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## TRADITIONAL JURISPRUDENCE AND PROTECTION OF OUR SOCIETY: A JURISGENERATIVE TAIL

Gregory H. Bigler\*

### *Abstract*

This Article organizes thoughts from a long period of work and life exploring some of what uniquely guides traditional Euchee and Muscogee society. My participation in Euchee ceremonial life is a lens by which I view tribal, federal, and human rights law and processes. I hope to begin articulating a modern traditional Indian jurisprudence and find some source(s) to aid in preservation of Native society. In order to truly reform federal Indian law, not only must traditional tribal jurisprudence be acknowledged, but the processes used by ceremonial people must be understood and utilized in a transformative effort. I am informed by discussions with friends from other tribes who hold similar beliefs to my Euchee people; I write from the perspective, however, of a Polecat Euchee ceremonial stomp ground member. I believe the validity of my observations depends upon tribal specificity, meaning I do not simply refer to “Indian” traditions but rather to Euchee, Muscogee, or Shawnee traditions.

Traditional jurisprudence must be a foundation of the current international indigenous<sup>1</sup> rights efforts regarding sacred sites and artifacts,

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\* J.D., Harvard Law School (1985); LL.M., Wisconsin Law School (1987); District Judge, Muscogee (Creek) Nation; Attorney General, Kickapoo Tribe of Oklahoma. Thank you to the stomp dance people who shared stories; to my Euchee elders who shared what Euchee society has to offer; my Chiefs and Speakers, living and deceased; my Euchee language mentors (unfortunately all deceased); Prof. Kristen Carpenter for her comments; and, my deceased mentor, partner, and friend, Prof. G. William Rice, with whom I spent years discussing these issues. And lastly, to my mother, Josephine Wildcat Bigler, who shared so much insight and way of thinking about our people, much of it without me realizing.

1. Under international law, “indigenous” is not well defined: “In the thirty-year history of indigenous issues at the United Nations, and the longer history in the ILO on this question, considerable thinking and debate have been devoted to the question of definition of ‘indigenous peoples,’ but no such definition has ever been adopted by any UN-system body.” Secretariat of the Permanent Forum on Indigenous Issues, Dep’t of Econ. & Soc. Affairs, *Workshop on Data Collection and Disaggregation for Indigenous Peoples: The Concept of Indigenous Peoples*, ¶ 1, U.N. Doc. PFI/2004/WS.1/3 (2004). In this Article, I use “Indian,” “tribes,” “nations,” “Native American,” and “indigenous” interchangeably. To some extent, these are all external definitions, as my mother, born in 1921, used to sometimes say, “I grew up as an Indian, but really I am just Euchee.”

religious practices, and culture. If Indian advocates are unable to articulate what we believe and the nature of the society being destroyed, it is more difficult to argue for its continuity.<sup>2</sup> More importantly, we must be able to explain to ourselves what we believe, teaching our own people and incorporating those beliefs into our tribal institutions. Doing so will ensure an indigenous based social-legal system that carries us into the future. I hope this process will also be of interest to my friends and colleagues exploring federal Indian law<sup>3</sup> and international human rights.<sup>4</sup>

### I. Introduction

This act [the Curtis Act], passed in 1898, abolished tribal laws and courts, thus fulfilling the fears of Crazy Snake. Matters came quickly to a head. In 1900 the Creek nation agreed to allot its lands, thereby consenting to the Curtis Act . . . . In 1901 they [the full blood faction] proclaimed him [Crazy Snake] their hereditary chief. Harjo at once called a national council of the House of Kings and the House of Warriors at Hickory Ground, six miles from Henryetta. The council proclaimed the reestablishment of the ancient laws and courts acknowledged by the United States in the treaty of 1825. In so doing they challenged the authority of the United States to dissolve the government of another nation, and appealed to the sanctity of treaties.<sup>5</sup>

Chitto Harjo, also known as Crazy Snake, was a Muscogee *Heneha*<sup>6</sup> from Hickory Ground. Between the 1890s and 1900s, he led the Muscogee

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2. When I use the word “we,” I refer to Euchee and Muscogee and to those of us who participate, belong, or reside within traditional Native American societies or communities.

3. Federal Indian law generally refers to the body of law promulgated by federal courts and Congress as it impacts Native Americans and Indian tribes. This tends to be distinct from tribal law, which refers to the cases, statutes, and internal laws of tribal courts and governments.

4. See G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

5. Mace Davis, *Chitto Harjo*, 13 CHRON. OKLA. 139, 142 (1935), [https://cdm17279.contentdm.oclc.org/digital/api/collection/p17279coll4/id/4756/page/0/inline/p17279coll4\\_4756\\_0](https://cdm17279.contentdm.oclc.org/digital/api/collection/p17279coll4/id/4756/page/0/inline/p17279coll4_4756_0).

6. A chief at Muscogee ceremonial grounds is called a *Meko* (plural *Mekvlke*). A *Heneha* is the second chief, or helper, and one who often speaks for the *Meko*. *Tvstenvke* is the head warrior. *Meko* is commonly used when speaking about both Muscogee and Euchee chiefs. (The Euchee word for chief is *B'a-thlae*.) The *Meko* is ultimately responsible for all

resistance to the allotment of tribal land and the attempted destruction of the tribal government by the United States. These warriors fought to stop those cooperating with the allotment process, hiding in the hills of eastern Oklahoma when the United States Marshals came after them. The stance Chitto Harjo took, the source from which he drew his determination, the values and arguments he made, and his adherence to the “ancient laws” and insistence upon respect for tribal government still offer lessons today to the Muscogee and Euchee people and other advocates. Our past traditions remain alive and a part of our society today. These traditions continue in ceremonies and in other more modern ways that still originate in our past. These lessons and stories form a basis for discovering a traditional tribal jurisprudence.<sup>7</sup>

Within the Euchee, Muscogee, Cherokee and Shawnee, the stomp dances are part of a still-existing traditional religion. Ceremonies and spirituality among the Euchee, and similarly among the Muscogee, Shawnee, and Cherokee, cross both tribal and linguistic boundaries. At one recent dance, I began thinking of the significant number of Euchee and Muscogee that attend these dances and how little others, even other Indians, know about the existence of our stomp dance religion. These thoughts led to the realization that while our stomp dance represents a complex, nuanced philosophy and way of life that contains a native jurisprudence, there is little of it represented in the code of laws of the Muscogee Nation. Why do we not have more in our legal structure? Ceremonial people are told to lead our life pursuant to the strictures of our ceremonies. If true, then perhaps we need to better articulate among ourselves what those strictures are as a

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activities within the grounds and sees that the annual ceremonies are done properly. As such, these *Mekvlke* generally hold a position of great respect within their nation, as they are responsible for keeping the nation tied to its history and culture. For simplicity’s sake, I will usually refer to the traditional chiefs, Muscogee and Euchee, with the term *Mekvlke*.

