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Abstract

Customary law still appears in many of the decisions of American state and federal courts. Customary law, part and parcel of the English common law adopted and adapted by the Founders of the United States, recurs less often given that statutory and administrative law dominate the field. In contrast, the importance of customary law in American Indian tribal courts cannot be understated. Indian tribes now take every measure conceivable to preserve Indigenous cultures and restore lost cultural knowledge and practices. Tribal court litigation, especially litigation involving tribal members and issues arising out of tribal law, often turns on the ancient customs and traditions of the people. But this development of applying customary law in tribal courts is new and undertheorized.

For the first time, this Article attempts to provide an adequate theory as to how tribal judges should find and apply customary law on a normative level. This paper argues that tribal judges have a great deal to learn from H.L.A. Hart's theory of primary and secondary rules.

RETHINKING CUSTOMARY LAW IN TRIBAL COURT JURISPRUDENCE

Matthew L.M. Fletcher*

Introduction

Ottawa Indians, removed from their homelands in the western Great Lakes region and living in Kansas in the mid-19th century, codified a series of laws and published them in the *Ottawa First Book*.¹ The laws appear to be an attempt to create a bridge between the tribal customs and traditions under which the Ottawas lived in their traditional homelands and their new surroundings in the Great Plains. One law, “Burning,” provides, “If any person shall set fire to the prairie, and burn another’s property, he shall pay for what is burnt.”² Another is “Revenge” – “If any person having his property lawfully taken, shall become angry, or threaten to take revenge, or shall injury another’s property, he shall see more trouble. Whatever the lawmen shall decide on, so it shall be.”³ According to commentary on the Ottawa laws, the laws of the Ottawas in 1850 were “primarily customary law,” but were “evolving in the direction of statute law made in the tribal council ... as distinguished from laws simply passed on in an oral manner from generation to generation.”⁴

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This paper is the second in a series of articles theorizing tribal common law. The first paper theorized a distinction between “intertribal common law” and “intratribal common law.” See Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 44 HOUSTON L. REV. 703 (2006). This paper delves further into the notion of an “intratribal common law.”

¹ See Theodore John Rivers, *A Study of the Laws of the Ottawa Indians as Preserved in the Ottawa First Book* (1850), 42 KAN. HIST. Q. 225, 225 (1976).

² Rivers, *supra* note ___, at 229.

³ Rivers, *supra* note ___, at 228.

⁴ Rivers, *supra* note ___, at 231.

What were the laws passed on in an oral manner from generation to generation? What remained of those customary laws⁵ for the Kansas Ottawas in 1850 as they attempted to create a written tribal code? What remains of those customary laws over 150 years later? There are four federally recognized Ottawa Indian tribes in the United States as of 2006.⁶ Others are petitioning for federal recognition. There are several Ottawa First Nations in Canada. The four Ottawa tribes recognized by the American federal government, at least, each have a tribal court system. Does the customary law of the Ottawa Indians have any impact in those tribal courts? How do they go about discovering customary law? Can customary law be discovered with any certainty and validity? Is customary law useful in modern tribal communities? What are the experiences of other Anishinaabe⁷ tribal courts? Can these experiences be useful to other tribal courts around the nation?

These are questions that are typical for tribal courts throughout Indian Country. They involve the examination of what I call “intratribal common law,” or, “the common law applied by tribal courts and other tribal dispute resolution venues for disputes arising out of a tribal legal construct, such as the inheritance of a right to on-reservation hunting territories.”⁸ The answers to the questions – and with many of the questions, the answers are elusive – are dependent on reservation context to a very high degree. Moreover, they are critical unanswered questions because tribal constitutions and legislation orders tribal courts to look to customary law as a device for interpreting tribal statutes and constitutions. And where statutes and constitutions are silent on a question, tribal courts often must first look to customary law, if any, to fill in the gap.

This paper presumes that in a tribal community that is insular, with few outsiders and where the tribal language is spoken, customary law is more easily discovered, understood, and applied.⁹ In a tribal community that is (for lack of a better word) assimilated, where there are few members that are surrounded and outnumbered by nonmembers

⁵ This paper uses the terms “customary laws,” “custom,” “traditional law,” and “tribal custom and tradition” interchangeably.

⁶ These tribes are the Grand Traverse Band of Ottawa and Chippewa Indians, the Little River Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians, and the Ottawa Tribe of Oklahoma.

⁷ “Anishinaabe” means “original people.” Benjamin Ramirez-Shkwegnaabi, *The Dynamics of Diplomacy in the Great Lakes Region*, 27 AM. INDIAN CULTURE & RES. J. 53, 72 n. 1 (2003).

⁸ Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, *supra* note __, at 707.

⁹ Cf. Alan Watson, *An Approach to Customary Law*, 1984 U. ILL. L. REV. 561, 569.

and where the tribal language is all but dead, customary law is extremely difficult to discover, understand, and apply. The vast majority of tribal communities are somewhere along the spectrum between the two poles.

Consider the following hypothetical:¹⁰

A newly married couple move into a new home on the Lake Matchimanitou Indian Reservation in Michigan. They live on trust land and both are citizens of the Lake Matchimanitou Band of Ottawa Indians. They have two children in the first three years of marriage. The husband's parents, who also live on the reservation but in an older home, become ill. One has a stroke and the other has diabetes. Both are unable to walk without wheelchairs. Their home is not handicap-accessible, but the newlyweds' home is handicap-accessible. The husband and wife discuss the matter and offer to "trade" homes with his parents until they are able to return to their own home. His parents agree. They "trade" homes, but no contract, lease, or other document is executed memorializing the agreement. The wife is never happy with the new arrangement. The newlyweds' relationship degenerates and the husband moves out, leaving the wife and their two children in the old house. The husband's parents, still living in the newlyweds' home, file suit in Lake Matchimanitou tribal court seeking the wife's eviction from the old home, while maintaining they will not move out of the new home. At trial, the wife alleges that she was coerced into agreeing to the "trade" due to the husband's threat of violence.

The hypothetical presents a difficult but typical choice of law problem. In the absence of tribal statutory or common law, should customary law apply? How do the parties and the tribal court find the customary law? Should they follow the *Ottawa First Book*, assuming any of its provisions apply?

Customary law still appears in many of the decisions of American state and federal courts. Customary law, part and parcel of the English common law adopted and adapted by the Founders of the

¹⁰ The fact pattern is based in part on *Malaterre v. Estate of St. Claire*, No. 05-007 (Turtle Mountain Band Ct. App. 2006).

United States,¹¹ recurs less often given that statutory and administrative law dominate the field.

In contrast, the importance of customary law in American Indian tribal courts cannot be understated. Indian tribes now take every measure conceivable to preserve Indigenous cultures and restore lost cultural knowledge and practices. Tribal court litigation, especially litigation involving tribal members and issues arising out of tribal law, often turns on the ancient customs and traditions of the people. But this development of applying customary law in tribal courts is new and undertheorized.

The literature discussing “customary law,” “traditional law,” “tribal custom and tradition,” and “tribal common law” in modern American tribal courts lacks a compelling theory of the role of custom in tribal court jurisprudence. There are numerous empirical studies of the use of custom in tribal law and an even more numerous papers describing custom in tribal law. Most of these studies are limited to a limited number of tribes, often just one. Nearly all studies of support the use of custom in tribal law, with some arguing that custom preserves the cultures of Indian people and others arguing that custom provides a better methodology of delivering justice to participants in tribal court adjudication. But little or no scholarship provides an adequate theory as to why tribal courts should rely on custom, nor does this scholarship assist tribal courts in deciding which law to apply. This paper attempts to provide a theory for the role of custom in tribal court jurisprudence that does both on a more general level.

Part I notes the increasing importance to tribal policymakers and communities of (re)discovering tribal customary law. Part I also introduces H.L.A. Hart’s theory of primary and secondary rules into the scholarship of tribal court jurisprudence. Part II offers a survey of tribal choice of law provisions that exemplify the legal manifestation of the importance of tribal customary law. Part III provides of quick survey of the role of custom in several prominent modern tribal court decisions. Part IV asserts that there are numerous practical limitations on tribal courts seeking to apply customary law – and numerous pitfalls or traps into which tribal court judges sometimes fall. Part V offers a normative theory for guiding tribal court judges in the assertion and application of tribal customary law.

¹¹ *Cf.*, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Inc.*, 526 U.S. 687 (1999) (applying the common law of England *circa* 1791 to the interpretation of the Seventh Amendment).

I. The Role of Custom in Modern Jurisprudence

A. The Importance of Customary Law

The application of custom in modern American jurisprudence is enjoying a little bit of a renaissance. Professor Larry Kramer showed that even after the Declaration of Independence and the drafting of state constitutions, American state courts continued to rely on the customary common law of English and Norman courts.¹² The Supreme Court relies more and more on English common law as it existed at the time of the ratification of the Constitution or the Bill of Rights. The importance of these customary rules that formed English common law increases as courts and commentators delve deeper into the original understanding of the Founders.

Unlike American constitutional law, which has no defining or mandatory method of interpreting the Constitution,¹³ Indian tribal courts have specific charges to apply tribal customary or traditional law. Tribal choice of law statutes (some of them codified into tribal constitutions) and court rules often require tribal court judges to seek and apply tribal customary law if possible. Congress intended for tribal courts to apply customary law in interpreting the provisions of the Indian Bill of Rights.¹⁴

The application of the customary law of England as applied around the period of the ratification of the Constitution and the Bill of Rights makes a reasonable amount of sense because the Framers did not intend to depart too far from English common law.¹⁵ While American leaders intended to create a much different constitutional system than the British understanding of constitutionalism,¹⁶ the same could not be said of Indian leaders. Many, if not most, tribal constitutions were ratified under a form of bureaucratic duress imposed by the Bureau of Indian Affairs and the Secretary of Interior.¹⁷ While Indian people voted

¹² See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 41 (2004).

¹³ See JED RUBENFELD, *REVOLUTION BY JUDICIARY* 5 (2006).

¹⁴ 25 U.S.C. § 1301 et seq.

¹⁵ See KRAMER, *supra* note ___, at 40.

¹⁶ See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at __ (1969).

¹⁷ *E.g.*, *Snowden v. Saginaw Chippewa Indian Tribe of Michigan*, 32 Indian L. Rep. 6047, 6048-49 (Saginaw Chippewa Indian Tribe Appellate Court 2005) (describing the history of the ratification of the tribal constitution).

for these constitutions, they evince no intent by the People to adopt or incorporate the common law of the United States or England.¹⁸

These historical and political differences between the American Constitution and Indian tribal constitutions explain the reticence of many (but not all) Indian tribal law scholars to rely upon American court precedents. If followed to their origins, American precedents derive from Anglo-American jurisprudence and values, not tribal values. Hence, more and more tribal leaders and policymakers are requiring their tribal courts to seek, find, and apply tribal customary law. One important caveat, however, as I noted in my previous work: the customary laws of Indian tribes rarely (if ever) apply to the disputes that involve non-Indians.¹⁹

B. Hart's Primary and Secondary Rules

The methods that most tribal judges use in finding and applying tribal customary law should be reconsidered in order to offer an answer to the problems in finding customary law and, once it's found, applying it. This Article suggests that an understanding of H.L.A. Hart's conception of "primary rules of obligation" and "secondary rules of recognition"²⁰ may assist tribal judges in their duties to locate and apply customary law.

