such competing values as cooperation, community, and conciliation? The point is that tribal courts do not have to blindly imitate the interpretive strategies and canons displayed in federal and state settings. If tribal interpretive strategies and goals are to be different, it is necessary to be conscious of why and how this should be so.

If tribes and tribal members and practitioners are interested in actively directing this process, tribal bars provide an ample opportunity to provide guidance in the direction of desired growth. Again, this ongoing process is subtle and not always visible in the tribal court's daily work of deciding cases and creating a recognizable body of reported decisions and tribal common law. It is therefore not easily subject to legislative direction. Yet it bears thinking and reflection—surfacing at least for indirect consideration—about what practitioners in tribal courts ought to be doing and saying and why.

The Intertribal Court of Appeals,[93] for example, explicitly recognizes and addresses this phenomenon in at least one respect. Rule 17 of the Court states that "in recognition of the oral tradition in tribal history and culture, and to speed the hearing and just disposition of cases on appeal,

92. *See, e.g.*, S. BURTON, *supra* note 63, at 101–237.

93. The Intertribal Court of Appeals was established in 1982 and is located at Ft. Thompson, South Dakota, and currently involves the following tribes: The Lower Brule, Crow Creek, Sisseton-Wahpeton and Flandreau tribes of South Dakota, the Omaha and Winnebago Tribes of Nebraska, and the Three Affiliated Tribes of North Dakota.

the Court may waive the requirement of legal briefs in selected cases."[94] Yet the rule may only be applied when *both* parties proceed *pro se*.[95] The waiver of written briefs is not available to represented parties. This approach, of course, treats all members of the tribal bar, law trained or not, as members of the same professional, interpretive community responsible to the same standard of competence and performance. Is this a good rule properly situated and defined? Should it be extended? What values are advanced or submerged by the rule?

V. CONCLUSION

Tribal courts perform important adjudicatory functions within the tribal system, but more importantly they are the primary tribal institutions charged with carrying the flame of sovereignty and self-government. In their difficult and challenging position, they face important developmental questions related to contextual legitimacy and the role of nascent tribal bars as interpretive communities identifying core values and techniques that promote tribal court maturity, competence, and fulfillment.

The need for both the respect and allegiance of the communities which these courts serve, as well as the comity and deference of state and federal judicial systems, also places great weight on the shoulders of tribal courts and tribal bars. The future of tribal justice and integrity hangs in the balance.

94. Intertribal Court of Appeals Court Rule 17 (1982).
95. *Id.*