7. While jurisprudence has many definitions, the one from Cornell Law School’s Legal Information Institute fits the intended meaning herein:

The word *jurisprudence* derives from the Latin term *juris prudentia*, which means “the study, knowledge, or science of law.” In the United States jurisprudence commonly means the philosophy of law . . . .

. . . .

. . . The third type of jurisprudence seeks to reveal the historical, moral, and cultural basis of a particular legal concept.

. . . The fourth body of jurisprudence focuses on finding the answer to such abstract questions as “What is law?” and “How do judges (properly) decide cases?”

*Jurisprudence*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/jurisprudence> (last visited Sept. 4, 2018).

system of law. Without this internal clarity, it will be difficult for our own people to incorporate our ways into our laws. Further, unless we insist upon the use of process in which those societal commandments are developed and transmitted, an important indigenous institution is lost even as we argue for its continuance. For example, the use of long form narration as a means of explanation must be respected through use, not just token acknowledgement.<sup>8</sup>

In their seminal work, Karl N. Llewellyn and Adamson Hobel explored the “law-ways among primitive peoples.”<sup>9</sup> They importantly noted that American Indian societies had complex laws if one only knew where to look; namely, the cultural ways of the people. Through this type of inquiry, scholars could discern examples of law falling into several categories:

The one road is ideological and goes to “rules” which are felt as proper for channeling and controlling behavior . . . . The second road is descriptive; it deals with practice. It explores the patterns according to which behavior actually occurs. The third road is a search for instances of hitch, dispute, grievance, trouble; and inquiry into what trouble was and what was done about it.<sup>10</sup>

This articulation of law meshes with my own developing perspective.<sup>11</sup> However, instead of being an outsider looking to see if we have law, I am realizing what I (or we) already know is law. There have been other works looking at traditional native societies to see what constitutes their laws. These works tend to be academic investigations conducted by outsiders, such as Llewellyn and Hobel. Very few commentaries are generated from tribal perspectives.<sup>12</sup> Despite now having several decades of written tribal

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8. The means by which this occurs is utilized throughout this Article both as illustration and as a mechanism that hopefully gives cultural context to the topic(s) discussed.

9. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* viii (1941). Hopefully, the term “primitive” is no longer used.

10. *Id.* at 20–21.

11. I purposely use “developing perspective” because after three years of law school and a lifetime of law practice, it takes considerable and conscious effort to approach matters from a non-Anglo-American jurisprudential view. As told to me by one Kickapoo, “Going to school makes you white. You speak English and forget your language. You go to work and neglect your ceremonies. You learn about America and forget your tribe.”

12. On the outsider spectra, of note are LLEWELLYN & HOEBEL, *supra* note 9 (legal scholar and anthropologist, respectively, looking at Cheyenne oral stories for sources of Cheyenne law); and JUSTIN B. RICHLAND, *ARGUING WITH TRADITION: THE LANGUAGE OF*

court decisions, there is a scarcity of discussions, either conducted by Indians or otherwise, of how a tribal government sees itself.<sup>13</sup> Fewer still look under the skin to see what the original veins of tribal jurisprudence reveal or where they might be located.<sup>14</sup> I approach this Article from the perspective of a member of the Polecat Euchee Ceremonial Ground.<sup>15</sup> This means much of what is contained herein is not found by citation to scholarly articles but rather comes from personal conversations or, more often, stories told to me as a member of the Euchee community, ceremonial

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LAW IN HOPI TRIBAL COURT (2008) (linguistic analysis of Hopi Court's uses of traditions). Examples of the internal perspective are Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191 (2001) (arguing a need to use cultural sovereignty based on traditions); and RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW* (2009) (Navajo jurist looking at Navajo judicial systems' use of traditions). These stand as markers against the Supreme Court's decision in *Ex parte Crow Dog*, 109 U.S. 556 (1883), which concerned the Lakota Crow Dog murder of another Lakota (and which was resolved within Lakota traditional law). The case did not address in any manner the internal Lakota right to their own justice system independent of the federal courts:

The federal attorney for Dakota Territory was aghast at the seemingly casual manner in which the Sioux dealt with this killing, and he soon charged Crow Dog with murder. The case reached the Supreme Court in 1883, and the conviction of Crow Dog by the territorial court was reversed on the grounds that the 1868 treaty had preserved for the Sioux the right to punish tribal members who had committed serious crimes.

VINE DELORIA JR. & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* loc. 102-104 (2013) (Kindle ebook). Ultimately, *Crow Dog* led to the passage of the Major Crimes Act (Act of Mar. 3, 1885), § 9, 23 Stat. 362, 385, that foisted federal criminal jurisdiction upon Indians on their reservations.

13. There is now a small but growing body of literature discussing tribal law. See MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* (2011); SARAH DEER & CECILIA KNAPP, *Muscogee Constitutional Jurisprudence: Vhaky Em Pvyaky (The Carpet Under the Law)*, 49 TULSA L. REV. 125, 126 (2013).

14. See JOHN BORROWS (KEGEDONCE), *DRAWING OUT LAW: A SPIRIT'S GUIDE* (2010) for a Canadian example that utilizes indigenous storytelling about Native life to explore indigenous jurisprudence.

15. The "ceremonial grounds," "stomp grounds," or "grounds" are the terms generally used to refer to the thirteen to fifteen historic tribal towns, or entities, that continue to exist within the Muscogee (Creek) Nation. These now primarily carry forward their ceremonial functions, whereas they originally functioned as both political and ceremonial entities. Jason Jackson tries to explain their current role by use of analogy to a congregation. JASON BAIRD JACKSON, *YUCHI FOLKLORE: CULTURAL EXPRESSION IN A SOUTHEASTERN NATIVE AMERICAN COMMUNITY* 157 (2013) (with contributions by Mary S. Linn). While perhaps not incorrect, that term may too easily lead outsiders to not comprehend the much fuller societal role the grounds or towns still hold and which can still be a source of law.

grounds, and society.<sup>16</sup> To be clear, I am not speaking for or on behalf of my ground since my chief has not directed me to do so. Additionally, while I am an active participant of my ground, and I try to write from what I have learned, there are others who know as much or more about our ceremonial ways. However, I have thought about these things in terms of law. Ironically, this work is a contradiction to the common assertion among our ceremonial leaders that to understand our “ways” (meaning ceremonial and spiritual), one must be present to participate and see rather than read or write about it.<sup>17</sup> Nonetheless, in order to aid me in making semblance of what I have learned and to develop appropriate argument, I lay out in writing my understanding of certain ceremonial precepts.

