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Elizabeth E. Joh
UC Davis School of Law

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CUSTOM, TRIBAL COURT PRACTICE, AND POPULAR JUSTICE

Elizabeth E. Joh*

Using custom is essential for the cultural survival of American Indians as a distinct people and as a governing entity.

— Gloria Valencia-Weber¹

Indian policy literature is preoccupied with the quantity of Indian control, rather than the quality of its exercise.

— Russel Lawrence Barsh²

Tribal courts in the United States have undergone dramatic changes in the past forty years.³ Encouraged both by recent federal Indian policy and by a burgeoning sovereignty movement, tribal courts in Indian country⁴ are no longer the conscious instruments of assimilation and external control that they were in the nineteenth century.⁵ While there is wide agreement that they have changed, what modern tribal courts *do* represent, however, is open to debate. Supporters of tribal court development assert that these emerging justice systems vindicate Indian sovereignty and self-determination, particularly through the use of customary laws and practices.⁶ Traditional practices, so the

*J.D., 2000, New York University School of Law; Ph.D. student, Institute for Law and Society, New York University. The author gratefully acknowledges the comments of Professor Benedict Kingsbury and the support of the Center on Crime, Communities, and Culture.

1. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 230 (1994).

2. Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 UNIV. MICH. J.L. REFORM 277, 303 (1993), reprinted in NATIVE AMERICAN SOVEREIGNTY 161 (John W. Wunder ed., 1996).

3. See, e.g., Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110, 112 (1995) (noting "trajectory of the rapid development of tribal courts" over past thirty to forty years); Carey N. Vincenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 141 (1995).

4. See Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287, 303 (1998) ("Since 1790, Congress has used the phrase 'Indian country' to refer to land subject to tribal and federal law, as opposed to state law.").

5. See, e.g., Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future*, 79 JUDICATURE 147 (1995) ("Several important Indian customs and religious practices, such as the sun dance, medicine men, and distribution of property owned by an Indian on his death, were outlawed, and violations were punished by [these early courts].").

6. See, e.g., Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. INDIAN L. REV. 379, 381 (1993) ("[B]y bringing their unwritten customary law, or common law, into the imposed Anglo-American style tribal court

theory goes, have transformed the alien "white man's courts" into places where "Indian justice" can be realized.⁷ But normative assertions about tribal court practice do not illuminate how they actually work.

The isolation of American Indian law as an area of study *sui generis* further obfuscates analytical comparisons with other categories of law.⁸ Those who study the even more marginalized subject of tribal courts⁹ have rushed to enumerate the uses of customary law and traditional practices, with little critical evaluation of whether these developments are practicable or desirable for the fundamental issue of indigenous self-government.¹⁰ This approach sidesteps a number of fundamental questions. Is it accurate to contend that tribal court practices are unique in this way? Is the use of customary legal practices necessary for American Indians to flourish as a distinct culture?

This article argues that tribal courts cannot be justified primarily through the use of custom and tradition. "Customary" law presents too problematic a concept in most instances to constitute a practicable and coherent foundation for modern tribal courts. Rather, it will be argued that Indian tribal courts ought to be understood as a subset of a much wider phenomenon: popular justice. Popular justice, or informal justice, refers to those law reform movements in the United States, as well as in other countries, that cast themselves in opposition to formal, Western, and conventional law models. The justifications for customary practices in Indian tribal courts bear striking parallels to the motivations for popular justice movements, particularly those which seek to recapture "community" norms. The popular justice literature also provides a useful analytic for the tensions which appear in the use of

systems, tribes are resurrecting, institutionalizing, and applying to the cases that come before them the norms and values that underlie the tribal traditions and customs.").

7. Despite the frequent use of "Native American" by non-Indians, a survey of the literature written by and for those interested in tribal courts and culture reveals a preference for the term "Indian." See Cooter & Fikentscher, *supra* note 4, at 287 n.2 ("[T]he people whom we interviewed referred to themselves as 'Indians' in almost every case, and only occasionally used the phrase 'Native Americans.'").

8. Federal Indian law — concerning jurisdictional disputes, the treatment of Indian tribes in federal courts, etc. — is treated by its own scholars as an esoteric, complicated, and unique area of study. See *infra* note 18.

9. Indeed, while there is an enormous body of literature on federal Indian law, there exist very few studies on the operation of tribal courts. One recent study suggests that not only is there less scholarship on tribal courts than on federal Indian law, but that it has even diminished over the years. Cooter & Fikentscher, *supra* note 4, at 292 ("For whatever reason, scholars have neglected the study of tribal courts."). Moreover, any systematic study of the jurisprudence of tribal courts is complicated by the fact that the majority of decisions are unavailable. There are only a few Indian law reporters, and the decisions they publish constitute a fraction of those cases actually decided. See, e.g., Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 294-95 (1998).

10. Fredric Brandfon, *Tradition and Judicial Review in the American Indian Tribal Court System*, 28 UCLA L. REV. 991, 1009 (1991) ("Only the use of tribal customs as the bases of tribal court decisions will increase the vitality and independence of the tribal courts.").

custom in tribal court practice. Ultimately, the discussion of tribal courts as a mode of popular justice is not so much an indictment as it is a suggestion that Indian governments reassess the aims of their tribal justice systems.