Under this theory, a tribal custom or tradition may be labeled a primary rule. Professor Hart conceived of primary rules as "imposing obligations ... [that] may be customary in origin."²¹ A rule could be construed as a primary rule when "human conduct is made in some sense non-optional or obligatory."²² In this sense, primary rules impose an obligation to conform behavior of the members of the community. These rules may include a prohibition on certain actions akin to crimes, subject to the imposition of "hostile or critical reaction" or even "physical sanctions."²³ Or these primary rules may include "rules which require honesty or truth or require the keeping of promises ... thought of

¹⁸ See generally Steve Aycock, Thoughts on Creating a Truly Tribal Jurisprudence, *compiled in Indigenous Justice Systems of North America*, 2nd Annual Indigenous Law Conference, Michigan State University College of Law (March 17-18, 2006) (on file with author).

¹⁹ Compare Fletcher, *Toward a Theory*, *supra* note __, at 728 ("[C]ases resolved using intratribal common law tend to involve tribal members to the exclusion of all others...."), with *Nevada v. Hicks*, 533 U.S. 353, 384-85 (2001) (Souter, J., concurring) (asserting that tribal law is "unusually difficult for an outsider to sort out").

²⁰ H.L.A. HART, *THE CONCEPT OF LAW* 95 (1961).

²¹ HART, *supra* note __, at 84.

²² HART, *supra* note __, at 80.

²³ HART, *supra* note __, at 84.

in terms of either ‘obligation’ or perhaps more often ‘duty.’”²⁴ Hart recognized that in theory a society could exist “where the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterized rules of obligation.”²⁵ However, for Hart, “It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a régime of unofficial rules.”²⁶

Professor Hart then identified a series of limitations on the applicability of these primary rules. He identified three “defects” in the system – the uncertainty of the rules, the static character of the rules, and the inefficiency of the rules.²⁷ Primary rules are uncertain, Hart argued, because “if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on the point are authoritative.”²⁸ Primary rules have the problem of being static in that “[t]he only mode of change ... will be the slow process of growth ... and the converse process of decay.... There will be no means ... of deliberately adapting the rules to changing circumstances, either by eliminating old rules or introducing new ones....”²⁹ Finally, the enforcement of primary rules is inefficient because there may be “no agency specially empowered to ascertain finally, and authoritatively, the fact of violation.”³⁰

The “remedy” for these defects is the creation of secondary rules.³¹ These rules “specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.”³² For each defect that Professor Hart recognized in the primary rules, he identified a remedy.³³ For the problem of uncertainty, he proposed a “rule of recognition,” some acknowledgement that the primary rule is “*authoritative*, i.e. as

²⁴ HART, *supra* note __, at 85.

²⁵ HART, *supra* note __, at 89.

²⁶ HART, *supra* note __, at 89-90; *see also id.* at 244 (citing KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941), “[f]or studies of the nearest approximations of this state”).

²⁷ HART, *supra* note __, at 89-91.

²⁸ HART, *supra* note __, at 90.

²⁹ HART, *supra* note __, at 90.

³⁰ HART, *supra* note __, at 91.

³¹ *See* HART, *supra* note __, at 91-92.

³² HART, *supra* note __, at 92.

³³ *See* HART, *supra* note __, at 92-95.

the *proper* way of disposing of doubts as to the existence of the rule.”³⁴ This can take the form of a choice of law statute or court rule or even a common law decision by the court that the rule is authoritative.³⁵ Professor Hart’s remedy for the static character of primary rules is related. He refers to the remedy as introducing “rule[s] of change ... which empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group.”³⁶ In more advanced societies, this could include a legislature or tribal council.³⁷

The remedy for the third defect – and the focus of Parts III, IV, and V of this Article – are “rules of adjudication.”³⁸ These rules create an entity that will make decisions about disputes: “[T]hese rules ... define a group of important legal concepts: in this case the concepts of judge or court, jurisdiction and judgment.”³⁹ These rules, according to Professor Hart, also are rules of recognition because the judge or court must identify “what the rules are” in addition to making “authoritative determinations of the fact that a rule has been broken.”⁴⁰ This is the rub for purposes of this Article. As Professor Hart concludes:

Unlike an authoritative text or a statute book, judgments may not be couched in general terms and their use as authoritative guides depends on a somewhat shaky inference from particular decisions, and the reliability of this must fluctuate with both the skill of the interpreter and the consistency of the judges.⁴¹

The remainder of this Article will frame the annunciation and application of customary law in tribal courts using Professor Hart’s framework.

II. The Legal Framework for the Use of Custom in Tribal Court Decisionmaking: Rules of Recognition and Change

Many tribal constitutions, tribal court codes and ordinances, and tribal court rules require the use of customary law in tribal court

³⁴ HART, *supra* note __, at 92 (emphasis in original).

³⁵ See HART, *supra* note __, at 92-93.

³⁶ HART, *supra* note __, at 93.

³⁷ See HART, *supra* note __, at 93-94.

³⁸ HART, *supra* note __, at 94.

³⁹ HART, *supra* note __, at 94.

⁴⁰ HART, *supra* note __, at 94-95.

⁴¹ HART, *supra* note __, at 95.

decisionmaking.⁴² And there are tribal courts that are not required to use customary law or even precluded from using customary law in certain circumstances. The various statutes and rules offer varying ways and means for the use of customary law. This Part provides a quick survey of several examples of these rules of recognition and change, in Professor Hart's vocabulary.

A. Tribal Constitutional Provisions

The constitution of the Passamaquoddy Tribe in Maine offers one example of a constitutional mandate for using customary law. The relevant provision reads:

Civil disputes which are within the jurisdiction of the Passamaquoddy Tribal Court shall, to the extent consistent with applicable tribal laws, ordinances, customs, and usages, as well as applicable provisions of federal Indian law, be resolved by the Tribal Court in accordance with any corresponding provisions of the applicable civil laws and remedies of the State of Maine, and such laws and remedies shall to that extent be deemed adopted as the law of the Pleasant Point Reservation of the Passamaquoddy Tribe.⁴³

This provision allows the tribal court to apply tribal customary law on par with tribal statutes and applicable federal and state law. The provision allows for the tribal court to declare the existence and applicability of customary law as the law of the tribe.

In contrast, the Constitution of the Grand Traverse Band of Ottawa and Chippewa Indians is silent as to customary law. The constitution provides, "This Constitution, ordinances, resolutions, regulations, and judicial decisions of the Band shall govern all people subject to the Grand Traverse Band's jurisdiction."⁴⁴ Silence does not preclude the Grand Traverse Band tribal courts from applying customary law in its decisions, however.⁴⁵

⁴² It should be noted that not all Indian tribes employ tribal courts to resolve disputes, but this Article will focus on tribes that have chosen to authorize court systems.

⁴³ CONST. OF THE SIPAYIK MEMBERS OF THE PASSAMAQUODDY TRIBE art. VIII, § 1, *available at* http://www.wabanaki.com/tribal_constitution.htm.

⁴⁴ GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS CONST. art. VI, *available at* <http://www.narf.org/nill/Constitutions/grandtraverseconst/grandtraversebody.htm#art5>.

⁴⁵ *See, e.g.,* Novak Construction Co., Inc. v. Grand Traverse Band of Ottawa and Chippewa Indians, No. 00-09-423-APP, at 3 (Grand Traverse Band of Ottawa and Chippewa Indians Ct. App. 2001) ("There are many wrongs that do not have a right to a remedy in areas beyond sovereign immunity. This type of fiat has been accepted in all jurisdictions and does not defy

B. Tribal Statutes

Tribal legislatures provide many different hierarchies and procedures in their choice of law provisions. The White Earth Band of Chippewa Indians Judicial Code, for example, requires the tribal court to “reduce[e] to writing with a historical justification therefore” any tribal “tradition and custom” it chooses to follow.⁴⁶ The decisions of the tribal court “shall become a precedential guide for the unwritten tradition, customs or laws so as to allow future Judges and litigants to be guided on the traditional law and custom.”⁴⁷ Customary law is ranked on par with “other laws” in the choice of law hierarchy.⁴⁸ The tribal court may, if doubt arises, “request the advice and assistance of the panel of elders.”⁴⁹ This statute provides clearer guidance to the White Earth Band tribal court than many other tribal choice of law provisions. The code provides that the tribal court may announce customary law and is not required, unless it chooses, to consult with tribal elders on customary law. Moreover, the code mandates that the tribal court follow any customary law that it announces. Finally, the code requires that the tribal court reduce to writing unwritten customary law that it announces so that it may be used as precedent.

The Oglala Sioux Tribe Law and Order Code authorizes the tribal code to use customary law, but only if the custom does not conflict with tribal statutes and federal law. The statute provides, “[T]he Oglala Sioux Tribal Court shall give binding effect to . . . any applicable custom or usage of the Oglala Sioux Tribe not in conflict with any of the Tribe or United States.”⁵⁰ As with the White Earth Band statute, “[w]here doubt arises as to such customs and usages, the Court may request the testimony, as witnesses of the Court, of personal familiar with such customs and usages[.]”⁵¹ The Oglala Sioux legislature made clear that customary law is not on par with tribal law or even federal law. Of course, it is a distinct possibility that the legislature did not or could not act without interference from federal officials, as is often the

Native American traditions held by the Grand Traverse Band of Ottawa and Chippewa Indian Tribe.”).

⁴⁶ WHITE EARTH BAND OF CHIPPEWA INDIANS JUDICIAL CODE ch. VII, § 6(a), available at http://www.tribalresourcecenter.org/ccfolder/white_earth_judicial.htm.

⁴⁷ *Id.*

⁴⁸ *Id.* § 6(b).

⁴⁹ *Id.*

⁵⁰ OGLALA SIOUX TRIBE LAW AND ORDER CODE § 20.27(c), available at http://www.tribalresourcecenter.org/ccfolder/oglala_lawandorder2.htm.

⁵¹ *Id.*

case where the tribal constitution requires the approval of the Secretary of Interior in the enactment of tribal codes.⁵²

The Stockbridge-Munsee Community of Mohican Indians' tribal court code is similar in some respect to the White Earth Band's code, but applies only to the rules of procedure for the tribal court. The code provides:

[The Tribal Court Code] is exempted from the rule of strict construction. It shall be read and understood in a manner that gives full effect to the purposes for which it is enacted. Whenever there is uncertainty or a question as to the interpretation of certain provisions of this code, tribal law or custom shall be controlling and where appropriate may be based on the written or oral testimony of a tribal elder, historian or other representative.⁵³

As with other tribal court codes, the Stockbridge-Munsee tribal court can and should seek the advice of a tribal person with relevant knowledge. This particular statute is different in that the tribal legislature has mandated that customary law be used not as substantive law but as an interpretive device to be used to interpret the tribal court code.

The Bay Mills Indian Community's tribal court code puts customary law on par with tribal statutes and applicable federal law, so long as the custom does not conflict with federal law:

In all civil actions, the Tribal Court shall apply the applicable laws of the United States, any authorized regulations of the Department of Interior which may be applicable, any ordinance of the Bay Mills Indian Community, and any custom of the Chippewa Tribe not prohibited by the laws of the United States.⁵⁴

The Bay Mills tribal court, however, *must* request the "advice of persons familiar with these customs and usages."⁵⁵

Other tribal statutes emphasize the use the customary law in certain types of disputes. The Little River Band of Ottawa Indians'

⁵² Cf. CONST. AND BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION OF SOUTH DAKOTA art. XI ("[N]o amendment shall become effective until it shall have been approved by the Secretary of the Interior."), available at http://www.tribalresourcecenter.org/ccfolder/oglala_constandbylaws.htm.

⁵³ STOCKBRIDGE-MUNSEE TRIBAL COURT CODE § 1.3(B), available at <http://www.mohican-nsn.gov/TribalOrdinances/Chapter%20one.pdf>.