## II. The Setting

### A. What We Had

At the time of contact between the Americas and Europe in 1492, there were advanced civilizations throughout the Americas.<sup>18</sup> While most attention in popular culture is devoted to the great Central and South American civilizations of the Aztec, Incas, and Mayas, North America also had great towns and societies. There were the organized societies of the

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16. The author notes some confusion over the use of the form of the term “ground” or “grounds”. When speaking with ceremonial members, they tend to freely use both forms when referring to the “stomp-ground” or “stomp-grounds”. I inquired about this with Amos McNac, Heles Hayv (medicine maker) at Nvyaka, and Meko George Thompson of Hickory Grounds, both also Supreme Court justices at the Muscogee Nation. Justice McNac noted that in Mvskoke he was Wotkovlke, racoon clan. *Vlke* is the plural form, that even though he was just one person, one was always part of a group and thus the plural was used. With the grounds they used *etvlwvlke*, the plural form of tribal town. Again, they explained that a person could not be a singular, but rather was always one of a group. I suspect that when the ceremonial members began using English this linguistic nuance was simply carried over from the native language. This too shows how even a simple exploration of traditional terminology can lead to understanding of indigenous conceptions.

17. Perhaps the single most common theme shared by the Euchee, Muscogee, and Cherokee grounds that I have visited is that “being Indian is hard.” The manner in which we must carry out our ways is strict and difficult. The former speaker at my grounds, Newman Littlebear, who passed away in 2015, was a well-respected elder. He was fond of the saying, “We dance at night because at 4 a.m. the flesh is weak and the spirit is strong.” One can only truly understand the spiritual truth of those words if one is sitting under the arbors at 4 a.m., struggling to stay awake, while watching a man forty years one’s elder dance and sing.

18. See CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS (2d ed. 2005) (covering in detail the history, societies, and cultures of the Americas just before Columbus’s arrival in the Americas).

great mound cultures of the Muscogee in the southeast and those in the Ohio River valley.<sup>19</sup> Grand cities could be found near Cahokia, Illinois, the Caddo villages in present Arkansas,<sup>20</sup> and the recently rediscovered vast Wichita Indian town in Kansas.<sup>21</sup> Agricultural innovation and trade moved goods thousands of miles between tribes and towns.<sup>22</sup> That, however, all went away for various reasons, not the least of which was disease. Our oldest Euchee stories tell that at one time there were 40,000 Euchee. There is neither record nor document to support this figure.<sup>23</sup> However, assuming

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19. *Id.* at 252-59.

20. Mann describes Hernando De Soto's 1539 expedition through what would become the southern United States. De Soto marched "into what is now eastern Arkansas, a land 'thickly set with great towns' . . . 'two or three of them to be seen from one.'" *Id.* at 98. Mann also notes another Spanish conquistador, Las Casas (circa 1542), to whom "the Americas seemed so thick with people 'that it looked as if God ha[d] placed all of or the greater part of the entire human race in these countries.'" *Id.* at 132.

21. A news article noting the believed finding of a Wichita Indian city in present Kansas that was the site of a 1601 battle with the Spaniards stated: "'The Spaniards were amazed by the size of Etzanoa,' Blakeslee said. 'They counted 2,000 houses that could hold 10 people each. They said it would take two or three days to walk through it all.'" Roy Wenzl, *Lost City Found: Etzanoa of the Great Wichita Nation*, WICHITA EAGLE (Apr. 17, 2017, 12:20 AM), <http://www.kansas.com/news/state/article144968264.html#storylin\K>; see also Frank Morris, *Kansas Archaeologist Rediscovered Lost Native American City*, NAT'L PUB. RADIO (May 10, 2017, 4:35 PM), <http://www.npr.org/2017/05/10/527817921/kansas-archaeologist-rediscovered-lost-native-american-city>.

22. See FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM AND THE CANT OF CONQUEST* 85 (1975) (noting northern Michigan copper was found in Jamestown, Virginia, and obsidian was found over 1700 miles away from its source). In another example, Grand Island, on Lake Superior just off the northern coast of Michigan's upper peninsula, covers some 13,000 acres. "Indian agent Henry Rowe Schoolcraft reported . . . that a population of *fifty-seven Ojibwe Indians* from thirteen families were producing *3,500 pounds of maple sugar* in 600 kettles (Schoolcraft 1851)." Matthew M. Thomas & Janet M. Silbernagel, *The Evolution of a Maple Sugaring Landscape on Lake Superior's Grand Island*, 35 MICH. ACADEMICIAN 135, 138, 140 (2003) (emphasis added).

23. There is, though, a *di'ile* (traditional Euchee story) about "How Wolves Came to Be" that begins with an old woman going to a village that is empty except for a crying baby boy. Knowing the high mortality rate the tribes experienced at the time of contact with Europeans, one wonders if the beginning of this *Di'ile* somehow memorializes those losses. Mann notes a similar situation in the Pacific Northwest in 1792. European explorer George Vancouver found in the Puget Sound area "deserted villages, abandoned fishing boats, human remains 'promiscuously scattered about the beach, in great numbers,'" suggesting the area saw a precipitous decrease in Native American population, having recently (circa 1790) been far more populous. MANN, *supra* note 18, at 110. Thus, the European account and Euchee account seem to be in accord as to Native American population decline, though approached from different sources. The ascribing of greater validity to one account over the



small pox and other diseases ran through the Euchee like many other tribes, especially those that were closest to the first European contact, a ninety-five percent loss is not unreasonable.<sup>24</sup> That puts the Euchee in line with where we were at the time of written records regarding contact: 500 gun men (warriors), meaning around 2000 total men, women, and children.<sup>25</sup> Thus, as illustrated by the trade of goods, diplomacy, and numbers of people, these were not *isolated* but rather *interactive*, vibrant societies. More importantly for the discussion that follows, we are unlikely to resurrect those self-sustaining societies that existed at the time of contact. Creating a society independent of the larger society around us is not the goal.<sup>26</sup> Rather, the desire is to have a society that retains distinct attributes derived from our past, which allows continuity of our unique culture and society. We must therefore understand what obstacles we face and what allows us the greatest chance of success. Of course, a fundamental question is this: what are we trying to continue, and how can we determine the nature of our remaining society?

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other due to its source goes to the heart of devaluing indigenous forms of history and society.

24. *See id.* at 107-49. Mann notes some academics argue such high loss figures is simply revisionist history. However, as Mann notes by citing the original European explorers'/conquistadors' journals, the high death rates are actually re-revisionist history as the 1500-1700 descriptions are of a land teeming with people, settlements, and life. *See id.* at 15-27 (laying out a case for at least ninety percent population loss).