The Problem of Customary Justice

The ability of Indian tribal courts to use custom rests on their reconstitution as institutions run by, and for, Indian governments. In 1883, the Bureau of Indian Affairs (BIA) established the Courts of Indian Offenses, the first formal Western-style courts on Indian land.¹¹ Indian involvement in these CFR courts (a reference to the Code of Federal Regulations used), was nominal or nonexistent.¹² Although many traditional practices, including indigenous methods of adjudication, were suppressed or extinguished by external regulatory practices like the CFR courts, the assimilation goals of the federal government were nonetheless considered a failure by the 1930s.¹³ Consequently, the Indian Reorganization Act (IRA) of 1934 reflected a shift in federal policy to encourage the development of tribal self-government.¹⁴ Under the IRA, tribes could establish their own court systems, draft their own constitutions, and enact their own legislation.¹⁵ CFR courts also continued to exist, although in a modified form aimed at encouraging tribal government.¹⁶ In the past thirty years, Indian tribes have increasingly focused their attentions on the development of tribal government, including tribal courts. A recent BIA report noted that there are now 254 tribal courts of both types, with CFR courts in the definite minority.¹⁷ Although their jurisdictional powers have been severely curtailed, particularly with regard to criminal cases,¹⁸ tribal courts are now the primary forum for adjudication in Indian country on nearly 260 federal reservations.¹⁹

11. See Myers & Coochise, *supra* note 5, at 147.

12. See *id.*

13. See *id.* at 148.

14. See Valencia-Weber, *supra* note 1, at 235.

15. See *id.* at 236.

16. *Id.*

17. See Myers & Coochise, *supra* note 5, at 149. There is some disagreement about the exact number. See Maria Odum, *The Legal System: Money Shortage Seen as Hindering Indian Justice*, COM. APPEAL (Memphis, Tenn.), Nov. 28, 1991, at G3 (noting that there are 147 tribal courts exercising jurisdiction over two million Indians).

18. Again, this article does not address the significant body of federal Indian scholarship, much of which attempts to disentangle the complex problems of jurisdiction in Indian disputes. See, e.g., William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1 (1987); Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113 (1995); Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118 (1995); Michael Taylor, *Modern Practice in Indian Courts*, 10 UNIV. PUGET SOUND L. REV. 231 (1987); J. Clifford Wallace, *A New Era of Federal-Tribal Court Cooperation*, 79 JUDICATURE 150 (1995).

19. See Charles Aweeka, *Tribal Courts: Unique System — Circuit Judges Dispense Justice*

Tribal courts are authorized to use custom as a source of law when applicable.²⁰ Not only is custom an approved source of law, but for many commentators the use of custom is an essential element of self-determination.²¹ Put another way, greater reliance on customary law represents, both instrumentally and expressively, a "return" to indigenous sovereignty. However, this emphasis on customary law assumes two propositions: that customs can be ascertained, and that these customs can be applied in a satisfactory manner.

Invariably, the search for an applicable customary legal principle raises questions of authenticity, legitimacy, and essentialism. Where does one find custom? Many tribal courts have established procedures for proving the existence of a custom, by reference to an elder's advice,²² or to sociological studies.²³ The less onerous method of judicial notice may also be sufficient.²⁴ All three methods are vulnerable to competing claims of legitimacy. Not everyone may agree with a particular elder's interpretation of an asserted custom.²⁵ Many prominent sociological or anthropological studies of Indian culture have been conducted by non-Indian outsiders, whose assessment of Indian customs may be colored by prejudice or mistake.²⁶ The use of judicial notice may imply that Indian tribal judges, by virtue of being Indian (and not all of them are), are able to discern and legitimate customary laws. Advocates of traditional law compound the problem by evaluating the successful use of custom with the fundamental fairness and "natural wisdom"

that is Based on a Different Set of Rules, SEATTLE TIMES, July 17, 1997, at F1. Note that this article does not discuss a possible third category: traditional courts that were never controlled or extinguished by the federal government. An example of these courts include the religious courts of the Pueblos. However, these courts have no recognition outside of their community and cannot be evaluated in the same manner as tribal courts. In addition, because of secrecy rules, virtually nothing is known about them. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 113 (1983).

20. Usually a tribal code contains a choice of law provision providing the hierarchy of applicable law. See Newton, *supra* note 9, at 299.

21. See, e.g., Valencia-Weber, *supra* note 1.

22. See, e.g., *id.* at 248. A recent study of tribal courts found that "the most traditional members [of a tribe], including the elders who are most immersed in the old way of life, often seem to avoid connection with tribal government and do not participate in court deliberations." Cooter & Fikentscher, *supra* note 4, at 322.

23. See, e.g., Lowery, *supra* note 6, at 390-91.

24. In the courts of the Navajo Nation, judicial notice is the predominant method. See Lowery, *supra* note 6, at 393, 395-96.

25. See, e.g., Lowery, *supra* note 6, at 391 (referring to Navajo Nation decision in which court acknowledged that parties might dispute existence and application of any particular custom).