⁵⁴ BAY MILLS INDIAN COMMUNITY TRIBAL CODE ch. IV, Law Applicable to Civil Actions, subsection A, available at <http://www.baymills.org/tribalcourt/>.

⁵⁵ *Id.* at subsection B.

Children’s Code provides, “Because of the vital interest of the Tribe in its children and those children who may become members of the Tribe, this Code, other ordinances, regulations, public policies, recognized customs and common law of the Tribe shall control in any proceeding involving a child who is a member of the Tribe.”⁵⁶

C. Tribal Court Rules

The Winnebago Tribe of Nebraska’s rule is similar to the Oglala Sioux statute. The rule mandates that the tribal court apply “traditional tribal customs and usages, which shall be called the common law[,]” but only if no tribal statute answers the legal question.⁵⁷ The rule also provides that, “[w]hen in doubt as to the tribal common law, the court may request the advice of counselors and tribal elders familiar with it.”⁵⁸ Winnebago civil court rules further provide:

1. In all civil cases, the tribal court shall apply:
 - A. The constitution, statutes, and common law of the tribe not prohibited by applicable federal law, and, if none, then
 - B. The federal law including federal common law, and, if none, then
 - C. The laws of any state or other jurisdiction which the court finds to be compatible with the public policy and needs of the tribe.
2. No federal or state law shall be applied to a civil action pursuant to paragraphs (B) and (C) of subsection (1) of this section if such law is inconsistent with the laws of the tribe or the public policy of the tribe.
3. Where any doubt arises as to the customs and usages of the tribe, the court, either on its own motion or the motion of any party, may subpoena and request the

⁵⁶ LITTLE RIVER BAND OF OTTAWA INDIANS CODE, ch. 900, § 3.08(a), *available at* http://www.tribalresourcecenter.org/ccfolder/littleriver_ottawa_ordandreg.htm#ch3; *see also* § 3.08(c) (“The substantive law and procedures for the state courts shall not be binding upon the Children’s Court except where specifically provided for in this Code. In the absence of promulgated rules of procedure, procedural rules of the State of Michigan shall be utilized as a guide. Michigan case law may serve as a guide for the Court but shall not be binding. Any matters not covered by the substantive laws, regulations, customs or common law of the Little River Band of Ottawa, or by applicable federal laws or regulations, may be decided by the Children’s Court according to the laws of the State of Michigan.”).

⁵⁷ WINNEBAGO (NEB.) TRIBAL COURT RULES 1-109, *available at* <http://www.winnebago-tribe.com/court.htm>.

⁵⁸ *Id.*

advice of elders and counselors familiar with those customs and usages.⁵⁹

This rule has been interpreted by the Winnebago Supreme Court,⁶⁰ as discussed below.

D. The Hoopa Rule

The most detailed, complicated, ambitious, and (probably) unworkable tribal rule relating to customary law is Section 2.1.04 of the Hoopa Valley Tribal Code. First, the code provides that customary law must be used by the tribal court where tribal statute is silent.⁶¹ Second, the code provides a detailed procedure for determining what the tribal customs are.⁶² The first step in the procedure is to determine if the tribal custom was written – “If the traditional Tribal law has been acknowledged by a legal writing of the Tribe the Court will apply the written law.”⁶³ Tribal custom is “written” if the Hoopa tribal council has taken action that amounts to a ratification of the custom:

Evidence that a traditional law is written includes written reference to a traditional law, right, or custom in a Tribal resolution, motion, order, ordinance or other document acted upon by the Tribal Council. Anthropological writings or publications, and personal writings are not evidence that the traditional law is written, but may be presented as persuasive or supporting evidence that the traditional law or custom exists.⁶⁴

So, in the case of the Hoopa tribe, the tribal council may announce customary law to the exclusion of the tribal court, but the code still authorizes the tribal court to announce customary law after following a complex procedure that includes the selection of expert witnesses similar to the way litigants sometimes select arbitrators and a hearing

⁵⁹ WINNEBAGO (NEB.) TRIBAL COURT RULES 2-111, available at <http://www.winnebago-tribe.com/court.htm>.

⁶⁰ See *Rave v. Reynolds*, 23 Indian L. Rep. 6150, 6156-57 (Winnebago Tribe of Nebraska Supreme Court 1996).

⁶¹ 2 HOOPA VALLEY TRIBAL CODE § 2.1.04, available at <http://www.hoopa-nsn.gov/departments/tribalcourt/code2.htm#Civill>.

⁶² See *id.* § 2.1.04(b) (“Where the parties choose to follow the civil procedures of Title 2, in any dispute, claim, or action, in which a party asserts that traditional Tribal law governs the outcome, the Court must first determine what the traditional law is.”).

⁶³ *Id.*

⁶⁴ *Id.* § 2.1.04(b)(1).

(or series of hearings) in which the tribal court may issue a “Conclusion of Law” declaring the customary law of the tribe.⁶⁵

The Hoopa rule is a serious attempt to deal with many of the potential problems relating to discovering, recovering, and applying

⁶⁵ *See id.* § 2.1.04:

(c) In any dispute, claim, or action, in which a party asserts that traditional Tribal law governs the outcome, and the Court finds that the traditional law is unwritten, the Court will hold a hearing to determine what the traditional law is.

(1) The parties may stipulate to what the traditional law to be applied is. If the parties stipulate to the traditional Tribal law, the Court will then hold an evidentiary hearing to determine the facts of the case.

(2) If the parties do not stipulate to the traditional Tribal law, the parties may stipulate to a list of neutral Tribal members to act as expert witnesses, whose testimony will be relied upon to determine the traditional Tribal law.

(A) If the parties do not stipulate to such a list, each party shall be allowed to call their own expert witnesses. The Court will determine how many expert witnesses each party may call to testify except that each party shall be allowed to call the same number of expert witnesses.

(B) Each party shall submit a list of Tribal elders' names that they wish to call as expert witnesses. The opposing party will have the right to Voir Dire the witnesses to determine if they are, in fact, knowledgeable of traditional Tribal law.

(C) Each party shall also submit to the Court a list of Tribal members' names that the party believes to be neutral and impartial, and knowledgeable of traditional Tribal law. The Court shall select from the submitted list names of individuals to act as expert witnesses for the Court.

(3) The Court may, but is not required to, accept recommendations of the parties before determining the neutral and impartial expert witnesses that will testify before the Court. The Court will determine how many neutral and impartial witnesses may testify except that the number will not exceed the number of witnesses that each party will be allowed to call as expert witnesses. The parties will have the right to Voir Dire the witnesses to determine if they are, in fact, knowledgeable of traditional Tribal law.

(d) After the expert witnesses have been determined, the parties will submit to each other and the Court a list of questions to be asked of each of the witnesses. A party may object to any question submitted by an opposing party. The Court will then determine which questions will be asked of each of the expert witnesses. The Court shall have the discretion to ask its own questions of the expert witnesses.

(e) After hearing the expert witnesses testimony the Court will issue a Conclusion of Law in which the Court will state what it has found to be the traditional Tribal law. If either of the party's object to the Court's conclusion, the Court will meet in closed session with all of the expert witnesses. The Court will then call for a discussion of the Conclusion of Law by the expert witnesses. Following this discussion, the Court may re-issue or amend and re-issue the Conclusion of Law, or repeat the process as defined herein, selecting different neutral and impartial witnesses and/or a different set of questions to be asked of the expert witnesses.

customary law. Reasonable minds can differ as to the meaning or validity of tribal customs and traditions and the rule attempts to create a procedure that alleviates these concerns. But the rule's adopting of an arbitration-style hearing involving a battle of tribal elders as expert witnesses has, in the experience of the author as former staff attorney and current appellate judge for the Tribe, prevented the application of any customary law in Hoopa courts.

III. The Use of Custom in Tribal Court Opinions: Applications of the Rules of Adjudication

As would be expected by a student of Professor Hart's theory of primary and secondary rules, tribal courts vary in the ways that they find, analyze, and apply tribal customary law. Most tribal courts cannot rely upon customary law for various reasons. They are unaware of it or, if they are aware of it, no customary law they are aware of applies to the fact pattern at issue. It is important to discuss instances of tribal courts applying customary law to locate methods of finding, analyzing, and applying customary law in order to discern the strengths and weaknesses of their methods. Tribal courts that cannot or do not apply much custom in their analysis can learn from these courts.

A. Tribal Court Opinions Relying upon Custom: A Snapshot

This section is grouped into pairings of different courts applying custom in a similar fact situation. The first pairing compares the applicability and the extent of the *Miranda* warnings in Indian Country where the tribal legislature has adopted legislation requiring the application of *Miranda*. In this first pairing, the tribal court is using custom to interpret ambiguities in a statute. The second pairing compares two tribal courts applying custom as a gap-filler in cases where the parties have argued the justiciability (normally an exclusively federal court question) of a matter before the court.

1. *Miranda* Warnings

a. Navajo Nation v. Rodriguez

In *Navajo Nation v. Rodriguez*,⁶⁶ the Navajo Nation Supreme Court determined that the Nation's law enforcement officers must give

⁶⁶ No. SC-CR-03-04 (Navajo Nation Supreme Court 2004), available at <http://navajolawblog.com/wp-content/Rodriguez.pdf>.

the Miranda warnings to every suspect in custody.⁶⁷ The Court was not making new law in the case – “These are the rights already recognized by the Kayenta Police District in their advice of rights form, and we confirm here that they apply across the Navajo Nation.”⁶⁸ The United States Constitution did not require this result because the Constitution does not apply to Indian tribes.⁶⁹ The Navajo Nation does not have a written constitution,⁷⁰ but the Navajo legislature has enacted a Navajo Bill of Rights.⁷¹ Section 8 of the Navajo Bill of Rights protects suspects from being “compelled ... to be a witness against themselves.”⁷² The Court recognized that the Navajo statute tracked the Indian Civil Rights Act and the Fifth Amendment.⁷³ Navajo statutory law requires that the Navajo courts take the “Fundamental Laws of the Diné” into consideration when interpreting statutory language such as the Navajo Bill of Rights.⁷⁴ As such, the Court held that the “[Navajo] Bill of Right, as informed by the Navajo value of individual freedom, prohibits coerced confessions.”⁷⁵

The *Rodriguez* Court made it clear that the interpretation of the English words prohibiting self-incrimination would be interpreted in light of Navajo customary law. Despite the fact that the language of the Navajo Bill of Rights tracked the language of the Indian Civil Rights Act and the Fifth Amendment, the Court asserted that “Navajo understanding of the English words adopted in statutes may differ from the accepted Anglo understanding.”⁷⁶ In the criminal procedure context of the *Rodriguez* case, the Court noted that the “modern Navajo government, which includes institutions such as police, jails, and

⁶⁷ See *id.* at 8 (“We hereby interpret the right against self-incrimination to require, at a minimum, clear notice by the police in a custodial situation that the person in custody (1) has the right to remain silent and may request the presence of legal counsel during questioning, (2) that any statements can be used against him or her, (3) the right to an attorney, and (4) the right to have an attorney appointed if he or she cannot afford an attorney.”).

⁶⁸ *Id.*

⁶⁹ See *Talton v. Mayes*, 163 U.S. 376 (1896).

⁷⁰ *McDonald II*

⁷¹ See *Rodriguez*, No. SC-CR-03-04, at 5 (quoting the Navajo Bill of Rights, codified at 1 NAVAJO NATION CODE, Chapter 1 (1995)); James W. Zion, *Civil Rights in Navajo Common Law*, 50 U. KAN. L. REV. 523, 538 n. 91 (2002).

⁷² 1 NAVAJO NATION CODE § 8 (1995).

⁷³ *Rodriguez*, No. SC-CR-03-04, at 5 (quoting 25 U.S.C § 1302(4) and CONST. amend. V).