25. The "500 gun men" derives from William Bartram of Philadelphia (1791), who believed the total Euchee population was 1000-1500. FRANK G. SPECK, *ETHNOLOGY OF THE YUCHI INDIANS* 7 (Univ. of Neb. Press 2004) (1909). Assuming a gun man was a male between the age of sixteen to sixty years, that would imply a possible wife, minor children, or sisters and elderly for each gun man, meaning a 2000 total seems more plausible for 500 "soldiers." These are guesses, given that only seven years later in 1798-99, the Yuchi were listed as having 250 gun men in three villages. COL. BENJAMIN HAWKINS, *CREEK CONFEDERACY AND A SKETCH OF THE CREEK COUNTRY* 62 (Savannah, Ga. Historical Soc'y 1848), <https://archive.org/details/creekconfederacy31hawk/page/n127>. Regardless, by the time of allotment in 1906, the population of Yuchi clustered in three settlements was estimated by Speck at no more than 500 total. SPECK, *supra*, at 9.

26. This seems reflected in the fear of states during the drafting of the UNDRIP, i.e., that indigenous peoples would seek to secede from member states. *See* Dalee Sambo Dorough, *Rough Drafts: A Personal Account of the 25-Year Struggle to Craft the U.N. Declaration on the Rights of Indigenous Peoples*, 34 *WORLD POL'Y J.*, Winter 2017/2018, at 46. Here, as in the UNDRIP, the real goal is self-determination with native societies retaining our unique identity, culture, and society.

The Euchee (also spelled Yuchi) are a tribe of Indians included within the Muscogee (Creek) Nation.<sup>27</sup> Mary Linn, Phd., Curator of Cultural and Linguistic Revitalization at the Smithsonian Center for Folklife and Cultural Heritage, has noted that Euchee is a language unrelated to any other language.<sup>28</sup> Despite being affiliated with the Muscogee since the late 1700s, we have strongly maintained our unique identity separate and apart from the Muscogee. We are a stomp dance people, referring to our ceremonial dance cycle. This ceremony includes the main Green Corn dance that, in various forms, was once common among not only the Euchee and Muscogee, but many other Eastern Woodlands tribes. At least with tribes now residing within Oklahoma, the Green Corn and stomp dance remains strongest, perhaps, among the Muscogee and Euchee. The Euchee stomp dance and Green Corn ceremony has a similar (though not identical) religious and ceremonial structure as the Muscogee and our friends, the Shawnee and Cherokee. This is despite those three tribes coming from three linguistic groups: Muscogean, Algonquin, and Iroquoian, unrelated to Euchee or each other.<sup>29</sup> There are differences due to language and culture, and while we each notice these differences amongst ourselves, outsiders might not. The differences can be significant, yet discussions between members of the host grounds and visiting grounds during dance season not only further understanding of our own ways but are a significant factor in each of us reaffirming a commitment and, importantly, an *ability* to continue our practices.<sup>30</sup>

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27. Muscogee refers to the Muscogee (Creek) Nation and the Muscogee people, also referred to as Creeks. The Muscogee were comprised of numerous tribal towns with similar or related languages, including the Hitchiti, Alabama, and Coushita. The language has been written since the mid-1800s and is most often spelled “Mvskoke.”

28. See SPECK, *supra* note 25, at 6; see also JACKSON, *supra* note 15, at 44 (“Yuchi is one of only a small number of language ‘isolates’ (a term used for a language that is not demonstrably related to any known language) still spoken in the Americas and the only one still surviving in the eastern part of the continent. This singular achievement, signaling an ancient history as a people and a power of cultural resilience into the present, has meant that the Yuchi have long captured the interest of scholars.”).

29. YUCHI INDIAN HISTORIES BEFORE THE REMOVAL ERA loc. 345 (Jason Baird Jackson ed., 2012) (Kindle ebook).

30. During one of our dances some years ago, a Meko, now deceased, from a Muscogee ground was drinking coffee at one of our camps. He asked if we knew why he always came to our grounds, even when Muscogee grounds were dancing. He said he was told by his elders that a long time ago his old people and the Euchee were visiting and they saw a day coming when neither would be able to carry on by themselves. So, they decided to let each other know when each were dancing and to come and assist. He said others have forgotten that, but he remembered and felt a duty to carry on that commitment. (From the context and

These ways, practices, ceremonies, or religions are often called “our traditions.” As used here, “traditions” refer to those elements in Native society that have a continuity with the tribe’s heritage.<sup>31</sup> Jason Jackson’s observation in *Yuchi Folklore* accurately describes one end of a trap which many outsiders fall into of “inadvertently perpetuating the long-established stereotype in which Native peoples are seen as quintessentially traditional—that is, as living ideal-types governed only by custom.”<sup>32</sup> Alternatively, some outsiders, particularly academics, argue many Indians’ traditions are actually modern constructions, not being “true,” exact derivations from pre-existing tribal practices.<sup>33</sup> However, as Jackson explains about the Euchee:

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language, it was understood this occurred very long ago, perhaps sometime after removal in the 1830s or even before.) From such actions, relations and duties arise between peoples.

31. “Traditional” is, at best, a fuzzy term. Natives frequently use it and can usually emotionally agree as to what it means. Others have noted “traditional” “is imprecise and open to interpretation.” Kristen A. Carpenter, *Individual Religious Freedoms in American Indian Tribal Constitutional Law*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY* 159, 195 n.25 (Kristen A. Carpenter, Matthew L. M. Fletcher & Angela R. Riley eds., 2012). I am not particularly concerned about defining Euchee traditions; rather, I simply want to talk about Euchee traditions.

32. JACKSON, *supra* note 15, at 74.

33. For instance, Richland discusses academics who seek to find the “true” traditions to which they deem themselves “uniquely” qualified to decide upon:

The use of notions of invented tradition to analyze the contemporary activities of American Indian, Hawaiian, Maori, and other indigenous peoples . . . has resulted in direct and difficult conflicts between such communities and scholars . . . [T]hese conflicts fundamentally turn on the question of authenticity, the authority to authenticate, and the roles that analysts and communities play, respectively, in processes of representation.

RICHLAND, *supra* note 12, at 150 (citations omitted). While Richland’s analysis is all too accurate, it is also true that false claims to traditions, or perhaps more accurately, false claims to rights to traditions, are a problem increasingly facing and costing Indian nations. Ben Barnes, Second Chief of the Shawnee Tribe located in northeast Oklahoma, has committed effort to exposing false claims of those he calls “Pre-tendians” that put on fake Shawnee ceremonies, as well as attempt to intervene at historic Shawnee sites and in repatriation issues of returning Shawnee ancestors and cultural patrimony to the proper place and people:

Between the years of 2007 and 2010, more than 100 million dollars went to just 26 non-recognized groups calling themselves a tribe. Fake tribes have even created problems with their misuse of federal funding such as recruiting children in Arkansas school systems to enroll as “native children” so that the school could receive Johnson O’ Malley (JOM) and Title 7 Indian Education support funds.

Tradition is evoked everywhere, from difficult arguments about religion or economic development to the planning of grandma's upcoming birthday party . . . . When the Yuchi and their neighbors discuss the nature and practices of their heritage culture, particularly the performance of their collective ceremonies, they explicitly frame such activity in processual terms, identifying it as a special and valued kind of "work." Thus they represent communities predisposed to a *dynamic* rather than essential theory of tradition.<sup>34</sup>

Jackson's use of "dynamic" is perhaps the most important conceptual point, being that to us traditions are living.

While there are inter-tribal activities among many tribes, I am not herein looking at generic or pan-Indian traditions.<sup>35</sup> When discussing mechanisms that flow from tribal ceremonial traditions, I perceive those religious activities of tribally-specific derivation. That is not to downplay the borrowed or incorporated elements from other sources *into* a tribal culture. Traditions may be partly or heavily influenced by other societies or cultures, including Anglo-American, Hispanic, or most especially, other tribes.

In the Euchee and Muscogee tribes, the more traditional members participate in stomp dances. Some Euchee, even though participating in traditional dances, have also become members of the Native American Church, part of the Peyote religion. The Euchee were historically a very conservative element within the Muscogee Nation, which, combined with the difficulty of outsiders learning our language, meant Christianity came late to us. Not until 1901 did the Methodist missionaries finally see Pickett Chapel founded just south of Sapulpa, Oklahoma. The church preached primarily in Euchee until the 1970s and, at least occasionally through the 1980s, and still sings Euchee hymns. More importantly, despite Pickett Chapel having until recent years a public avoidance of the Euchee ceremonial dances, the church held traditional funerals while the tribe still

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Benjamin J. Barnes, *Faux Indians, Their Threat, and Tribal Responses* 8 (paper presented at the Muscogee (Creek) Nation District Court CLE Conference, "Doing Business in Indian Country," Apr. 28, 2016) (on file with author).

34. JACKSON, *supra* note 15, at 75 (emphasis added).

35. Again, these observations come from participation in Euchee society and ceremonial cycle and are not based upon academic observations or analysis. While pow-wows and like gatherings may have originated with specific tribes, when they are now hosted by Cherokees or Muscogees (or some inter-tribal organization), they obviously are not in that iteration a tribally specific ceremony.

had Indian doctors to conduct them<sup>36</sup> and still occasionally used the traditional medicine to wash after funerals held at Pickett Chapel.<sup>37</sup>

Interestingly, as the number of native Euchee speakers dwindled to a handful, the remaining speakers were primarily elderly female members of Pickett Chapel. Some Muscogee churches are still able to preach in Mvskoke, though with the aging of Mvskoke speakers there are fewer full services conducted in the language. The Muscogee are likely soon to be in the same situation as the Euchee.<sup>38</sup> Yet other Muscogee and Eucheas know little to nothing of their culture or ways, traditional or otherwise.

“Modern traditional” is seemingly contradictory but must be a foundational principle if a Native society is to continue as a *living* society, as opposed to a museum piece. Traditional Native society infers values and practices derived from the past. However, no society survived by remaining stagnant. Adaptation in some areas is necessary to exist and grow. A small example of this is the creation of new words in Native languages for things such as cars: *yabithlo* – also a wagon, literally “wood going round”; also *k'as'ædicha* – “something that is fast.” The foregoing examples illustrate

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36. The Euchee tend to refer (in English) to these people as “doctors,” being people who were formally trained pursuant to Euchee traditional practices. They knew the plants, medicines, and songs to treat people for physical *and* spiritual ailments. Other tribes often referred to them as “medicine men.” The last of these Euchee doctors passed away in the late 1960s or early 1970s.

37. In the late 1990s, a form of crisis arose at Pickett Chapel when my uncle wished to have the traditional Euchee medicine to wash with after a funeral. Some members were against allowing it, perhaps because they thought it was not appropriate to have traditional Euchee doings at a church, despite having done so for nearly ninety years. Ultimately, the medicine was used and continues at Pickett. This illustrates the process of assimilation and suppression that occurs within the Euchee community and elsewhere. Internally, this dynamic is different than when knowledge is either lost or is no longer able to be carried forward. How these internal tribal decisions come about probably has jurisprudential lessons, but I have not yet worked through them. Sometimes, their meaning does not become clear until a similar situation next arises.

38. Many of these Muscogee churches came from Methodist and Baptist missionaries and were grouped out of former tribal towns or ceremonial grounds. Thus, you have fifty or more Muscogee churches, including Alabama Coushatta, Concharty, Big Cussetah, Greenleaf, and Okfuskey. All of these came out of tribal towns. Even while no longer knowing much about the stomp grounds, many of these churches incorporate stomp dance structures into their services, such as where men and women sit and the use of a “stickman” to sit people or assist. Many of these same Indian churches used to, and some perhaps still do, consider the stomp grounds as evil and try to persuade people from such dances, perhaps as a result of the missionaries’ work to convert the “heathen” Indians in the 1800s and early 1900s. Conversely, some Muscogee Indian churches have recently hosted social or fundraiser stomp dances, upsetting some of the more conservative grounds’ Meklke.

adaptation and incorporation but also how even those can fade with time or dilution of tribal ties.

To my developing perspective, traditions might best be understood by reference to the Mvskoke term “*emayetv*,” which, as explained to me when translated into English, means “this is what I was taught” and infers “this is my ways.” The Muscogee do not have direct terms for tradition, culture, or society, but rather discuss “those things that we were taught, (that are our ways) which have been handed down to us.”<sup>39</sup> This concept perhaps best embodies what I mean herein as to traditional society. Determining what core values and practices cannot be given up if the traditional society is to remain true to itself is often the tricky part of the traditional equation. Nonetheless, what is traditional is quintessentially the tribe’s decision.

*B. Traditional Rights as the Canary for Indigenous Rights*<sup>40</sup>

Two of the overarching issues in Indian Country are reaffirming political sovereignty and economic development. However, as David Comingdeer, Chief of the Cherokee Echota Ceremonial Grounds near Tahlequah, Oklahoma, puts it, political sovereignty flows from cultural sovereignty.<sup>41</sup> They must stand together—tribal leaders of today owe their existence to the culture. Wallace Coffey and Rebecca Tsosie wrote about this issue in 2001, asserting that “cultural sovereignty is a process of reclaiming culture and of building nations.”<sup>42</sup> Their article notes the threat Indian nations face regarding the possibility of complete annihilation of their political status.<sup>43</sup> They see cultural sovereignty as valuable because it would be an internally generated doctrine that could address the increasing loss of language,

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39. This is at least according to the Mekvlke who worked on the Mvskoke translation of the UNDRIP.

40. Felix S. Cohen, the father of Indian law scholars, wrote the often-used analogy: It is a pity that so many Americans today think of the Indian as a romantic or comic figure in American history without contemporary significance. In fact, the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner’s canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.

Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

41. This idea has been discussed in personal conversations and was also expressed by Chief Comingdeer in a series of conference calls hosted by the author in 2017 to discuss the UNDRIP and how to implement it domestically.

42. Coffey & Tsosie, *supra* note 12, at 191.

43. *Id.* at 194.

ceremonies, and way of life.<sup>44</sup> In contradistinction, Sam Deloria, disavows, in part, the use of culture as a basis of asserting tribal sovereignty. In a 2006 article, Deloria notes three federal bases for support of tribal political sovereignty: inherent tribal rights, cultural distinctiveness, and general poverty of the tribes.<sup>45</sup> Deloria opines to the extent tribes pin their sovereignty arguments too much upon poverty or culture, if that poverty or culture disappears, the arguments for sovereignty may also disappear.<sup>46</sup> Thus, Deloria writes that while tribal advocates may have a responsibility to their culture, they should not tie themselves too closely to cultural arguments because it could lead to courts requiring tribal culture to be static in order to affirm tribal sovereignty.<sup>47</sup> That, however, is a trap that opponents already spring upon tribal rights.<sup>48</sup> Many traditional people have always believed their core is cultural and their tribal existence flows from that culture. To argue traditional people must not assert this point for fear of losing their political identity is, in essence, to tell them they must accommodate away their core beliefs by not emphasizing that their culture equals existence.<sup>49</sup> The proper response, though, is not one of fear of the argument about ossified traditions but of understanding ourselves so that we may articulate why it is wrong.

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44. *Id.* at 196.

45. Sam Deloria, *New Paradigm: Indian Tribes in the Land of Unintended Consequences*, 46 NAT. RESOURCES J. 301, 303 (2006) [hereinafter Sam Deloria].

46. *Id.* at 303-04.

47. *Id.* at 313-14. Both Coffey & Tsosie, *supra* note 12, and Sam Deloria, *supra* note 45, were written before the UNDRIP was adopted in 2007. The Declaration reframed indigenous rights into indigenous peoples' inherent rights to exist in terms of human rights. Thus, an exterior source now exists that does not contain the traps found in confining oneself to arguments created by the federal system. Of course, the UNDRIP is not positively adopted domestic law at this time. However, it does, as discussed at Part V, offer possibilities.

48. See Brief for Petitioner at 17, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399) (raising by way of racial classification arguments inferencing lack of sufficient cultural identity) ("Where an Indian child is eligible for tribal membership simply because of her blood lineage, ICWA is triggered by the child's racial status unmoored to tribal sovereignty, *culture*, or politics." (emphasis added)).

49. Note the federal courts still regularly cite nineteenth century cases for support of positions which had as their basis the goal of social engineering of Indian society. "Congress in the late nineteenth century adopted 'the view that the Indians tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately-owned parcels of land.'" *Murphy v. Royal*, 875 F.3d 896, 919 (2017) (quoting *Solem v. Bartlett*, 465 U.S. 463, 466 (1984)). Not only is such social engineering wrong, but it is ironic because the indigenous peoples of North America had been among the greatest farmers the world ever saw until destruction of their agrarian economy by the Europeans up to and through the removals commencing in the 1830s.

As to assertion of economic development rights in Indian Country,<sup>50</sup> such rights are likely better received than assertion of traditional cultural or spiritual rights.<sup>51</sup> First, American society firmly falls within the capitalist structure. Both Congress and federal courts understand business or economic arguments, even when framed within Indian Country. That does not mean arguments for tribal economic rights free from state interference will prevail. Tribes, however, are able to use existing laws to assert such rights.<sup>52</sup> The history of American law is replete with business and economic

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50. Indian Country is defined in 18 U.S.C. § 1151. This codified the Supreme Court's existing common law classifications of Indian Country in the Act of June 25, 1948, which states:

[T]he term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Act of June 25, 1948, Pub. L. No. 80-772, § 1151, 62 Stat. 683, 757. This term of art is used to define where, generally, federal and tribal jurisdiction holds sway as opposed to state jurisdiction. Perhaps the earliest definition of "Indian Country" was by statute in the Act of June 30, 1834: "all that part of the United States . . . to which the Indian title has not been extinguished." Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729, 729 (1834). Felix Cohen explained the effect of the early Indian country legislation was that: "Indian country in all these statutes is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by statute, and state law is not applicable at all." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 6 (1941), <http://thorpe.ou.edu/cohen/chapter1.pdf>.

51. This is also shown by articles such as Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859 (2016), and Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L. J. 299 (2002), which together argue for a new approach to American property law to account for traditional perspectives on property and cultural possessions. The necessity for such arguments necessarily illustrates that the current dominant property structure does not accommodate alternative conceptions of cultural property.

52. See *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993) (Tribe may license car tags within its jurisdiction); *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164 (1973) (state individual income tax was unlawful as applied to reservation Navajo Indians with respect to income derived wholly from reservation sources); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In *Merrion*, the Court stated:

In *Washington v. Confederated Tribes of Colville Indian Reservation*, we addressed the Indian tribes' authority to impose taxes on non-Indians doing business on the reservation. We held that "[t]he power to tax transactions



arguments regarding governments and individuals. The argument is not whether such rights exist<sup>53</sup> but rather about the division of jurisdiction between various sovereigns within Indian Country (i.e., can the tribe tax non-Indians, can it regulate non-Indian activities, can it participate in market activities in the manner of corporations). If we establish the right to our indigenous institutions, we should be better able to assert a right to our own economic paths.

Finally, in this vein, the reader must remember this discourse is not primarily about what federal Indian law says, but where traditional tribal law can be found, what that law might say, and how it might be fostered. Personal conversations with one Meko best illustrate why this is so imperative. The Meko related a discussion he had with another Meko, who expressed that if the time comes when the *Mvskoke* language can no longer be used in the ceremonies because the last speaker at his ground dies, it may be time to put out the fireplace. Doing so would end that ceremonial ground and all the distinct cultural jurisprudence attached thereto. Statements such as these must be taken at face value as to how the ceremonial people perceive fundamental directives of traditional law and how it must be adhered to by the people. This comports precisely with the saying of some of the Euchee old people “that if you want to dance you have a place to dance,” meaning that stomp dances should be done only at the ceremonial grounds.<sup>54</sup> Clearly, this *traditional law* perspective is

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occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.” The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.

*Id.* at 137 (citations omitted).

53. See, for example, Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit from 1981 until 2017, a leading jurist of the modern era who built his reputation upon economic analysis applied to dispute resolution. His jurisprudential philosophy has been described as arguing “that judges should consciously use law to further designate[] social goals, namely wealth maximization.” Todd J. Zywicki & Anthony B. Sander, *Posner, Hayek, and the Economic Analysis of Law*, 93 IOWA L. REV. 559, 562 (2008).

54. This phrase infers there is a place to do things and a way to do things. It goes to sacred site issues as to which places may hold ceremonial dances, and nowhere else, and what happens when those lands are threatened. It should also be noted that this conception of the “only place to dance” is changing in recent years as more and more people, including Euchee, begin to participate in “indoor” social stomp dances. See JACKSON, *supra* note 15, at 167, 170-73. None of the other stomp dance tribes appear to adhere to this strict prohibition of dancing away from the ceremonial grounds. However, there are still some Meko

separate and apart from *Indian law* discussions about how Indian law is derived from political status and that tying federal tribal rights to existing culture risks losing those rights if/when the culture thins out too much. The federal and state actors using the thinning argument that Indians are becoming less “Indian” through reduced blood quantum, language loss, “tenuous” cultural ties, and life apart from the reservation as a means to attack our political sovereignty are diametrically different than us arguing that our cultural sovereignty must be affirmatively recognized within our right to political sovereignty.

I now turn to three issues. First, tribes, some more than others, retain vestiges of our unique traditional societal structures that form a jurisprudence and that may aid in rejuvenation of our societies. Second, the American legal structures that deal with Indians as peoples are not purposed to allow the vestiges to continue. Third, if they are to continue, or even to some extent recover, a new legal system must be implemented that can recognize and account for traditional societies. With this in mind, domestication of the UNDRIP is the system most likely to succeed in rejuvenation efforts.

### *III. A Ceremonial Approach to Law*

Scholars have looked to the development of Indian law as “other” through a review of Western thought.<sup>55</sup> Additionally, scholars have shown the flaws in current Supreme Court federal Indian case law.<sup>56</sup> These authors have exposed the inherent flaws with Indian law and what needs to change before Native peoples can have true protections in federal law. Such analysis does not inform what distinct jurisprudence exists within the tribal society nor ferret out the foundations upon which we can strengthen or rebuild our own structures. I realized over time that I approached Indian law issues from my Euchee perspective, not federal law looking towards the tribal. I pursued a complimentary but opposite endeavor from most by attempting to understand tribal jurisprudence from knowledge of our traditional society.

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within the Muscogee Nation who strongly oppose dances away from the sacred fire. *See text accompanying infra* note 177 (statement of Mekvlke Proctor and Thompson).

55. *See* ROBERT A. WILLIAMS JR., *SAVAGE ANXIETIES* (2012).

56. *See* WALTER ECHOHAWK, *IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED* (2010) [hereinafter ECHOHAWK, *10 WORST INDIAN LAW CASES*].

I assumed my people still had elements within our society that were sufficient to piece together at least parts of a traditional jurisprudence. The question is what, from our perspective, binds together our members as a still-existing traditional society? Further, where can these elements be found? With a conscious understanding of our unique internal jurisprudence, we can better determine what must be done to sustain our society regardless of participation within the larger American culture. This section sits within our arbors and looks at our own people for examples. These examples indicate where we may draw guidance and discussions about our beliefs as forming a jurisprudence ordering what continues to exist of our Native society. It does not lay out a full jurisprudence but rather illustrates bits of where it might be derived.

Tribes retain varying degrees of their original traditional culture, some fairly intact, some perhaps mere remnants. However, to the extent the culture remains as a jurisprudence, it should be protected and respected, both internally and externally.<sup>57</sup> Discourse on this topic seems to mostly occur not in published works, but between a few tribal judges in the hallways at meetings such as the National American Indian Court Judges Association, Federal Bar Association Indian Law Section, or similar gatherings. Former Navajo Supreme Court Justice Raymond Austin has written on the dynamics facing this issue:

Making Indian common law a significant and daily part of modern Indian life on reservations across the country will not happen unless we educate Indian leaders, Indian peoples, and eventually non-Indians. American Indians must understand the intricacies of their own traditional ways and the powers inherent in their philosophies, customs, and traditions in order to garner benefits from them.<sup>58</sup>

Imbuing Indian institutions with traditional values, as Austin suggests, requires that those institutions must either originate with or involve those who understand traditional cultures. In Oklahoma and elsewhere, modern tribal governments, for the most part, carry out their functions using structures modeled on Western forms, such as the “Business Committee”

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57. As to the external protections, a system of law claiming to have as its foundation fairness and justice, such as the United States, should protect those indigenous institutions that are most endangered and vulnerable. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that all men “are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness”).

58. AUSTIN, *supra* note 12, at xxiii.

and court systems<sup>59</sup> created under the Indian Reorganization Act (IRA).<sup>60</sup> Felix Cohen and John Collier envisioned their legacy, the 1934 IRA, and the IRA's 1936 sibling, the Oklahoma Indian Welfare Act (OIWA),<sup>61</sup> as rejuvenating tribal governments after the federal policy of suppression from the late 1800s to the 1930s.<sup>62</sup> These pieces of legislation began the alteration of many tribal governments away from traditional forms, although that does not appear to have been the intent.<sup>63</sup> Westernizing of Native institutions continues even while American courts explore alternative dispute resolution that consciously or coincidentally models indigenous institutions such as peacemaker courts. However, to create tribal institutions that utilize traditional systems, one must first determine whether there is anything to sustain.

Presently in many tribal communities, it is often a matter of traditional institutions trying to survive, rather than a question of sustainability. By sustainability, I refer to a communal interaction, a shared knowledge within the community, and commonality of purpose sufficient to achieve continuity. Inherent in being sustainable is having sufficient numbers to share the burden among community members. Survival, though, refers to the fact that certain tribal institutions may disappear with the passing of but

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59. This is a natural result of criteria the federal government increasingly requires of tribes in order to expand their tribal institutions, such as found in Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, § 234, 124 Stat. 2261, 2280 (codified at 25 U.S.C. § 1302) (increasing criminal penalties in tribal courts from one year in jail and \$5000 fine to a maximum of three years in jail and \$15,000 fine (with a maximum of nine total years' incarceration)); Violence Against Women Reauthorization Act of 2013, tit. IX, Pub. L. No. 113-4, sec. 904, § 204, 127 Stat. 54, 120 (codified at 25 U.S.C. § 1304) (allowing criminal prosecution against non-Indians in tribal courts, discussed *infra* Part IV.A). *See also* 45 C.F.R. 1356.21(i) (providing timelines for termination of parental rights in foster placements if the tribes are seeking foster care payments (noting, however, tribes' ability to vary will depend on specific tribes' laws, statutes, or rules)).

60. Ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 5101-5129) (reclassified from 25 U.S.C. §§ 461-479) (also known as the Wheeler-Howard Act).

61. Ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. §§ 5201-5209).

62. In a 1934 memorandum published posthumously in 2007, Felix Cohen wrote: "Those Indians who have had experience in self-government will not need this guide. For many years, however, most of the Indian tribes have not only been denied the right to manage their own affairs, but have even been denied a *voice* in those affairs." FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 3-4 (David E. Wilkins ed., 2007) [hereinafter COHEN, TRIBAL CONSTITUTIONS].

63. The use of westernized institutions is not always the IRA's fault. The Navajo use a president and council system but have not adopted the IRA or written a constitution. *See* DELORIA & LYTLE, *supra* note 12, at loc. 1271 ("Collier saw old values and customs transformed, not replaced or transmuted.").

a few individuals. Native languages are a prime example of survival versus sustainability. My mother's *Golaha* (grandmother) Millie in the mid-1920s to 1930s raised my mother, my mother's four siblings, and several of their cousins.<sup>64</sup> *Golaha* Millie, unlike most Indians of that time, insisted the children all speak Euchee upon their return home from Indian boarding schools, regardless of them being punished for speaking it at school.<sup>65</sup> My mother told the following story of the day when she and her siblings came back to *Golaha*'s home during a school break and were all playing in the yard:

I guess we were all speaking in English because *Golaha* came out and yelled at us in Euchee, saying: "*Di tsolehe nonda nehdze sawlawle Euchee-haw! Nedze saw-lawle Eucheehaw gowadine o-gwa-guhn!*" (This is my house and you are all Euchee. When you are here you speak Euchee!)

That is what they did at her house from then on. Because of this stubborn streak, three of the last four or five native fluent speakers of Euchee were *Golaha* Millie's grandchildren.

The above story is a matter of survival of the language. If other Euchee households had done the same then it might have created a *sustainable* language environment.<sup>66</sup> Euchee not only unites the tribe through commonality of language, but the structure of our language may have played a role in retaining an ongoing cohesion. In Euchee, pronouns referring to other Euchee classify male or female and whether a man or woman is speaking. However, reference to non-Euchee animate objects all use the same pronoun "*wanuh*," regardless of whether speaking of another non-Euchee Indian or a non-Indian. It also is used to refer to any other

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64. Why and how this happened is another long story that also has implications on traditional Euchee society and jurisprudence as to responsibility to family, tribe, and culture.

65. Native language use was actively suppressed at federally sponsored boarding schools, and usually local public and private schools as well, up to very recently. Professor K. Tsianna Lomawaima quotes a student from the Chilocco Indian Agricultural School (near Newkirk, Oklahoma) as saying, "[I]t was frowned on for any of the students to speak their native tongue." K. TSIANNA LOMAWAIMA, *THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL* 139 (1994). Richard H. Pratt, the founder of Carlisle Indian School in 1879, also wrote that "the sooner the Indian loses all his Indian ways, even his language, the better it will be for him and the government." *Id.* at 5.

66. The United Nations recognized the dire status of indigenous languages worldwide in 2016 when the UN General Assembly adopted Resolution 71/178, proclaiming 2019 the International Year of Indigenous Languages. G.A. Res. 71/178, Rights of Indigenous Peoples, ¶ 13 (Dec. 19, 2016), <https://undocs.org/A/RES/71/178>.

living thing (i.e., animals).<sup>67</sup> Thus, in our language there are Eucheas and then there are all other living things.<sup>68</sup>

Of the few remaining native languages, many are near extinction. In 1491, over three hundred Native languages were spoken in North America. One paper from 1996 estimated that in the United States, some 175 languages continued to exist, with perhaps twenty of those Native languages being learned in the traditional manner of transmission from elders to children.<sup>69</sup> Currently, many have only a handful of speakers left who are usually the elderly.<sup>70</sup> These numbers have certainly decreased since 1996, despite ongoing efforts by some tribes. The Eucheas language now has two or three remaining Native, fluent speakers. Fortunately, the efforts of several young people have created a few new Eucheas speakers. However, once a language descends to only a handful of fluent speakers, it takes extraordinary concerted efforts to carry it forward.

Two points are illustrated by *Golaha* Millie and the status of languages. First, in situations such as the Eucheas, even if the language somehow survives, the richness of the language is lost in that a mere handful of speakers are unlikely to know all the nuanced complexity a language used to have when expressed by a full, vibrant society. For example, if it were primarily homemakers that retained the language (as was the situation with Eucheas), they would know in detail the language of the home. They would also know about the farmers, hunters, warriors, politicians, healers, and so forth. However, they would unlikely be as fluent in the full complexity of those other dialogues, leading to loss of linguistic information and societal explanations. Secondly, the reason that the Eucheas language survived was not because *Golaha* talked about the importance of the language, nor that she worried about it, but rather because she insisted her grandchildren *live* the language. Similarly, traditional society will continue to exist only if sufficient people live it, as opposed to attend conferences to discuss the nature of traditional societies.<sup>71</sup>

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67. See JACKSON, *supra* note 15, at 5, 49.

68. One wonders what nuanced worldview is lost when this is no longer used consistently in all discussions.

69. Michael Krauss, *Status of Native American Language Endangerment*, in *STABILIZING INDIGENOUS LANGUAGE* 15, 15-16 (Gina Cantoni ed., 1996).

70. The calculation of exact numbers of fluent speakers is subjective. Questions always arise as to a person's "true" fluency. Do they merely understand, speak, or speak really well? Is their speech halting or smooth? Do they know all the proper forms, tenses, and vocabulary? Nonetheless, the numbers of native language speakers are depressingly few throughout Indian Country.

71. Or write long articles about it, I might add.

This is an issue that has reality with the Euchee. We have three ceremonial grounds, with Polecat being the main ground and the only one that does the entire Green Corn day dance ceremony. Around 1960, Polecat stopped dancing for about three years. Fortunately, Polecat started up again but with only five or six families and maybe six or seven men sitting in the arbors at the first reconvened Green Corn. Presently, on Green Corn day at Polecat, there are over twenty camps open and filled by Euchee families, with sometimes 500 to 750 or more people participating, visiting, and observing. Not all present are Euchee. The three arbors on the square ground will be completely full of menfolk while doing the day dances and taking medicine for Green Corn.

Of interest here, however, is that those dances do not happen by accident. Before all the Euchee families have their relations come back, many things must occur. One never reads in books of the work done to get wood for the ground's fireplace, tuning chainsaws, sharpening axes, having to gather on some Saturday morning to cut wood and then split and stack it. In the recent past, these work parties sometimes had a mere six to ten men. This is but one small example of work needed to be done. Similarly, our grounds have many positions within it that need filling. