American Indian Law Review

Volume 38 | Number 2

1-1-2014

Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era

Samuel E. Ennis

Caroline P. Mayhew

FEDERAL INDIAN LAW AND TRIBAL CRIMINAL JUSTICE IN THE SELF-DETERMINATION ERA

Samuel E. Ennis[*] *& Caroline P. Mayhew*[**]

I. Introduction

On March 7, 2013, President Obama signed into law the Violence Against Women Reauthorization Act of 2013 (VAWA).[1] Section 904 of the VAWA expressly affirmed Indian tribes' inherent criminal jurisdiction over non-Indians for crimes of domestic violence or dating violence, as well as criminal violations of certain protection orders that occur in Indian country.[2] As the first recognition of tribal criminal authority over non-Indians since the Supreme Court extinguished such jurisdiction in 1978,[3] section 904 was hailed as a victory by tribal advocates[4] and represents a major development in federal Indian law's treatment of and interaction with tribal law and tribal justice systems.

As sharply illustrated in the VAWA, however, federal Indian law appears to be accelerating in a direction that simultaneously supports the development of robust, contemporary tribal law — a goal closely aligned with the current stated federal policy of Indian self-determination and self-governance — and also cautiously seeks to align tribal judicial exercise more closely with American state and federal practices. Even in taking the

---

* Associate Attorney, Sonosky, Chambers, Sachse, Endreson & Perry, LLP. Mr. Ennis would like to thank Reid Peyton Chambers and Colin Cloud Hampson for their insightful review and edits and Caroline Mayhew for her dedication and excellent writing. The views expressed by the author do not reflect those of Sonosky, Chambers law firm, its attorneys, or any of its clients.

** Associate, Hobbs, Straus, Dean & Walker, LLP. The views expressed by the author do not reflect those of Hobbs, Straus, Dean & Walker, its attorneys, or any of its clients.

1. Pub. L. No. 113-4, 127 Stat. 54 (2013).

2. *Id.* tit. IX, § 904, 127 Stat. at 120 (codified at 25 U.S.C. § 1304 (Supp. I 2013)) (adding section 204 to title II of the Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 73 (1968)). For a discussion of the importance of Congress affirming inherent tribal criminal jurisdiction, rather than attempting to confer it initially by statute, see Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 601-04 (2009).

3. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). For a general discussion of jurisdiction in Indian country, see *infra* Part II.

4. *See, e.g.*, Press Release, Nat'l Congress of Am. Indians, House Passes Violence Against Women Act (Feb. 28, 2013), *available at* http://www.ncai.org/news/articles/2013/02/28/house-passes-violence-against-women-act.

monumental step of acknowledging tribal jurisdiction over non-Indians in section 904, Congress was influenced by the opposition of some politicians[5] and scholars[6] to any expansion of tribal court jurisdiction over non-Indians, and their concerns over the constitutionality and inherent legitimacy of tribal judiciaries.[7] As a result, Congress qualified its support for tribal jurisdictional expansion under the VAWA: tribes wishing to exercise VAWA's expanded jurisdictional authority must adopt certain legal safeguards that provide non-Indian defendants with federal Constitutional protections exceeding those that tribes must provide to most Indian defendants under federal law.[8] Thus, the hard-won and well-deserved victory of expanded jurisdictional authority under the VAWA came at the price of stringent and expensive requirements on tribal judicial systems and the potential further "Westernization" of tribal courts.[9]

---

5. *See, e.g.*, Press Release, Senator Chuck Grassley of Iowa, Consideration of the Violence Against Women Act (Feb. 4, 2013) (arguing that VAWA "raises serious constitutional questions concerning both the sovereignty of tribal courts and the constitutional rights of defendants who would be tried in those courts"), *available at* http://www.grassley.senate.gov/news/news-releases/consideration-violence-against-women-act-0.

6. *See, e.g.*, Tom Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, July 2012, at 40, 44 (arguing that that expanding tribal criminal jurisdiction "would subject non-Indian citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject, and where the customary guarantees of federal constitutional protections may be questioned").

7. *See, e.g.*, Senator Slade Gorton, *Equal Justice for Indians, Too*, WASH. POST, Sept. 16, 1997, at A-17 (arguing against the impartiality of tribal courts); DAVID B. MUHLHAUSEN & CHRISTINA VILLEGAS, HERITAGE FOUND., BACKGROUNDER NO. 2673, THE VIOLENCE AGAINST WOMEN ACT: REAUTHORIZATION FUNDAMENTALLY FLAWED (Mar. 28, 2012), *available at* http://www.heritage.org/research/reports/2012/03/the-violence-against-women-act-reauthorization-fundamentally-flawed; David Wolitz, *Criminal Jurisdiction and the Nation-State: Toward Bounded Pluralism*, 91 OR. L. REV. 725, 766 (2013) (noting that the "reality and perception that tribal justice is too often unreliable, unfair, and immune to fundamental rights review undermines confidence in the tribe's jurisdiction — and makes widening the functional jurisdiction of tribes an uphill climb").

8. Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence, 78 Fed. Reg. 35,961, 35,962 (June 14, 2013) [hereinafter Pilot Project Notice].

9. Indeed, tribes have almost uniformly reported severe funding difficulties in implementing the legal protections that must be extended to non-Indian defendants in tribal courts. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, TRIBAL LAW AND ORDER ACT: NONE OF THE SURVEYED TRIBES REPORTED EXERCISING THE NEW SENTENCING AUTHORITY, AND THE DEPARTMENT OF JUSTICE COULD CLARIFY TRIBAL ELIGIBILITY FOR CERTAIN GRANT FUNDS 3 (May 30, 2012) (finding that anywhere from 64% to 96% of 109 surveyed tribes did not have the necessary resources to do so).

In a very practical way, federal Indian law — including legislation like the VAWA, but also federal common law and executive policy — *matters* to tribal law and legal systems. While tribes may choose to operate justice systems that serve community needs without regard to federal acknowledgment or enforcement, tribal justice systems feel the influence of the federal model; in the words of one tribal judge: "[tribal] courts do not do their work in isolation. [They] need important questions of law settled, jurisdictional questions, questions of choice of law, questions of full faith and credit and comity, issues of the trust responsibility, and the internal tribal law itself, which can be complex of its own."[10] That is to say, tribal legal decisions are not rendered in a vacuum, and tribal courts require respect and partnership from the state and federal courts in order for tribes to fully embrace their rightful partnership as the "third sovereign" in the United States.[11]

In this article, we consider these "important questions of law" — questions of jurisdiction, federal statutory law, comity, tribal choice of law and application of tribal law, primarily in the context of criminal law. Inspired by the VAWA, we explore the ways in which federal Indian law has simultaneously encouraged the development of tribal law by offering explicit recognition of tribal authority and essential resources for development, while also seeking to shape the exercise of tribal law by attaching conditions on that recognition and access. At the heart of this inquiry is the intersection of the federal government's encouragement of tribal self-governance with the competing pressures of federal Indian law. For decades, the United States has recognized "its commitment to the maintenance of the federal government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole."[12] The Supreme Court has likewise "repeatedly recognized the federal government's longstanding policy of encouraging tribal self-government" and that tribal courts "play a vital role in tribal self-

10. *Hearing Before the Subcomm. on Native Am. Affairs of the Comm. on Natural Res. on H.R. 1268, to Assist the Development of Tribal Judicial Systems, and for Other Purposes*, 103d Cong. 67 (1993) [hereinafter *Hearing on H.R. 1268*] (statement of Hon. Carey Vicenti, Chief Judge of the Jicarilla Apache Tribal Court).

11. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 2 (1997).

12. 25 U.S.C. § 450a(b) (2012); *accord* Reid Peyton Chambers, *Compatibility of the Federal Trust Responsibility with Self-Determination of Indian Tribes: Reflections on Development of the Federal Trust Responsibility in the Twenty-First Century*, *in* NATURAL RESOURCES DEVELOPMENT IN INDIAN COUNTRY ch. 13A (Rocky Mountain Min. L. Found. Special, Nov. 2005) (chronicling executive progression on Indian self-determination).

government"[13] Yet as tribes struggle to create culturally representative tribal judiciaries that reflect tribal norms and values, and dispense justice in accordance with tribal tradition, federal Indian law concurrently pushes tribal judiciaries closer towards the federal constitutional system and towards becoming "mirror images of the dominant society."[14]

This article will review several specific ways in which federal Indian law simultaneously acts to strengthen and encourage the development of tribal law in the criminal context while also seeking to influence its trajectory and even constrain it in certain ways. In Part II we review the background principles of self-governance that have shaped federal Indian law policy since the 1970s, and set out the criminal jurisdiction scheme in Indian country. Largely a product of federal common law, tribal court criminal jurisdiction facilitates a close relationship between federal and tribal law and creates ready opportunities for federal law, in its various forms, to seek to influence tribal law through a carrot-and-stick approach. As such, an understanding of the jurisdictional scheme serves as a useful backdrop for Part III, in which we consider three distinct methods by which federal law undertakes this effort: (1) congressional legislation; (2) federal funding choices; and (3) comity as it is employed by the courts to recognize and enforce tribal judgments.

In Part IV, we turn from federal to tribal law and explore how tribes themselves negotiate the realities and complications of the self-governance opportunities provided under federal Indian law and operate their own criminal justice systems. In order to consider the goals and effects of federal law in a different light, we begin with an overview of one tribal system that, as much as any other, has focused on maintaining cultural distinction in the face of an overarching federal presence: the Judicial Branch of the Navajo Nation. We then broaden our analysis with an overview of how tribal courts more generally have applied tribal law in light of the federal system with which they must coexist. The final analysis raises questions about the basis for the pro-federal approach embodied in statutes like the VAWA, and whether or not that approach is likely to meet federal policy goals and best serve tribal or public interests.

---

13. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987).

14. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 836 (2007); *cf.* Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLINE L. REV. 594, 596 (1985) (expressing concern that tribal exercise of inherent sovereignty may "too starkly challenge western notions of democratic self-government" to gain traction).

II. Backdrop Principles and Criminal Jurisdiction in Indian Country

A. Federal Principles of Tribal Governance

Any examination of the relationship between federal Indian law and the internal development of tribal law must be understood in the context of the two overarching principles that, at least in theory, govern the relationship between Congress and Indian tribes: the trust responsibility and the self-governance policy.

In its most basic form, the federal trust responsibility toward Indian tribes stems from the seminal Indian law case of *Cherokee Nation v. Georgia*,[15] where the Court held the Cherokee Nation was not a "foreign state" as understood in Article III of the Constitution. Rather, the tribes were "more correctly . . . denominated domestic dependent nations,"[16] and in the words of Chief Justice Marshall "[t]heir relation to the United States resembles that of a ward to his guardian."[17] This relationship, now known as the trust responsibility, "recognizes a sort of 'protectorate' status in the tribes, securing to them the power of managing their internal affairs in an autonomous manner," as well as recognizing "a federal duty to protect the tribe's land and resource base."[18] It is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes.[19]

The trust responsibility is a guiding principle for the relationship between Congress and the tribes,[20] providing impetus for legislation furthering, among other issues, Indian education,[21] health care,[22] and self-

15. 30 U.S. (5 Pet.) 1 (1831).

16. *Id.* at 17.

17. *Id.*

18. Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1219 (1975).

19. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

20. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04(3)(a) (Nell Jessup Newton et al. eds., LexisNexis 2012) ("[F]ederal action toward Indians as expressed in treaties, agreements, statutes, executive orders, and administrative regulations is construed in light of the trust responsibility. As a result, the trust relationship is one of the primary cornerstones of Indian law.").

21. 20 U.S.C. § 7401 (2012) ("It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.")

22. 25 U.S.C. § 1601(1) (2012) ("Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people.").

governance.[23] The federal trust relationship recognizes the unique responsibilities that the federal government owes to Indian tribes due to their "domestic dependent" status and encourages federal facilitation of the development of tribal institutions and infrastructure. Some scholars accordingly argue "[t]ribes operating an Anglo-American adversary system should insist on training opportunities and funding for court personnel as essential to a just system" as "[t]raining, funding, and an independent tribal defense organization are all requirements of a just system, and all are perspicuously encompassed under the federal trust responsibility."[24]

The second prong of this relationship is the federal government's policy of supporting tribal self-governance. This policy was promulgated in direct response to the so-called Termination Era of the 1940s and 1950s, during which "Congress moved to withdraw responsibility for a number of Indian tribes, along with it recognition of their special legal status; attempted to extend state jurisdiction over many more tribes; and ultimately sought to assimilate all Indians into the broader polity."[25] Recognizing the disastrous effect of the Termination Era on tribal culture and on the very existence of tribes themselves, since the late 1960s the United States has expressly pursued a policy of "self-determination" for Indian tribes and communities. This policy envisions federal backing of robust tribal governments, increased economic self-sufficiency, and tribal control over tribal programs and territory.[26]

The self-determination policy has manifested itself in a number of ways in the context of tribal judiciaries. Perhaps most importantly, in 1975, Congress enacted the Indian Self-Determination and Education Assistance

---

23. 25 U.S.C. § 458aaa-4 (2012).

24. Barbara L. Creel, *The Right to Counsel for Indians Accused of a Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 358 (2013).

25. Bethany R. Berger, Williams v. Lee *and the Debate Over Indian Equality*, 109 MICH. L. REV. 1463, 1466 (2011).

26. *See, e.g.*, Presidential Message to Congress on January 24, 1983, 19 WEEKLY COMP. PRESS DOC. 99 (1983); *see, e.g.*, Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000) (recognizing "the right of Indian tribes to self-government" and supporting "tribal sovereignty and self-determination"); Presidential Statement Reaffirming the Government-to-Government Relationship between the Federal Government and Indian Tribal Governments, 27 WEEKLY COMP. PRES. DOC. 936 (June 14, 1991); Proclamation No. 7500, 66 Fed. Reg. 57,641 (Nov. 12, 2001) (noting that the United States "will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities"); Exec. Order No. 13647, 78 Fed. Reg. 39,539 (June 26, 2013) (establishing White House Council on Native American Affairs).

Act (ISDEAA),[27] which authorizes tribes to assume responsibility for the operation of various federal programs in place of federal agencies such as the Bureau of Indian Affairs and the Indian Health Service, including the operation of tribal law enforcement entities. The Supreme Court has recognized principles of self-determination require parties to exhaust all tribal court remedies before challenging the tribe's subject matter jurisdiction in federal courts,[28] and Congress has stated "enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency."[29] In their roles as arbiters of their own jurisdiction and the primary interpreter of tribal law and policy, tribal courts truly are "frontline institutions that most often confront issues of American Indian self-determination and sovereignty."[30]

The trust responsibility and the federal policy of encouraging tribal self-governance provide an important pro-tribal backdrop to the relationship between Congress, the federal courts, and the tribes. Through the repeated federal affirmation of these principles, tribes, at least in the abstract, should expect a certain level of political and legal autonomy to develop the parameters of tribal law, determine tribal jurisdictional limitations under both tribal law and any overarching federal framework, and to develop a robust, culturally-specific body of tribal common law.