⁷⁴ *Id.* at 7 (citing Navajo Nation Council Res. No. CN-69-02 (Nov. 1, 2002)); see also *Judy v. White*, No. SC-CV-35-02, 2004.NANN.0000007, at ¶ 55 (Navajo Nation Supreme Court 2004), available at <http://www.tribal-institute.org/opinions/2004.NANN.0000007.htm>;

⁷⁵ *Id.* at 5 (citing *Navajo Nation v. McDonald*, 7 Nav. Rep. 1, 13 (Navajo Nation Supreme Court 1992)).

⁷⁶ *Id.* at 7.

courts[,] ... track state and federal government structures not present in traditional Navajo society.”⁷⁷ The Court’s analysis went deep into the customs and traditions of the Diné, leading to the following statement of tribal common law:

We are not guided in our own criminal jurisprudence by a legacy of internal oppression. Nevertheless, the U.S. Supreme Court’s discussion [in *Miranda v. Arizona*] reminds us of our Navajo principle of *hazhó’ógo*. *Hazhó’ógo* is not a man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals. When discussions become heated, whether in a family setting, in a community meeting or between any people, it’s not uncommon for an elderly persons to stand and say “*hazhó’ógo, hazhó’ógo sha’álchíní* [*hazhó’ógo, hazhó’ógo*, my children]. The intent is to remind those involved that they are *Nohookáá Diné’é* [human beings], dealing with another *Nohookáá Diné’é*, and that therefore patience and respect are due. When faced with important matters, it is inappropriate to rush to conclusion or to push a decision without explanation and consideration to those involved. *Áádóó na’níle’díí éí dooda* [Delicate matters and things of importance must not be approached recklessly, carelessly, or with indifference to consequences.]. This is *hazhó’ógo*, and we see that this is an underlying principle in everyday dealings with relatives and other individuals, as well as an underlying principle in our governmental institutions. Modern court procedures and our other adopted ways are all intended to be conducted with *hazhó’ógo* in mind.⁷⁸

The *Rodriguez* Court then applied this statement of law to the facts at hand – the Kayenta district law enforcement officers did not read or provide the *Miranda* warnings to the suspect in the language of the *Diné*, nor did they explain them to the suspect in either English or Navajo.⁷⁹ Law enforcement also threatened the suspect with 60 years of prison in a federal penitentiary and a \$1.5 million fine.⁸⁰ The Court reasoned, “We must never forget that the accused is still *Nohookáá Diné’é*, and that he or she is entitled to truthful explanation and respectful relations regardless of the nature of the crime that is

⁷⁷ *Id.* at 8 (citing *Mitchell v. Davis*, No. SC-CV-52-03, at 3-4 (Navajo Supreme Court 2004), available at <http://navajolawblog.com/wp-content/Mitchell.pdf>).

⁷⁸ *Id.* at 10.

⁷⁹ *See id.* at 1-2.

⁸⁰ *See id.* at 1.

alleged.”⁸¹ The Court concluded that the officers’ conduct toward the suspect did not “conform with the ways that people should interact.”⁸² The Court vacated the conviction.⁸³

The *Rodriguez* Court’s result was to extend criminal procedure rights of suspects in the custody of the Navajo Nation’s law enforcement officers beyond that which is required by federal or state law. This is not unusual for the Navajo Nation’s courts.⁸⁴

More interesting is the reasoning for applying the *Miranda* warnings in the first instance. The *Miranda* Court focused on the police practices of the day, emphasizing their psychological impacts on the suspect.⁸⁵ But the Court had little choice but to acknowledge that law enforcement nationwide had long engaged in physical abuse and torture to elicit confessions.⁸⁶ Aside from physical abuse, the Court noted that law enforcement used psychological coercion on suspects, relying upon police interrogation manuals of the time.⁸⁷ The Court concluded that warnings were necessary, in part because of the need to protect “human dignity,”⁸⁸ but more so because “no statement obtained from the defendant can truly be the product of his free choice.”⁸⁹ In other words, a more critical purpose for the use of *Miranda* warnings by state and federal officers is to ensure that confessions will be truthful.

The *Rodriguez* Court was more concerned not with whether the confessions or statements taken by Kayenta District law enforcement were truthful, but the relationships between members of the Navajo

⁸¹ *Id.* at 10.

⁸² *Id.*

⁸³ *See id.* at 12.

⁸⁴ *See id.* at 8 (“We have applied federal interpretations, but have augmented them with Navajo values, often providing broader rights than that provided in the equivalent federal provision.”) (citing *Duncan v. Shiprock District Court*, No. SC-CV-51-04, at 8, n. 5 (Navajo Nation Supreme Court 2004), available at <http://navajolawblog.com/wp-content/Duncan.pdf>; *Fort Defiance Housing Corp. v. Lowe*, No. SC-CV-32-03, at 4-5 (Navajo Nation Supreme Court 2004), available at <http://navajolawblog.com/wp-content/Duncan.pdf>).

⁸⁵ *See Miranda v. Arizona*, 384 U.S. 436, 445-57 (1966).

⁸⁶ *See Miranda*, 384 U.S. at 445-46 (listing beatings and the use of lit cigarettes to torture suspects and witnesses in criminal cases).

⁸⁷ *E.g., id.* at 449-50 (“If at all practicable, the interrogation should take place in the investigator’s office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.”) (quoting CHARLES O’HARA, *FUNDAMENTALS OF CRIMINAL INVESTIGATION* 99 (1956)).

⁸⁸ *Miranda*, 384 U.S. at 457.

⁸⁹ *Id.* at 458.

community. While the Court reached a conclusion that the *Miranda* warnings applied to suspects held in tribal law enforcement custody, the Court expanded those rights to require that officers treat suspects like relatives, with respect and dignity. As the Court wrote, “[A] police badge cannot eliminate an officer’s duty to act toward others in compliance with the principles of *hazhó’ógo*.”⁹⁰

The *Rodriguez* Court incorporated tribal customary law by relying on the language of the Navajo people as a source of custom and tradition. Unlike most tribal court judges, Navajo judges must be fluent in the language of the people.⁹¹ *Rodriguez* is an example where the Court drew upon its understanding of the language to derive important rules of conduct for tribal police officers. For the Navajo people, it is the Navajo language that is the source of the community’s customs and traditions.

b. Crow Tribe of Indians v. Big Man

In *Crow Tribe of Indians v. Big Man*,⁹² the Crow Court of Appeals held that “criminal defendants are entitled to *Miranda* protections when they are prosecuted in the Crow Tribal Court.”⁹³ The *Big Man* Court recognized that *Miranda* does not apply in tribal courts as a matter of American constitutional law,⁹⁴ but also recognized that the Indian Civil Rights Act might serve to extend Anglo-American criminal procedure protections to tribal court defendants.⁹⁵ The Court dipped into the legislative history of the Act and found (like the U.S. Supreme Court did) that interpretation of the Act “will frequently depend on question[s] of tribal tradition and custom...”⁹⁶

But the *Big Man* Court noted that the Crow legislature had adopted a rule of criminal procedure “that appears to parallel the requirement under current federal constitutional law[, *i.e.*, *Miranda*].”⁹⁷ The Court noted that the *Miranda* warnings are “not grounded in Tribal custom or tradition – nor is the rest of the adversarial criminal

⁹⁰ *Rodriguez*, No. SC-CR-03-04, at 11-12.

⁹¹ 7 NAVAJO NATION CODE § 354(E) (“Each [judge] must be able to speak both Navajo and English, and have some knowledge of Navajo culture and tradition.”).

⁹² No. 00-410, 2000 Crow 7, 2000.NACT.0000007 (Crow Ct. App. 2000), available at <http://www.tribal-institute.org/opinions/2000.NACT.0000007.htm>.

⁹³ 2000.NACT.0000007, at ¶ 53.

⁹⁴ See *id.* at ¶ 29 (citing *Talton v. Mayes*, 163 U.S. 376, 384 (1896); *United States v. Wheeler*, 435 U.S. 313 (1978)).

⁹⁵ See *id.* (citing 25 U.S.C. §§ 1301-1303); see also *id.* at ¶ 31 (citing 25 U.S.C. §§ 1302(4) (“due process”), (8) (“equal protection”)).

⁹⁶ *Id.* at ¶ 35 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978)).

⁹⁷ *Id.* at 40.

prosecution process set out in the Crow Rules of Criminal Procedure.”⁹⁸ The Court, constricted by the tribal legislature’s decision to adopt the *Miranda* rule, applied federal precedent to decide the case.⁹⁹

2. Justiciability Doctrines

a. Village of Mishongnovi v. Humeyestewa

In *Village of Mishongnovi v. Humeyestewa*,¹⁰⁰ the Hopi Tribe’s appellate court reversed a lower decision dismissing a complaint on federal standing and political question grounds.¹⁰¹ The underlying dispute involved the control of a bank account held in the name of the Village of Mishongnovi.¹⁰² The alleged traditional leader of the community (*kikmongwi*) and his supporters brought suit against the village Board of Directors, who were acting under the apparent authority vested in them by a 1992 election.¹⁰³ The lower court dismissed the claim, relying upon the federal standing doctrine.¹⁰⁴

Hopi common law and positive law both appear to require the Hopi courts follow a rule whereby “the customs, traditions and culture of the Hopi Tribe must take precedence in a court’s decision of what law to apply before a court reaches the use of any foreign law, including federal or Arizona state law.”¹⁰⁵ Hopi law creates a choice of law hierarchy for Hopi courts to follow. In a previous case, *Hopi Indian Credit Assoc. v. Thomas*,¹⁰⁶ the Court held that Hopi law, either customary or statutory, must apply before any “foreign law,” that is, federal or state law.¹⁰⁷ The *Hopi Indian Credit* Court explained in great detail the procedure later Hopi courts must follow in applying Hopi customary law. First, “[a] party who intends to raise an issue of unwritten custom, tradition or culture shall give notice to the other party and the court through its pleading or other reasonable written notice.

⁹⁸ *Id.* at ¶ 40.

⁹⁹ *See id.* at ¶¶ 57-73.

¹⁰⁰ No. 96AP000008, 1998.NAHT.0000017 (Hopi Ct. App. 1998), available at <http://www.tribal-institute.org/opinions/1998.NAHT.0000017.htm>.

¹⁰¹ *See Humeyestewa*, No. 96AP000008, at ¶¶ 30-59 (standing), ¶¶ 60-66 (political question doctrine).

¹⁰² *See id.* at ¶¶ 8, 10.

¹⁰³ *See id.* at ¶ 10.

¹⁰⁴ *See id.* at ¶¶ 17-18.

¹⁰⁵ *Id.* at ¶ 39 (quoting *Hopi Indian Credit Assoc. v. Thomas*, No. AP-001-84, 1996.NAHT.0000007, at ¶ 25 (Hopi Ct. App. 1996), available at <http://www.tribal-institute.org/opinions/1996.NAHT.0000007.htm>); Hopi Res. H-12-76 (cited in *Humeyestewa*, No. 96AP000008, at ¶ 40).

¹⁰⁶ No. AP-001-84, 1996.NAHT.0000007 (Hopi Ct. App. 1996), available at <http://www.tribal-institute.org/opinions/1996.NAHT.0000007.htm>.

¹⁰⁷ *Hopi Indian Credit*, No. AP-001-84, at ¶ 25.

