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AMERICAN INDIAN CUSTOMARY LAW IN THE MODERN COURTS OF AMERICAN INDIAN NATIONS

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I. INTRODUCTION

American Indian nations need encouragement and support with funds, favorable laws, research, and scholarship to improve life and conditions on their reservations. Core traditional values need to be identified, revitalized, and used to address and solve modern community problems. Leaders of Indian nations and professionals who advise them should understand that the future of Indian nations partly lies in renewed cultures, languages, and religious practices, and in utilizing them in the nation-building process. One way that Indian nations can begin working with traditional precepts is by using them as customary law in the dispute resolution process.[1] Traditional dispute resolution methods should also be revitalized and activated because, as the Navajo Nation has experienced, traditional methods such as peacemaking, when compared to court litigation, are inexpensive, require less time, do not require much personnel, and allow disputants to reach consensual solutions to their problems.

As this article shows, a few Indian nations have proven that traditional values work very well when used as law in Indian nation courts. This article recommends that more Indian nation courts, and the practitioners in those courts, engage in this kind of lawmaking as part of the nation-building process and exercise

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[1] Customary law refers to the longstanding values, customs, and traditions of American Indian nations. These values, customs, and traditions are found in American Indian cultures, languages, and religions.

sovereignty the Indian way. Furthermore, this article recommends that leaders of American Indian nations seek out their own nation's long-standing cultural values, apply them to reservation problems, and gauge their effectiveness.

II. THE UNITED STATES SUPREME COURT ON AMERICAN INDIAN CUSTOMARY LAWS

As early as 1823, the United States Supreme Court acknowledged that Indian nations had their own laws that regulated crimes, relationships, and transactions within their societies.[2] In *Johnson v. M'Intosh*, Indian chiefs sold two plots of land to non-Indian individuals.[3] Later the Indian nations sold lands containing the two plots to the United States.[4] The federal government then deeded the lands, including the two plots, to other individual non-Indians.[5] A dispute arose between the non-Indians as to who had superior title: the parties who received their titles directly from the Indian landowners or the parties who received their deeds from the federal government.[6] The Supreme Court held that although a person who obtains land from an Indian nation has a right to it under the laws of that nation, that right cannot be recognized in the courts of the United States.[7] The Supreme Court said, "The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws."[8] Although deeds to land granted by an Indian nation to individual non-Indians may not be enforceable in United States courts (at least in 1823), the Supreme Court, nonetheless, recognized the customary laws of an Indian nation can protect these kinds of property transactions in tribal forums.[9]

One hundred and thirty-six years after *Johnson v. M'Intosh*,[10] the Supreme Court affirmed in *Williams v. Lee* that Indian nations have the inherent right to make their own laws and be ruled by them.[11] Today, Indian nations' laws include statutory laws that make up tribal codes, tribal customary laws, administrative rules and regulations, court rules, and tribal government policies. Although

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[2] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 568 (1823).

[3] *Id.* at 571–72.

[4] *Id.* at 593–94.

[5] *Id.* at 560.

[6] *Id.* at 594.

[7] *Id.* at 604–05.

[8] *Id.* at 593.

[9] *Id.*

[10] *Id.* at 543.

[11] 358 U.S. 217, 221–23 (1959). The United States Supreme Court also confirmed the right of Indian nation courts to use Indian customary law in *United States v. Wheeler*, 435 U.S. 313, 331–32 (1978).

Indian nations do not need authorization from the Supreme Court, Congress, or the executive branch to use customary laws, these decisions of the nation's highest Court show that the federal government acknowledges that Indian customary laws exist and tribes have the inherent right to utilize them to solve legal and community problems within their jurisdictions.

The Navajo Nation took *Williams v. Lee*'s words of sovereignty to heart and began to aggressively identify long-standing Navajo customs and traditions and apply them in solving legal issues and community problems.[12] Today, the Navajo Nation is a leader among Indian nations—and very likely among the world's indigenous peoples—on using indigenous customs and traditions to solve modern problems. Navajo customary law, called Navajo common law, is the law of preference in the Navajo Nation courts.[13] Navajo common law refers to the customs, traditions, and values that are applied as law and come from Navajo culture, language, and spirituality.[14] In the absence of statutory law, the Navajo Nation courts use Navajo common law as primary and substantive law to resolve legal issues. Navajo common law is also used to interpret Navajo statutes and non-Navajo laws, such as the individual rights provisions in the federal Indian Civil Rights Act of 1968.[15] Furthermore, Navajo common law guides the Navajo Nation government as it engages in policymaking and daily governmental operations.

The federal government recognizes 565 American Indian tribes as possessing the right to self-government.[16] Two hundred and forty-eight American Indian tribes have formal tribal court systems or court systems based on the American form of courts.[17] Only a handful of these tribal courts use customary law.[18]

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[12] 358 U.S. at 223. The decisions of the Navajo Nation Supreme Court and Navajo Nation trial courts are published in the Navajo Reporter. The eight volumes of the Navajo Reporter contain decisions from 1969 to 2005. Navajo court decisions issued after 2005 are in slip opinion form. A substantial amount of the Navajo Nation court decisions apply Navajo customary law to modern legal issues. Navajo Nation court opinions are cited according to the Navajo Nation Supreme Court's Order Establishing a Uniform Citation System for Opinions, as set forth in *In re a Universal Citation System for the Decisions of the Courts of the Navajo Nation*, No. SC-SP-01-00, slip op. at 1–2 (Nav. Sup. Ct. January 23, 2004).

[13] Navajo Nation v. Platero, 6 Nav. R. 422, 424 (Nav. Sup. Ct. 1991).

[14] *Id.*

[15] 25 U.S.C. § 1302 (2006). Some of the rights enumerated in the Indian Civil Rights Act are the free exercise of religion, freedom of speech, freedom of the press, due process, equal protection, and criminal procedure rights like probable cause required for search warrants, sentencing limitations, prohibition against cruel and unusual punishment, and the right to a jury trial. *Id.* § 1302(1)–(10).

[16] *Frequently Asked Questions*, U.S. DEPARTMENT INTERIOR, INDIAN AFF., http://www.bia.gov/FAQs/index.htm (last visited Apr. 22, 2011).

[17] *Id.*

[18] Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 81–82 (2007) (citing Steve Aycock, Thoughts on Creating a Truly Tribal

Leaders of Indian nations must understand that long-standing tribal values, customs, and traditions are sources for problem-solving, not only in the legal arena but also in areas like health and social welfare, education, and government. This process of looking inward for solutions can be described as Indian peoples doing self-government and self-determination the Indian way, by drawing on Indian thinking and long-used Indian methods and normative precepts to solve community problems.