26. Cf. Laura Nader, *When Is Popular Justice Popular*, in THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES 435, 443 (Sally Engle Merry & Neal Milner, eds., 1993) (arguing that cultural values underlying dispute processes are profoundly political and that several anthropological studies in the 1950s and 1960s mistakenly assumed that native systems of justice were inherently compromise-oriented).

of tribal judges.²⁷ Some normative claims about how judges "find" custom appear no different than descriptions of how any judge, Indian or otherwise, draws upon his own cultural values. Is the influence of culture on personal decision making so remarkable? Alternatively, is there something to the status of being Indian which confers a knowledge of custom? Such claims of inherent knowledge sound suspiciously essentialist.

When a tribal judge does claim to find applicable custom, is it enough — as some opinions suggest — that the custom is generally "Indian"? In a typical case, *In re C.D.C. and C.M.H.*, the tribal judge for the Delaware Tribe of Western Oklahoma based a child custody decision on the following custom: "[I]t is common knowledge in Indian country that both the maternal and paternal grandmothers traditionally play a very significant role in the Indian family."²⁸ This invocation of custom suggests that "Indian" here is meant to be a contrast to non-Indian, or Western values: a rather indeterminate category.²⁹ Surely the many Indian tribes of North America, originally distributed over a vast geographic range, differ to some extent in their cultural practices. Yet the use of "custom" at this general level can be found in many instances.³⁰ "Indian" traditions in these decisions represent a number of broad values — community, family, reconciliation, healing, and harmony³¹ — which suggest as much a nostalgia for "small-town" norms as they do for Indian ones.

27. For instance, Cooter & Fikentscher describe the ability of judges to divine custom in the following manner: "Some tribal judges and almost all jurors have no formal training in law. People without legal education who must make legal decisions inevitably draw upon their own sense of justice, which in turn draws upon custom and tradition." Cooter & Fikentscher, *supra* note 4, at 322. See also Valencia-Weber, *supra* note 1, at 262 (advocating custom and asserting that "[u]ltimately, the legitimacy of the tribal courts rests on decisions that show concern for justice"). But see SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE 27 (1978) ("The sometimes-expressed idea that dispensing justice in this setting requires only a dose of 'natural wisdom' is not tenable.").

28. No. PG-87-A50, 1 Okla. Trib. 200, 205 (Oct. 13, 1988). The court also relied on a number of other sources to reach its decision, including state law and family law scholarship.

29. One might argue that federal Indian law has treated American Indians in this wholesale manner, but tribal courts themselves are under no obligation to define their constituents so broadly.

30. See, e.g., Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 126 (1995) ("The indigenous justice paradigm is based on a holistic philosophy and the world view of the aboriginal inhabitants of North America."); James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 75 (1997) ("The European mind has a difficult time understanding Indian legal procedure because the legal institutions of Europe, and those imported to the Americas, are a product of concentrations of royal power, nationalism and central government. . . . Traditional Indian legal systems were, in large part . . . founded on equality and reciprocal relationships.").

31. See, e.g., Robert Yazzie & James W. Zion, *Slay the Monsters: Peacemaker Court and Violence Control Plans for the Navajo Nation*, in POPULAR JUSTICE AND COMMUNITY REGENERATION: PATHWAYS OF INDIGENOUS REFORM 67, 77-81 (Kayleen M. Hazelhurst ed., 1995) (listing "Indian" values); Melton, *supra* note 30, at 131-32 (same).

Furthermore, the applicability of customary law in contemporary Indian life is far from obvious. In many kinds of law, such as complex commercial litigation, no one suggests that custom ought to play a dominant role. On the other hand, in areas of law in which custom is most frequently invoked, such as family law and hunting rights,³² the use of custom presents a number of difficulties. Members of Indian tribes are not uniformly allied in a "re-traditionalization movement"³³; some find the use of custom outdated or undesirable.³⁴ The influence of modernization and Western culture on American Indians has resulted in reorganization of the very order, consensus, and internal social controls on which the customary law model relies.³⁵ For instance, while "positive" influences like the American feminist movement may have mobilized Indian women around causes like domestic violence, such influences may rattle traditional views on gender relations in customary law.³⁶ No less disruptive is the influence of modern Western social pathologies — e.g., gang violence and substance abuse³⁷ — for which custom may provide a meager anodyne.³⁸ The legitimacy of tribal courts depends in large part on the extent to which Indians can identify with the values the courts promote.³⁹

32. See, e.g., Lowery, *supra* note 6, at 402 (noting that Navajo custom is most frequently applied in family law decisions).

33. See Newton, *supra* note 9, at 303.

34. In his frequently cited study, Brakel noted that one tribal official's "general opinion was that the tribal court was 'pathetic' and in need of a 'complete overhaul,' to which he added: 'What we need is nothing 'racial' — we need just plain white man's justice with no consideration of extenuating circumstances.'" BRAKEL, *supra* note 27, at 66. As one might guess, recorded opinions like this are rare. Reference to a comparable situation is helpful here. A study of Maori customary practices used in New Zealand juvenile justice law yielded mixed reactions from Maori participants. While some welcomed the sensitivity to custom, others strongly objected to its use. Teresa Olsen et al., *Maori and Youth Justice in New Zealand*, in POPULAR JUSTICE AND COMMUNITY REGENERATION: PATHWAYS OF INDIGENOUS REFORM 45, 55-60 (Kayleen M. Hazlehurst ed., 1995).

35. In some cases, the invocation of traditional "consensus" may sometimes be used to justify what is in reality a one-party political machine in tribal government. See Barsh, *supra* note 2, at 169 ("In fact, what has emerged [in tribal government] is the *one-party state*, which condemns dissent as foreign-inspired subversion and limits politics to personality disputes among a clique of strongmen.").

36. See, e.g., Mary-Ellen Turpel, *The Women of Many Nations in Canada*, in INDIGENOUS WOMEN ON THE MOVE 93-103 (1990).

37. See, e.g., *Joint Hearing of the Senate Judiciary & Indian Affairs Committees; Subject: Indians and Gangs*, Federal News Service, Sept. 17, 1997 ("A recent FBI study identified 177 gangs on 14 different reservations."); Lisa M. Poupart, *Juvenile Justice Processing of American Indian Youths*, in MINORITIES IN JUVENILE JUSTICE 179 (Kimberly Kempf Leonard et al. eds., 1995) (suggesting that Indian juveniles are treated more harshly in juvenile justice system).

38. Although the primary legal proceedings for these problems will be criminal, and thus probably subject to federal jurisdiction, their secondary effects are felt in truancy cases, domestic violence complaints, and the like: all of which are subject to customary law application in tribal courts.

39. See Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts*

No less problematic is the structure of Indian court practice, which is often defended on the grounds that it is more amenable to, or resembles, traditional procedures. Most Indian judges are not law school graduates, nor do they receive any systematic legal training.⁴⁰ Many tribal courts do not have prosecutors.⁴¹ Although Indian defendants are given a qualified right to an attorney in criminal cases, most cannot afford them.⁴² The majority of disputants represent themselves, or are represented by a lay advocate, a fellow reservation member who may only have a high school education.⁴³ While at first glance these appear to be institutional shortcomings, a number of tribal court supporters insist that this situation enhances a customary approach to justice. For instance, Deloria and Lytle contend that

if attorneys were to take over the systems of tribal justice, it would not be too long before Indian customs and traditions, the studied informality of the tribal courts, and the particular attention that tribal judges pay to family situations and responsibilities would be replaced by a variety of model codes written by and for the convenience of the attorneys.⁴⁴

In this view, custom is invoked to justify the relaxation, or virtual elimination, of Anglo-American procedural rules in many tribal justice systems.⁴⁵ Advocates of the current system point to instances where tribal judges take the disputing parties aside, away from the courtroom, and suggest informal resolutions to disputes.⁴⁶ Thus, the tribal court judge is recast in the role of tribal mediator, the traditional elder whose aim is to restore harmony to the group.

and the Role of the Tribal Bar as an Interpretive Community: An Essay, 18 N. M. L. REV. 49, 60 (1988).

40. See BRAKEL, *supra* note 27, at 17.

41. See *id.* at 19.

42. See DELORIA & LYTLE, *supra* note 19, at 130.

43. See BRAKEL, *supra* note 27, at 66 ("[T]he advocate admits being frustrated by his lack of legal ability. Though not stating it explicitly, he implies that the only role he can play is an obstructionist one — making life difficult for the judges."). One Indian law commentator notes that although some tribes may require knowledge of customary law as a prerequisite to practice, it is rarely tested. See Pommersheim, *supra* note 39, at 57, 58, 59.

44. See DELORIA & LYTLE, *supra* note 19, at 122.

45. See Aweeka, *supra* note 19, at F1 ("Evidentiary objections are seldom made, and the rules of evidence are enforced less strictly than in other courts. In fact, most of the tribal codes allow any type of evidence, including hearsay.").

46. See DELORIA & LYTLE, *supra* note 19, at 150 ("The general temperament of tribal judges is that of the benign patriarch who sincerely wishes to resolve dispute with a minimum of disruption of human lives . . . [Tribal judges] are likely to stop the proceedings when they notice a tribal elder in the courtroom and ask his or her opinion on a matter of Indian tradition, which involves a lengthy conversation . . . This behavior is considered normal among Indian people, for the whole purpose of the trial is to do justice.").

The invocation of custom here, however, masks causal explanations for the differences in structure between a tribal court and a state or federal court. A variety of factors contribute to the absence of practicing attorneys in tribal courts: the lack of access to professional schools for Indians⁴⁷; the reluctance of the few Indian lawyers to practice in tribal courts; and the dimly underfunded tribal courts⁴⁸ themselves, in a profession where prestige is often tied to salary.⁴⁹ In theory the withdrawal from formal procedures and principles may not affect proceedings that focus on "talking out" the resolution of disputes. On the surface of things, it may appear that a tribal court proceeding vindicates customary practices; the judge may know the parties or be related to them, many "legalistic" practices are tossed aside, and all parties are relatively free to speak their minds.⁵⁰ Studies of tribal court practice, however, suggest that in a large number of cases, individuals in tribal courts receive neither a Western-style adjudication nor a customary one.⁵¹ Criminal defendants may be convicted or pressured into pleading guilty on the basis of virtually no evidence: a phenomenon Brakel deplors as "summary justice."⁵² And, unlike the use of customary law, tribal court practices are not a choice among alternatives in individual cases. The absence of formality and "legalese" is not necessarily identical to the practice of customary law.

The difficulties of using customary law in tribal court practice also apply to experiments in recreating traditional dispute mechanisms, of which the Navajo Peacemaker Court is the primary example. Established in 1982, the Peacemaker Court offers to voluntary participants the opportunity to have their claims resolved through what are purportedly "traditional" Navajo procedures.⁵³ No judge presides, and the designated mediator is present

47. In 1982 there were approximately 450 lawyers in the U.S. who identified themselves as Indian. See DELORIA & LYTLE, *supra* note 19, at 149.

48. See, e.g., Myers & Coochise, *supra* note 5, at 149 ("Given the current \$12 million in federal funding, the average is less than \$48,000 per court system, per year to fund judges, clerks, prosecutors, defenders, the juvenile and probation departments, bailiffs and process servers, court facilities, court resources, and administrative costs. . . . There are no state or federal court systems that function on only \$200,000, let alone less than \$48,000 per year.").

49. See Vincenti, *supra* note 3, at 139 ("[T]he tribal courts are last in line to be considered for career development. Tribal courts have had to bear a reputation for providing little in the way of salary . . .").

50. See BRAKEL, *supra* note 27, at 94.

51. See *id.* at 99 ("In the tribal courts, the judges rarely attempted to effect reconciliations between disputants or to establish harmony among reservation factions. In general, they made summary dispositions of the cases before reaching the merits. Often, as a result, the parties were left confused and unhappy."). Note that Brakel's study is exceptional in its skeptical evaluation of tribal court practice. Probably as a result of studies like his, many tribes are now quite reluctant to grant access to researchers. See Cooter & Fikentscher, *supra* note 4, at 292 n.16 ("[S]ome reservations now require researchers to apply to a tribal board for permission to enter the reservation and conduct research. These boards, which have little to lose from denying an application, proceed cautiously and slowly.").

52. BRAKEL, *supra* note 27, at 44.

53. See James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and*

primarily to assemble the parties and to coordinate activities with the district tribal court.⁵⁴ The results of a Peacemaker Court are to be as binding as a tribal court judgment. Many of the same difficulties regarding custom in tribal courts are present in the creation, justification, and use of the Peacemaker Court. First, the "custom" cited as a precedent for this forum was found to have existed "from the times of the Navajo Court of Indian Offenses, 1892 to 1959."⁵⁵ The use of custom here suggests not a practice extending far beyond European contact, but a method of resistance against external domination. Is this custom, or culture, or both? Second, among the sources used for the creation of the Peacemaker Court were not only Navajo practices, but Quaker mediation, practices of the American Arbitration Association, and the procedures of American small claims courts.⁵⁶ Despite these very different sources, the Peacemaker Court is typically cited for its "traditional" roots.⁵⁷ Finally, recent scholarship suggests that the Peacemaker Court has more symbolic than practical value as an adjudicatory forum. The available data indicate a significant lack of use by the Navajo community.⁵⁸

These several complications suggest an alternative interpretation to the justification for "custom" in tribal courts. Given the ambiguity of its definition, the values it attempts to vindicate, the uncertainty of its application, and the timing of its popularity, "custom" in tribal court practice appears to be not so much a literal recapture of historically accurate practices but rather *a mode of resistance* to all that Western legal culture represents. Defined in this way, the support of custom in tribal court practices shares many attributes of other legal movements which seek their vindication in opposition to conventional formal law.

Tribal Courts and Popular Justice

Although Indian law generally has been treated as a unique area of study, the support for customary law in tribal courts is best understood as a type of popular justice movement. In the United States, the most recent outburst of support for popular justice took place in the 1960s and 1970s.⁵⁹ The alternative dispute resolution (ADR) movement was spearheaded by then

Accommodation to the New, 11 AM. INDIAN L. REV. 89, 89-90 (1983).

54. See *id.* at 103.

55. See *id.* at 94.

56. See *id.* at 96.

57. See, e.g., Lowery, *supra* note 6, at 383 ("The most far-reaching exercise of custom and tradition by the Navajo courts took place . . . when the judges of the courts formally adopted the rules establishing the Navajo Peacemaker Court.").

58. See Lowery, *supra* note 6, at 385 n.23.

59. However, popular justice movements have also been prominent in earlier periods in the U.S. See, e.g., Christine B. Harrington, *Delegalization Reform Movements: A Historical Analysis*, in 1 THE POLITICS OF INFORMAL JUSTICE 35 (Richard L. Abel ed., 1982).

Chief Justice of the United States Supreme Court, Earl Warren.⁶⁰ Chief Justice Warren delivered a number of speeches in which he advocated an alternative to courts that focused less on adversarial tactics, and more on harmony, personal relationships, community, and healing.⁶¹ These values lie at the heart of most popular justice movements, whether they take the form of mediation processes, neighborhood justice centers, or family group conferences. Popular justice depends on these idealized values. Most important to the constitution of popular justice is its dependence on a series of binary oppositions in which informal, local, family/community-oriented, healing, and expressive values are defined against "law,"⁶² which represents formalism, professionalism (i.e., lawyers), the adversarial process, bureaucracy, and the state.⁶³ These oppositions are virtually identical to those found in justifications for customary Indian law. For instance, in comparing an "American Justice Paradigm" with an "Indigenous Justice Paradigm," Melton offers a series of contrasting attributes, including "[a]dversarial and conflict oriented" versus "[b]uilds trusting relationships to promote resolution and healing"; and a "[f]ocus on individual rights" versus a "[f]ocus on victims and community, apology and forgiveness."⁶⁴

Two aspects of the movement's ideology are particularly helpful in understanding the place of customary Indian law in popular justice. First, popular justice typically depends on a constructed myth of community.⁶⁵ The attempt to recapture the lost values of community affect the organization of popular justice reforms in specific ways. The reconstitution of community requires that legal processes are local. All participants originate from the community, and as many as possible are given a "voice" in the proceedings. Third parties and staff are typically lay people, with the same dress, demeanor, and skills (i.e., unskilled) as the participants. The language of the proceedings is plain and nontechnical; reasoning is commonsense-oriented. The aim of any resolution is to restore harmony to the community, rather than to determine a winner between two disputing parties. Thus, criminal sanctions tend to focus on restitution, or on public displays of remorse, rather than on punishment. These values are the same ones touted by supporters of

60. See Laura Nader, *supra* note 26, at 435, 441.

61. *Id.*

62. *Id.* (describing Warren's efforts as part of an "antilaw" movement).

63. See Peter Fitzpatrick, *The Impossibility of Popular Justice*, 1 SOC. & LEGAL STUDIES 199, 200 (1992) ("Popular justice takes identity through the not uncommon mythic mode in which binary oppositions provoke and produce positive contents. The great figure of opposition and rejection is the state.")

64. Melton, *supra* note 30, at 133.

65. See Richard L. Abel, *The Contradiction of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 59, at 267, 276. The description of the popular justice model in the following paragraphs taken from Abel and from Sally Engle Merry, *Popular Justice and the Ideology of Social Transformation*, 1 SOC. & LEGAL STUDIES 161, 162-64 (1992).

customary law, and the attributes of a community-oriented process are strikingly similar to tribal court practice.⁶⁶ The idea of "community" is especially appealing in Indian country where the population is more homogeneous than in other parts of the United States and appears to be a cohesive group.

Second, popular justice provides a therapeutic model of resolution. This explains why popular justice forums generally relax or eliminate procedures that limit the parties' ability to speak. Having had one's "say" is typically a measure of a proceeding's success. Another measure is the degree to which the injured party, and community participants or observers, feel "healed" by the process: friendships mended, family ties restored, or a sense of community security regained. Healing also tends to be a primary focus in tribal court proceedings. One recurring theme in Indian law scholarship is the extent to which tribal courts vindicate the feelings of the victim, both by giving voice to the victim's injury, and by ordering forms of restitution by the offender.⁶⁷ These gestures are opposed to the cold, formal, and individualistic punishments of the state.⁶⁸

This comparison suggests that customary law in tribal court practice shares too much in common with other popular justice movements for it to be a unique phenomenon. More than the accumulation of historically accurate practices, the term "custom" in tribal courts represents a mode of struggle against external control. To say that custom in tribal courts is best understood as a kind of popular justice movement is not to suggest that it is wholly artificial, or that it contains nothing that is recognizably indigenous to Indian culture. There is almost certainly influence from both sides. Tribal courts began to flourish at roughly the same time that many of the American popular justice movements, such as the San Francisco Community Boards, came into existence.⁶⁹ It is possible that supporters of traditional Indian legal practices were bolstered by similar movements which stressed community, local control, and harmony. In addition, the pop psychology terms of the 1970s "therapy" decade⁷⁰ probably had some impact on all legal reform movements

66. See, e.g., Valencia-Weber, *supra* note 1, at 262 ("A world view focused upon collective values, where nature is part of the community, presents different principles upon which to decide the recurring disputes among members. More than individual victims are considered when the restoration of harmony and balance is the objective.").

67. See, e.g., Melton, *supra* note 30, at 132 ("Offenders [in Indian custom] are forced to be accountable for their behavior, to face the people whom they have hurt, to explain themselves, to ask forgiveness, and to take full responsibility for making amends. Observing and hearing the apology enables the victim and family to discern its sincerity and move toward forgiveness and healing.").

68. Of course the opposition depends on painting the state in these very broad and oversimplified terms. This necessarily omits the complicated internal reforms within Western law, e.g., the victims' rights movement, alternative to incarceration, etc.

69. See Nader, *supra* note 26, at 438.

70. *Id.*

which aspired to be more emotionally oriented. The development of some alternatives, like the Navajo Peacemaker Court, acknowledged these external resources.⁷¹ By the same token, popular justice movements of the same period often relied upon idealized images of pre-colonial, pre-capitalist, and non-Western societies to point to everything that was wrong with conventional modern law.⁷²

Tensions Within Popular Justice

If support for custom in tribal courts is a type of popular justice movement, it is also vulnerable to many of the criticisms of popular justice. Legal reform movements typically draw upon imagery that provides a shorthand for their values, justifications, and operations. Popular justice generally, and Indian customary law in particular, depend upon oppositions in which they offer harmony, community, healing, and informality as alternatives to the formalism, bureaucracy, and technicality of state law. However, in practice popular justice often promises what it cannot deliver.

A recurring criticism relevant to tribal courts is that popular justice results in a corruption of informality in which catharsis becomes the end of the process, rather than the means.⁷³ Often, participants in a popular justice setting view the process as expressive, rather than instrumental.⁷⁴ As a result, the emphasis on feelings to the virtual exclusion of other aims tends to suppress or neutralize conflicts rather than resolve them.⁷⁵ Structural deficiencies enhance the silencing of conflicts. Hampered by the lack of any professional training, staff members of informal institutions actively encourage compromise.⁷⁶ By insisting on compromise, popular justice institutions deny the existence of frequent, antagonistic conflict, by "simulating a society in which conflict is less frequent and less threatening."⁷⁷ The support of custom in tribal courts is often predicated on the assertion that Indian culture is more harmonious, and consensus-oriented than non-Indian society. Yet the inherent contradiction in the use of compromise is that it typically works by

71. See *supra* notes 53-58 and accompanying text.

72. See Nader, *supra* note 26, at 444 (noting that studies of non-Western law in the 1950s and 1960s erroneously described most indigenous systems of law as centered on compromise); Fitzpatrick, *supra* note 63, at 209 ("A voracious ethnography provided accounts of 'different' cultures' in which 'the apparent naturalness . . . of informal dispute processing' provided ideate origins for alternative justice in the United States.").

73. See Abel, *supra* note 65, at 294; Fitzpatrick, *supra* note 63, at 203 ("Feelings are elevated over facts and aspirations, even over a resolution of the dispute. The primacy of feelings disconnects the disputants from the social forces encapsulated in their conflict. At best, what is relevant is how they feel about such things").

74. See Abel, *supra* note 65, at 284.

75. See *id.* at 280.

76. See *id.* at 293.

77. *Id.* at 283.

individualizing grievances.⁷⁸ Despite its insistence on healing and on a broader community dynamic, the nature of compromise obstructs the redress of systematic social problems.⁷⁹ Although informal institutions, like the Peacemaker Court, may speak of the Indian community, what they actually address and encourage is a "collection of isolated individuals circumscribed by residence."⁸⁰ Other institutional deficits aggravate the problem. Tribal courts, like many informal institutions, usually lack the records that would suggest patterns in juvenile delinquency, domestic violence, or land disputes.⁸¹ Like many who work in informal institutions, tribal court staff, who experience a high turnover rate and little professional training, may have little or no ability to aggregate problems brought before the court.⁸²

A second objection to popular justice is that informal institutions tend to expand state control rather than represent the "rolling back" of the state. A reality of informal institutions is that they never exist entirely outside of the state. Because the state maintains the only recognized source of legitimate authority, reformist institutions must "either be its creation or exist at its sufferance."⁸³ The extent of state direction or sanction of informal institutions is usually concealed by the language and forms of popular justice.⁸⁴ By convincing local populations that their processes are more natural, indigenous, and friendly, informal institutions tend to mask the coercion which stimulates resistance and justifies demands for substantive rights.⁸⁵ For most Indians, tribal courts are not an alternative, but the only forum for adjudication of their claims. Indian disputants are urged to support tribal courts because they vindicate "their" values. However, the use and acceptance of more informal institutions like tribal courts discourage other "nonstate sanctions," such as "gossip, boycott, [and] self-help."⁸⁶

78. See *id.* at 289.

79. See Robert C. Depew, *Popular Justice and Aboriginal Communities*, 36 J. LEGAL PLURALISM 21, 54 (1996) ("[T]he ideology and language of 'healing' have a tendency to mask the diversity of individual, group and community justice problems by considering them as similar 'illnesses', and to homogenize, and therefore trivialize, the corresponding need by applying a therapeutic response that is supposed to lead to 'health.'").

80. *Id.* at 289.

81. See Cooter & Fiketscher, *supra* note 4, at 327 ("When we asked tribal judges for files from previous cases, many judges did not have any to show us. Most tribal judges cannot consult records of rules and principles articulated in past decisions in their own courts.").

82. See Abel, *supra* note 65, at 289.

83. See *id.* at 275.

84. *But see* Merry, *supra* note 65, at 166 ("Even tribunals ideologically opposed to state law and founded on a critique of its failures, nevertheless borrow its forms and symbols: the table, the book of rules and the judge.").

85. See Abel, *supra* note 65, at 270; Merry, *supra* note 65, at 168 ("By its appeal to indigenous ordering, [popular justice] defuses protest and resistance to state law.").

86. Abel, *supra* note 65, at 277.

The result of being implicated in the state system is that informal institutions invariably end up at the bottom of the hierarchy.⁸⁷ This situation, which Abel terms "internal colonialism,"⁸⁸ produces a number of disabling consequences. The self-help ethos of using local, indigenous, or customary practices veils a lack of state interest, and perhaps more importantly, state funding. The rhetoric of giving communities control over their own problems often comes at the cost of state finances. Tribal courts have not been immune from this problem. Though federal officials have been lavish in their praise of Indian sovereignty⁸⁹, self-government has also come hand in hand with decreasing levels of federal funds.⁹⁰ In addition, support for popular justice movements often implicates negative normative assessments by legal elites; judges from state and federal systems are happy to shed what they see as "junk" cases — cases they view as politically, economically, and socially insignificant.⁹¹ Part of this devaluation is tied to the demographics of the participants. Tribal courts, like many neighborhood justice centers and community boards, serve politically disempowered groups.⁹²

None of these criticisms, however, are meant to be fatal. Even the most skeptical assessments acknowledge that popular justice movements aspire to worthy and commendable goals: a preference for harmony, quick and cheap methods for dispute resolution, participatory decision making rather than rigid professionalism, and processes that are familiar rather than arcane.⁹³ Despite the influence and infiltration of the state, popular justice nevertheless provides a contested space in which forms of resistance or alternatives to state law are nurtured.⁹⁴

Conclusions

This article has argued that the use of custom in Indian tribal courts represents a type of a popular justice movement, rather than another example

87. See Merry, *supra* note 65, at 163 ("Popular justice typically functions at the bottom tier of state law.").

88. See Abel, *supra* note 65, at 301.

89. See, e.g., Reno, *supra* note 18, at 113 ("[T]ribal justice systems are essential pieces of the mosaic of tribal self-governance.").

90. See, e.g., Barsh, *supra* note 2, at 161 (noting that federal aid to Indian tribes began decreasing significantly in the 1970s); Myers & Coochise, *supra* note 5, at 148 (noting that although Congress passed a much needed Indian Tribal Justice Act in 1993, promising over \$58 million in funding, zero funds had been appropriated as of 1996).

91. See Abel, *supra* note 65, at 302.

92. A significant exception to this is the explosive growth of gaming law, but its practice in tribal courts has been much like any other federal or state court. See Dick Dahl, *The Gamble That Paid Off*, A.B.A. J., May 1995, at 86, 86 (noting that gaming law has "reoriented the practice of 'Indian law' from poverty law to business law").

93. See, e.g., Abel, *supra* note 65, at 310.

94. See Merry, *supra* note 65, at 168.

of Indian law exceptionalism. This alternative interpretation suggests some general conclusions for thinking about the development of tribal courts generally and their scholarly assessment.

First, tribal leaders and judges should reassess the extent to which custom is necessary to indigenous self-government. Many Indian leaders fear that Indian self-government is predicated on cultural difference, and therefore on traditional practices.⁹⁵ However, given the problematic use of custom in tribal court practice, tribal governments would benefit from asserting the right to self-government in terms of local control, and community participation. Tribal governments can pursue the ownership of their justice problems⁹⁶ without relying on cultural otherness. Disengaging tradition from self-government could produce significant changes in tribal court priorities. Tribal courts can continue to encourage community participation, but not at the expense of individual substantive rights. It is possible to require higher standards of professional training for all tribal court staff without drawing criticism that this reflects nontraditional influences. Alternatively, tribal courts can pursue funds for professional training more aggressively, rather than suggest that the employment of lay person staff comports with custom. The institutional energy invested in the search for customary laws and practices might be redirected towards addressing systematic problems in Indian country that would benefit from social work, education, and preventative care.

Second, a more critical evaluation of the role of "custom" affects the measure of success in tribal courts. When custom is a primary justification, the question posed is the extent to which a particular practice is "customary enough." However, if custom is not necessary to indigenous self-government, different questions may provide a better measure of success.⁹⁷ Do the participants feel that their concerns have been addressed? Are the community's interests represented in court? Do all participants in the process express satisfaction? Does the tribal court address recurring problems in the

95. See, e.g., Barsh, *supra* note 2, at 162 ("American Indian tribal leaders and their academic supporters are locked in a conspiracy of denial. They fear that should white Americans discover that there is nothing qualitatively different, or substantially better, about Indian self-government, they will abolish it."). But see Cooter & Fikentscher, *supra* note 4, at 321 ("Some Indians told us that traditional Indians prefer to elect assimilated Indians to tribal office so that they can work better with whites and provide a buffer against the surrounding society.").

96. See Depew, *supra* note 79, at 53 ("By acting, the community, rather than the State, can claim ownership of justice problems and can administer justice independently from the State.").

97. Indeed, in Olsen et al.'s study of culturally sensitive family group conferences in New Zealand, the authors concluded that the success of the process could be measured in a general sense of community involvement, rather than any specific satisfaction of Maori needs. See Olsen, *supra* note 34, at 61 ("The answer is, in our view, that inevitably the processes and patterns developed in small clan-based communities cannot be replicated in a modern, industrial, mobile, and industrialized culture. But on the other hand, . . . it is possible for the spirit of the community-based social systems of the past to adapt to modern times and to modify the individualistic and remote patterns that have characterized Western justice models.").

community? Of course, even in this alternative model, terms like "local control" and "satisfaction" must be defined with some specificity in order to be meaningful. Nevertheless, popular justice provides tribal governments — and indigenous people generally — with an alternative vision in which group autonomy is not contingent upon a thorny search for "authentic" roots.