The intent of this notice is to prevent unfair surprise, which is consistent with Hopi custom and tradition of fairness.”¹⁰⁸ Second, “[t]he proponent of Hopi customs, traditions and culture must then (1) plead them to the court with sufficient evidence so as to establish the existence of such a custom, tradition or culture, and then (2) show that the recognized custom, tradition or culture is relevant to the issue before the court.”¹⁰⁹ Third, the court may apply customary law “if it finds the custom, tradition or culture to be generally known and accepted within the Hopi Tribe” via judicial notice.¹¹⁰ Moreover, even if the parties do not please customary law, the Hopi courts are obligated to “take judicial notice of and then apply Hopi custom, tradition or culture when it is applicable.”¹¹¹

The rationale of the Hopi appellate court for adopting these procedures was two-fold. First, the application of Hopi customary law, the Court asserted, was important to reconciling the Anglo-American legal constructs that formed the basis of Hopi positive law with the need and desirability for applying Hopi customary law where possible:

The customs, traditions and culture of the Hopi Tribe deserve great respect in tribal courts, for even as the Hopi Tribal Council has merged laws and regulations into a form familiar to American legal scholars, the essence of our Hopi law, as practiced, remains distinctly Hopi. The Hopi tribe has a constitution, ordinances and resolution, but those Western forms of law codify the customs, traditions and culture of the Hopi Tribe, which are the essential sources of our jurisprudence.¹¹²

Second, the Court acknowledged the practical difficulties with discovering and applying Hopi customary law:

Hopi customs, traditions and culture are often unwritten, and this fact can make them more difficult to define or apply. While they can and should be used in a court of law, it is much easier to use codified foreign laws. That ease of use may convince a trial court to forego the difficulty and time needed to properly apply our unwritten customs, traditions and culture. However, the trial court must apply this important source of law when it is relevant.¹¹³

¹⁰⁸ *Id.* at ¶ 30.

¹⁰⁹ *Id.* at ¶ 31 (citation and footnote omitted).

¹¹⁰ *Id.* at ¶ 32.

¹¹¹ *Id.* at ¶ 33.

¹¹² *Id.* at ¶ 24.

¹¹³ *Id.* at ¶ 28.

Both of these factors came into play in the *Humeyestewa* case. The defendant relied upon the federal doctrines of standing and political question – both questions going to the justiciability of cases before federal courts – in their arguments supporting the motion to dismiss the action.¹¹⁴ The trial court agreed, relying upon a previous case *Shungopavi v. Quamahongnewa*, which had held that a claim by a group of elected officials in the Village of Shungopavi against individuals who had once been village leaders was barred by the plaintiffs’ lack of standing.¹¹⁵ That court sought Hopi customary law on standing and, finding none, applied federal law.¹¹⁶

b. Rave v. Reynolds

In *Rave v. Reynolds*,¹¹⁷ the Winnebago Supreme Court held (among many other things) that tribal members and a tribal member organization have standing to challenge the constitutionality the rules for tribal elections under tribal law.¹¹⁸ In *Rave*, the tribal government defendants argued that “voters, tribal members, and organizations composed of interested tribal voters ... lacked the necessary personal stake or interest in the controversy....”¹¹⁹ The Court noted that the defendants cited “only federal cases brought under article III of the United States Constitution....”¹²⁰

The *Rave* Court’s analysis often relied upon customary law as the Court understood it, but it sometimes relied on federal law as well.¹²¹ The Court first found, however, that the tribal court rules mandated that “[i]n all civil actions the tribal court shall apply ... [t]he constitution, statutes, and common law of the tribe....”¹²² The Court interpreted this provision to mean that “the Winnebago tribal courts prefer tribal law as a rule of decision to any rule afforded by federal and state law. Resort to

¹¹⁴ See generally *Village of Mishongnovi v. Humeyestewa*, No. 96AP000008, 1998.NAHT.0000017, at ¶ 17 (Hopi Ct. App. 1998), available at <http://www.tribal-institute.org/opinions/1998.NAHT.0000017.htm>.

¹¹⁵ See *Humeyestewa*, No. 96AP000008, at ¶¶ 35-36 (discussing *Shungopavi*).

¹¹⁶ See *id.* at ¶ 36 (discussing *Shungopavi*).

¹¹⁷ 23 Indian L. Rep. 6150 (Winnebago Tribe of Neb. S. Ct. 1996).

¹¹⁸ See *Rave*, 23 Indian L. Rep. at 6159.

¹¹⁹ *Id.*

¹²⁰ *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Simon v. Eastern Kentucky Welfare Rights Ass’n*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. Richardson*, 418 U.S. 166 (1974)).

¹²¹ To be fair, Chief Justice Clinton wrote an opinion that covered 22 pages in the Indian Law Reporter, which, given the small font of the Reporter, is probably equivalent to 75-100 pages of regular writing – and he did so in under 30 days. See *Rave*, 23 Indian L. Rep. at 6151.

¹²² *Id.* at 6156 (quoting WINNEBAGO (NEB.) TRIBAL COURT RULES 2-111(1)(A), available at <http://www.winnebagoTribe.com/court.htm>).

federal or state law therefore is appropriate to inform the tribal courts of a rule of decision only if tribal law is completely silent on the question.”¹²³ The Court further interpreted “common law of the tribe” to mean two different types of law:

First, the term common law may reference the western style common law derived from English legal roots, *i.e.*, the judge-made law articulated in decided cases through written opinions often reflecting the judicial understanding of the customs and practices of a people in a particular sector of endeavor. Such common law may include both already existing decisions and any new rule of law announced by a tribal court in a case before it.

Second, ... section 2-111 contemplates that tribal customs and usages, both traditional and evolving, will constitute tribal common law.¹²⁴

The Court found that no tribal constitutional or statutory provision applied in the standing analysis.¹²⁵

The *Rave* Court then chose to announce tribal customary law as it applied to the standing analysis. The Court held that the strict federal standing requirements do not apply in their fullest extent to tribal court litigants, holding that it would rely upon:

[T]he healing approach traditionally taken to resolve tribal disputes. The traditions of most Indian tribes in the United States, including the Ho-Chunk people, part of whom compose the Winnebago Tribe of Nebraska, encouraged participatory and consensual resolution of disputes, maximizing the opportunity for airing grievances (*i.e.*, hearings), participation, and resolution in the interest of healing the participants and preventing friction within the tribal community.¹²⁶

The Court presented a very long string cite of authorities in support of this proposition, none of which, it appears, mention Ho-Chunk traditions.¹²⁷ The majority of the citations focused on the Navajo

¹²³ *Id.*

¹²⁴ *Id.* at 6157.

¹²⁵ *See id.* (“Neither party cited and this court is unaware of any express provisions in the tribal constitution or statutes that deal with standing or of any decided cases of the Winnebago tribal courts that have previously addressed the issue.”).

¹²⁶ *Id.* (citations omitted).

¹²⁷ *Id.*

Nation.¹²⁸ Other citations involved other Indian nations, such as the New York tribes,¹²⁹ and other citations focused on peacemaker courts¹³⁰ or alternative dispute resolution.¹³¹

The *Rave* Court buttressed its announcement of tribal customary law with candid pragmatism through an announcement of public policy:

In small, close-knit tribal communities, like the Winnebago tribe of Nebraska, denying an opportunity to air and heal grievances in a neutral forum otherwise possessed of jurisdiction, such as the tribal courts, could have disruptive effects by sowing dissention, hostility and distrust that otherwise could be ameliorated by airing and resolving the dispute. Accordingly, adopting the narrow standing rules employed in federal courts could have a disruptive impact on tribal communities and, accordingly, would not constitute sound public policy.¹³²

The Court noted that the tribal government's attorneys represented to the Court (without being able to cite to any authority on the matter) during oral argument that "whatever participatory mechanism might have existed then subsequently devolved participatory dispute resolution on the tribal council, but not on the Winnebago courts."¹³³ This argument appeared to be a weak claim that the tribal courts had no jurisdiction over the case at all. The Court rejected that argument and held that "whatever tribal traditions previously controlled tribal council, clan or family dispute resolution in the mid-nineteenth century must, in the absence of express positive law on standing, affect this court's resolution of the standing issue."¹³⁴

The *Rave* Court then turned to the question of the extent that federal standing law would apply in the dispute.¹³⁵ The Court first noted

¹²⁸ The citations include Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 227-34 (1989); Tom Tso, *Moral Principles, Traditions and Fairness in The Navajo Nation Code of Judicial Conduct*, 76 JUDICATURE 15 (1992); Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 185-87 (1994); James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983); Judicial Branch of the Navajo Nation, *The Navajo Peacemaker Court Manual* (1982).

¹²⁹ See N.Y. Indian Law § 46 (discussing Seneca Nation of Indians' peacemaker courts).

¹³⁰ See Collected Papers from National Conference on Traditional peacemaking Remaking Justice (Sept. 20-22, 1993, Arizona State University).

¹³¹ See National Indian Justice Center, *Alternative Dispute Resolution Manual* (1989).

¹³² *Rave*, 23 Indian L. Rep. at 6158.

¹³³ *Id.* at 6157.

¹³⁴ *Id.*

¹³⁵ See *id.* at 6158-59.

that federal courts, unlike the Winnebago tribal court, are courts of limited, not general, jurisdiction.¹³⁶ The Court, parsing through the federal cases, announced a general rule on standing: “[S]tanding, and therefore the requisite interest or stake, requires that the party assert some actual or threatened injury that is logically related to the legal claims they seek to present to the court.”¹³⁷ Drawing upon “the traditions of openness to the healing of disputes which have long characterized traditional Indian healing dispute resolution,”¹³⁸ the Court declined to adopt any of the federal courts’ limitations on the broad principle stated above, such as limitations on generalized grievances¹³⁹ and whether the matter is redressable by the court.¹⁴⁰ The Court’s announced rule read as follows:

Therefore, as a matter of tribal law, the standing questions presented by the defendants must be resolved by inquiring whether the plaintiffs asserted some actual or threatened injury that is logically related to the legal claims they sought to present to the tribal court.¹⁴¹

As such, the Court held that any and all tribal members and tribal member organizations have standing to challenge tribal elections on the basis that governmental action violated their “rights to free speech, [to] petition the government for redress, and freedom of political association....”¹⁴² The Court also held that tribal members had standing to bring claims alleging that the tribal government violated the tribal constitution in allegedly placing individuals on the ballot that did not meet the qualifications.¹⁴³

¹³⁶ See *id.* at 6158 (comparing Code of Winnebago Tribe of Nebraska §§ 1-105 through 1-108 with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *United States v. Richardson*, 418 U.S. 166 (1974)).

¹³⁷ *Id.* (citing *Data Processing Service v. Camp*, 397 U.S. 150, 151-54 (1970); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

¹³⁸ *Id.*

¹³⁹ See *id.* (citing *Defenders of Wildlife*, 504 U.S. 555; *Simon v. Eastern Kentucky Welfare Rights Ass’n*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. Richardson*, 418 U.S. 166 (1974)).

¹⁴⁰ See *id.* (citing *Warth*, 422 U.S. 490).

¹⁴¹ *Id.*; see also *id.* at 6159 (“[The tribal member organization] CHANGE also had standing to challenge those same procedures on behalf of those members since the interest asserted is germane to the association’s purpose of improving tribal government....”).

¹⁴² *Id.* at 6158.

¹⁴³ See *id.* at 6158 (citing CONST. OF THE WINNEBAGO TRIBE OF NEBRASKA art. VI).

B. The Dearth of Tribal Custom in Tribal Court Opinions

Tribal courts rely more and more on custom as authority when they decide cases, but still precious few tribal court cases cite to custom as persuasive or controlling authority. The chief judge of the Colville Confederated Tribes tribal court, Steve Aycock, conducted a survey of tribal court opinions and was disturbed to find how often tribal courts adopt Anglo-American common law legal doctrines.¹⁴⁴

There are numerous practical reasons for the lack of citation to tribal custom. First, tribal custom is difficult to discover for tribal judges and parties. Custom may be so ingrained in the language of the tribe that it cannot be translated in an accurate or meaningful way into English. In addition, the tribe's language speakers may be limited in number, minimizing the utility of the language in tribal courts. Even where custom is translatable into English, often it is difficult to reach back into the tribe's past to recover the custom. Students of tribal custom often must resort to the work of anthropologists and ethnohistorians, few of whom are members of the communities they study. While speakers of the tribe's language are in a much better position to understand custom, outsiders who are tribal judges or counsel to tribal court litigants have little or no ability to do so.

Second, it is difficult to achieve consensus on the tribal custom in question. This problem is related to the first problem in that there may be few tribal speakers to relate the relevant custom. It may be unpractical to tap the knowledge of tribal speakers during litigation. And, unfortunately, the very few speakers of the language may disagree amongst themselves or they may be unreliable relators of the relevant custom. For custom that might be discovered by reliance upon academic works, the problem may be that the academics writing in the field also disagree on the custom or are unreliable relators.

Third, few tribal judges who are tribal members are law-trained and are less likely to write opinions that might help to expound customary law for future litigations. Moreover, since most intratribal common law only applies where all the parties are members of the tribe, it is conceivable that the announcement of the law may be in the language of the tribal community. A corollary is that few tribal judges who are lawyers are members of the tribal community. While these

¹⁴⁴ See Steve Aycock, Thoughts on Creating a Truly Tribal Jurisprudence, *compiled in Indigenous Justice Systems of North America*, 2nd Annual Indigenous Law Conference, Michigan State University College of Law (March 17-18, 2006) (on file with author).

judges are more likely to deliver written opinions in a matter, and (to a lesser extent) even cite to tribal custom, they tend not to be reliable relators. As a result, the opinions of tribal court judges who are not members of the community may push the common law of the community in an erratic and even illegitimate direction.

Fourth, customary law may have limited utility in modern disputes. Customary law may be too broad or vague to apply to a specific set of circumstances arising from a dispute between Indians. Or customary law may be too specific, with the relevant law applying only to limited fact patterns that tend not to arise in the modern world. Customary law also might be too elementary, with prohibitions on conduct, for example, already prohibited via statute.

Fifth, customary law might not carry enough moral weight to legitimate its use. The prescriptions of the past and of the ancestors could be replaced with new rules that are inconsistent with the old law. These new rules might be statutory or based in tribal court decisions or they may be new customs recognized by the tribal community. After all, cultures never remain static. They adapt and adopt and always are changing.

Sixth, litigants in tribal courts often do not cite to customary law. Litigants that are unrepresented in tribal courts are more likely to refer to customary law than others, but they might not have the training develop the reference in a manner sufficient to be useful to the tribal court. Litigants who are represented by community lay advocates or tribal member attorneys would be in a better position to assert customary law, but these litigants tend to rely on Anglo-American law or intertribal common law, rather than customary law. Litigants that are represented by counsel who are unfamiliar with tribal courts and tribal court practice tend not to refer to customary law at all. Lawyers and law advocates go for the most cost-effective presentation to the court – and that means reliance upon what the *Hopi Indian Credit* Court referred to as “foreign law.”¹⁴⁵ Briefing in appellate cases and in trial court motions practice is designed, in part, to alert the court to the existence of relevant authority. When the briefs in a tribal court case come in, they almost never point to customary law, making the tribal court’s task harder.

Seventh, customary law might be preempted by the adoption of a statute that forecloses the application of relevant custom or tradition.

¹⁴⁵ *Hopi Indian Credit Assoc. v. Thomas*, No. AP-001-84, 1996.NAHT.0000007, at ¶ 25 (Hopi Ct. App. 1996), available at <http://www.tribal-institute.org/opinions/1996.NAHT.0000007.htm>).

The Confederated Tribes of the Grand Ronde Community adopted the State of Oregon's commercial code in a manner that appears to preclude the interpretation of that code using customary law.¹⁴⁶

Eighth, and perhaps most importantly, many tribal court judges do not feel competent to announce or apply tribal customary law. One appellate court panel wrote:

Most assuredly, it is not the cross we bear as an appellate court to right every alleged wrong, to predicate and postulate the redeeming righteousness of conduct we approve and abhor by deciding the perceived unrighteousness of tribal conduct within a cultural setting that just may view issues in a manner foreign to our own sense of justice. Decisions predicated on cultural tradition and the need to preserve the very existence of the tribe are better left to tribal members as constituents, the tribal advocates, the tribal council and the elder statesmen of the tribe to be decided in the context of political and social change within their culture. Never to be decided on the basis of whim and fancy of an appellate court substituting its judgment on tradition and cultural values peculiar to but most assuredly, part of that very tribal culture.¹⁴⁷

C. Categories of Application of Tribal Customary Law

When tribal courts in written opinions do cite to custom, they often do so in a superficial manner, without reference to specific precedents. Far more often than not, tribal court citation to custom amounts to nothing more than a citation to a broad, vague notion to tribal values. And often these tribal values are pan-tribal values – values that the tribal courts recognize are inherent to many or even most tribes. This is a trap for tribal court judges, one that they should take care to avoid.

There are at least three different characterizations this Article will make in describing the typical application of tribal customary law in tribal court opinions. These three are: (1) basis of decision; (2) modification; and (3) gut check or sugar coating. All but a very few tribal court opinions that apply tribal customary law fit into one (or more) of these categories.

¹⁴⁶ CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY TRIBAL COURT ORDINANCE § 310(g)(2), available at <http://weblink.grandronde.org/>.

¹⁴⁷ Board of Trustees v. Wynde, 18 Indian L. Rep. 6033, 6036 (Northern Plains Intertribal Ct. App. 1990).

1. Basis of Decision

Only in extremely rare occasions in tribal court opinions available in the public domain does a tribal court judge apply tribal customary law as the basis of decision. As I speculated in my earlier work,¹⁴⁸ tribal customary law serves as the controlling law in tribal court cases only where the parties consent to its application or where all of the parties are members of the tribe *and* who understand the law as applied. A careful review of the few thousand tribal court opinions available in the Indian Law Reporter, the Oklahoma Tribal Court Reports, the Northwest Intertribal Court System Reporter, the Southwester Intertribal Court of Appeals Reporter, the Tribal Court Reporter, VersusLaw, LEXIS, WESTLAW, and individual tribal court websites reveals few cases in which tribal court decisions are based on tribal customary law as the basis of decisions. Cases in which it could be said that tribal customary law is controlling (and whether this is true remains arguable for all of them) mostly come from the insular tribal communities in the desert southwest, Alaskan native villages, or other insular communities. An important factor in the limited availability of these decisions to non-Indians and nonmember Indians is the likelihood that these cases are adjudicated in the language of the people.

Professor Justin Richland's description of one of these cases out of the Hopi tribal court is instructive.¹⁴⁹ Professor Richland reviewed 30 hours of audio recordings in a tribal court cases regarding a property disputes between tribal members.¹⁵⁰ In 14 of 15 cases from 1995 to 2002 involving these disputes, litigants resorted to assertions of tribal customary law in support of their position.¹⁵¹ Richland analyzed one hearing in detail, *James v. Smith*,¹⁵² most of which was conducted in the Hopi language.¹⁵³

Given that these cases are not litigated in English or with a written opinion, it is very difficult to study these cases universally. Many of these cases are decided informally, without the burden of imposing formal legal rules.¹⁵⁴ That does not mean that there are very few of these cases – likely, there are many hundred or even thousands a

¹⁴⁸ See Fletcher, *Toward a Theory*, *supra* note __, at 728-33.

¹⁴⁹ See Justin B. Richland, "What are You Going to Do with the Village's Knowledge?" *Talking Tradition, Talking Law in Hopi Tribal Court*, 39 LAW & SOC'Y REV. 235 (2005).

¹⁵⁰ See *id.* at 246.

¹⁵¹ See *id.* at 247.

¹⁵² No. CIV-018-94 (1994).

¹⁵³ See Richland, *supra* note __, at 250-58.

¹⁵⁴ Cf. Watson, *supra* note __, at 569-70 (explaining that disputes in small communities are resolved without recourse to "searching for a definitive legal rule").

year – but they are not available for easy analysis. Nevertheless, these cases are where the tribal courts understand and apply traditional law in a manner most reflective of the tribe’s customs and traditions. The sole limitation of this category of applying tribal customary law is subject matter. Unlike many tribes that have faced down more assimilation or have been subject to more importation of non-Indian people and culture, insular tribal communities are more likely to retain the same or similar kinds of lifeways that custom and tradition developed over time to protect. The Hopi property disputes, for example, are closely related to the property ownership structure that the Hopi people have used since time immemorial.¹⁵⁵ The property dispute discussed at the beginning of this Article arising out of the Turtle Mountain Band reservation has little similarity to the kinds of disputes that Ojibwe and Cree customary law was developed to resolve.

Relatively few tribes or tribal judges have the understanding to apply traditional law in this manner. And relatively few subject matters tackled by tribal courts that appear in the available materials can be decided by resort to customary law. They must resort to alternative methods.

2. Modification

A still infrequent but more common use of tribal customary law is to apply a custom or tradition as a means of modifying an Anglo-American legal rule or an intertribal common law rule.¹⁵⁶ In these instances, the tribal court identifies a rule that does not derive from the tribe’s customary law with which to use in deciding the case. However, an aspect of the rule may conflict with an understanding of customary law. The tribal court will still apply the foreign rule,¹⁵⁷ but modify as much as possible in order to make it conform to understandings of customary law. Much of the very best applications of intertribal common law follow this pattern.

Take, for example, the Hopi Tribe’s appellate court decision in *Village of Mishongnovi v. Humeyestewa*.¹⁵⁸ There, the appellate court reviewed the United States Supreme Court jurisprudence on standing and justiciability, applying only the very essentials of the rules on

¹⁵⁵ See Richland, *supra* note __, at __ (describing the link between the Hopi culture and property disputes).

¹⁵⁶ See Fletcher, *Toward a Theory*, *supra* note __, at 720-28 (describing “intertribal common law”).

¹⁵⁷ Cf. Watson, *supra* note __, at 570 (“In perplexing cases, the [feudal or Roman] courts frequently based their decisions upon foreign customs.”).

¹⁵⁸ No. 96AP000008, 1998.NAHT.0000017 (Hopi Ct. App. 1998), available at <http://www.tribal-institute.org/opinions/1998.NAHT.0000017.htm>.

standing and chose to discard the rest.¹⁵⁹ The court adopted a standing test that required plaintiffs to make a showing of a logical relationship between an actual or threatened injury,¹⁶⁰ as opposed to federal law, which would have required a showing of injury in fact that is concrete and particularized and actual or imminent.¹⁶¹ This narrow definition of standing was inconsistent with both the Hopi constitution and the customs and traditions of the Hopi people.¹⁶² As such, the Hopi appellate court amended the rule to conform to tribal customs.

The application of tribal customary law in this context often has advantages, but is still fraught with peril. The advantages include the potential to discover new applications to customary rules. As Vine Deloria and Clifford Lytle suggested decades ago,¹⁶³ tribal courts cannot hope to rely only on customary law, noting that cultures and legal regimes change over time, and that tribal law must also develop to meet the needs of modern tribal societies. An additional advantage is that tribal courts will be more likely to take the time to discover customary law, or require that litigants help them discover the law. Tribal court judges that take seriously the charge to discover and apply customary law have an excellent opportunity to develop and harmonize tribal customs and traditions with the modern needs of Indian people.

The peril includes the careless invocation of intertribal common law or, worse, the invocation of pan-Indian customs. Non-Indian and nonmember Indian tribal judges (and scholars) have a limited means of accessing or understanding the customs and traditions of the tribe for which they work. One trap is to research and apply the customs and traditions of other Indian tribes, such as the Navajo Nation, in particular. A relatively large amount of outstanding and groundbreaking scholarly material has developed about the Navajo common law and Navajo tribal court decision making process.¹⁶⁴ The experiences and advances made by that Nation's courts are unprecedented in Indian tribal court history –

¹⁵⁹ See *id.* at ¶¶ 30-55.

¹⁶⁰ See *id.* at ¶¶ 54-55.

¹⁶¹ See *id.* at ¶ 44 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

¹⁶² See *id.* at ¶¶ 48-52.

¹⁶³ See VINE DELORIA, JR. & CLIFFORD LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 120 (1983).

¹⁶⁴ *E.g.*, Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L. J. 1047 (2005); Antoinette Sedillo Lopez, *Evolving Indigenous Law: Navajo Marriage, Cultural Traditions, and Modern Challenges*, 17 ARIZ. J. INT'L & COMP. L. 283 (2000); Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989); Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994); James W. Zion, *Civil Rights in Navajo Common Law*, 50 U. KAN. L. REV. 523 (2002).

but the customs and traditions of the Navajo Nation are not the customs and traditions of any other tribe. The court in *Rave v. Reynolds*,¹⁶⁵ deciding many of the same standing issues that the Hopi Tribe's appellate court decided in *Village of Humeyestewa*, cited to a series of authorities on the Navajo Nation's tribal courts for the proposition that Indians tribes prefer an open "healing approach" to dispute resolution, rather than the adversarial process.¹⁶⁶ The court cited to no authorities discussing the lifeways of the Ho-Chunk people, leaving aside for the moment whether the available authorities were valid.¹⁶⁷ While the *Rave* court appeared to make no significant error – indeed, the Hopi appellate court adopted the rule as modified by the *Rave* court¹⁶⁸ – the potential for carelessness existed. This carelessness may include the method of adopting a superficial view of tribal customs and traditions by relying upon pan-Indian notions of Indian people.

The recommendations in Part V will focus on this category, given that this may be the category with the most potential for the development of tribal law in the foreseeable future.

3. Gut Check, or Sugar Coating

Another common use of tribal customary law in tribal court opinions is as a "gut check" or, worse, "sugar coating." This occurs when a tribal court judge has decided to apply an Anglo-American legal rule from a state or federal court case or an intertribal common law rule as the basis of decision. The judge then compares these rules that will form the basis of decision to an articulation of the judge's understanding of tribal customary law. If the foreign rule is consistent or otherwise does not conflict with the tribal custom or tradition, then the court is satisfied that the application of the foreign rule is acceptable. No modification of the foreign rule is made. The application of customary law as gut check does little to advance the importance, relevance, and understanding of tribal custom and tradition.

¹⁶⁵ 23 Indian L. Rep. 6150 (Winnebago Tribe of Nebraska Supreme Court 1996).

¹⁶⁶ *Rave*, 23 Indian L. Rep. at 6157 (citing Tso, *supra* note __; Tom Tso, *Moral Principles, Traditions and Fairness in the Navajo Nation Code of Judicial Conduct*, 76 JUDICATURE 15 (1992); Yazzie, *supra* note __; James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983); other authorities omitted).

¹⁶⁷ *E.g.*, PAUL RADIN, *THE AUTOBIOGRAPHY OF A WINNEBAGO INDIAN: LIFE, WAYS, ACCULTURATION, AND THE PEYOTE CULT* (1920) (Dover 1963).

¹⁶⁸ *Village of Mishongnovi v. Humeyestewa*, No. 96AP000008, 1998.NAHT.0000017, at ¶ 52 (Hopi Ct. App. 1998) (citing *Rave* with approval), available at <http://www.tribal-institute.org/opinions/1998.NAHT.0000017.htm>.

There are some explanations as to why this method of applying tribal customary law is so prevalent. The subject matter of the dispute in question simply may have no antecedent in the tribe's customs and traditions, for example. Or perhaps the foreign rule to be applied actually is consistent with the tribe's customs and traditions. Nevertheless, there should be fewer (and hopefully one day, no) cases in which a tribal judge required to apply customary law should ever resort to using the gut check method.

IV. A Note on the Problem of Finding Tribal Customary Law

The cases discussed in the previous two parts highlight the difficulties with finding, understanding, and applying customary law in deciding matters in complex litigation before tribal courts. Two of the cases were decided by the Navajo and Hopi tribal courts. These courts examined, understood, and applied customary law but did so in the context of the federal common law rules – the *Miranda* warnings and the justiciability doctrine of standing. The other two cases struggled mightily to find and apply customary law. The Crow case, for all practical purposes, gave up without finding or applying Absáalooke custom and tradition to its analysis of the *Miranda* warnings in the context of the Indian Civil Rights Act. In that case, the tribal legislature had adopted rules requiring law enforcement to follow the mandates of the *Miranda* case, further precluding the court's capacity to apply customary law, even if it had located any. The final case, decided by the Winnebago Supreme Court, did rely upon broad, general notions of pan-Indian dispute resolution. But the Court could not find any specific legal or other authority that described the Ho-Chunk people's customary means of dispute resolution and, in fact, relied upon writings about the Navajo people's (modern) customs and traditions about dispute resolution in Navajo tribal courts. The Winnebago court fell into a trap of applying broad, vague notions of pan-Indian culture that might or might not have been applicable in Ho-Chunk communities. The court further made the mistake of grabbing the mantle of asserting authority to declare customary law, when it had no serious basis for doing so.

This paper is intended to provide a template for finding, understanding, and applying customary law that all tribes can follow. Not all tribal courts will need to consider this template. And some tribal courts may be constricted by their rules or governing statutes and constitutions from taking these steps. But this paper is intended to

advance the discussion about the role that custom plays in tribal court jurisprudence – a discussion that is sorely lacking.

The first subsection of this Part provides a very general description of a template or roadmap for tribal courts to follow when they are obligated to find and apply tribal customary law. The template is general and may have several weaknesses, some of which are discussed in the second subsection of this Part.

A. The Template for Finding Customary Law

Tribal choice of law provisions that require or encourage the application of tribal custom and tradition tend not to provide a procedure or any guidance at all as to how a tribal court is to go about the business of finding, understanding, and applying tribal customary law. Some tribal courts that do make a serious effort to apply customary law are hampered by the lack of guidance. Others assert expansive authority to declare customary law. What tribal choice of law provisions should include – or what tribal courts can include in their court rules – is a roadmap for finding, understanding, and applying customary law.

For tribal judges who are not experts in the culture and traditions of the community for which they are a judge, including those who do not understand the traditional language of the community or those who are not even members of the community, finding customary law is extraordinarily difficult. For judges who do understand their tribal language and do have a strong connection to the community for which they are a judge, the task is made much easier, but is not obvious.

There are numerous sources for tribal judges to use when looking for customary law. The first source should be (but is almost never the case) are the parties to the litigation. The *Rave* Court's attempt to glean tribal customary law from the government's attorneys (who were non-Indians, it appears) was the right place to start, but the result was disappointing. Many tribal court judges, in this author's experience, start off by asking counsel for the parties to brief and argue customary law for few, if any, lawyers and advocates have anything to contribute. The government's counsel in *Rave*, most dangerously, made representations about tribal customs without citing authority – they were guessing, it seems. Had the *Rave* Court adopted those representations made by the government's attorneys as customary law, the outcome of the case would have come out the other way, precedent would have existed on the tribal court's books based on what appears to be the misguided or even uneducated guesses of a non-Indian lawyer's bald assertions. While tribal choice of law provisions and the realities of

complex litigation all but require tribal courts to ask the parties for guidance, the *Rave* litigation suggests that the guidance might not be very helpful.

Most tribal courts stop right there. The costs of seeking out customary law when the parties cannot assist are high for tribal court judges and tribal court staff. Often, tribal judges don't know where to look next. But some tribal judges do know where to look next. The second source for tribal court judges is the inherent knowledge. Navajo judges, for example, must be fluent in the language of the Navajo people. A clear understanding of the language, with all its nuances and complexities, is essential to finding tribal customs and traditions. For many tribal communities, the law is encoded right into the language – and the stories generated from the language. A mere translation of the stories into English may leave out fundamental fine distinctions, subtle nuances, and even correct meaning. A native speaker would be able to use the language as a means for discovering the law. But, as the realities of tribal communities dictate, there are few tribal judges who are native speakers. This source, while having the potential of being the finest source available, does not solve the problem for most tribal courts.

A third possible source for tribal courts looking for customary law is secondary literature about tribal customs and traditions. There is no shortage of anthropologists, historians, sociologists, and other social science professors and graduate students that study American Indian peoples. There is a large subset of writing and work by these academics that describes and (sometimes) analyzes tribal customs and traditions. There is a smaller and relatively undiscovered subset of this work – some of which has been done by lawyers or law professors – that describes and analyzes these customs and traditions as customary law. A good researcher could locate and deliver this work to tribal judges for perusal. The possibilities of this strategy are considerable, but the limitations might make this strategy unworkable or even counterproductive. The next subsection will identify and weigh these advantages and disadvantages.

A fourth source for tribal courts are the people of the community – often elders – who are cognizant of the community's customs and traditions. Other than a tribal judge who fits in this category, this is the next best ideal source for tribal customary law. There is a blurring in the distinction between the two – some tribes select tribal judges because they are elders.

A fifth source includes the written work of tribal community members. This work can take the form of academic research, translation

by others of the oral stories and histories of Indian people and Indian tribes, and even fiction, poetry, stories, and legends told and written by tribal community members. There is more and more literature in this regard.

Many, if not most, tribal courts will have little option but to resort to academic literature and other written works. The next subsection discusses the general potential and limitations of these sources.

B. Problems with the Sources of Customary Law

Not every source of customary law is comprehensive or legitimate. This subsection details the possible strengths and weaknesses of using the written word of academics as a source and the written or oral word of tribal community members as a source.

1. The Academic Literature

Vine Deloria and others have long criticized the work of non-Indian anthropologists and other researchers and scientists. There is a very significant bias by Indian people against the work of these academics. This bias, whether reasonable or not, will be a formidable obstacle to any tribal court judge using written academic literature as a basis for finding and understanding the customary law of a tribal community. The legitimacy of a tribal court opinion declaring customary law based on the findings of an academic would be in serious doubt much of the time.

But the fact of the matter remains that, for many tribal communities, the work of non-Indian academics is the only source for tribal histories, legends, political science, religious practices, and even customary laws. For these communities, it could be foolish to ignore this work. The work might be 100 years old or very recent. It might contain commentary that offends every Indian person within a thousand miles of its unveiling, but tribal judges might be able to see through the academic jargon and bias to learn something significant.

Or not.

2. Tribal Community “Experts”

The use of live tribal community members as expert witnesses for the finding and understanding of customary law is laudable, but also very flawed. There are numerous difficulties, the least of which is finding Indian people willing and qualified to participate in tribal court litigation, either as expert witnesses or even as a decisionmaking body not subject to impeachment by counsel. Many Indian people don't want

to talk about their deepest, most fundamental beliefs. Many that are willing don't want to do so for litigation purposes.

Another problem – one that this author is very sensitive and careful in discussing – is the legitimacy of the representations made by tribal community “experts.” Reasonable minds may differ on customs and traditions. Classic examples include the differences between practitioners of the Native American Church and the Navajo traditional religion at Navajo and the differences between the Midewiwin and other Anishinaabe traditional religions. But there may be fundamental differences in the understanding of the culture and traditions of a community on family or political lines. Of course, none of this is any different than the differences in understanding of Anglo-American law between law professors. Tribal courts, as in the procedure for identifying Hoopa customary law, would be in the unenviable position of choosing between competing understandings of customary law – and this would be a choice that tribal courts might not have the institutional capacity to make.

3. The Problem of Tribal Courts Announcing Customary Law

The question of institutional capacity for tribal courts and tribal judges in announcing or declaring tribal customary law is complicated and very important. Judges in federal and state courts are common law courts in the mode of English common law courts but, while many tribal courts are modeled on American common law courts, tribal judges should not have the same notion that they can declare tribal common law. While Justice Rehnquist can rely upon English common law decisions issued around the time of the American Revolution as a source of authority for the origins of many American common law doctrines, tribal judges do not have the same sources of authority upon which to rely.

The issue raises the question of whether, as the Northern Plains Intertribal appellate court wrote in 1990, tribal courts should be announcing or declaring tribal customary law. Of course, some tribal entity has to do it and the court and its judges should be involved, but to what extent? The *Rave* Court acted in a manner similar to state and federal common law courts by announcing customary law as tribal common law, but the Court appeared to adopt *Navajo* understandings of dispute resolution that were not necessarily Ho-Chunk understandings.

Tribal customary law as applied by tribal courts now follows (or is moving in the direction of) a pattern similar to the theory of *opinio necessitatus*, or the theory that “individuals purposely follow a certain

rule simply because they believe it be the rule of law.”¹⁶⁹ According to Alan Watson, “Under this view, custom becomes law when it is known to be law, is accepted as law, and is practiced as law by persons who share the same legal system.”¹⁷⁰ So, tribal courts’ adoption or announcement of tribal customary law is an acknowledgment that a certain custom or tradition remains viable within the community.

However, this view “contains no mechanism for deleting law that no longer commands appeal.”¹⁷¹ In Professor Watson’s words, “[S]uppose that once the custom is known to be law and is accepted as law, the practice changes. Does the old law cease to be law, and the new practice become law?”¹⁷²

Another issue – again, a very sensitive subject – is whether tribal judges who are not members of the community should be announcing tribal customary law as the law of the tribe. The question is one that each tribal community should face, ask itself, and answer in an official and comprehensive manner.

V. Rethinking Customary Law in Tribal Court Jurisprudence: Employing Rules of Adjudication

Some tribes and tribal courts, without referencing Professor Hart’s theory, have already engaged in portions of this analysis; namely, by adopting rules of recognition and change. These are the tribes such as the ones discussed in Part II that have adopted choice of law statutes or common law holdings incorporating tribal customary law. Tribal courts often are required to recognize tribal customs and traditions as persuasive or even controlling law. However, like Jed Rubenfeld noted about American constitutional law,¹⁷³ tribes have not adopted rules for how to find and apply customary law. Part III identified representative examples of how tribal courts find and apply customary law and critiqued them. Part IV offered a normative discussion on finding and announcing tribal customary law. This final part of the Article will highlight two methods for applying customary law, only one of which will be endorsed.

¹⁶⁹ Watson, *supra* note __, at 563.

¹⁷⁰ Watson, *supra* note __, at 563.

¹⁷¹ Watson, *supra* note __, at 563.

¹⁷² Watson, *supra* note __, at 563.

¹⁷³ *Cf.* RUBENFELD, *supra* note __, at 5 (“In constitutional law ... there are no such overarching interpretive precepts or protocols. There are no official interpretive rules at all.”).

A. Linguistic Method

Indian cultures (often) were and are oral cultures. As noted by some, including for example Keith Basso,¹⁷⁴ the customs and traditions of Indian people often are buried within the peoples' language, stories, and even the geographic terrain of their homelands. One method of teasing out a tribe's primary rules may be to focus on important and fundamental rules articulated in the tribe's language. The Navajo Nation Supreme Court, as exemplified in the *Rodriguez* case discussed above, employs this method in a wide majority of its cases.

The method, in a nutshell, involves this process: First, the tribal court identifies an important and fundamental value identified by a word or phrase in the tribal language. In the case of the Navajo Nation courts, the judges often identify the word *hazhó'ógo*. As the court noted in *Rodriguez*, "*Hazhó'ógo* is not a man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals."¹⁷⁵ *Hazhó'ógo* is, for lack of a better term, a primary rule. *Rodriguez* involved the application of an Anglo-American legal construct to tribal criminal prosecutions (the *Miranda* rule), a secondary rule, to borrow once again from Professor Hart. The application of the tribal primary rule to the Anglo-American or intertribal secondary rule is necessary to harmonize these outside rules to the tribe's customs and traditions. In the words of the *Rodriguez* Court, "Modern court procedures and our other adopted ways are all intended to be conducted with *hazhó'ógo* in mind."¹⁷⁶ As a result, the Navajo court stiffened the *Miranda* rule far more than the Supreme Court would require state or federal courts to in similar circumstances.¹⁷⁷

This method may be transferable to other tribal courts as well. For example, many Anishinaabe people from the Great Lakes region are taught how to live in *ni-noo'-do-da-di-win'*, or harmony.¹⁷⁸ These Indian people should live what some refer to as the "good life," or *bimaadiziwin*.¹⁷⁹ A Leech Lake Ojibwe elder defined the *bimaadiziwin* as follows:

¹⁷⁴ See KEITH BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE 40 (1996).

¹⁷⁵ Navajo Nation v. Rodriguez, No. SC-CR-03-04, at 10 (Navajo Nation Supreme Court 2004), available at <http://navajolawblog.com/wp-content/Rodriguez.pdf>.

¹⁷⁶ *Id.* at 10.

¹⁷⁷ See *id.* at 12.

¹⁷⁸ EDWARD BENTON-BENAI, THE MISHOMIS BOOK: THE VOICE OF THE OJIBWAY 113 (1979).

¹⁷⁹ Lawrence W. Gross, *Cultural Sovereignty and Native American Hermeneutics in the Interpretation of the Sacred Stories of the Anishinaabe*, 18 WICAZO SA REV. 127, 128 (2003);

Every day you will learn something different, every day a new piece of knowledge. That's the way you live your life [*Mii i'w akeyaa bimaadiziyan*]. Then you approach those things a little more to hear them, to see them. And the Spirit shares. That's how you search for the good things. Nothing bad will come of it.¹⁸⁰

“Although the Anishinaabe themselves are loath[e] to establish a limited, set definition of [*bimaadiziwin*], some of the parameters of the Good Life include humility, generosity, and kindness.”¹⁸¹ These could be identified by Anishinaabe tribal judges as the primary rules of the Anishinaabe people. They provide the ground rules for behavior in Anishinaabe communities and provide interpretative parameters for Anishinaabe tribal judges.¹⁸² The adjudicative work of tribal judges would follow from these understandings in much the same way as the Navajo judges perform their work.

There will be concerns that many Anishinaabe tribal judges are unqualified to interpret *bimaadiziwin* in the context of a modern dispute that turns into complex litigation. More likely than not, these judges will not speak or read Anishinaabemowin, the language, but that should not preclude the attempt to apply these primary rules.

The critical advantage to identifying primary rules first as the method of identifying customary law is that it allows tribal courts to bring customary law into the modern era without creating much additional confusion as to the application of the law. The primary rule of *bimaadiziwin* may serve to affect, perhaps, the application of state and federal law analogs in a tribal election dispute or a tribal personnel dispute. This is another way of applying a form of “judicial minimalism” into tribal court jurisprudence in a manner similar to that advocated by Professor Cass Sunstein.¹⁸³

B. Case Method

Another method, which we may label the “case method,” may be the equivalent of a federal or state court attempting to encapsulate a question within the larger context of a paradigmatic Supreme Court case

see also BENTON-BENAI, *supra* note __, at 12 (referring to *ba-ba'-ma-di-zi-win'* as “journey”).

¹⁸⁰ Hartley White, *This is a Good Way of Life [Onizhishin o'ow Bimaadiziwin]*, in LIVING OUR LANGUAGE: OJIBWE TALES & ORAL HISTORIES, A BILINGUAL ANTHOLOGY at 216, 218-19 (Anton Treuer, ed. 2001).

¹⁸¹ Gross, *supra* note __, at 128.

¹⁸² Cf. Gross, *supra* note __, at 128-29.

¹⁸³ See generally, e.g., Cass R. Sunstein, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

such as *Miranda v. Arizona*¹⁸⁴ or *Johnson v. M'Intosh*.¹⁸⁵ It would be tempting to dust off the *Ottawa First Book*¹⁸⁶ for guidance as to modern disputes, as suggested in the introduction to this Article. Or to dig into the more detailed collection of Cheyenne tribal cases described (famously) by Professors Karl Llewellyn and E. Adamson Hoebel¹⁸⁷ or the Zuni case (not so famously) by Watson Smith and John Roberts.¹⁸⁸ But these cases are the results of adjudications by judges and leaders of an older time. As Llewellyn and Hoebel wrote, "Cases are of course themselves no substitute for sound theory...."¹⁸⁹ These case compendiums offer little to modern tribal courts, unless a tribal judge can extract from them a primary rule that sustains the tribal community even today. But one suspects that the non-Indian compilers of these cases would not have been able to see that primary rule, especially if buried in the language of the people.

A variation of this method may be to identify a paradigmatic tribal story or stories that have some relevance to the dispute at issue. Professor John Borrows suggested this concept in his work.¹⁹⁰ It is more difficult to see the relevance of tribal legends and stories to modern dispute resolution in the manner Borrows suggests. For example, Borrows draws the rule in administrative law cases that all administrative remedies must be exhausted, with notice given to all affected parties, from the story of the Duck Dinner, in which the Anishinaabe trickster Nanaboozhoo (or any of numerous spellings) decapitates a number of ducks for his dinner, falls asleep while they are cooking, and is angered upon awakening to find them gone.¹⁹¹ It is difficult to draw limits on the interpretation of these stories and is probably inferior to the application of primary rules. "In this schema, a plurality of meanings for Anishinaabe myths becomes possible, but it is

¹⁸⁴ 384 U.S. 436 (1966).

¹⁸⁵ 21 U.S. 543 (1823).

¹⁸⁶ See Rivers, *supra* note __.

¹⁸⁷ See generally KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

¹⁸⁸ See generally WATSON SMITH & JOHN M. ROBERTS, *ZUNI LAW: A FIELD OF VALUES* (1954).

¹⁸⁹ LLEWELLYN & HOEBEL, *supra* note __, at 40.

¹⁹⁰ See JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* 46-54 (2002) (applying the Anishinaabe story, "The Duck Dinner," to a modern environmental dispute).

¹⁹¹ See BORROWS, *supra* note __, at 46-54; see also Archie Mosay, *When Wenebozho Decapitated the Ducks*, in *LIVING OUR LANGUAGE*, *supra* note __, at 31, 31-33 (retelling the same story with a twist involving Sioux Indians).

not the case that anything goes.”¹⁹² Some limitation in meaning must be present or else there will be no meaning at all.

Conclusion

Tribal courts have an unusual opportunity to mold tribal jurisprudence in a manner that speaks to Indian people. Tribal leaders, with prodding from both Congress and even the Supreme Court, often have instructed tribal judges to find and apply tribal customary and traditional law. The desire to find and apply customary law is there, but what is missing is the method. Tribal judges often are at a loss.

This Article offers a first look at theorizing intratribal common law in terms of the mechanics for tribal judges. I suggest going back to basics and relearning H.L.A. Hart’s theory of primary and secondary rules, rather than applying piecemeal and artificial understandings of tribal customs.

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¹⁹² Gross, *supra* note __, at 128.