The Navajo Nation courts are skilled at this way of problem-solving. This article explains the methods the Navajo Nation courts and practitioners use to draw customary laws from Navajo culture, language, and spirituality and apply them to legal issues. Navajo common law is one means that the Navajo Nation utilizes to practice self-determination, solve modern problems, and ensure a future for the Navajo people. Navajo common law represents the laws that the Navajo people know and understand. Indian nations across North and South America and indigenous peoples around the globe can learn from the Navajo Nation and use their own long-standing customs and traditions to address their modern problems.

III. THE HISTORY OF INDIAN NATION COURTS

Customary laws and traditional methods of dispute resolution were widely practiced by the American Indian peoples long before the federal government imposed the American form of courts on Indian country in 1883.[19] Traditional American Indian methods for dispute resolution, although unique to each tribe, are usually non-adversarial in practice and function in some ways like American mediation rather than the litigious style of American courts. American Indian peacemaking is now the general term used to identify the various forms of traditional American Indian dispute resolution methods. The Navajo people's traditional forum is called *hózhooji naat'áanii*. *Hózhooji naat'áanii* is a dispute resolution ceremony that has, as its chief goals, the healing of relationships and restoration to harmony of individuals with their communities. American Indian peacemaking usually uses prayer, free-flowing discussion of the underlying causes of the dispute, cultural values, elders and other respected individuals to advise the disputants and participants, and consensus to arrive at a solution. Like Navajo peacemaking, traditional native methods of dispute resolution work to repair relationships among individuals and restore harmony in the community.

Jurisprudence, *in* Conference Materials, Indigenous Justice Systems of North America, 2nd Annual Indigenous Law Conference, Michigan State University College of Law (Mar. 17–18, 2006) (on file with author)). Also, it has been the author's experience that few courts of American Indian nations use customary law.

[19] In 1883, the Bureau of Indian Affairs approved administrative regulations that authorized establishment of the Court of Indian Offenses on different American Indian reservations.

The reformers and federal bureaucrats of the 1880s were not deterred by the fact that Indian nations already possessed well-established customary laws and traditional forums for resolving disputes as they designed and imposed an American form of legal institution on Indian nations.[20] Established in 1883 by the Bureau of Indian Affairs, the Court of Indian Offenses (also called the CFR court) served as one of the tools to implement the federal government's Indian assimilation policy.[21] Inherent in the assimilation policy was the idea that the Indians had to first be "civilized" before assimilation into American mainstream society could occur. Several federal programs—all intended to destroy Indian cultures, languages, religions, and property—were established to carry out the policy. Most notable among these programs to "civilize" the Indians were the reservation system, the federal Indian boarding school system, the spread of Christianity on reservations, the General Allotment Act of 1887, and the establishment of American forms of criminal and civil laws and courts on Indian reservations.[22]

A. The Court of Indian Offenses

The assimilationists believed that the best way to assimilate the Indian peoples into American society was to strip them of their cultures, languages, and religious practices and then indoctrinate them with Christianity and American laws, values, and ways of life. To that end, on December 2, 1882, Secretary of the Interior Henry M. Teller recommended the drafting of civil and criminal rules for use on Indian reservations to end the Indians' "savage and barbarous practices," which were "a great hindrance to [their] civilization."[23] Carrying out Secretary Teller's directive, Hiram Price, Commissioner of Indian Affairs, established a set of criminal and civil rules which included rules for the Court of Indian Offenses.[24] The Bureau of Indian Affairs approved them as "Rules Governing the Court of Indian Offenses" (law and order regulations) on April 10, 1883.[25]

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[20] WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 3–4 (1966). The reformers were primarily Easterners who believed that the solution to the Indian problem was the speedy acculturation of the American Indian peoples into American mainstream society. *Id.*

[21] SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 175 (1994). The Court of Indian Offenses was established using the Code of Federal Regulations; hence the term CFR court. Destruction of American Indian tribalism—cultures, languages, religions, and communal land holdings—was at the heart of the Indian assimilation policy.

[22] Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887); HARRING, *supra* note 21, at 13.

[23] H.R. EXEC. DOC. NO. 48-1, pt. 5, vol. I, at xi–xii (1883), *in* AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880–1900, at 296 (Francis Paul Prucha ed., 1973) [hereinafter AMERICANIZING THE AMERICAN INDIANS].

[24] *See* HAGAN, *supra* note 20, at 108–09.

[25] *Id.* at 109.

In short, the 1883 Bureau of Indian Affairs law and order regulations criminalized traditional Indian dances, traditional marriage and divorce, community and social gatherings, traditional probate, traditional burials and mourning practices, and religious practices of medicine men.[26] In essence, the federal government used the law and order regulations to directly attack American Indian cultures and deny American Indians the right to practice their religions.[27] Indian religious practices, including spiritual and healing ceremonies, performed by tribal spiritual leaders were especially problematic for Secretary Teller:

> Another great hindrance to the civilization of the Indians is the influence of the medicine men, who are always found with the anti-progressive party. The medicine men resort to various artifices and devices to keep the people under their influence . . . [and they use] their conjurers' arts to prevent the people from abandoning their heathenish rites and customs. . . . Steps should be taken to compel these impostors to abandon this deception and discontinue their practices . . . .[28]

The Indians who preferred and continued to practice the traditional ways were, of course, the "anti-progressive party."[29] The reservation Indian agent selected "progressive" Indian men to serve as judges on the Court of Indian Offenses.[30] To be "progressive" meant that the individual had to "wear citizens' dress, and engage in civilized pursuits," and most importantly, be non-polygamist.[31] According to the law and order regulations, the judges of the Court of Indian Offenses, assisted by the reservation Indian agent and Indian police, had the task of stamping out all traditional practices that allegedly kept the Indians in an uncivilized state.[32]

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[26] H.R. EXEC. DOC. NO. 48-1, pt. 5, vol. I, at xi–xii, *in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 23, at 296–98. These traditional practices, among others, were deemed offenses and comprised the 1883 (and 1892) Bureau of Indian Affairs law and order regulations. *Id.*

[27] The federal government used the law and order regulations to violate the right of American Indians to freely practice their religions, but no one came to the defense of the Indian peoples.

[28] *Id.* at 297–98.

[29] *Id.* at 296.

[30] VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 115 (1983).

[31] H.R. EXEC. DOC. NO. 52-1, pt. 5, vol. II, at 28–31 (1892), *in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 23, at 301; *see also* HAGAN, *supra* note 20, at 109.

[32] H.R. EXEC. DOC. NO. 52-1, pt. 5, vol. II, at 28–31, *in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 23, at 301–04. Each Indian defendant was charged and tried in the Court of Indian Offenses operating on his or her respective reservation. The Indian police were formed to keep peace and order on Indian reservations and replace the United States Army, which carried out similar functions. The Indian agent selected and supervised the Indian men who served on the reservation's Indian police force. *Id.* at 301–05.

Whether the CFR judges carried out this duty faithfully, especially when it came to the Navajo CFR judges, is debatable.[33]

Right from the beginning, the Court of Indian Offenses appeared to be on shaky legal ground. In 1888, Indian defendants from the Umatilla Indian Reservation in Oregon challenged the constitutionality of the court.[34] In *United States v. Clapox*, the United States District Court for the District of Oregon dealt with the constitutional question this way:

> These "courts of Indian offenses" are not the constitutional courts provided for in section 1, art. 3, Const., which congress only has the power to "ordain and establish," but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.[35]

The lack of constitutional support was obvious but did not matter, because the Court of Indian Offenses, despite its name, was not a court at all but a program established by the federal government to "civilize" the Indians.

By the early 1900s, many Indian reservations had a Bureau of Indian Affairs Court of Indian Offenses in operation, although many were still lacking a formal (i.e., western-style), functioning tribal government. The Bureau of Indian Affairs established a Navajo Court of Indian Offenses on the Navajo Reservation in 1892.[36] The Navajo Nation did not begin a formal, American type of Navajo tribal government until January 7, 1923, when the Secretary of the Interior approved ad hoc regulations drafted by the Bureau of Indian Affairs that inaugurated a twelve-member Navajo Tribal Council.[37] Similar to other Indian nations, the Navajo Nation Court System, which has as its foundation the Navajo Court of Indian Offenses, predates the formal western-style Navajo Nation government.

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[33] *See* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 18–23 (2009) (discussing the use of Navajo customary law in the Navajo Court of Indian Offenses).

[34] United States v. Clapox, 35 F. 575, 576 (D. Or. 1888).

[35] *Id.* at 577.

[36] AUSTIN, *supra* note 33, at 19.

[37] *Id.* at 13. The regulations creating the original Navajo Tribal Council were drafted by Herbert J. Hagerman, who had been appointed by the Secretary of the Interior as Special Commissioner to the Navajo Tribe. *Id.*

Although the job of the Court of Indian Offenses was to apply the Bureau of Indian Affairs law and order regulations, many of its judges found innovative ways to incorporate Indian customary ways into the court's proceedings and decisions. Examples of customary methods frequently used included the "talking to," where the judge or a respected elder would counsel the offender on maintaining proper behavior within the community, and traditional restitution, an American Indian method of payment to a victim to atone for an injury and repair relationships. On the Navajo Nation, the knowledge that most Navajos could not read or write gave a Navajo Court of Indian Offenses judge in the 1930s a perfect opportunity to emphasize his disappointment with the defendant's behavior. While giving the young man a "Navajo lecture" on what is considered right and wrong in Navajo society, the judge pointed to "the laws in this law book" that the young man allegedly violated.[38] The "law book" was a copy of Reader's Digest. A "Navajo lecture," still in use in the Navajo Nation courts today, uses stern words to reproach offenders and counsel them on proper behavior in Navajo society.

The Bureau of Indian Affairs issued new law and order regulations for the Court of Indian Offenses on November 27, 1935 (later amended in 1937).[39] Owing to the recent enactment of the Indian Reorganization Act of 1934,[40] the 1935 law and order regulations permitted use of a few Indian customs in the Court of Indian Offenses.[41] The courts were allowed to employ the Indian custom of restitution as a remedy in criminal cases: "In addition to any other sentence, the Court [of Indian Offenses] may require an offender who has inflicted injury upon the person or property of any individual to make restitution [to the injured party]."[42] Another regulation allowed the judges to use "customs of the tribe, not prohibited by . . . Federal laws" in civil cases, and even recommended that persons familiar with "customs and usages" of the tribe advise the court.[43]

Many Indian nations adopted several provisions of the 1935 Bureau of Indian Affairs law and order regulations, including the two provisions just mentioned, as part of their initial statutory laws pursuant to the 1934 Indian Reorganization

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[38] The late Homer Bluehouse, retired Associate Justice of the Navajo Nation Supreme Court and eye-witness to several proceedings of the Navajo Court of Indian Offenses, told this story to the author in the late 1980s. Justice Bluehouse served with the author on the Navajo Nation Supreme Court from 1985 until his retirement in early 1993. The Navajo CFR judge was admonishing in the Navajo language when he pointed to "the laws" in the "law book."

[39] 25 C.F.R. § 161.23 (1938).

[40] Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461–479 (2006)) (recommending tribes exercise self-government).

[41] Law and Order Regulations, 3 Fed. Reg. 1134, 1137 (May 18, 1938).

[42] *Id.*

[43] 25 C.F.R. § 161.23.

Act.[44] Most Indian nations that organized under the Indian Reorganization Act established constitutional governments and their own tribal courts. The Navajo Nation rejected the Indian Reorganization Act and continued to use the Navajo Court of Indian Offenses until the Navajo Nation Council replaced it with the Navajo Nation Court System in 1958.[45] However, the Navajo Nation Council adopted the Bureau of Indian Affairs law and order regulations and the structure of the Court of Indian Offenses for its court system and even hired the judges of the Navajo Court of Indian Offenses as the first judges of the Navajo Nation courts.[46]

B. Modern Courts of Indian Nations

Today, approximately two hundred and twenty-five tribal courts and twenty-three Courts of Indian Offenses operate on Indian reservations throughout the country.[47] The judicial systems of most American Indian nations have a trial court and an appellate court. Depending on caseloads and funding, several Indian nations within a geographic region may organize and use one intertribal court system.[48] Each participating Indian nation usually appoints a judge of its choice to the intertribal court system.