B. Foundational Jurisdictional Principles

The core of "federal Indian law" is the recognition of the right of Indian tribes to "make their own laws and be ruled by them."[31] Congruent with that basic notion, the development of modern federal Indian law relating specifically to tribal courts and their jurisdiction within Indian country[32]

---

27. Pub. L. No. 93-638, § 2, 88 Stat. 2203, 2203 (1975) (codified as amended at 25 U.S.C. § 450 *et seq.*).

28. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987).

29. 25 U.S.C. § 3651(7) (2012).

30. Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110, 110 (1995).

31. Williams v. Lee, 538 U.S. 217, 220 (1959).

32. For the purposes of this determination, the phrase "Indian country" includes (a) any Indian reservation, (b) all dependent Indian communities within the borders of the United States and (c) all Indian allotments, the Indian title to which has not been extinguished. 18 U.S.C. § 1151 (2012). "Dependent Indian communities" generally refers to Alaska Native Villages that are (1) located on land set aside for the tribe and (2) both the land and the tribe are under the superintendence of the federal government. *See generally* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998). The "Indian allotments" clause

begins with the premise that, as pre-constitutional sovereign entities, Indian tribes are not subject to the Constitution of the United States.[33] Since Indian tribes "did not participate in the Constitutional Convention and did not 'sign on' by joining the federal union,"[34] they are not bound by the Constitution, absent affirmative congressional action to the contrary.[35] Rather, federal and state courts have recognized that tribal courts generally retain inherent civil and criminal jurisdiction over Indian reservations by virtue of their sovereign status.[36]

At times, however, the federal courts have rejected tribal court criminal jurisdiction over tribal territories.[37] The subsequent convoluted evolution of this area of the law — which has famously led scholars to refer to the jurisdictional scheme governing Indian country as a "maze"[38] — has tied federal and tribal law together almost by necessity. Because the jurisdictional scheme lays the groundwork for the relationship between federal Indian law and tribal we turn now to an overview of the federal, state, and tribal law governing Indian country.

---

generally refers to Indian lands located in reservations that kept their tribal trust status despite having been allotted to non-Indians by the federal government in the late 1800s.

33. Talton v. Mayes, 163 U.S. 376 (1896); *accord* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.")

34. United States v. Red Bird, 146 F. Supp. 2d 993, 999 (D.S.D. 2001) (noting that Sixth and Fourteenth Amendments did not apply of their own force to Indian tribes).

35. *Talton*, 163 U.S. at 384 ("But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States.").

36. *See* United States v. Bird, 287 F.3d 709, 713 n.5 (8th Cir. 2002) ("Indian tribes, although limited sovereigns, have retained the right to try and punish individuals who transgress their laws. This right is not derived from the federal government but is inherent in the tribes' sovereignty.").

37. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978) (finding that "that Indian tribes, although fully subordinated to the sovereignty of the United States, [do not] retain the power to try non-Indians according to their own customs and procedure").

38. Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

C. Federal Criminal Jurisdiction in Indian Country

Congress began expanding federal criminal jurisdiction in Indian country as early as the late eighteenth century.[39] Most notably, the Indian Trade and Intercourse Act of 1834[40] applied federal criminal law to Indian country, but excluded "crimes committed by one Indian against the person or property of another Indian" in recognition of the fact that "the tribes have exclusive jurisdiction" of such offenses and "we can [not] with any justice or propriety extend our laws to" them.[41] These provisions were reauthorized and clarified in 1948 with the passage of the Indian General Crimes Act (GCA),[42] which generally extended to Indian country the same federal criminal jurisdiction exercised in other "federal enclaves."[43] However, the GCA explicitly reserves tribal court jurisdiction over non-federal crimes[44] committed in Indian country and solely involving Indians.[45]

This latter provision came under scrutiny in 1883 when the United States Supreme Court ruled in *Ex parte Crow Dog* that federal courts lacked jurisdiction over the murder of one Indian by another.[46] Congress subsequently passed the Major Crimes Act (MCA)[47] in 1885,[48] which

---

39. At the time, this did not include Indians, who were not granted full U.S. citizenship until 1924. *See* Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2012)).

40. Ch. 161, § 25, 4 Stat. 729, 733 (1834).

41. *See* United States v. Wheeler, 435 U.S. 313, 325 (1978) (citing H.R. REP. NO. 23-474, at 13 (1834)).

42. 18 U.S.C. § 1152 (2012).

43. *See* United States v. Markiewicz, 978 F.2d 786, 797-98 (2d Cir. 1992).

> The federal enclave laws are a group of statutes that permits the federal courts to serve as a forum for the prosecution of certain crimes when they occur within the "special maritime and territorial jurisdiction of the United States", 18 U.S.C. § 7; this jurisdiction includes federal land, and property such as federal courthouses and military bases.

Id. at 797.

44. In the event that there is no federal law controlling for a crime committed in a federal enclave, the GCA incorporates the Assimilative Crimes Act, 18 U.S.C. § 13 (2012), which authorizes the federal government to apply state definitions and sentencing guidelines for crimes occurring in federal enclaves. *See* 18 U.S.C. § 1153(b) (2012).

45. 18 U.S.C. § 1152 ("This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe . . . .").

46. 109 U.S. 556 (1883).

47. 18 U.S.C. § 1153.

48. *See* Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 192-93 n.4 (1989).

establishes concurrent federal criminal and tribal jurisdiction over fourteen "major" crimes when committed by an Indian in Indian country.[49] Discussed in greater detail *infra*, a second statute, the Indian Civil Rights Act (ICRA), restricts tribal criminal sentencing in such cases to, at maximum, three years in jail and a $15,000 fine, or both.[50] These limits on tribal prosecutorial and sentencing authority, combined with limited tribal resources for detention facilities, result in the United States federal government often being the primary sovereign exercising jurisdiction over the prosecution of major crimes in Indian country and the subsequent incarceration of on-reservation offenders.

D. State Criminal Jurisdiction in Indian Country

Until the 1950s, state court jurisdiction in Indian country was generally limited to crimes committed by non-Indians that were either victimless (such as vandalism) or else committed against another non-Indian.[51] But in 1953, Congress passed Public Law 280, which required certain state governments to assume what would otherwise be federal criminal jurisdiction over Indian country.[52] Congress also authorized other "non-mandatory" states to opt-in to Public Law 280; initially these states could do so at their own discretion, but since the passage of ICRA, states have been required to obtain consent from tribes with reservations within the state before extending their jurisdiction into Indian country under Public Law 280.[53] Public Law 280 states currently assert the criminal jurisdiction

49. These fourteen crimes are murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [crimes of sexual abuse], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, an assault against an individual who has not attained the age of sixteen years, felony child abuse or neglect, arson, burglary, and robbery. *See* 18 U.S.C. § 1153.

50. *See* 25 U.S.C. § 1302(a)(7)(C) (2012).

51. United States v. McBratney, 104 U.S. 621 (1882). In addition, Congress authorized certain states to exercise criminal jurisdiction over certain reservations. *See, e.g.*, Act of June 30, 1948, ch. 759, 62 Stat. 1161 (granting the state of Iowa criminal jurisdiction over the Sac and Fox Reservation); Act of June 8, 1940, ch. 276, 54 Stat. 249 (granting Kansas criminal jurisdiction over in-state reservations); 25 U.S.C. § 232 (2012) (granting New York criminal jurisdiction over in-state reservations).

52. Pub. L. No. 83-280, ch. 505, 67 Stat. 588, 588-60, (codified as amended at 18 U.S.C. § 1162 (2012)) (mandatory states). These "mandatory states" are Alaska (except the Annette Islands with regard to the Metlakatla Indians), California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. Id.

53. *See* 25 U.S.C. § 1321 (2012). These so-called "optional states" are Nevada, South Dakota, Washington, Florida, Idaho, Montana, North Dakota, Arizona, Iowa, and Utah,

which would have otherwise been exercised by the federal government, though tribal criminal jurisdiction remains the same as in non-Public Law 280 states.[54]

E. Tribal Court Criminal Jurisdiction

Pursuant to tribal law, as well as the settled federal legal principle that Indian tribes retain all sovereign powers not expressly abrogated by Congress,[55] certain tribes did historically criminally prosecute and try non-Indians.[56] But in 1978, the Supreme Court held in *Oliphant v. Suquamish Indian Tribe* that Indian tribes "do not have inherent jurisdiction to try and to punish non-Indians."[57] Writing for the majority, Justice Rehnquist held that such jurisdiction was "inconsistent with [tribes'] status" as a result of the "intrinsic limitations on Indian tribal authority" stemming from the overarching sovereignty of the United States and the comparative diminution in tribal sovereignty.[58] This doctrine has since been categorized as an "implicit divestiture of sovereignty"[59] and summarized as a judicial analysis of "whether tribes have legitimate local interests implemented by appropriate lawmaking and law-applying procedures and institutions that transcend the interests of outsiders to be free from tribal authority."[60]

---

although the optional states often only assume jurisdiction over certain reservations when in-state tribes reject the assumption of state authority. *See* Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 699-01 (2006).

54. Bryan v. Itasca County, 426 U.S. 373, 389 (1976); Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990).

55. Merion v. Jicarilla Apache Tribe, 455 U.S. 130, 139 (1982).

56. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196 (1978) (noting that "of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians"); J. Matthew Martin, *The Nature and Extent of the Exercise of Criminal Jurisdiction by the Cherokee Supreme Court, 1823-1835*, 32 N.C. CENT. L. REV. 27, 50 n.195 (2009) (discussing Cherokee prosecutions of non-Indians in the early nineteenth century).

57. *Oliphant*, 435 U.S. at 212.

58. *Id*. at 208-09.

59. United States v. Wheeler, 435 U.S. 313, 326 (1978).

60. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Non-Members*, 109 YALE L.J. 1, 71 (1999). For an in-depth examination of the development of the implicit divestiture doctrine, see Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 627-49 (2011).

In 1990, the Supreme Court further narrowed tribal criminal jurisdiction over non-tribal members when it held in *Duro v. Reina*[61] that the *Oliphant* Court's prohibition on tribal court prosecutions of non-Indians also applied to Indians not actually enrolled in the prosecuting tribe. Justice Kennedy's majority opinion centered on the fact that non-member Indians had not "consented" to tribal court jurisdiction, in that they could not vote in tribal elections and were frequently unfamiliar with the language, customs, and cultural legal norms of the prosecuting tribes,[62] a line of reasoning that has since been dubbed "the consent theory."[63]

In order to address jurisdictional confusion in the aftermath of the *Duro* ruling, Congress quickly passed the so-called *Duro* Fix, which reaffirmed tribes do have inherent criminal jurisdiction over all Indians, and not just tribal members.[64] In *United States v. Lara*,[65] the Supreme Court upheld the statute, holding the *Duro* Fix reflects Congress's "constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority,"[66] and that separate prosecutions by tribal and federal authorities for the same crime did not violate double jeopardy.[67] However, aside from the limited jurisdictional expansion under VAWA, federal law continues to prohibit tribal court criminal jurisdiction over non-Indians. Over time, federal statutes and common law have expanded the federal and state presence in Indian country, while paring back the scope of acknowledged tribal authority.

---

61. 495 U.S. 676 (1990).

62. *Id.* at 693; *see also* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 297-98 (2001) ("This rhetoric suggests that some members of the Court question the competence and fairness of Indian courts and governments, are troubled by the separatism and special rights of Indians and their impact on non-Indians, or see the operation of tribal governments as anomalous in a federal system.").

63. *See* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 990-94 (2010).

64. Pub. L. No. 101-511, § 8077(d), 104 Stat. 1856, 1893 (1990). (codified as amended at 25 U.S.C. § 1301 (2012)) (adding the clause "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians" to the definition of "powers of self-government").

65. 541 U.S. 193 (2004).

66. *Id.* at 196.

67. *Id.* at 210. The Duro Fix has since been upheld in the face of equal protection and due process challenges, as well. *See* Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005), *cert. denied*, 549 U.S. 952 (2006).

III. The Carrot and the Stick: Developmental Encouragement for, and Restrictions on, Tribal Law

Stepping into the unusual space created by the federal Indian law jurisdictional scheme, the federal government has been able to amplify its influence over the development and application of tribal criminal law. Specifically, through at least three powerful mechanisms, federal Indian law takes advantage of claimed congressional plenary power over tribal criminal jurisdiction to simultaneously support and encourage the exercise of tribal law, while also seeking to encourage its compliance with standard federal and state practices. This Part is devoted to a discussion of these three mechanisms: legislative affirmation and limitation of tribal court jurisdiction, federal funding choices, and comity in non-tribal courts.

A. Legislative Affirmation, and Limitation, of Tribal Court Jurisdiction

Insofar as they are not constitutionally based, Congress can patch the gaps created by federal common law in acknowledged tribal court jurisdiction. This plenary congressional power therefore, offers federal lawmakers the opportunity to significantly influence the development of tribal law by controlling legislation that could partially reverse those limits. Accordingly, legislative regulation of tribal court jurisdiction is perhaps the most direct way that federal Indian law acts in relationship to tribal law.

The Indian Civil Rights Act — likely the single piece of federal legislation with the greatest direct influence on the development and application of tribal criminal law in practice — illustrates this principle quite well. Two more recent federal statutes: the Tribal Law and Order Act and the Violence Against Women Reauthorization Act of 2013, also illustrate this principle. These statutes exemplify the inherent paradox in the relationship between tribal and federal law: the federal government's simultaneous acknowledgment, and endorsement, of the trust responsibility and the doctrine of tribal self-governance, and its competing caution with regard to the expansion of tribal court criminal jurisdiction.

1. Indian Civil Rights Act

In his 1968 message to Congress on "Goals and Programs for the American Indian" President Johnson "propose[d] a new goal for our Indian programs: [a] goal that ends the old debate about 'termination' of Indian programs and stresses self-determination; a goal that erases old attitudes of

paternalism and promotes partnership self-help."[68] Generally recognized as the outset of the self-determination era, this new direction of tribal policy preceded the passage of the Indian Civil Rights Act (ICRA)[69] by just over a month.

ICRA was enacted following a series of hearings held by the Senate subcommittee on Constitutional Rights concerning the alleged deprivation of civil liberties in Indian country.[70] Even though tribal feedback from the ICRA hearings suggested that state and federal authorities were primarily responsible for alleged mistreatment and civil liberties violations in Indian country,[71] the bill's primary sponsor, Senator Sam Ervin (D-NC), nevertheless framed the legislation as a remedy of what he saw as an inability of tribes to administer justice on reservations, arguing that this was the result of "tribal judges' inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system."[72]

During the drafting process, tribes expressed concerns that compliance with ICRA would be financially unfeasible[73] and would run roughshod over tribal culture and traditions.[74] Congress eventually removed the prohibition on the establishment of religion from the draft ICRA legislation (though maintaining the prohibition on interference with individual religious free exercise);[75] dropped the requirement that tribes provide attorneys to criminal defendants (though maintaining the defendant's right to provide an attorney at his or her own expense); and did not require that tribes provide a

68. Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 1 PUB. PAPERS 335 (Mar. 6, 1968).

69. Pub. L. No. 90-284, tit. II, § 201, 82 Stat. 73, 77 (1968) (codified as amended at 25 U.S.C. § 1301 (2012)).

70. *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., pt. 3, at 769 (1962).

71. Such mistreatment took the form of physical abuses of Indians, the failure prosecute crimes, refusal to fund tribal justice systems, and imposition of federal restrictions on the operation of tribal courts. Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 582-88 (1972).

72. 113 CONG. REC. 13,473 (1967) (statement of Sen. Ervin).

73. *See generally Amendments to the Indian Bill of Rights: Hearing on Title II on the Civil Rights Act of 1968 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong. (1969).

74. *See generally Hearings on S. 961-968 and S.J. Res. 40 Before Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong. 243 (1965).

75. For a discussion of tribal constitutional treatment of religion, see generally Kristin A. Carpenter, *Considering Individual Religious Freedoms Under Tribal Constitutional Law*, 14 KAN. J.L. & PUB. POL'Y 561 (2005).

jury trial in civil cases.[76] As enacted, ICRA applies the majority of the U.S. Constitution's Bill of Rights to tribes and tribal courts; including, for example, due process, equal protection, and freedom of speech, as well as prohibitions on double jeopardy, takings, unreasonable search and seizure, and cruel and unusual punishment.[77]

By applying these Bill of Rights components on the exercise of tribal authority under ICRA, Congress directly shaped the development and application of tribal law by attaching conditions on its exercise.[78] But ICRA also played an important function in affirming the role of tribal courts. First, by defining tribal "powers of self-government" as including "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed,"[79] ICRA represents codified acknowledgment of tribal judicial authority. Further, Congress recognized the importance of ensuring that ICRA adjudications remained within the purview of the tribal courts and provided a very limited remedies clause for alleged violations of ICRA rights: "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."[80] Finally, the fact that Congress required tribal courts to adopt multiple levels of federal protections for criminal defendants likely helped ease staunch opponents of tribal court jurisdiction over anyone, even Indians, into accepting the legitimacy of tribal court practice, thus affording tribal courts an opportunity to establish themselves to skeptics as functioning judiciaries in their own right.

In the immediate aftermath of ICRA, numerous federal courts accepted appeals from parties arguing that their ICRA rights had been violated during the course of the tribal adjudication.[81] But in the seminal case of *Santa Clara Pueblo v. Martinez*, the Supreme Court invalidated this

76. *See* 25 U.S.C. § 1302 (2012).

77. *Id.* § 1302(a).

78. *See, e.g.*, Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 317 n.21 (2000) (noting that the application of ICRA "significantly infringe[s] on tribal self-government by injecting the procedures and values of non-Indian legal thought into political systems that never consented to such").

79. Pub. L. No. 90-284, tit. II, § 201(2), 82 Stat. 73, 77 (1968) (codified as amended at 25 U.S.C. § 1301 (2012)).

80. 25 U.S.C. § 1303 (2012).

81. *See, e.g.*, Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969) (invalidating on due process grounds tribal order removing individual from Navajo reservation for alleged disrespect towards Tribal Council).

practice, reasoning that the inclusion of the habeas clause in ICRA represented congressional intent that habeas remain the sole non-tribal remedy for alleged ICRA violations, and that federal courts therefore lacked jurisdiction to substantively review non-habeas claims from tribal courts.[82] As discussed *infra*, tribes have seized on this semi-exclusive jurisdiction to further develop their own civil rights law even within the confines of the federal system.

2. The Tribal Law and Order Act

Unlike the ICRA, which was intended primarily to protect the individual rights of Indians and other persons subject to tribal jurisdiction, the tribal court provisions of the Tribal Law and Order Act (TLOA)[83] were intended to expand tribal authority, albeit with important caveats. In fact, perhaps the most notable provision of the TLOA was to roll back some of ICRA's restrictions on tribal criminal sentencing authority in order to help address the high rates of crime in Indian communities, the similarly high rates of prosecutorial declination by the Department of Justice, and the hampered ability of tribal courts to themselves prosecute serious crimes on Indian reservations under ICRA.[84]

Section 234 of the Tribal Law and Order Act began by maximizing tribal court prison sentencing authority to terms up to three years, as opposed to the former one-year maximum.[85] It also explicitly authorized a common, though controversial, tribal court practice of circumventing the previous one-year sentencing limitation through "stacking" of multiple sentences, though the TLOA caps the total penalty or punishment to a maximum term of nine years in any criminal proceeding.[86] This expanded sentencing authority only applies to criminal defendants who have been "previously convicted of the same or a comparable offense by any jurisdiction in the United States" or are "prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States."[87]

---

82. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) ("In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.")

83. Pub. L. No. 111-211, tit. II, 124 Stat. 2258, 2261 (2010).

84. *Examining S. 797, the Tribal Law and Order Act of 2009: Hearing Before the Senate Comm. on Indian Affairs*, 111th Cong. 1-3 (2009) (opening statement of Sen. Byron L. Dorgan).

85. Pub. L. No. 111-211, sec. 234(a)(2), § 202(a)(7)(C), 124 Stat. 2258, 2280 (2010).

86. *Id.* § 202(a)(7)(D).

87. *Id.* § 202(b).

In expanding tribal sentencing authority under the TLOA, Congress simultaneously required additional rights for criminal defendants beyond those imposed under ICRA. These protections are principally modeled on federal constitutional protections afforded criminal defendants in American courts; therefore, ensuring that tribal courts handing down longer criminal sentences sufficiently mirror their state and federal counterparts in certain ways. Specifically, prior to imposing a sentence of greater than one year for any criminal defendant, the TLOA requires tribal courts to:

1. provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
2. at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensing attorneys[.][88]

In addition to these requirements, any tribal court exercising expanded sentencing authority under the TLOA must employ a judge to preside over the criminal proceeding who "has sufficient legal training to preside over criminal proceedings" and "is licensed to practice law by any jurisdiction in the United States[.]"[89] Further, the tribe must, "prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government;"[90] and must "maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding."[91]

The TLOA stands as yet another example of federal Indian law's cautious view of unfettered tribal law, and the continued conditioning of tribal law expansion on a further "federalization" of tribal courts. Although the TLOA imposes these "Westernized" limitations on the exercise of tribal court criminal jurisdiction, it also lends a great deal of power to tribal courts

88. *Id.* § 202(c).
89. *Id.* § 202(c)(3).
90. *Id.* § 202(c)(4).
91. *Id.* § 202(c)(5).

through that explicit recognition,[92] and at least two tribes have since passed laws officially implementing TLOA sentencing authority.[93] For example, by affirming the controversial practice of stacking sentences,[94] Congress lent credence to a practice developed internally by tribal courts in order to address significant hurdles facing tribal law enforcement efforts.[95] This recognition of internal tribal court development reemphasizes congressional awareness and furtherance of tribal self-governance in and of itself, despite potential misgivings towards federal Indian law's increased presence on tribal court criminal practice.

3. The Violence Against Women Act Reauthorization

The passage of the Violence Against Women Reauthorization Act of 2013 marked a major event in the modern recognition of tribal court criminal jurisdiction.[96] Though limited to certain listed crimes and to defendants with certain ties to the tribe,[97] section 904 of the VAWA Reauthorization grants tribal criminal jurisdiction over non-Indians for the first time since *Oliphant*.[98] Significantly, section 904 acknowledges tribal

92. At this point, though, that recognition exists more in theory than in practice; in May of 2012, the Government Accountability Office reported that, primarily due to lack of funding and confusion over funding availability, no tribes were yet exercising the TLOA extended sentencing authority. U.S. GOV'T ACCOUNTABILITY OFFICE, TRIBAL LAW AND ORDER ACT: NONE OF THE SURVEYED TRIBES REPORTED EXERCISING THE NEW SENTENCING AUTHORITY, AND THE DEPARTMENT OF JUSTICE COULD CLARIFY TRIBAL ELIGIBILITY FOR CERTAIN GRANT FUNDS 8 (May 30, 2012), *available at* http://www.gao.gov/assets/600/591213.pdf.

93. *See* Cherokee Council House Ordinance No. 182 (2012) (passed on Aug. 2, 2012), *available at* http://turtletalk.files.wordpress.com/2012/10/ordinance-182-2012.pdf; Anne Minard, *A Leader Emerges: Hopi Tribe Adopts New Criminal Code According to Tribal Law and Order Act Standards*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sept. 3, 2012) (reporting that the Hopi Tribe passed a new criminal code implementing the TLOA on August 28, 2012), *available at* http://indiancountrytodaymedianetwork.com/2012/09/03/leader-emerges-hopi-tribe-adopts-new-criminal-code-according-tribal-law-and-order-act.

94. Ramos v. Pyramid Tribal Court, Bureau of Indian Affairs, 621 F. Supp. 967 (D. Nev. 1985) (holding that stacking convictions not violate the "cruel and unusual punishment" provision of ICRA).

95. Christopher B. Chaney, *Overcoming Legal Hurdles in the War Against Meth in Indian Country*, 82 N.D. L. REV. 1151, 1163 (2006) (citing stacking as an example of tribal court practices designed to crack down on on-reservation methamphetamine abuse).

96. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

97. *See generally* 25 U.S.C. § 1304 (Supp. I 2013).

98. Violence Against Women Reauthorization Act of 2013, sec. 904, § 204, 127 Stat. at 120.

criminal jurisdiction over non-Indian domestic violence offenders as an inherent tribal power, rather than a delegated federal power, providing: "the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons."[99]

The VAWA reauthorization extends what the Act refers to as "special domestic violence criminal jurisdiction,"[100] which, as noted, is limited in several important ways. First, the jurisdiction is limited to crimes of domestic violence, dating violence, and certain violations of protection orders.[101] Second, a tribe may not exercise jurisdiction if neither the victim nor the alleged offender is an Indian.[102] Third, a tribe may only exercise special domestic violence criminal jurisdiction over a non-Indian defendant who (1) resides within the Indian country of the tribe, (2) is employed within the Indian country of the tribe, or (3) is the spouse, intimate partner, or dating partner of a tribal member of other Indian residing within the Indian country of the tribe.[103]

Section 904 also imposes several requirements on tribal courts exercising special domestic violence criminal jurisdiction relating to protections for criminal defendants. All rights protected under the Indian Civil Rights Act apply to criminal defendants being prosecuted under section 904.[104] Further, all of the added protections that apply to criminal defendants sentenced to a term of imprisonment of one year or more under the TLOA apply under section 904 in any case where a term of imprisonment of *any* length may be imposed.[105] Section 904 also guarantees "the right to a trial by an impartial jury that is drawn from sources that — (A) reflect a fair cross section of the community; and (B) do not systematically exclude any distinctive group in the community, including non-Indians[.]"[106]

Finally, section 904 requires tribes exercising special domestic violence criminal jurisdiction to provide criminal defendants with "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal

99. *Id.*
100. *Id.* § 204(a)(6).
101. *Id.* § 204(c).
102. *Id.* § 204(b)(4)(A).
103. *Id.* § 204(b)(4)(B).
104. *Id.* § 204(d)(1).
105. *Id.* § 204(d)(2).
106. *Id.* § 204(d)(3).

jurisdiction over the defendant."[107] The Department of Justice has interpreted this last "constitutional catch-all" provision as one that "gives courts the flexibility to expand the list of protected rights to include a currently unforeseen right whose protection the 113th Congress did not believe was essential to the exercise of [the expanded VAWA jurisdiction]"[108] but that "does not require tribal courts to protect all federal constitutional rights that federal courts are required to protect (for example, the Fifth Amendment's grand-jury indictment requirement, which state courts are also not required to protect)."[109]

While it remains to be seen how tribal courts will implement these provisions as well as how they will be interpreted by federal courts, the Department of Justice has commented:

> Although the United States Constitution, which constrains the federal and state governments, has never applied to Indian tribes (which were not invited to, and did not attend, the 1787 Constitutional Convention), that fact does not leave the rights of individual defendants in tribal courts unprotected. Both tribal law and federal statutory law provide important protections for criminal defendants' rights. The tribal courts' application of the federal statutory rights described in subsection 1304(d) should be comparable to state courts' application of the corresponding federal constitutional rights in similar cases.[110]

Interestingly, this statement is inconsistent with the manner in which at least some federal courts have examined tribal court decisions under ICRA and held that tribes need not "utilize judicial procedures identical to those used in the United States Courts."[111] Also, like the TLOA, the Justice Department's statement reminds tribes that the federal Indian law system is simultaneously cautiously supportive of tribal court jurisdiction and yet remains uncertain of its treatment of the rights of non-Indians.

---

107. *Id.* § 204(d)(4).
108. Pilot Project Notice, *supra* note 8, at 35,964.
109. *Id.*
110. *Id.* at 35,963.
111. Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997).

B. Federal Funding of Tribal Legal Systems

Another way in which federal Indian law acts to both further the development of tribal law and to impose conditions on its exercise is through the allocation of resources (whether through grants or other opportunities) to tribal justice systems. With the federal government acting as the primary source of funding for many tribal governments and tribal judiciaries, it therefore retains the power to set the conditions under which tribal justice systems are funded.[112]

The issue of funding is an extremely practical one, with direct consequences for the day-to-day ability of tribal justice systems to function effectively and to engage in the work of developing and applying tribal law. The Indian Tribal Justice Act of 1993 (ITJA) was passed in recognition of this very fact.[113] In enacting the ITJA, Congress acknowledged that the federal trust responsibility supports the exercise of sovereignty by tribal governments, and that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments[.]"[114] It further declared that "traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this Act"[115] and that "tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation[.]"[116]

Section 101 of the ITJA established the Office of Tribal Justice Support within the Bureau of Indian Affairs, whose functions include "[p]rovid[ing] funds to Indian tribes and tribal organizations for the development, enhancement, and continuing operation of tribal justice systems" and for the "continuation and enhancement of traditional tribal judicial practices."[117] The ITJA authorized appropriations of $7,000,000 per year for seven years for the Office of Tribal Justice Support to carry out section 101 and to conduct a survey of tribal justice systems; $50,000,000 per year

112. *Hearing on H.R. 1268*, *supra* note 10, at 76 (testimony of Robert Yazzie, Chief Justice for the Navajo Nation) ("Control of the purse strings includes control as to how the money is spent.").

113. *See* Pub. L. No. 103-176, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601-3631 (2012)).

114. *Id.* § 2(5), 107 Stat. at 2004.

115. *Id.* § 2(7), 107 Stat. at 2004.

116. *Id.* § 2(8), 107 Stat. at 2004.

117. *Id.* § 101(c)(1), (6), 107 Stat. at 2005-06 (codified at 25 U.S.C. § 3611(c)(1), (6) (2012)).

for base support funding for tribal justice systems pursuant to the ISDEAA; and $500,000 per year for tribal judicial conferences.[118]

The ITJA was passed following extensive testimony about the dire need for increased funding for tribal justice systems.[119] But in congressional testimony leading up to the passage of the ITJA, tribes were both adamant about the immediate need for funding and equally concerned about how such assistance would be administered.[120] Specifically, tribal leaders and justice officials insisted throughout that the receipt of funding must not be accompanied by conditions that would threaten the integrity or constrain the flexibility of tribal justice systems.[121] They were also clear that the concept of "tribal justice systems" under an Act designed to fund and support those systems must be broad enough to recognize and include whatever system the tribes deemed most appropriate for themselves, including traditional systems that might be fundamentally different from the American state and federal court model.[122]

As a threshold matter, tribal witnesses were concerned about the definition of "tribal justice systems" that would be adopted in the ITJA. The Chairman of the Shoshone Business Council testified before the Senate Committee on Indian Affairs, stating:

---

118. *Id.* § 201, 107 Stat. at 2009 (codified at 25 U.S.C. § 3621).

119. *See generally Hearing on H.R. 1268*, *supra* note 10; *accord id.* at 70 (written testimony of President Leonard Atole and Chief Tribal Judge Carey Vicenti, Jicarilla Apache Tribe) ("[T]he lack of federal funding and resources remains the biggest obstacle facing tribes as they develop effective tribal justice systems. . . . Because of the scarcity of tribal resources and other pressing governmental and social services needs, the tribal court budget has not seen a real increase for five consecutive years. The $250,000 the tribe annually allocates to its trial court is money it can't use to solve the rampant unemployment and other needs on the Reservation. Although training is mandated by tribal policy there are insufficient funds to provide that training. The trial court is in dire need of additional staff, a public defender, a full-time prosecutor, law books and a space to house the books, additional court and office space, updated equipment and monies to repair, expand and modernize the court and juvenile and adult detention facilities. Too often important court proceedings are interrupted by the emergency of fixing a busted pipe."); *see also Hearing Before the Comm. on Indian Affairs on S. 521, to Assist the Development of Tribal Judicial Systems*, 103d Cong. 1 (1993) [hereinafter *Hearing on S. 521*].

120. *See, e.g.*, *Hearing on S. 521*, *supra* note 117, at 97 (statement of Elbridge Coochise, President, Nat'l Am. Indian Court Judges Ass'n) ("The bill should clarify that Federal funding should be made to Tribal governments for Tribal Courts in a manner that minimizes Federal and administrative costs and that encourages flexibility and innovation by Tribal justice systems. This funding must avoid encroaching on Tribal traditions, and should protect the diversity of Tribal Court systems.").

121. *See infra* notes 124-25 and accompanying text.

122. *See infra* note 12 and accompanying text.

> First, it is very important that the definition of 'tribal justice system' remain broad enough to cover the types of dispute resolution practiced in traditional tribal governments. Our Tribes are traditional governments, having no constitutions and governed by General Councils, which consist of the entire adult memberships of the two Tribes. When they meet, our General Councils are the Congress, the President, and the Supreme Court all rolled into one. Our tribal business councils and our tribal court exercise only those powers expressly delegated to them by the General Councils. The General Councils now are considering the establishment of Peacemakers, tribal elders authorized to resolve minor civil disputes without all the formality of litigation.[123]

The Shoshone Business Council supported a version of the legislation that would permit the Tribe to use federal funding for such systems under a broad definition of "tribal justice system,"[124] and several other tribes offered similar testimony.[125] As ultimately passed, the ITJA defined "tribal justice systems" as "the entire judicial branch, and employees thereof, of an Indian tribe, including (but not limited to) traditional methods and forums for dispute resolution, lower courts, appellate courts (including intertribal appellate courts), alternative dispute resolution systems, and circuit rider systems, established by inherent tribal authority whether or not they

---

123. *Hearing on S. 521*, *supra* note 117, at 56 (testimony of Darwin St. Clair, Sr., Chairman, Shoshone Business Council).

124. *Id.*

125. For example, the Pueblo of Tesuque submitted a similar statement:

> The Pueblo has a number of specific comments regarding S. 521. One of the key elements of the bill is its recognition of traditional forums of dispute resolution. The right to tribal self-government includes the right to determine the form of government, including the form and nature of the tribal justice system. The definition of 'tribal justice system' in S. 521 is, we believe broad enough to cover the types of dispute resolution practiced in traditional tribal governments like Tesuque's. Most tribes do not choose to have full separation of powers — judicial, legislative, and executive — and, thus, many tribes do not have distinct judicial branches. At the Pueblo of Tesuque, we have both a formal tribal court as well as a traditional forum for dispute resolution. Both systems work hand-in-hand and are integral to our way of life in the '90s. Both systems are unique and have their own needs for resources. We are pleased that S. 521 is sufficiently broad to require BIA to provide assistance to all the numerous forms of tribal justice systems.

Hearing on S. 521, *supra* note 117, at 58-59 (testimony of Charles Dorame, Governor, on behalf of the Pueblo of Tesuque).

constitute a court of record."[126] By authorizing funding for this wide array of tribal dispute resolution mechanisms, Congress rightfully acknowledged that tribal adjudicative systems might not always be the type of tribal courts envisioned under ICRA.

Tribes were also concerned about the level of control that the BIA would have through the Office of Tribal Justice Support over tribal justice systems, both directly and more indirectly, and requested language to "[make] it clear that the Bureau does not authorize the Office of Tribal Justice Support to impose justice standards on Indian tribes."[127] As expressed in a letter submitted for the record by the Zuni Pueblo,

> [W]e wish to make it clear that while we support the establishment of an Office of Tribal Justice Support within the Bureau of Indian Affairs as a means of further funding certain training and technical assistance to tribes, we also support the continuation of traditional tribal judicial practices. In particular, we urge [Congress] to allow tribes which wish to do so to continue their practices of handling land matters at the tribal council level where such issues as land division in the case of death on an elder can be resolved according to time-honored traditions.[128]

126. Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, § 3(8), 107 Stat. 2004, 2005 (codified at 25 U.S.C. § 3602).

127. *Hearing on S. 521*, *supra* note 117, at 26 (testimony of Darwin St. Clair, Sr., Chairman, Shoshone Business Council) ("It is important that the office should be explicitly prevented from overruling tribes' decisions of this nature. We have been looking at ways of fairly resolving disputes other than using the system used by non-Indians."); *see also id.* at 58 (testimony of Charles Dorame, Governor, on behalf of the Pueblo of Tesuque) (supporting similar language) ("It is important that the Office of Tribal Justice not be given authority to override tribal self-government to determine the nature and form of tribal justice systems."); *id.* at 66 (testimony of Robert Yazzie, Chief Justice for the Navajo Nation) ("Our major concern is that the BIA will impose court standards on our tribal system at a time when we are developing our own innovative and traditional approaches."); *id.* at 153 (Letter from the Apache Tribe of Oklahoma, to Senator Daniel K. Inouye, Chairman, Senate Select Committee on Indian Affairs) ("The 'Office' (B.I.A. & Solicitor Office) must not be allowed to construe or devise criteria that in any way impair the ability of the Tribal Court to operate in the manner enacted by the Tribal Government. No 'B.I.A.M.' that influences the Tribe to alter its judicial system, do [sic] to imposed funding criteria."); *see also Hearing on H.R. 1268*, *supra* note 10, at 54 (similar testimony provided).

128. *Hearing on H.R. 1268*, *supra* note 10, at 120 (Letter from the Pueblo of Zuni to the Honorable Bill Richardson, Chairman, Subcommittee on Native American Affairs.).

The tribes were concerned not only with direct attempts by the BIA to control the administration of justice by tribes, but also by the potential and perhaps even unintended "homogenizing" effect of appointing a single office to assist hundreds of different tribes in the implementation of their justice systems.[129] They had similar concerns about whether or not formulas used to determine funding would adequately account for the uniqueness of tribal dispute resolution practices. The Pueblo of Laguna wrote to the committee:

> The Pueblo opposes the development of caseload standards for tribal courts, either as a means of determining funding or evaluating tribal court performance. Neither Congress, the BIA, nor any outside entity should determine the structure of tribal justice systems. The imposition of caseload standards determines, in many aspects, the structure of the tribal justice system.[130]

The Pueblo explained,

> When the Office begins dictating how many cases must be handled by tribal staff in order to receive funding, it is in effect dictating the manner in which justice is to be dispensed. Some tribal justice systems incorporate traditional forms of dispute resolution which can be quite labor intensive; many of these 'alternative dispute resolutions' forums do not, because of their nature, result in formal case filings or the public dissemination of the existence of a dispute.[131]

The Pueblo was joined by the Jicarilla Apache Tribe, expressing a similar concern:

---

129. *Hearing on S. 521*, *supra* note 117, at 129 (Letter from the Jicarilla Apache Tribe to Senator Daniel K. Inouye, Chairman, and Senator John McCain, Vice Chairman, Senate Committee on Indian Affairs) ("[T]he Jicarilla Apache Tribe is cognizant of the homogenizing affect [sic] BIA may have in proposing boilerplate codes and court administrative procedures. We recall the use of boilerplate constitutions following passage of the Indian Reorganization Act. The Jicarilla Apache Tribe has had to review and reform that model constitution five times since its adoption because the form Constitution simply could not and did not reflect the Tribe's own history, traditions and decisions on how to structure its government and laws.").

130. *Hearing on S. 521*, *supra* note 117, at 145 (Letter from Harry D. Early, Governor, Pueblo of Laguna, to Senator Daniel K. Inouye and Senator John McCain).

131. *Id*. at 143.

> Our trial court is increasingly using what is now known as 'alternative dispute resolution' mechanisms and traditional methods for resolving disputes before a case is actually filed. These ADR and traditional mechanisms are often more labor intensive than standard court filings. However, they usually produce better results. Caseload standards simply will not reflect these distinct methods of resolving disputes and tribes should not be penalized in the funding formula for being innovative or using traditional dispute resolution mechanisms.[132]

This testimony pinpoints subtle, but very real, forces at play in the interaction between federal Indian law and policy and the implementation of tribal law, as well as the practical influence that federal laws can have over the exercise of tribal law through recognition and allocation of resources. It also represents tribal recognition of the interrelationship between federal law and tribal law, and a concentrated tribal effort to protect the latter in expansions of the former. In the case of the ITJA, tribes succeeded in securing language to reduce more direct interference with the operation of tribal justice systems under tribal standards, as Congress provided in the ITJA that "[n]othing in this chapter shall be deemed or construed to authorize the Office to impose justice standards on Indian tribes,"[133] in addition to various disclaimers.[134] The Office may still exercise a more subtle influence, though, through the provision of technical

---

132. *Id*. at 130 (Letter from the Jicarilla Apache Tribe to Senator Daniel K. Inouye, Chairman, and Senator John McCain, Vice Chairman, Senate Committee on Indian Affairs).

133. 25 U.S.C. § 3611(d) (2012).

134. 25 U.S.C § 3665 (2012). The statute provides:

> Nothing in this chapter shall be construed to — (1) encroach upon or diminish in any way the inherent sovereign authority of each tribal government to determine the role of the tribal justice system within the tribal government or to enact and enforce tribal laws; (2) diminish in any way the authority of tribal governments to appoint personnel;(3) impair the rights of each tribal government to determine the nature of its own legal system or the appointment of authority within the tribal government; (4) alter in any way any tribal traditional dispute resolution forum; (5) imply that any tribal justice system is an instrumentality of the United States; or (6) diminish the trust responsibility of the United States to Indian tribal governments and tribal justice systems of such governments.

Id.

assistance[135] and the determination of how to apportion funding between the tribes,[136] leading perhaps (consciously or not) to a federal preference for a certain style of tribal court systems.

Grants and other opportunities may also be created as part of the kind of jurisdictional legislation discussed *supra*. Both the TLOA and the VAWA authorize funding for grant programs or extend eligibility for existing funding programs to tribes.[137] In such contexts, federal funding for tribal justice systems may be seen as more directly tied to conditions explicitly meant to bring those justice systems into closer alignment with the American state and federal model. That is not to say that tribes reject such funding opportunities — indeed, once conditions are imposed in exchange for expanded recognition of tribal jurisdiction, it is important for tribes to have access to the resources necessary to meet those conditions in order to receive the benefit of expanded recognition. Moreover, at least some tribes may want to extend the types of protections that those conditions impose, but lack the funding to do so. For example, some tribal witnesses at the ITJA hearings requested that Congress include language in the ITJA requiring tribal justice systems to provide a right to counsel as defined by

---

135. The ITJA also directs the Office to provide technical assistance and training and to "[p]romote cooperation and coordination among tribal justice systems and the Federal and State judiciary systems." 25 U.S.C. § 3611(c)(2)-(4).

136. We note that none of the funding authorized under the ITJA has ever actually been appropriated. *See* Nat'l Congress of Am. Indians, Testimony Before the U.S. Senate Committee on Indian Affairs Hearing the President's Fiscal Year 2014 Budget for Tribal Programs 10 (Apr. 24, 2013), *available at* http://www.indian.senate.gov/hearings/loader.cfm?csModule=security/getfile&pageid=13321. That testimony also noted:

> Further, the method by which BIA supplemental court funding is distributed is seriously flawed and needs to be overhauled. Currently, in order to obtain necessary additional operating funds, a tribal court must undergo — and fail — a court evaluation. This deters tribes from seeking additional funding because they must be assessed as being sub-standard; and this information becomes public, undermining the reputation and credibility of the tribal court. In addition, the innovative tribal courts that achieve success with pilot programs are unable to obtain funding to continue the programs or to allow for replication as best practices by other tribal nations. A confidential evaluation process and award system that allow for under-functioning courts to receive additional funding and also support successful pilot programs should be developed and implemented.

Id.

137. Tribal Law and Order Act, Pub. L. No. 111-211, sec. 243, § 1701, 124 Stat. 2258, 2292-94 (2010) (Tribal Resources Grant Program); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204(f), 127 Stat. 54, 120. (Grants to Tribal Governments).

tribal law,[138] testifying that they desired to provide the right to counsel to criminal defendants in their courts, but simply did not have funding. These tribes were willing, and even preferred, to require the protection of this right in tribal courts through federal law, as long as that was accomplished through a vehicle that would also provide the resources. This stands as an important reminder that the federal push towards a United States constitutional model is not necessarily inherently unwelcome among tribes, and may in fact be viewed instead simply as a best practice or a codification of a comparable tribal tradition. Critically, though, these tribal witnesses requested that the right to counsel be defined by *tribal* law, rather than federal or state law.[139]

The TLOA and the VAWA also both require tribes to guarantee effective assistance of counsel, with no stipulation that the right be defined under tribal law. Under the TLOA, tribal courts must "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution" in order to exercise the expanded sentencing authority permitted under the Act.[140] VAWA further extends all protections that apply under the TLOA, including the right to counsel, to defendants subject to a tribe's exercise of special domestic violence criminal jurisdiction under the VAWA.[141] As noted, the Department of Justice has opined that "[t]he tribal courts' application of the federal statutory rights described in [the VAWA] should be comparable to state courts' applications of the corresponding federal constitutional rights in similar cases."[142]

Thus, funding to implement the right to counsel requirement under the TLOA and VAWA may not be available to tribal justice systems in which the right to counsel looks too different from what it would look like under state or federal law. This likely restricts funding to those tribes with courts that appear similar to their state and federal counterparts. Of course, this

138. *Hearing on S. 521*, *supra* note 117, at 1 (testimony of Elbridge Coochise, Chief Judge, Northwest Intertribal Court System) ("The legislation should include a provision stipulating a right to counsel. Many of our tribes have not provided for defense counsel for our members, solely because we don't have funds to do so. In that stipulation it would be defined by tribal law who is to represent them in court."); *id*. at 50 (testimony of W. Ron Allen, Chairman, Jamestown S'Klallam Tribe) ("The legislation should include a provision stipulating a right to counsel as defined by Tribal law").

139. *Id*.

140. Tribal Law and Order Act, sec. 234, § 1302(c)(1), 124 Stat. at 2280.

141. Violence Against Women Reauthorization Act of 2013, sec. 904, § 204(d)(2), 127 Stat. at 120.

142. Pilot Project Notice, *supra* note 8, at 35,963.

approach can lead to uniformity across jurisdictions, making it more likely that a non-tribal forum will extend comity to tribal courts, and will generally acclimate skeptics towards tribal court practices and encourage future expansion of tribal court jurisdiction. Nevertheless, it does not change the fact that on some level, it may discourage truly unique tribal practices.

C. Comity Towards Tribal Courts

In light of the practical need for outside recognition of tribal court authority,[143] the influence that federal courts (and, for the purposes of this discussion, state courts) wield as a condition of that recognition act as an additional facet of the relationship between federal Indian law and tribal law. Because the federal government, states, and Indian tribes coexist as separate sovereigns, "they have no direct power to enforce their judgments in each other's [courts]."[144] As a result, in order for a state or federal court to enforce a tribal court judgment, the tribal court must be afforded comity,[145] thus exerting strong pressure on tribal justice systems to apply tribal law in a manner compatible with state and federal jurisprudence. As Roman J. Duran, Vice President of the National American Indian Court Judges Association, testified before the Senate Committee on Indian Affairs in 2008: "[n]ow more than any time in their history, tribes and their tribal courts are challenged to maintain their judicial and tribal sovereignty in a manner that will pass legal scrutiny by the federal judicial system."[146]

---

143. Tribes themselves often lack the means to enforce tribal court judgments, particularly in civil cases involving non-Indians. *See, e.g.*, Craig Smith, Comment, *Full Faith and Credit in Cross-Jurisdictional Tribal Court Decisions Revisited*, 98 CALIF. L. REV. 1393, 1405-06 (2010) (discussing evidence of low enforcement rates of tribal judgments in non-tribal forums).

144. Wilson v. Marchington, 127 F.3d 805, 807 (9th Cir. 1997).

145. While tribal courts are occasionally extended full faith and credit, rather than comity, courts analyzing tribal court judgments based on a comity analysis are far more revealing as to prevailing views of tribal court legitimacy in the eyes of non-tribal judiciaries, and the comparative federal Indian law pressure on tribal courts to conform tribal law to a "constitutionally acceptable" standard. *See, e.g.*, Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589, 651-62 (1990) (examining the historical progression of the debate).

146. *Hearing Before the Senate Comm. on Indian Affairs: Tribal Courts and the Administration of Justice in Indian Country*, 110th Cong. 10 (2008) (statement of Hon. Roman J. Duran, First Vice President, Nat'l Am. Indian Court Judges Ass'n).

The doctrine of comity has its origins in federal common law stemming from the Supreme Court case of *Hilton v. Guyot*,[147] in which the United States Supreme Court held that:

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh[.][148]

In implementing this general doctrine in the tribal court context, many courts have adopted the analysis established in *Wilson v. Marchington* and its progeny and apply the following rules towards tribal court comity:

1. Federal courts may neither recognize nor enforce tribal judgments if:
    a. the tribal court did not have both personal and subject matter jurisdiction; or
    b. the defendant was not afforded due process of law.
2. A federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances:
    a. the judgment was obtained by fraud;
    b. the judgment conflicts with another final judgment that is entitled to recognition;
    c. the judgment is inconsistent with the parties' contractual choice of forum; or

147. 159 U.S. 113 (1895).
148. *Id.* at 202-03.

> d. recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought.[149]

Perhaps the comity cases most telling for our purposes are those that examine whether the tribal court provided a defendant with due process of law. "Due process, as that term is employed in comity [analysis,] . . . [requires that there be] opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws."[150] These cases are emblematic of the intersection between federal Indian law and tribal law, and the former's tendency to shape the latter.

Several courts have adopted a general rule that tribal court proceedings that comply with ICRA are inherently compatible with due process,[151] even when, for example, that compliance with ICRA resulted in the defendant being criminally tried without being afforded the right to counsel.[152] Other courts have been more skeptical of tribal court proceedings. For example, in *United States v. Cavanaugh*,[153] the court refused to consider the defendant's tribal court domestic violence convictions as prior convictions under a federal statute making it a crime to commit a domestic assault within Indian country if the defendant had at least two prior final convictions for similar assault.[154] The court reasoned that the lack of counsel provided to the defendant in tribal court, although fully compliant with ICRA, nevertheless violated due process.[155] Although the district court's opinion in *Cavanaugh* was ultimately overturned,[156] its reasoning underscores the inherent

149. *Wilson*, 127 F.3d at 810; *accord* MacArthur v. San Juan Cnty., 497 F.3d 1057 (10th Cir. 2007) (generally applying the *Wilson* doctrine).

150. *Wilson*, 127 F.3d at 811.

151. *See, e.g.*, United States v. Shavanaux, 647 F.3d 993, 1000 (10th Cir. 2011) ("Unless a tribal conviction has been vacated through habeas proceedings or on other grounds, it constitutes a valid conviction . . . [and] does not violate a defendant's right to due process in a federal prosecution.")

152. *Id.* at 999; *accord* State v. Spotted Eagle, 71 P.3d 1239, 1245-46 (Mont. 2003).

153. 680 F. Supp. 2d 1062 (D.N.D. 2009).

154. *Id.* at 1074-77.

155. *Id.*

156. *See* United States v. Cavanaugh, 643 F.3d 592, 605 (8th Cir. 2011) (citing, *inter alia*, *Spotted Eagle*, and approving of its reasoning concerning the necessity of affording comity to tribal court convictions that were set out in accordance with ICRA); *see also Shavanaux*, 647 F.3d at 999 n.6 (rejecting the district court's decision in *Cavanaugh*).

tensions between federal Indian law and tribal law, as some judges do not even view ICRA compliance as setting a high enough bar for the recognition of tribal court judgments.

This general suspicion towards tribal court practice, while perhaps exaggerated in *Cavanaugh* and similar cases, nevertheless permeates comity analysis. The nominal baseline principle among state and federal courts is that, absent one of the *Wilson* exceptions, "[t]he importance of tribal courts and the dignity we accord their decisions will weigh in favor of comity in any case where we have discretion to recognize and enforce a tribal court judgment."[157] But the relevant and discretionary due process, equity, and public policy determinations are made pursuant to the values and norms of the state or federal forum in which enforcement is sought, and not pursuant to the values of the tribe.[158] Some courts recognize and seek to counter federal encroachment, holding they must "refuse to accept jurisdiction over a case when doing so 'would undermine the authority of the tribal courts,'"[159] or stating that comity "does not require that a tribe utilize judicial procedures identical to those used in the United States Courts."[160] But as the cases illustrate, many non-Indian forums nevertheless engage in non-tribal determinations of due process and equity despite their alleged deference to tribal law.

For example, if the case involves the interpretation of tribal laws or customs that "differ significantly from those commonly employed in Anglo-Saxon society,"[161] tribes are afforded more leeway, as courts will "weigh the individual right to fair treatment against the magnitude of the tribal interest in employing those procedures to determine whether the procedures pass muster."[162] By comparison, and despite the congressional directive that tribal courts be able to develop their own robust legal

157. Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1142 (9th Cir. 2001).

158. *Cf.* Starr v. George, 175 P.3d 50, 57-58 (Alaska 2008) (refusing to enforce tribal ICWA judgment when tribal court did not provide a relevant party with adequate notice and opportunity to be heard, which the Court found "are essential elements of due process under the Alaska Constitution"), *and* Halwood v. Cowboy Auto Sales, Inc., 946 P.2d 1088, 1094 (N.M. Ct. App. 1997) (upholding a tribal court judgment of punitive damages rendered against a non-Indian, holding that the award was "perfectly consistent with New Mexico public policy").

159. Beltran v. Harrah's Ariz. Corp., 202 P.3d 494, 501 (Ariz. Ct. App. 2008) (quoting Williams v. Lee, 358 U.S. 217, 222 (1959)).

160. Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997).

161. Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988) (citations and internal quotations omitted).

162. *Id.*

systems,[163] courts will apply "federal constitutional standards . . . in determining whether the challenged procedure violates the [Indian Civil Rights] Act,"[164] reasoning that "concerns for respecting a sovereign's procedures and avoiding paternalism are reduced when tribal court laws and procedures governing trials and appeals track those of our federal courts."[165] Courts have used this general reasoning to decline extensions of comity, or full faith and credit under similar analysis, to tribal courts for reasons such as failure to provide adequate notice to interested parties in child custody hearings,[166] failure to timely rule on a defendant's *in forma pauperis* motion,[167] failure to prohibit a party from discussing race in a closing argument against a non-Indian defendant,[168] failure to provide parties with counsel at a child custody hearing,[169] failure to timely rule on evidentiary hearings,[170] confusion and lack of coordination between different judges on the same case,[171] and concerns over separation of powers between the judicial, legislative, and executive branches.[172]

In contrast to this heightened scrutiny applied to tribal courts, federal courts routinely extend comity to foreign judiciaries that fail to apply American standards of due process so long as there are no "outrageous departures from our own motions of civilized jurisprudence"[173] and the judgment is "'fundamentally fair' and do[es] not offend against 'basic fairness.'"[174] Courts will also afford particular deference to "favored

163. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66-70 (1978) (detailing legislative history of the ICRA and emphasizing importance of avoiding undue intrusion into tribal jurisprudence); *see also* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14-15 (1987) ("Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development.") (internal citation omitted).

164. *Randall*, 841 F.2d at 900.

165. Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1143 (9th Cir. 2001).

166. *See, e.g.*, Starr v. George, 175 P.3d 50, 56-59 (Alaska 2008); *In re* DeFender, 435 N.W.2d 717, 721 n.4 (S.D. 1989); Desjarlait v. Desjarlait, 379 N.W.2d 139, 144 (Minn. Ct. App. 1985).

167. *Randall*, 841 F.2d at 900-02.

168. *Bird*, 255 F.3d at 1149-52.

169. *Desjarlait*, 379 N.W.2d at 144.

170. Burrell v. Armijo, 456 F.3d 1159, 1173 (10th Cir. 2006).

171. *Id.*

172. *Id.* at 1170.

173. British Midland Airways Ltd. v. Int'l Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974); *accord* De Csepel v. Republic of Hung., 714 F.3d 591, 608 (D.C. Cir. 2013).

174. Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000).

systems,"[175] such as the courts of England that are "likely to secure an impartial administration of justice between the citizens of its own country and those of other countries."[176] Thus, federal courts have upheld convictions based on statements made to foreign law enforcement without *Miranda* warnings;[177] the use of evidence obtained through searches and seizures that would have violated the Fourth Amendment had they been conducted in the United States;[178] the introduction into evidence of prior convictions rendered by courts sitting without juries,[179] or trials that would have violated double jeopardy.[180] These cases routinely turn on the court's finding that these constitutional shortcomings were acceptable absent a showing that the "[foreign] legal system lacks the procedural protections necessary for fundamental fairness."[181] Yet, courts rarely delve into the same "fundamental fairness" examination when it comes to tribal courts; rather, they simply create *per se* rules that if tribal courts do not provide certain rights, comity will not be extended.[182]

It would be more consistent with the general rule of comity for state and federal courts to acknowledge tribal judgments, as they do in the foreign context, absent a grievous breach of due process. But the tribal-specific comity doctrine, although nominally developed from the basis of foreign comity, nevertheless reflects the dichotomous relationship between federal and tribal law. While federal law acknowledges that tribal courts are due deference and should be encouraged to draft and apply tribal law, there is a simultaneous undercurrent that tribal courts are comparatively untrustworthy when applying "federal" law.

---

175. Soc'y of Lloyd's v. Webb, 156 F. Supp. 2d 632, 640 (N.D. Tex. 2001) (citation omitted).

176. Somportex Ltd. v. Phila. Chewing Gum Corp., 318 F. Supp. 161, 166 (E.D. Pa. 1970), *aff'd*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) (citation omitted).

177. *See* United States v. Covington, 783 F.2d 1052 (9th Cir. 1985); United States v. Mundt, 508 F.2d 904 (10th Cir. 1974); United States v. Welch, 455 F.2d 211 (2d Cir. 1972); United States v. Conway, No. 93-8124, 1995 WL 339403 (10th Cir. June 8, 1995); State v. Burke, 717 P.2d 1039 (Idaho Ct. App. 1986).

178. United States v. Mitro, 880 F.2d 1480 (1st Cir. 1989); United States v. Hawkins, 661 F.2d 436 (5th Cir. 1981); United States v. Rose, 570 F.2d 1358 (9th Cir. 1978).

179. United States v. Kole, 164 F.3d 164 (3rd Cir. 1998); United States v. Wilson, 556 F.2d 1177 (4th Cir. 1977).

180. United States v. Brito-Hernandez, 996 F.2d 80 (5th Cir. 1993).

181. United States v. Wilson, 556 F.2d 1177, 1178 (4th Cir. 1977).

182. *See, e.g.*, Starr v. George, 175 P.3d 50, 56-57 (Alaska 2008) (no comity for tribal court cases that fail to give notice in child proceedings, regardless of context).

This is not to say that tribal courts do not make mistakes of law, or that tribes and tribal judges always treat parties fairly. Indeed, critics argue that ICRA's constitutional limitations and the "consent theory" weigh against any expansion of tribal court jurisdiction,[183] and even ardent supporters of tribal rights have argued that tribes should, for example, waive sovereign immunity for ICRA claims as a matter of good governance.[184] Additionally, there are certainly policy arguments to be made that state and federal court oversight of tribal courts, whether through ICRA, comity analysis, or otherwise, helps provide accountability to tribal courts and encourages best practices. But it is undeniable that the development of federal Indian law in this area has presented unique difficulties for tribal courts seeking to apply tribal law, as tribes must strive to balance cultural traditions and community needs with the reality that the more "alien" or "tribal" the judgment, the less likely it is that it will ever be upheld or enforced at the state or federal level — even if those judgments are fundamentally fair in any context.

IV. Tribal Courts and Tribal Law: Navigating the Federal Indian Law System

Though Indian tribes have long exercised inherent authority to address crime and conflict within their societies, navigating the practical consequences of existing as a "sovereign within a sovereign" has brought new challenges to the exercise of these powers. The relationship between federal Indian law and tribal law is magnified as tribes seek to implement their justice systems in the manner most responsive to their unique needs and circumstances. Tribal justice systems adhere to, build on, depart from, and continue to experiment with what might be called "traditional" justice practices as relevant to each particular tribe, whether through wholly unique applications of customary law or tribal court interpretation of ICRA.

Rather than conduct an exhaustive survey of what tribal criminal law is or could be, this section examines the tribal law side of the equation through consideration of a particularly well-developed and widely recognized tribal justice system: that of the Navajo Nation. Because the Judicial Branch of the Navajo Nation is a well-known and often-cited example of a robust, well-functioning and distinctly tribal justice system,

183. *See, e.g.*, Gede, *supra* note 6, at 40 ("[T]here are still significant reasons to be concerned that [the tribal provision of the 2013 VAWA reauthorization] may raise difficult constitutional issues and serious policy objections.").

184. Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1108-16 (2007).

the Navajo Nation Peacemaking Program is a convenient example and a good starting point for discussion that aims to consider the full potential of tribal law.[185]

A. The Navajo Peacemaking Program

The Peacemaking Program exists alongside the Navajo Nation's family courts, district courts, and the Navajo Nation Supreme Court.[186] Initially given the name Navajo Peacemaker Court, the program institutionalizes the longstanding Navajo practice of peacemaking and was created in 1982 by the Navajo Judicial Conference.[187] Its purpose was "to find an alternative to Anglo-American judicial methods that had roots in Navajo common law, and which could pull in Diné wisdom, methods and customs in resolving disputes."[188] Currently, the Peacemaking Program is available as an alternative to the Navajo courts, though matters requiring court orders, such as divorces or applications for restraining orders and domestic violence matters are among certain matters which must first be filed in tribal court.[189] Then, these matters are referred by the court to the Peacemaking Program upon request of the parties.[190]

The Navajo Peacemaking process uses what Robert Yazzie, Chief Justice of the Navajo Nation from 1992 to 2003, refers to in English[191] as the

185. The Judicial Branch of the Navajo Nation itself provides quite a bit of information on its website, *see The Peacemaking Program of the Navajo Nation*, NAVAJOCOURTS.ORG, http://www.navajocourts.org/indexpeacemaking.htm (last visited Aug. 20, 2014), and numerous and detailed scholarly studies have been published, *cf.* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE (2009); MARIANNE O. NIELSEN & JAMES W. ZION, NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE (2005); Robert Yazzie, *"Life Comes from It": Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).

186. *Courts & Peacemaking in the Navajo Nation*, NAVAJOCOURTS.ORG, http://www.navajocourts.org/publicguide.htm (last updated May 16, 2013).

187. PEACEMAKING PROGRAM OF THE JUDICIAL BRANCH OF THE NAVAJO NATION: PLAN OF OPERATIONS (July 30, 2012), *available at* http://www.navajocourts.org/Peacemaking/Plan/PPPO2013-2-25.pdf [hereinafter PLAN OF OPERATIONS].

188. *See id.* at 2.

189. *See id.* at 37.

190. *Id.*

191. Navajo Peacemaking (and Navajo law generally) involves many Navajo concepts that are not easily translated into English. *See, e.g.* Justice Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 368 (2011).

"talking out" process.[192] The process is based on Navajo Fundamental Law and aims to achieve consensus between the parties — those commonly referred to in American state and federal (and many tribal) courts as the offender and the victim.[193] The participation of family members of both the offender and the victim is also a key aspect of Navajo Peacemaking. Indeed, the Navajo Peacemaking response to criminal behavior is rooted in Navajo cultural notions of relationships and the nature of crime and dispute.[194] As explained by Chief Justice Yazzie,

> What is an offender? It is someone who shows little regard for right relationships. That person has little respect for others. Navajos say of such a person, 'He acts as if he has no relatives.' So, what do you do when someone acts as if they have no relatives? You bring in the relatives! Victim rights are an important issue. What do you do about them? There, too, you bring in the relatives.[195]

Other individuals involved in or affected by the crime that has been committed may also participate or attend.[196]

Procedurally, Chief Justice Yazzie describes Navajo Peacemaking as consisting of six elements: "(1) prayer, (2) expressing feelings, (3) 'the lecture', (4) discussion, (5) reconciliation, and (6) consensus."[197] After the prayer, which Chief Justice Yazzie says "puts people in the right frame of mind" for the process, all those involved in the conflict are given an opportunity to express their view and their feelings about what happened.[198] Here, Chief Justice Yazzie points out one of the major differences between the peacemaking system and the adversarial process utilized in the American federal system:

---

192. Chief Justice Robert Yazzie, *Healing as Justice: The Navajo Response to Crime*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS 121, 130 (Wanda D. McCaslin ed., 2005) [hereinafter Yazzie, *Response to Crime*].

193. *See, e.g.*, PLAN OF OPERATIONS, *supra* note 182, at 12-13.

194. Relationships (especially family and clan relationships) form a major part of the legal structure in Navajo society. *See* Yazzie, *Response to Crime*, *supra* note 187, at 122-23.

195. *Id.* at 123.

196. *See* PLAN OF OPERATIONS, *supra* note 182, at 6 (describing the four categories of participants in peacemaking).

197. Yazzie, *Response to Crime*, *supra* note 187, at 125; *see also* Donna Coker, *Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking*, 47 UCLA L. REV. 1, 99 n.500 (1999) (describing the author's experience with the lecture and prayer process).

198. Yazzie, *Response to Crime*, *supra* note 187, at 125.

> Opinion evidence is freely allowed within the bounds of saying things in a respectful way. . . . In Western courtrooms, a person is not allowed to express how he or she feels. Yet expressing emotions is an essential part of healing. . . . That is part of making or restoring a healthy relationship.[199]

During the "lecture" portion of the Peacemaking process, it is the Peacemaker's job to offer insight and guidance by framing the dispute with reference to Navajo law and knowledge: "[t]he peacemaker will relate parts of the *Hajine Bahane*, our creation lore, and apply it to the problem. The old 'stories' are actually a form of precedent that everyone respects."[200] Unlike a neutral mediator, or even a judge whose role could be described as simply applying law to the facts, peacemakers may also offer their own opinions during the lecture.[201] After the peacemaker has guided the participants, all participants in the peacemaking are permitted to engage in discussion. Again, family participation is key, as powerfully illustrated in examples recounted by Chief Justice Yazzie:

> Having relatives participate in the process is fundamental. Consider the following example: A young Navajo woman took a man to court in a paternity action for child support. The man denied that he was the father. It was his word against hers, and most Navajos can't afford blood tests. The judge sent the case to the peacemaker court. The couple's parents attended. The discussion was no longer about whether the man was the father, but what the families were going to do for the well-being of their child. … Family participation is part of the healing process because it gets past denial. Denial — the psychological barrier that underlies most cases of child abuse, alcohol-related crime, family violence, sexual abuse, and driving while intoxicated — is the act of people refusing to face reality or own up to their actions.[202]

199. *Id.*
200. *Id.* at 126.
201. *Id.*; *accord* PLAN OF OPERATIONS, *supra* note 182, at 10.
202. Yazzie, *Response to Crime*, *supra* note 187, at 126.

Chief Justice Yazzie also notes that the discussion aspect of the Navajo Peacemaking process is effective as a means of identifying the root cause of a crime, so that cause can be meaningfully addressed.[203]

When the Navajo Peacemaking Court was first initiated, it was not used in cases involving violence and threats against personal safety. Instead, such cases were confined to the Navajo Nation courts which, like American state and federal courts, "focus[ed] on safety issues first and foremost in legal interventions, [and] cautiously advocated coerced separation."[204] The Navajo Nation has since revisited the assumptions underlying that approach. As the current Plan of Operations for the Peacemaking Program notes, "[t]he presumption is that separation increases safety. However, it is clear that coerced separation may sometimes result in greater violence, especially when there is no police presence to enforce the separation. The issuance of a restraining order, without involvement and investment of a rural and isolated community, and without police presence, may escalate violence."[205] On the other hand, "Peacemaking, in essence, serves to involve and invest the often isolated community. The sessions gather a family and community tightly around the abuser and protectively around victims."[206] Now, pursuant to the Navajo Nation Code, domestic violence cases may be referred by the Supreme Court of the Navajo Nation to the Peacemaker Program.[207] Referral is at the victim's option, and the victim's consent must be given in writing.[208] At any time, the victim may choose to have the petition removed to the Navajo Nation Family Court.[209] Peacemakers who handle domestic violence cases must have "received specialized training in their primary language on the causes, symptoms and dynamics of domestic abuse[.]"[210]

Program administrators believe that the Peacemaking process is highly effective in domestic violence cases: "From our observation, the various

---

203. *Id.* at 127 (noting that one Navajo judge discovered as a result of Peacemaking referrals that many of the offenders appearing in her courtroom suffered from post-traumatic stress disorder, and began sending those offenders to traditional Navajo curing ceremonies).

204. PLAN OF OPERATIONS, *supra* note 182, at 28.

205. *Id.*

206. *Id. But see also* Coker, *supra* note 192, at 89 n.440 ("Mediation's privacy is also criticized both because it fails to hold mediators accountable via public scrutiny and because it recreates the privacy of the family, thus recreating norms of denial and minimization of abuse.").

207. NAVAJO NATION CODE ANN. tit. 9, § 1652 (1993).

208. *Id.*

209. *Id.*

210. *Id.*

peacemaking practices work best in the most hazardous and emotionally fraught situations such as domestic violence, which is considered 'epidemic' on our various reservations."[211] Moreover, they believe that effectiveness surpasses that of an adversarial court.[212] Chief Justice Yazzie agrees that, due to its focus on family involvement and addressing denial, Peacemaking can be particularly effective in domestic violence cases:

> In a recent peacemaking involving domestic violence that took place in our Tuba City court, the male batterer's sister came in with him. The defendant was full of denial; he made light of his actions; and he blamed his wife for the whole thing. It was the man's *sister* who straightened him out. She told him he was violent and that he must do something about his emotional state and his drinking — to stop making excuses for his *own* actions. She told him the traditional principles that he violated — that Navajos believe in the dignity of women, so you must not hurt them. She then offered to help him. She broke down his barrier of denial and used her influence as a sister to deal with the underlying problems.[213]

The Peacemaking process then closes with reconciliation and consensus. According to Chief Justice Yazzie, the reconciliation process focuses on: "restor[ing] people to good relationships with each other."[214] As for consensus, Chief Justice Yazzie says that "the people themselves usually reach a consensus about what to do. Planning is actually a central Navajo justice concept, and the people plan a very practical resolution to the problem."[215] As part of the current process, an official Peacemaking Agreement is written and signed by the parties.[216] Resolution of the incident often includes *nalyeeh*, which Chief Justice Yazzie says may imperfectly be

---

211. PLAN OF OPERATIONS, *supra* note 182, at 27; *see also* Yazzie, *Response to Crime*, *supra* note 187, at 132 ("People are using peacemaking for family squabbles, alcohol-related behavior, family violence, and even such controversial things as sex offenses. It works.").

212. PLAN OF OPERATIONS, *supra* note 182, at 27 ("Domestic violence is an extreme example of family discord in which peacemaking should be used to address urgent situations. When family members become monsters to each other, the teachings that they will need to change are seldom within the ability of the courts.").

213. Yazzie, *Response to Crime*, *supra* note 187, at 126-27.

214. *Id.* at 127.

215. *Id*.

216. PLAN OF OPERATIONS, *supra* note 182, at 45.

translated into English as "restitution."[217] "The offender's relatives play a very important part in *nalyeeh*. It is the families that actually provide the money, horses, or goods. Once they have done that, they will keep an eye on the offender to make certain that he or she will not offend again."[218]

For the Navajo Nation, the institutionalization of traditional Peacemaking practices within the broader context of the Nation's current justice system has involved an ongoing process of defining and redefining the relationship between peacemaking and the Navajo courts. That process in turn has involved the complicated task of balancing the primary purpose of the Peacemaking Program against the need for compatibility with other components of the Nation's current system, to say nothing of outside entities. The Peacemaking Program's existing Plan of Operations offers a fairly detailed history of this process and a helpful, frank discussion of some of the challenges faced:

> The court that was created aspired to protect and support the customary practice of peacemaking, *hózhóji naat'aah,* but also imposed Anglo-American court-style procedural rules on *hózhóji naat'aah*. The judicial institutionalization of *hózhóji naat'aah* had the inadvertent consequence of changing its fundamental nature.
>
> Over thirty years, institutionalized *hózhóji naat'aah* more and more resembled mediator-assisted settlement. Its teaching component, its heroic component, and its dynamic life value engagement component as *hózhóji naat'aah* were not included in the peacemaker court rules and, over time, fell out of practice. "Consent" to participate in the often emotional journey came to be equated with the Anglo-American notion of "consent" to lessen gains or losses through settlement. As a result of the rules, the emotional component of peacemaking came to be viewed as

217. For an examination of the Navajo court system's application of *nalyeeh*, see Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. LJ. 1047, 1080-85 (2005).

218. Yazzie, *Response to Crime*, *supra* note 187, at 129; *see also* Austin, *American Indian Customary Law*, *supra* note 191, at 365 n.71 ("One Navajo common customary law is *nályéél* (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.").

> a complication that the peacemaker ought to quieten and diffuse.[219]
>
> [Furthermore], over time, many courts began requiring the Peacemaking Program to provide legal assistance to *hózhóji naat'aah* participants and also began requiring peacemaking agreements to be drafted in the style of legal documents. As the legal demands of the courts grew, it became evident that the program lacked the legal ability to provide such services and should not do so.[220]

The fact that the Peacemaking Program includes this history in its current Plan of Operations suggests that the story provides, in the view of its authors, lessons or considerations that are important to the successful operation of the Program. Indeed, the narrative shows the Navajo Nation to be wrestling with the types of challenges that many Indian tribes are likely to face in their efforts to preserve, grow, or create alternatives to the American federal and state justice model. These challenges, while relating in this instance to the relationship between the Navajo Nation's own courts and its more traditional dispute resolution methods, shed light on similar relationships between tribal justice systems and state and federal courts with which they interact.

For the Navajo Peacemaking Program, the lessons of the last thirty years suggest that preserving the freedom and autonomy of its traditional dispute resolution process is one key piece in the puzzle: "[o]ver time, it has become clear that the independence of the peacemakers needs to be reinforced, the goal of peacemaking clarified, and the traditional components of *hózhóji naat'aah* as a distinct and separate method need to be restored for the traditional method's effective and proper use."[221] Nevertheless, autonomy does not necessarily mean isolation from or incompatibility with contemporary institutions. On the one hand, the Navajo Peacemaking rules were replaced with more flexible "guidelines," and the word "court," which in English carries certain procedural and other connotations, was dropped from the program's title.[222] On the other hand, the Navajo Nation Council officially acted to acknowledge Diné Fundamental Laws and to create the Peacemaking Division (which later became the Peacemaking Program), and expanded the legal relationship of

219. PLAN OF OPERATIONS, *supra* note 182, at 2.
220. *Id*. at 3.
221. *Id*.
222. *Id*. at 2.

peacemaking with other Navajo institutions through the codification of laws.[223] In this way, contemporary, institutional methods were utilized to further strengthen and protect the legitimacy of the traditional Peacemaking process.[224] Challenges still exist for the Peacemaking Program,[225] and the process is ongoing, but the program is widely recognized for the success that it has achieved.[226]

B. Navajo Customary or Common Law

Even separate from, and prior to, the institutionalization of Navajo Peacemaking, the Navajo Nation was implementing Navajo customary or common law in the Navajo courts, including in criminal cases. For example, in *In re D.P.*, the Navajo District Court for the District of Crownpoint looked to Navajo common law as well as statutory law in evaluating a restitution order in the case of a minor found convicted of armed robbery, unlawful use of a deadly weapon, and unauthorized use of an automobile.[227] The Judge observed the contrasting approaches of Anglo-European and Navajo common law to restitution in criminal cases. Specifically, the judge noted that the victim is largely removed from the process in Anglo-European tradition, under which the government takes restitution in the form of fines "as payment to protect the wrongdoers from the vengeance of the victim."[228] The Judge, however, applied Navajo law, which he found differed substantially:

> Under Navajo tradition, all offenses (with the exception of witchcraft) were punished by payments to the victim or the victim's immediate family or clan. . . . In this case, robbery with injury would be punished by a payment of 'blood money' to the immediate family, plus a multiple payment for any property taken. Theft would be punished by a multiple payment to the victim or immediate family group.

223. *Id*.
224. *Id*.
225. *Id*. at 3.
226. *See, e.g.*, Matthew L. M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. OF RACE & L. 57, 87 (2007) (discussing the use of tribal custom by tribal courts and noting that "[t]he experiences and advances made by [the Navajo] . . . Nation's courts are unprecedented in Indian tribal court history[.]").
227. *See, e.g.*, *In re* D.P., 11 Indian L. Rep. 6023, 6024 (Navajo D. Crownpoint 1982).
228. *Id.*

> The Navajo tradition recognizes that the central ideas of punishment were to put the victim in the position he or she was before the offense by a money payment, punish in a visible way by requiring extra payments to the victim or the victim's family (rather than the king or state), and give a visible sign to the community that wrong was punished. The offender was given the means to return to the community by making good his or her wrong.[229]

Accordingly, the court found that "not only is restitution permitted under Navajo custom law, but indeed it was so central to Navajo tradition in offenses that it should be presumed to be required in any juvenile disposition."[230]

In fact, Navajo statutory law has long provided courts must apply Navajo custom where not prohibited by law.[231] More recently, in 2002, the Navajo Nation Council passed a Resolution specifically recognizing Diné Fundamental Law in the Navajo Nation Code.[232] That was followed in 2003 by an amendment to the choice of law statute applicable to the Navajo Nation courts, as part of a broader update of the Judicial Code.[233] That choice of law statute now provides:

> A. In all cases the courts of the Navajo Nation shall first apply applicable Navajo Nation statutory laws and regulations to

---

229. *Id.* (internal citations omitted).

230. *Id.*

231. Prior to an amendment in 2003, title 7, section 204, of the Navajo Nation Code read as follows:

> A. In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws or customs of the Navajo Nation not prohibited by applicable federal laws.
>
> B. Where any doubt arises as to the customs and usages of the Navajo Nation the court may request the advice of counselors familiar with these customs and usages.
>
> C. Any matters not covered by the traditional customs and usages or laws or regulations of the Navajo Nation or by applicable federal laws and regulations, may be decided by the Courts of the Navajo Nation according to the laws of the state in which the matter in dispute may lie.

Resolution of the Navajo Nation Council CO-72-03, at exhibit A (Oct. 24, 2003) (showing pre-amendment language of § 204), *available at* http://www.navajocourts.org/Resolutions/CO-72-03CourtsAmend.pdf.

232. Resolution of the Navajo Nation Council CN-69-02 (Nov. 1, 2002), *available at* http://www.navajocourts.org/Resolutions/CN-69-02Dine.pdf.

233. Resolution of the Navajo Nation Council CO-72-03.

> resolve matters in dispute before the courts. The Courts shall utilize Diné bi beenahaz'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.
>
> 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.
>
> C. The courts of the Navajo Nation shall apply federal laws or regulations as may be applicable.
>
> D. Any matters not addressed by Navajo Nation statutory laws and regulations, Diné bi beenahaz'áanii or by applicable federal laws and regulations, may be decided according to comity with reference to the laws of the state in which the matter in dispute may have arisen.[234]

Accordingly, the interpretation of statutory law in the Navajo courts may involve the application and interpretation of uniquely Navajo law and custom — even when the statutory right at issue may be similar to a right protected under United States federal law. In *Navajo Nation v. Kelly*,[235] for example, the Supreme Court of the Navajo Nation confronted the question of whether a dual conviction for reckless driving and homicide by vehicle would violate the prohibition against double jeopardy codified in the Navajo Bill of Rights.[236] Noting that the term "double jeopardy" is borrowed from federal law, the Court nevertheless observed that "[m]erely because the Navajo Bill of Rights uses the same term does not mean that the Court should simply adopt and apply federal interpretations. Though the Court considers federal interpretations, the Court ultimately must interpret the Bill of Rights consistent with *Diné bi beenahaz'áanii*."[237]

In contemplating the standard that ought to be applied in interpreting the legislative intent of the double jeopardy prohibition, the Navajo Supreme Court considered the traditional Navajo approach to dispute resolution and the contemporary Peacemaking Program, which centers on voluntary

234. NAVAJO NATION CODE ANN. tit. 7, § 204 (2009).
235. 6 Am. Tribal Law 772 (Navajo 2006).
236. *Id.* at 776.
237. *Id.* at 777 (internal citations omitted).

participation and resolution to restore harmony.[238] The court regarded conviction and sentencing for a statutory criminal offense in that light:

> As the functional equivalent of traditional resolution through an agreement, a conviction and sentencing should be the final resolution of the dispute caused by a defendant's single action. Multiple charges under multiple statutory offenses for a single action undermine that finality, as conviction for a single offense does not resolve the entire dispute. The Navajo Nation courts therefore cannot lightly apply multiple statutory offenses to a defendant's single action. The Council must clearly intend the separate offenses to punish separate conduct, and therefore resolve separate disputes. *Duncan,* No. SC-CV-51-05, 5 Am. Tribal Law at 465-66, 2004 WL 5658109 at *5-6 (as jury trial reflects traditional Navajo values of participatory democracy, Council may restrict that right only if intent is clear). The Court will apply heightened scrutiny to provisions that allegedly create separate offenses based on a single action, and in the absence of clear intent that the statutory offenses indeed punish separate conduct, multiple convictions for the same action will be barred by double jeopardy.[239]

The Navajo Supreme Court distinguished its approach from the United States federal court approach under *Blockburger v. United States*:[240]

> The mere fact that the elements of the two or more statutory offenses are fulfilled by a defendant's action does not, by itself, show clear intent. In other words, the mere fact that each offense "requires proof of a fact which the other does not," the *Blockburger* test, alone does not establish clear intent. Because the application of multiple criminal statutes to the same action could be done for other purposes, such as enhancing the chances for conviction or increasing the pressure on the defendant to enter into a plea agreement — purposes other than the objective of *bee hózhó náhodoodleeł* — the Court will scrutinize whether the separate statues clearly evince different conduct. Therefore, prosecutors must be aware that multiple charges arising out a defendant's single action may not allow multiple convictions, as

238. *Id.*
239. *Id.* at 777-78.
240. 284 U.S. 299 (1932).

> the offenses charged must clearly resolve separate conduct to not violate a defendant's double jeopardy right.[241]

Finally, the Court noted the ways in which Navajo law protects the rights of criminal defendants differently (and in this case, more stringently) than federal law with regard to double jeopardy: "The *Diné* concept of 'double jeopardy' also means that even if the Council creates two separate offenses that clearly punish the same conduct, it cannot nonetheless mandate multiple punishments, even if its intent is clear. Multiple punishments for the same conduct are contrary to the Navajo concepts described above."[242] The use of Navajo customary or common law thus ensures that Navajo values are reflected even in the Navajo Nation's more "Western"-style courts.

According to the Department of Justice's most recent Census of Tribal Justice Agencies in Indian country, 175 federally-recognized Indian tribes in the lower forty-eight states have a formal tribal court, while ninety-one also have a court of appeals.[243] Not all tribes are able to incorporate tribal customary law into their tribal court operation to the extent that the Navajo Nation has – nor can one assume that every tribe would have the same desire to do so. Further, "the customary laws of Indian tribes rarely (if ever) apply to the disputes that involve non-Indians."[244] Substantial obstacles exist to the application of tribal customary law in tribal courts.[245]

---

241. 6 Am. Tribal Law 772, 778 (Navajo 2006).

242. *Id.* Numerous other examples join those discussed here to illustrate the use of Navajo custom or common law by the Navajo courts. *See, e.g.*, Davis v. Means, 7 Navajo Rptr. 100 (Navajo 1994) (applying Navajo custom to determine the best interests of the child in a paternity suit); Apache v. Repub. Nat. Life Ins. Co., 3 Navajo Rptr. 250, 253-54 (Navajo D. Ct. 1982) (resolving the question of whether a spouse named as an insurance beneficiary lost the right to insurance due to a divorce with reference to the effect of divorce in Navajo custom); *see also* NAVAJO NATION BAR ASS'N, NAVAJO COMMON LAW (collecting cases regarding Navajo Common Law), *available at* http://www.navajolaw.org/navajo%20 common%20law/ncl.htm.

243. STEVEN W. PERRY, U.S. DEPARTMENT OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, at iii (Dec. 2005), *available at* http://www. bjs.gov/index.cfm?ty=pbdetail&iid=543. This study did not include Alaska Native tribes: while many Alaska Native tribes operate tribal courts, *see, e.g.*, John v. Baker, 982 P.2d 738 (Alaska 1999) (finding concurrent state and tribal court jurisdiction over a family law claim), they tend to be smaller or more limited in scope than many tribal courts in the lower forty-eight states.

244. Fletcher, *Rethinking Customary Law*, *supra* note 221, at 63.

245. *Id*. at 82-84 ("Custom may be so ingrained in the language of the tribe that it cannot be translated in an accurate or meaningful way into English"; tribal courts may employ non-member judges unfamiliar with tribal values and practices; customary law may have "limited

Nevertheless, in general "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."[246] In doing so, tribes like the Navajo Nation, and others discussed *infra*, seize on the opportunities they are presented under the federal government's self-determination policy and develop robust, culturally sensitive tribal judiciaries even within the confines of federal Indian law.

C. Tribal Court Common Law Under the Indian Civil Rights Act

Having glimpsed both the operation of an alternative tribal forum for dispute resolution as well as the application of tribal common law in more American-style courts through the example of the Navajo Nation, in this section we broaden our analysis for a brief survey of tribal common law applying federal law requirements in the criminal law context — namely, the Indian Civil Rights Act.

This survey begins to illustrate how tribes are navigating the impositions of federal Indian law within the context of their own justice systems; thus, leaving their own fingerprints on the complex and contradictory relationship between the two fields. Operating within the jurisdictional limitations set by federal common law, tribal judiciaries must recognize the requirements and incentives of federal legislation and resource opportunities, in conjunction with considering whether or not the courts of sister sovereigns will agree to uphold their resolutions if a tribal adjudication strays from the "American" norm either in form or in substance. They must do all of this while developing and applying tribal law in a way that meets the unique needs of their tribal citizens and community members and makes sense in the context of the tribe's cultural and historical existence.

Because the ICRA has been in effect since 1968, there is a sizeable body of tribal law applying the statute. Other scholars have undertaken numerous comprehensive reviews of tribal court decisions under ICRA,[247] and we do

---

utility in modern disputes" because it is either too vague or too specific; or it may no longer "carry enough moral weight to legitimate its use").

246. *Id*. at 60-61.

247. *See, e.g.*, Ann E. Tweedy, *Sex Discrimination Under Tribal Law*, 36 WM. MITCHELL L. REV. 392 (2010); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479 (2000); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of*

not purport to do the same. Instead, our purpose is to consider more broadly the lessons that these cases impart concerning tribes' ability to address the complex relationship between federal Indian law and tribal law.

At the outset, it is interesting to note that many tribes have passed constitutions or ordinances explicitly authorizing tribal courts to apply state or federal law when tribal law is not on point, or when doing so would otherwise further the interests of justice,[248] whether out of concerns for comity, to fill holes in tribal law, respect for precedent, or simple convenience. It is often common practice for tribal courts to consult and incorporate these sources of law when adjudicating disputes under ICRA.[249] Therefore, it is important to recognize that the application of non-tribal law in tribal forums is not in and of itself necessarily or solely reflective of federal coercion. Rather, many traditional tribal values echo Bill of Rights requirements in spirit, and state and federal laws may encourage good governance within tribal judiciaries by enforcing those values.

Regardless, many tribes have developed tribal glosses on the applicable federal doctrines. For example, recognizing that ICRA does not require that tribes provide attorneys to most criminal defendants, the Confederated Tribes of the Colville Reservation Court of Appeals held that pursuant to *Townsend v. Burke*,[250] *Gideon v. Wainwright*,[251] and *United States v. Tucker*,[252] the tribal court could properly sentence a criminal defendant after considering the defendant's prior convictions, for which he had been unrepresented by counsel, so long as the defendant had been advised of his

---

Rights at Thirty Years, 34 IDAHO L. REV. 465 (1998); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994).

248. *See, e.g.*, WHITE MOUNTAIN APACHE JUDICIAL CODE § 2.2(I); COLORADO RIVER INDIAN TRIBES LAW & ORDER CODE art. 1, § 110(B).

249. *See, e.g.*, Magee v. Mashantucket Pequot Gaming Ent., No. MPTC-CV-AA-2006-150 (Mashantucket Pequot Aug. 31, 2007) (applying Mathews v. Eldridge, 424 U.S. 319 (1976), and Goldberg v. Kelly, 397 U.S. 254 (1970), in the context of adjudicating due process dispute); Komalestewa v. Hopi Tribe, 25 Indian L. Rep. 6213, 6214 (Hopi App. Ct. 1996) ("Hopi custom speaks to fairness, but it does not provide specific guidance for defining when the right to a speedy trial has been violated. Therefore, we will consider foreign law and apply it to the extent it is consistent with our customs, traditions and culture.").

250. 334 U.S. 736 (1948) (criminal sentence based on materially false assumptions about defendant's criminal record violated due process).

251. 372 U.S. 335 (1963) (finding a constitutional right to an attorney in criminal cases).

252. 404 U.S. 443 (1972) (criminal sentence based on prior, unconstitutionally-obtained convictions violated due process).

right to counsel and had not had counsel improperly denied.[253] Other tribes have held that ICRA's free speech provision, which prohibits tribes from making or enforcing "any law . . . abridging the freedom of speech,"[254] quite literally prohibits speech restrictions found only in formal tribal "laws," and not general tribal actions[255] or employment policies.[256] This reading departs from state and federal employee speech law, under which the government's attempt to restrict speech in any capacity is inherently a First Amendment issue.[257]

A second facet of tribal law in this context is the shaping of federal legal principles through tribal customs and traditions.[258] The Navajo Supreme Court has repeatedly recognized that "the Navajo concept of due process is unique, in that it applies concepts of fairness consistent with Navajo values" and that while "federal concepts of civil rights may be considered . . . ultimately the rights set out in the Navajo Bill of Rights are to be interpreted in light of Navajo Fundamental Law."[259] The Cheyenne River Sioux Court of Appeals similarly overturned a garnishment determination about which the garnishee had not been notified, reasoning that: "Lakota tradition requires the respectful listening to the position of all interested persons on any important issue" and that the lack of notice violated both ICRA's due process provision and "Lakota traditions of respect and honor."[260] The Hopi Court of Appeals premises its tribal comity analysis on

253. St. Peter v. Colville Confederated Tribes, CCAR 2 (Colville Confederated Sept. 28, 1993); *see also In re* D.H., 8 Am. Tribal Law 164, 166 (Grand Traverse Tribal Ct. 2009) (finding that due process did not require provision of jury trial at child custody proceeding).

254. 25 U.S.C. § 1302(a)(1) (2012).

255. Fletcher v. Mashantucket Pequot Tribe, No. 3 Mash. 265 (Mashantucket Pequot Tribal Ct. 1998) (rejecting tribal employee's claim that he was impermissibly terminated for publicly criticizing the tribe because "no Mashantucket Pequot tribal law is alleged to have been enacted and/or enforced by the defendants in violation of the ICRA — which this Court finds to be an essential element of an ICRA claim").

256. *See* W.T. Creations v. Oneida Hiring Comm'n, No. 98-OHB-0009 (Oneida Ct. App. 1999) (holding that ICRA free speech provision did not apply to tribal non-disclosure agreement).

257. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

258. *See, e.g.*, Wagner v. Tulalip Housing Auth., No. TUL-EMP-12/00-418, 2001 WL 36211300, at *5 (Tulalip Court App. Oct. 2, 2001) (remanding case to district court for a determination on Tulalip customary law concerning insubordination as part of due process claim).

259. Navajo Transp. Servs., Inc. v. Schroeder, 7 Am. Tribal Law 516, 521 (Navajo 2007); *accord id.* at 521-22 (collecting cases applying Navajo traditional law to ICRA suits).

260. High Elk v. Veit, 6 Am. Tribal Law 73, 78, 80 (Cheyenne River Sioux Ct. App. 2006).

"concepts of harmony, accommodation, policy and compatibility," and whether the "foreign judgment accommodates and is compatible with the Hopi laws, traditions and 'notions of fairness,'"[261] while the Mille Lacs Court of Appeals has analyzed its statute of limitation in the context of "sha wa ni ma," meaning, keeping the people together as one. Reasoning that the statute of limitations "balances the rights of the individual with the needs of the community for peace and harmony. It accomplishes this by allowing a reasonable time period to bring actions before the Court while also ensuring that the community will be able to move forward in achieving peace and harmony by preventing perpetual disruptions in the circle of peace and harmony."[262]

In other contexts and situations, like the Navajo Peacemaking Program described *supra*, tribes defer entirely to traditional venues or dispute resolution processes. Another example is the Mohegan Tribe operates a Council of Elders that, in addition to various legislative, executive, and cultural oversight functions, acts as the tribal court for non-gaming matters. This civil adjudicatory system has been described as consistent "with Mohegan custom and tradition"[263] and has been upheld under tribal law in the face of arguments that the Council's culturally-specific punishments violate due process.[264] And on one occasion, the Cheyenne-Arapaho tribal court simply chose not to adjudicate a dispute over the use and handling of sacred tribal artifacts, leaving the determination to the political process and reasoning that "tribal courts cannot merely simulate the state and federal courts in interpreting and applying tribal laws. The Tribal Court has the duty of incorporating centuries of customs and traditions within the framework of the new Constitution" and that "Anglo-American concepts of fairness and civil rights are sometimes inappropriate, in their raw form, to Indian communities."[265]

When their legitimacy is challenged, tribal courts respond eloquently. In *Kelly v. Kelly*,[266] a non-Indian involved in a divorce proceeding in his

261. Hopi Tribe v. Namoki, 5 Am. Tribal Law 238, 242 (Hopi Ct. App. 2004).

262. Kalk v. Mille Lacs Band of Ojibwe Corp. Com'n., No. 03 APP 03, 2004 WL 5746060, at *5-*6 (Mille Lacs Ct. App. Sept. 16, 2004).

263. CONSTITUTION OF THE MOHEGAN TRIBE OF INDIANS OF CONNECTICUT art. X, § 2(d).

264. Mohegan Tribe of Indians of Connecticut v. Mohegan Tribal Court, 8 Am. Tribal Law 213, 222 (Mohegan Elders Council 2009) (punishments included exclusions from tribal meetings and functions for one year, and an order to provide a written apology to the tribal membership for the publication of private tribal information on a personal website.).

265. *In re* The Sacred Arrows, 3 Okla. Trib. 332, 337 (Chy.-Arapaho Tribes D. Ct. 1990).

266. No. DV 08-013, 2008 WL 7904116 (Stand. R. Sioux Trib. Ct. June 23, 2008).

Indian wife's tribal court condescendingly referred to the tribal court as a "pawn" of his wife that would never grant him a fair trial.[267] The tribal court recognized that this attitude embodied "an unfortunate, but honestly, not entirely surprising fear."[268] The court pointed to language from a recent federal court case where, in the context of a tribal comity analysis, the federal court stated a tribe "is neither required nor expected to use the same judicial procedures employed by federal courts, however, and federal courts must take care not to exercise 'unnecessary judicial paternalism in derogation of tribal self-governance.'"[269] The tribal court responded:

> But this is, itself, a paternalistic editorial comment. It is condescending and patronizing. [*Santa Clara Pueblo v.*] *Martinez* neither said, nor, in this Court's analysis, implied that Tribes may dispense with or curtail generally accepted notions of due process or equal protection. . . . Indeed, this Tribe has gone beyond the Indian Civil Rights Act and has ensconced the guarantees of due process and equal protection in its own Constitution, Article XI, Section 8: The Tribe shall not deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process. To reiterate: "to *any person* within its jurisdiction." If there is any universally recognized cultural tradition among the Lakota, Dakota and Nakota people, it is respect and fair dealing with all people. It will be afforded to all who come before this Court. It has been, in past cases, will be, in this case, and will continue, in future cases, to be this Court's position that all those who appear before it are also entitled to *at least* as much due process and equal protection as they would receive in a state or federal court, under the Standing Rock Bill of Rights.[270]

This reasoning is emblematic of the tension and harmony between federal Indian law and tribal law: the latter continues to develop even within the constraints of federal Indian law, as tribal judges and advocates recognize the opportunities to reconcile federal constitutional values with comparable tribal values of fairness, justice, and healing. In doing so, tribes weigh every factor discussed in this article: on the one hand, pressure

267. *Id.* at *12.

268. *Id.*

269. Plains Commerce Bank v. Long Family Land & Cattle Co., 491 F.3d 878, 890-91 (8th Cir. 2007), *rev'd*, 554 U.S. 316 (2008) (citations and internal quotations omitted).

270. *Kelly*, 2008 WL 7904116 at *12.

towards "Westernization," concerns for comity, and funding limitations, and on the other, the opportunities afforded under ICRA, the federal government's express policy of tribal self-governance and commitment to the trust relationship, and the simple fact that tribal judiciaries act as some of the most important outlets for tribes to strengthen their internal governmental institutions in a culturally-appropriate manner.

V. Conclusion

Tribal justice systems have long shown the determination and ability to develop and implement tribal law even within the strictures of federal Indian law. As tribes begin to implement the newfound, statutorily sanctioned jurisdiction under laws like the TLOA and VAWA, and find themselves at the heart of a new spate of challenges towards tribal law and culture, it will be increasingly important for both Congress and the federal judiciary to truly embrace the policy of self-determination and give tribal courts the opportunities needed to grow.

To this end, as federal Indian law seeks to balance support for distinctive tribal justice systems in accordance with federal policy against the need to protect the basic rights of all persons subject to any jurisdiction within the United States, it may be useful to more carefully examine the true concerns at stake and more thoughtfully evaluate the approaches that have been taken. The desire to ensure basic fairness in criminal proceedings regardless of the forum is surely valid. But how should that goal be accomplished in light of the federal policy of self-determination and in the context of diverse tribal cultures and circumstances? To what extent are measures, like the constraints in section 904 of the VAWA, being adopted based on reasonable fairness concerns as opposed to a general desire to press tribal judiciaries to conform to Western cultural standards? [271]

In the context of the VAWA, the solution adopted was to impose specific protections from the United States Bill of Rights on tribal justice systems exercising the VAWA's expanded jurisdiction. In some instances, such an approach may meet federal goals of protecting fairness. In others, it may

271. *See* Jonathan Weisman, *Measure to Protect Women Stuck on Tribal Land Issue*, N.Y. TIMES, Feb. 10, 2013, http://www.nytimes.com/2013/02/11/us/politics/violence-against-women-act-held-up-by-tribal-land-issue.html?_r=0 (quoting Representative Tom Cole of Oklahoma commenting on opposition to expanded tribal jurisdiction under the VAWA, and stating that "some of his colleagues seem to 'fear Indians are going to take out 500 years of mistreatment'" on non-Indians through the exercise of expanded criminal jurisdiction, and calling the objections to tribal criminal jurisdiction over non-Indians "fear, veiled in constitutional theories[.]").

simply force tribes to adopt an adversarial justice model similar to federal and state courts, along with the inherent disadvantages that such adversarial systems carry for criminal defendants, without the full resources necessary to implement counterbalancing protections in an effective manner.[272] Stated differently, it is worth remembering that federal constitutional protections are designed for the adversarial system in and for which they were developed. In such a system, they are necessary to achieve fairness for criminal defendants and ensure the legitimacy of final judgments. But in other kinds of justice systems, they may be neither necessary nor appropriate for that purpose, at least in the same form as applied in state and federal courts.

Consider, again, the Navajo Peacemaking Program. Many of the federal constitutional protections extended under the VAWA, as normally interpreted in state and federal courts, do not necessarily apply — the right to counsel or to a jury drawn from a fair cross-section of the community, for instance. Instead, family members and other affected individuals participate along with those directly involved in the conflict. Strictly speaking, certain constitutional rights may not be granted to criminal defendants participating in Peacemaking — but that does not mean that Navajo Peacemaking is not fair or effective. On the contrary, the Navajo Nation has found Peacemaking to be more effective than the adversarial process for crimes of domestic violence in at least some instances.[273] In addition, Peacemaking benefits criminal offenders in ways that the adversarial process usually does not, because it focuses on rehabilitation and reintegration of the offender as a productive member of society whenever possible. For exactly this reason, non-tribal entities seeking to strengthen state and federal justice systems and address endemic crime and violence in non-Indian communities are now looking to tribal justice systems for inspiration and guidance, even as federal Indian law seeks to influence tribal law and bring it into closer alignment with state and federal ideals and practices.[274]

---

272. In a seminal study on tribal court practices and procedures, the United States Commission on Civil Rights reported that congressional underfunding was the primary restriction on the development of tribal courts, and called for an expansion of tribal court jurisdiction over non-Indians to bolster tribal sovereignty and increase tribal court sophistication. *See* U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 44, 72-73 (1991).

273. *See supra* notes 211-13 and accompanying text.

274. *See* Ctr. for Court Innovation, Widening the Circle: Can Peacemaking Work Outside of Tribal Communities? A Guide for Planners and Policymakers (n.d.), *available at*

Such is the paradox of the federal Indian law approach to tribal criminal law: through laws and policies authorizing tribes to apply their customs and traditions in a carefully limited manner, tribes potentially lose the ability to develop legal systems that more robustly reflect their cultural values, histories, and future goals even as they access expanded opportunities. The federal government, as guardian to its tribal wards and as a proponent of tribal self-determination, also potentially loses the opportunity to make good these commitments by allowing traditional tribal justice systems to develop as tribes see fit and to potentially outstrip the efficacy of their ICRA-based counterparts. Finally, state and federal justice systems, along with the communities they serve, potentially lose out on a valuable source of alternative knowledge to strengthen their own justice systems and societies as a whole. But at the same time, such concessions have proven necessary for tribes to be given any opportunity at all to try non-Indians and expand their jurisdiction.

In light of these considerations, it seems worth considering whether an alternative model could address legitimate federal concerns while more fully protecting meaningful tribal self-governance in the administration of justice. Federal Indian law could, for example, move closer towards a foreign comity approach with tribes. Both Congress and the courts could ask whether tribal justice outcomes, on balance and in the context of the tribal-specific culture and circumstances, are basically fair. Rather than skittishly examining whether tribal courts are applying an "alien" tribal law to a "federal" concept like due process (which itself cannot fairly be classified as "federal" given the long tribal tradition of seeking fairness and harmony in dispute resolutions), or seeking to impose tribal law on a non-Indian, Congress and the courts could ask whether defendants are afforded the right to be heard, to defend themselves, and to seek justice? This is just one of many ways to protect tribal flexibility while simultaneously ensuring that criminal defendants are subject to fair treatment, and to do so in a way

---

http://www.courtinnovation.org/sites/default/files/documents/Widening_Circle.pdf; *see also* Remarks of Attorney General Janet Reno, Strengthening Indian Nations Conference (Jan. 24, 1997) ("In addition to assuring safety and harmony in Indian country, traditional mechanisms for dispute resolution offer fruitful alternatives to litigation for federal and state courts to consider. Community-based peacemaking according to tribal tradition seeks to resolve problems instead of processing cases in lengthy adversarial proceedings. As we gain familiarity with tribal concepts of traditional justice and community, they will surely enrich the administration of justice in America."); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (outlining both congressional and judicial support for arbitration as an alternative to litigation).

more consistent with stated federal Indian policy of self-determination and self-governance.

For almost two centuries, the United States has recognized its trust responsibility towards Indian tribes, and for almost forty years, has expressly supported a policy of tribal self-governance. In doing so, the federal government has both provided resources and worked to expand tribal jurisdiction while simultaneously limiting that expansion, conditioning those resources, and (implicitly or explicitly) promoting the "Americanization" of tribal judiciaries. These federal Indian law dynamics have existed uneasily with tribal law since the outset of the trust relationship, and will continue to do so into the future so long as tribes receive mixed messages as to whether their internal judiciaries could, should, or must resemble their federal counterparts.