Some Indian nations allow only their members to serve as judges on their courts while others have a mixture of member and non-member judges, including law professors and retired state and federal court judges. Judges of Indian nation courts can be a mixture of state-licensed attorneys and lay practitioners who are called tribal-court advocates. Tribal-court advocates generally are not law school graduates but have obtained experience in tribal court practice and law through an apprenticeship or study at a tribal college and/or a certified paralegal program.[49]

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[44] Section 16 of the Indian Reorganization Act authorized tribes to adopt constitutional governments, including court systems, as a means of tribal self-government. The Navajo Nation government is not organized under the Indian Reorganization Act. Although at least four attempts have been made to adopt a constitution, the Navajo Nation does not have a written constitution today.

[45] *See* Navajo Tribal Council Res. No. CO-69-58 (Oct. 16, 1958). This resolution established the Navajo Nation Court System.

[46] *Id.*; *see also infra* note 63 and accompanying text.

[47] *Frequently Asked Questions*, *supra* note 16.

[48] See, for example, the Southwest Intertribal Court of Appeals, Albuquerque, New Mexico, and the Northwest Intertribal Court System, Lynnwood, Washington.

[49] Tafoya v. Navajo Nation Bar Ass'n, 6 Nav. R. 141, 143 (Nav. Sup. Ct. 1989) (noting that advocates are indispensable to tribal court practice because they "are familiar with the customs and traditions of their people").

Navajo law requires Navajo court judges to be enrolled members of the Navajo Nation, speak the Navajo language, know Navajo culture and traditions, and have several years of practical legal experience in the Navajo Nation courts.[50]

Annual caseloads of tribal courts vary from less than 100 cases for the small courts to an average of 70,000 cases for the larger Navajo Nation courts.[51] Indian nation courts handle many kinds of cases including domestic relations, probate, torts, crimes, contracts, enrollment matters, gaming disputes, employment, land and natural resources issues, and suits against the nation's government. Although suits against non-Indians in Indian nation courts receive the most attention from scholars (and the United States Supreme Court) and generate prolonged and costly litigation through the federal court system, they only account for a small percentage of total yearly caseloads.[52] The majority of cases handled by tribal courts involve parties who are members of the Indian nation or are all Indians (i.e., member and non-member Indians) and concern matters internal to the tribe, tribal and individual property, and tribal lands and natural resources. Funds for court operations are a mixture of federal funds (allocated to tribes through the Bureau of Indian Affairs), Indian nation general funds, and federal, state, and private grants.

IV. AUTHORITY FOR THE USE OF CUSTOMARY LAW

Using the Navajo Nation as an example, two kinds of authorization to use customary law exist. The first is cultural or traditional authorization (which is unwritten), and the second is written authorization contained in a constitution, code, or court rule. The authorizing provision usually sets the boundaries for the use of customary law in the nation's court and/or the traditional dispute resolution forum. Traditional dispute resolution forums are non-adversarial and are generally called peacemaking. On the other hand, a provision in an Indian nation code may preclude use of customary law in the tribal court altogether. For some Indian nations, authorization to use customary law may not be in

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[50] NAVAJO NATION CODE ANN. tit. 7, § 354(A)–(D) (2005) (the Navajo Nation Code is hereinafter cited as "__ N.N.C. § __," in accordance with citation instructions set forth in the Code at page XI, Volume 1). There are several additional qualifications for the position of Navajo Nation judge, including education, age, and lack of criminal convictions. 7 N.N.C. § 354(A)–(D).

[51] 2009 JUD. BRANCH NAVAJO NATION ANN. REP. 34, *available at* http://www.navajocourts.org/Reports/FY2009%20Annual%20Report.pdf (noting that the Navajo Nation courts had 73,193 open cases (yearly caseload) for Fiscal Year 2009 (Oct. 1, 2008–Sept. 30, 2009)). See http://www.navajocourts.org for the Quarterly and Annual Reports of the Navajo Nation courts.

[52] The Navajo Nation Judicial Branch does not keep statistics on the number of civil cases litigated in the Navajo Nation courts by non-Indians, but the best estimate is they number less than 1000 cases per year. The United States Supreme Court took away tribal court criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

the constitution, code, or court rules, which brings up an important question: Does the lack of written authorization preclude a tribal court from using customary law?

A. Traditional Authorization

We live in a world of the written word, which has conditioned some people to believe that the written word is more valuable and credible than the oral tradition. When tribal court judges cannot locate a written provision, such as in the tribe's constitution, code, or court rule, authorizing them to use customary law, they might conclude that they do not have authority to do so. This reasoning is not consistent with either the ruling in *Williams v. Lee*,[53] that Indian nations possess a right to make their own laws and be ruled by them, or the modern federal policy of self-determination that American Indian peoples believe is the proper course. It would also mean tribal court judges are denying the use of Indian customary law by allowing western concepts on the application of law to control what is essentially tribal court decision making. Modern Indians and tribal government officials can, at times, think like the ancestors to construct frameworks to apply to internal problems. Relying on traditional thinking to construct methods and solve problems is "doing sovereignty" the American Indian way.

Before the introduction of the American form of courts and laws among the American Indians, the traditional peacemaker did not ponder whether authority was available allowing him to use customary law—the authority was inherent in the culture which brought about the position of peacemaker. Furthermore, the authority to use normative precepts was inherent in the tribe's culture and long-standing dispute resolution practices. In other words, disputes had to be settled so harmony, peace, and positive relationships prevailed within the community.

American Indian cultural knowledge, primarily contained in oral narratives, contains doctrines, principles, and postulates that permit the use of customs and traditions in dispute resolution and community problem-solving. Traditional knowledge provides ample authority for the use of customs and traditions as law in modern Indian nation courts. Indian judges of the Court of Indian Offenses, including the Navajo CFR judges, relied on culture and long-standing dispute resolution practices to incorporate native normative precepts into their court proceedings even before the Bureau of Indian Affairs allowed the use of Indian custom in the 1930s. The past provides assurance that a modern court of an Indian nation can tap its own culture and traditional dispute resolution practices for authorization to use customary law.

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[53] 358 U.S. 217, 222–23 (1959).

B. Written Authorization

Most Indian nation codes have a choice of law statute similar to the one found in the Navajo Nation Code:

> A. In all cases the courts of the Navajo Nation shall first apply applicable Navajo Nation statutory laws and regulations to resolve matters in dispute before the courts. The Courts shall utilize Diné bi beenahhaz'áanii (Navajo Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulations. The courts shall also utilize Diné bi beenahaz'áanii whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts.
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> B. To determine the appropriate utilization and interpretation of Diné bi beenahaz'áanii, the court shall request, as it deems necessary, advice from Navajo individuals widely recognized as being knowledgeable about Diné bi beenahaz'áanii.[54]

Statutes similar to the Navajo choice of law statute grant Indian nation courts express written authority to apply customs and traditions to resolve disputes and to request the advice of elders (the people I call "the tribal encyclopedia") to help clarify issues concerning a custom or tradition. Written authorization may also be given in a constitution or in a court rule.[55] For example, a Navajo probate rule states, "If there is shown to be a Navajo custom concerning the distribution of property, the property will descend according to that custom, even if the custom is in conflict with any other provision of this rule."[56]

In addition to explicit authorization, the choice of law statute determines the order by which the court applies the laws. The Navajo statute requires that the Navajo Nation courts first apply Navajo statutory laws and regulations and then Navajo common law, if a statutory law does not address the issue.[57] Navajo common law can be used to interpret Navajo statutory laws and non-Navajo laws.[58] Next, the Navajo Nation courts can resort to "applicable federal laws

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[54] 7 N.N.C. § 204(A)–(B).

[55] PASCUA YAQUI TRIBE CONST. art. VIII, § 2. For example, the Pascua Yaqui Tribe Constitution provides, "The jurisdiction of the courts shall extend to all cases in law and equity arising under, this constitution and the laws, traditions, customs or enactments of the Pascua Yaqui Tribe consistent with the provisions of this constitution." *Id.*

[56] NAVAJO R. PROBATE P. 6(10). The court rules for the courts of the Winnebago Tribe of Nebraska also authorize use of Winnebago customary laws. WINNEBAGO TRIBAL CODE tit. 2, §§ 2-104, 2-111(1)(A) (1994).

[57] 7 N.N.C. § 204(A).

[58] Non-Navajo laws include state and federal statutes and court decisions that are argued as authority in the Navajo Nation courts.

or regulations" in the absence of applicable Navajo law.[59] Last in the order of preference is state law.[60]

The Navajo choice of law statute given above has its source in the Bureau of Indian Affairs law and order regulations that were approved by the Secretary of the Interior on November 27, 1935, and reissued in 1937.[61] The relevant provision in the Bureau of Indian Affairs law and order regulations provided:

> 161.23 Law applicable in civil actions. In all civil cases the Court of Indian Offenses shall apply . . . any ordinances or customs of the tribe, not prohibited by . . . Federal laws.
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> Where any doubt arises as to the customs and usages of the tribe the Court may request the advice of counsellors [*sic*] familiar with these customs and usages.[62]

Many Indian nations, including the Navajo Nation, adopted several provisions of the 1937 Bureau of Indian Affairs law and order regulations (often word-for-word) as their initial laws on domestic relations, criminal offenses, and court procedures.[63]

V. HOW THE NAVAJO COURTS FIND AND USE CUSTOMARY LAW

Before discussing the use of Navajo common law in the Navajo Nation courts, it is important to understand some basic facts about access to customary law. Colonization and destructive federal Indian policies, including forced removals, assimilation, and termination, caused varying amounts of damage to American Indian languages, cultures, and religious practices so that in some modern tribal courts remnants of old values may be useless as customary law. Some Indian nations do not have anyone knowledgeable about the tribe's past culture, religious practices, and language, all of which contain customary law. Tribes left with little of their traditional culture or language are not known to use customary law in

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[59] 7 N.N.C. § 204(C).

[60] *Id.* § 204(D). Three states partially overlap the Navajo Nation: northeastern Arizona, northwestern New Mexico, and southeastern Utah. The Navajo Nation is located in the four corners area of the southwestern United States.

[61] 25 C.F.R. § 161.1 (1938). The 1937 law and order regulations added livestock and grazing regulations that applied specifically to the Navajo and Hopi reservations. *Id.*

[62] *Id.* § 161.23.

[63] For example, in 1959 the Navajo Tribal Council adopted the Bureau of Indian Affairs law and order regulations as Navajo law: "Pending the adoption by the Navajo Tribe and approval thereof by the Secretary of the Interior of a permanent law and order code, the law and order regulations of the Department of the Interior, 25 CFR 11, . . . are hereby adopted as tribal law . . . ." Navajo Tribal Council Res. No. CJA-1-59 (Jan. 6, 1959).

their courts or government. Some Indian nations may have members who know bits of culture and language but whose knowledge is not sufficient enough to overcome credibility and relevancy objections during litigation.

Locating an Indian nation's applicable customary law in a particular case can require time and effort if the tribe's customs and traditions are unwritten.[64] Although time-consuming, such research is certainly not impossible because, just like other kinds of legal research, a tribe's customary law can be found in literature (e.g., books, research studies, articles, or court cases) or by locating individuals, usually elders, who carry that knowledge. Attorneys, including non-Indian attorneys, who are members of the Navajo Nation Bar Association and practice in the Navajo Nation courts (and federal and state courts) have shown repeatedly that locating and using customary law in litigation is not something that is "unusually difficult for an outsider to sort out" or do.[65] There are certainly challenges in finding and using customary law, but litigators should not shy away from revitalizing traditional values and applying them as law in the courts and other dispute resolution forums of American Indian nations.[66]

A. Notice and Defining Customary Law

A party wishing to rely on customary law should state the law in a pleading, preferably as early in litigation as possible, so the court and all parties to the case are properly afforded notice.[67] Notice allows the opposing party an opportunity to locate its own witnesses and identify relevant customs that it may want to

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[64] The Hopi Appellate Court stated very well the challenges associated with finding unwritten 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 [meaning non-Hopi law]. 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.

Hopi Indian Credit Ass'n v. Thomas, No. AP-001-84, 1996 NAHT 0000007, ¶ 28 (Hopi App. Ct. Mar. 29, 1996) (VersusLaw).

[65] Nevada v. Hicks, 533 U.S. 353, 385 (2001) (Souter, J., concurring).

[66] There really is no such thing as "American Indian customary law." The diversity of American Indian tribes allows for only a particular nation's common law, such as Navajo common law or Hopi common law. To go beyond a specific nation's common law into what might be called Indian common law leads to generalities and pan-Indianism.

[67] *See In re* Estate of Belone, 5 Nav. R. 161, 164 (Nav. Sup. Ct. 1987). "Where a claim relies on Navajo custom, the custom must be alleged, and the pleading must state generally how that custom supports the claim." *Id.* The Hopi Appellate Court recommends that custom be alleged at the trial court first: "A party who intends to raise an issue of unwritten custom, tradition or culture must give notice to the trial court and to the other party." Polingyouma v. Laban, No. AP-006-95, 1997 NAHT 0000018, ¶ 27 (Hopi App. Ct. Mar. 28, 1997) (VersusLaw).

introduce. Notice also gives the court time to evaluate the offered customs and determine whether they are acceptable as customary law and whether other customs are available that might be applied using the doctrine of judicial notice.[68]

Conflict among offered customs can be resolved in one of two ways. First, the court can use its discretion to decide which custom is relevant and useful as customary law in the case. The court should clearly state in its order why it selected custom X over customs Y and Z to preserve the ruling in case of appellate review. Second, the court can form an advisory panel of elders (or knowledgeable people). The court selects one elder and the plaintiff and defendant each select one elder to complete the panel. The court still exercises its discretion in deciding which custom is law and should be used in the case.

A question may arise as to whether an identified custom has the force of law, but that issue is properly left to the discretion of the judge because the answer is embedded in the tribe's culture, language, spirituality, or ways of doing things.[69] A custom that is not law for one tribe may be law for another tribe. For example, a handshake as part of a greeting is a well-known custom, but it is not law. A handshake at the end of oral contracting might be enforceable as customary law for a tribe that practices it as a final act of oral contracting. On the other hand, a similarly performed handshake may only be a custom and not customary law for a tribe that does not consider it integral to oral contracting.

The job of determining what is customary law is easier in the Navajo Nation courts, because Navajo judges are required by law to speak the Navajo language and understand Navajo culture and spirituality, including the complex kinship system.[70] The traditional values that the Navajo Nation courts apply as customary law are usually well known as "law" by the Navajo people. In other words, some well-known Navajo customs function as "law" through "people-practice" in Navajo communities.[71] This is not to say that the courts of Indian nations do not need written guidelines to help litigants and practitioners determine which customs have the force of law in their jurisdictions. Guidelines in this area should be available in a court opinion.

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[68] *See infra* note 80 and accompanying text (defining the judicial notice doctrine).

[69] The following excellent articles should help Indian nation courts decide which customs have the force of customary law: Fletcher, *supra* note 18; Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319 (2008).

[70] 7 N.N.C. § 354(A)(5).

[71] One Navajo common customary law is *nályééh* (restitution). If there is an injury, the families of the tortfeasor and the injured get together, talk over the problem, and agree on the amount of restitution to be paid to the injured person.

B. The "Tribal Encyclopedia"

Most tribal court judges know that elders, ceremonial practitioners (people non-Indians call "medicine-men" or "-women"), traditional dispute resolvers ("peacemakers"), retired tribal court judges who have knowledge of customary law, and people who generally live a traditional lifestyle are the best sources of customary law.[72] I refer to these knowledgeable people as the "tribal encyclopedia" because they carry the tribe's language, culture, spirituality, and history in their heads. An individual who carries traditional knowledge can be qualified as an expert on such and then testify to traditional values that can be applied as customary law.

The party relying on custom should make sure that the witness, especially if the witness is an elder or a ceremonial practitioner, understands why and how the narrative or traditional value will be used in the dispute resolution process. This explanation on use of custom in court should be done at the beginning of the interview process or at first contact with the potential witness to make sure the witness thoroughly understands the process and what is at stake. If the elder agrees to testify on custom, then any issue related to in-court interpretation or translation should be addressed as early as possible.

Everyone involved in a court case should understand that a traditional person may refuse to disclose sacred knowledge (also called guarded knowledge) or knowledge that applies only in ceremony. A traditional person may also refuse to disclose knowledge that is out of season. For example, some Navajo narratives can be told only in the winter; thus, an elder may caution that customs contained in winter stories should not be disclosed during the summer, although they may be used in the summer if disclosed in the winter. The testimonial boundaries should be mapped and understood to prevent disclosure issues from arising for the first time while the witness is under oath.

For the benefit of practitioners who practice in the tribe's courts, a court of an Indian nation should establish written guidelines on the qualifying of experts based on the tribe's traditional values. These guidelines should establish a roadmap to the kinds of evidence necessary to qualify a person as an expert witness on the tribe's customs and traditions that can serve as customary law. Appellate or trial court opinions, rules of evidence, or an ad hoc set of rules can contain written guidelines.[73] Factors that can be considered for the guidelines include the witness's skill, knowledge, or experience with the tribe's culture, language, or

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[72] The leading Navajo case that explains the process for introducing customary law into litigation before the Navajo Nation courts is *In re Estate of Belone*, 5 Nav. R. 161.

[73] *Id.* The Navajo Nation Supreme Court set forth such guidelines for its trial courts and practitioners. *Id.*

spiritual practices. Knowledge of tribe's values can be obtained through traditional education (e.g., knowledge of creation narratives, traditional stories, or trickster stories), practice (e.g., ceremonial practitioner), skill (e.g., medicine-man's helper, herbalist, or storyteller), and a western form of education (e.g., researcher or author on tribe's culture, linguist, or professor). Finally, care must be taken to ensure that the trial court's discretion regarding the qualifying of experts is preserved, because there are no substitutes for a court's direct observation of the examination of a witness in court.

Customs that can be used as customary law are found in creation narratives, clan narratives, tribal history, maxims, trickster stories, ceremonies, songs, prayers, language, and places, including stories about geographical features and special places. Language is always a rich source of customary law. The Navajo language is descriptive, as are many American Indian languages. Navajo words can describe customary law in action; words create a mental image of law doing its job. Take for example, the Navajo traditional principle called *bił chi'iniyá*, which literally means "something has slipped past, because of a person's inattentiveness or carelessness," or in the legal sense, "a party has failed to take advantage of an opportunity." Implied in the principle of *bił chi'iniyá* is the notion that the person has control over the matter, a control he can lose. This Navajo customary law has the same legal effect as res judicata and finality in American law. A party who misses the deadline for filing a notice of appeal would be subject to the principle of *bił chi'iniyá*.[74]

C. Written Materials

Customary law can be found in the trial or appellate court opinions of an Indian nation. Customary law, used to resolve an issue in an appellate court opinion, has precedential value and should be treated and argued as such in other cases. Tribal court judges who apply customary law in their decisions should do more than just cite a broad, vague tribal value and call it customary law. Parties to the case, tribal court advocates, fellow tribal court judges, and the public deserve a good explanation of the customary law, which should include background information about the custom, how the custom translates into English, how the custom applies in the nation's culture, and what persuaded the court to rule that the custom is customary law. A tribal court's written analysis of its application of customary law allows for further development of the customary law, establishes the customary law's use as precedent in other cases and sets the groundwork for

[74] An example of how this principle is used to determine appellate jurisdiction is found in *Begay v. Alonzo*, No. SC-CV-40-08, slip op. at 4–5 (Nav. Sup. Ct. November 7, 2008) (a party who has missed the deadline for filing a notice of appeal is subject to the principle of *bił chi'iniyá*). *See also* AUSTIN, *supra* note 33, at 71, 116.

establishing frameworks that can be used to identify, screen, and apply other customs as law. Also, tribal courts "should take care to avoid" using pan-tribal values as their nation's customary law.[75]

The opinions of Indian nation courts can be found in the respective nation's court reporter (e.g., Navajo Reporter); a general court reporter that publishes the decisions of several tribal courts (e.g., Indian Law Reporter); a loose-leaf collection of the respective tribal court's decisions (e.g., those filed in a binder); and online, including in VersusLaw, Westlaw, and Tribal Court Clearinghouse.[76] Traditional values that can be used as law can also be found in academic writings such as those by anthropologists, ethnologists, and legal scholars. Especially useful are books and articles on a specific tribe's culture, stories (e.g., creation narratives), and religious practices. Books are also available on a particular Indian nation's customary law.[77]

Care must be taken, however, when relying on the writings of non-members of a tribe. Academics normally do an excellent job interpreting and describing aspects of American Indian cultures, but even then there is always the inherent translation or interpretation problem if the researcher does not speak the tribe's language and has to rely on translators. For example, the Navajo language is difficult to translate or interpret into English because some Navajo concepts do not have English word equivalents, and some Navajo words express broad meanings that are not easily translatable into English. From my experience, much of the original meaning of a Navajo concept is lost during translation of Navajo words into English, and a poor translator usually intensifies the problem. Furthermore, the problem is enhanced in a courtroom setting because English legal terms do not have equivalents in the Navajo language and American rules on the admissibility of evidence often filter traditional Navajo concepts of much of their original meanings. Moreover, traditional Indian elders get frustrated when their testimony is frequently interrupted by counsel's objections.[78]

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[75] Fletcher, *supra* note 18, at 84.

[76] The Internet address for Tribal Court Clearinghouse is http://www.tribal-institute.org/.

[77] *See generally* AUSTIN, *supra* note 33; KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941); MARIANNE O. NIELSON & JAMES W. ZION, NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE (2005); JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT (2008); RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975).

[78] In many American Indian cultures, including Navajo culture, it is deeply disrespectful to frequently interrupt an elder when he is telling a story, especially if the interruption is not a question seeking to clarify an event just covered.

Some tribal court judges have expressed that writings on a tribe's culture by its own members may be more accurate than those by non-members.[79] That may be true, but it would be a mistake to ignore the writings of non-Indian scholars. The bulk of the research and literature on American Indian cultures available today, including those on old tribal customs and traditions, is by non-Indians. Tribal court judges can utilize customs found in non-Indian authored literature with the caveat that they ensure the identified custom is accurate, relevant, and useful as customary law when applied to the facts in the case.

D. The Judicial Notice Doctrine

One of the best devices available to Indian nation courts to develop their tribal common law jurisprudence is the judicial notice doctrine.[80] An Indian nation's court can utilize the doctrine to initiate its customary law practice and put practitioners on notice that henceforth customary law will be an essential and important part of the nation's legal system. Indian nation courts should define the judicial notice doctrine within the context of the tribe's culture and establish rules for its use in court decision making.

The Navajo Nation Supreme Court has established that a Navajo judge may use the judicial notice doctrine after satisfying the following test: "[I]f a custom is generally known within the community, or if it is capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned, it is proven. . . . [In other words,] 'judicial notice may only be taken of those facts every damn fool knows.'"[81] For example, it is a well-known kinship custom among the Navajo people that a Navajo has the same clan as his or her mother. The Hopi Appellate Court requires the Hopi courts to take judicial notice of "Hopi

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[79] *In re* Estate of Apachee, 4 Nav. R. 178, 180 (W.R. Dist. Ct. 1983). A Navajo Nation trial judge made this observation clear:

> Only some learned treatises on Navajo Ways will be deemed to reflect Navajo common law because this Court's experience with the works of anthropologists, ethnologists and other commentators on the Navajos is that often these works are incomplete, inaccurate or do not reflect the current state of the Navajo common law, which is a living spirit of the Navajo People. The court notes that the more reliable works for use in finding Navajo common law are those authored by wise and experienced Navajo authors. The Diné are the most accurate commentators on themselves.

Id.

[80] BLACK'S LAW DICTIONARY 923 (9th ed. 2009). Judicial notice means a court can accept a well-known and indisputable fact without requiring a party's proof. *Id.*

[81] *In re* Estate of Belone, 5 Nav. R. 161, 165 (Nav. Sup. Ct. 1987) (citing E. CLEARY, MCCORMICK ON EVIDENCE § 329 (3d ed. 1984)).

custom, tradition or culture when it is applicable."[82] Otherwise, the test for judicial notice in Hopi courts is similar to the one for the Navajo Nation courts.[83]

Whenever an Indian nation court takes judicial notice of a commonly known traditional value, it should set forth a clear explanation of its reasoning in its written decision for the benefit of the parties, to preserve the ruling for possible appellate review, and to establish a decision that may have precedential value. The court should explain the source of the custom (e.g., book, article written by anthropologist, advice from an elder, or judge's own expert knowledge); how it is that the custom is "generally known" in the community or tribe; how the custom is relevant to the facts of the case; and any information that would further the court's development of its tribal common law jurisprudence. A proper analysis of the custom as it is found in that tribe's culture, its description, and method of application should prevent the court from generalizing and relying on pan-Indianism. This is not to say that philosophical doctrines common to many Indian nations do not exist. Indigenous peoples throughout the Americas have several common doctrines through which they see the world and which serve as the foundation of their societies.

Tribal appellate and trial court judges, at least those who speak the tribe's language and know the culture, may rely on their own knowledge to take judicial notice of traditional values even though those traditional values may not have been pleaded or otherwise introduced through a witness or literary source. Taking judicial notice of custom without allowing parties an opportunity to comment may be good for judicial economy, but the better approach is to allow litigants to state their positions about the custom through supplemental briefing. This suggested approach applies to an Indian nation's trial and appellate courts. A judge definitely would not want to take judicial notice of an outdated custom or one that is not relevant to the issue before the court. A statement by a Navajo trial judge underscores this point: "Navajo customs cannot be applied in a vacuum, and they must be applied with logic in accordance with present circumstances."[84] There is also the possibility that a local custom, such as a clan custom, may have more relevance to an issue than a more general custom of the tribe. Thus, to prevent errors (and possible embarrassment), a tribal court should allow litigants an opportunity to review and comment on a custom that it has identified as credible for judicial notice before it applies the doctrine.

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[82] Hopi Indian Credit Ass'n v. Thomas, No. AP-001-84, 1996 NAHT 0000007, ¶ 33 (Hopi App. Ct. Mar. 29, 1996) (VersusLaw).

[83] *Id.* ¶ 32 ("A court may dispense with proof of the existence of a Hopi custom, tradition or culture if it finds the custom, tradition or culture to be generally known and accepted within the Hopi Tribe.").

[84] Apache v. Republic Nat'l Life Ins. Co., 3 Nav. R. 250, 252 (W.R. Dist. Ct. 1982).

E. Using Customary Law to Interpret Foreign Law

The term "foreign law" as used in this section means any law that is not the law of the Indian nation. Laws of an Indian nation include statutes in the tribal code, rulings in court decisions, court rules, administrative rules and regulations, and common law (customary law). An Indian nation's laws can be adopted from state and federal laws, including state and federal court decisions, but once adopted, they become laws of the Indian nation. The Navajo Nation Supreme Court made this point clear when addressing a Navajo statute that had been adopted from state law: "[A statute] adopted from an outside source does not, by itself, make it illegitimate, as the Navajo Nation Council has made it the law of the Navajo Nation."[85] Foreign law includes international laws, statutory and caselaw of American states and the federal government, laws of foreign nations, and laws of other American Indian nations. There is not an American Indian nation today that has exclusively traditional customary laws as its law, just as modern courts of Indian nations are not traditional native institutions.

Indian nation courts, at least those that rely on customs and traditions, can use their customary laws to interpret foreign laws. It is therefore important for each Indian nation to develop a test to screen a foreign law's compatibility with the tribe's culture and ways of doing things. For example, as the Navajo Nation Supreme Court has done, a tribal court can use customary law to interpret the due process provision of the Indian Civil Rights Act, but that interpretation should be compatible with due process as understood and applied in the tribe's culture.[86] The Navajo Nation Supreme Court explained,

> Due process under the [Indian Civil Rights Act] . . . must be interpreted in a way that will enhance Navajo culture and tradition. . . . To enhance the Navajo culture, the Navajo courts must synthesize the principles of Navajo government and custom law. From this synthesis Navajo due process is formed.
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> When Navajo sovereignty and cultural autonomy are at stake, the Navajo courts must have broad-based discretion in interpreting the due process [clause] of the [Indian Civil Rights Act] . . . and the [Navajo] courts may apply Navajo due process in a way that protects civil liberties while preserving Navajo culture and self-government.[87]

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[85] Fort Defiance Hous. Corp. v. Lowe, 8 Nav. R. 463, 474–75 (Nav. Sup. Ct. 2004).

[86] 25 U.S.C. § 1302(8) (2006) (outlining the due process provision of the Indian Civil Rights Act).

[87] Billie v. Abbott, 6 Nav. R. 66, 74 (Nav. Sup. Ct. 1988).

Many of the protections found in the Indian Civil Rights Act, such as free exercise of religion, freedom of speech, freedom of assembly, right to private property, assistance of counsel, equal protection, and due process, have all been known and practiced as part of traditional Navajo and other American Indian cultures since time immemorial. American Indian peoples did not first become aware of individual rights through the 1968 Indian Civil Rights Act or even the United States Bill of Rights. Individual and community rights are inherent in traditional American Indian cultures and have been protected by each tribe's customary law for centuries, including prior to European contact.

The experiences of American Indian nations with protecting individual and community rights have long cultural histories. Thus, there should be no question that modern tribal courts have leeway in interpreting the provisions of the Indian Civil Rights Act and "need not follow the United States Supreme Court precedents 'jot-for-jot.'"[88] In fact, by not following United States Supreme Court precedents "jot-for-jot," the Navajo Nation courts have in some cases accorded individuals more protection than the American courts.[89] Therefore, it is important for federal courts to acknowledge and protect the right of Indian nation courts to use traditional values to interpret not only the provisions of the Indian Civil Rights Act but also tribal and non-tribal statutes and court rulings.

VI. CONCLUSION

Federal Indian policies that promoted assimilation, acculturation, and termination did much damage to American Indian cultures, languages, religions, and property holdings. Consequently, at the close of the first decade of the twenty-first century, American Indian peoples still lag behind other Americans in terms of health, educational achievement, economic prosperity, and social well-being. The time is ripe for American Indians, and particularly their leaders, to realize that the solutions to some of these modern problems may lie in their own traditional cultures. Embedded in American Indian cultures, languages, religious

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[88] Nevada v. Hicks, 533 U.S. 353, 384 (2001) (quoting Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 344 n.238 (1998)).

[89] Navajo Nation v. Rodriguez, 8 Nav. R. 604 (Nav. Sup. Ct. 2004) (asserting that when it comes to *Miranda* warnings, Navajo traditional values grant criminal suspects in Navajo police custody broader and more criminal procedure rights than required by federal and state courts); Atcitty v. Dist. Court for the Judicial Dist. of Window Rock, 7 Nav. R. 227 (Nav. Sup. Ct. 1996) (signifying that due process as interpreted by Navajo traditional values grants applicants a right to governmental benefits that they would not otherwise have received if federal court interpretations of due process were applied).

practices, lore, and sense-of-place are useable values, norms, and mores that can help American Indian peoples overcome reservation problems and improve their living standards.

American Indian peoples must use Indian thinking and long-standing tribal ways and methods to empower themselves, address problems on their lands, and develop strategies that can bring them prosperity. It is a process of Indian peoples "doing sovereignty" the Indian way, by relying on their own traditional values to map out and control their futures. Modern tribal dispute resolution forums, including tribal courts and tribal governmental operations, provide opportunities to develop, test, and refine methods and skills that promote use of long-standing customs and traditions to solve contemporary issues. The opportunities for each American Indian nation to set a course for its future are there. We would not want future American Indian generations to say this about their current American Indian leaders—*bił chi'iniyá*.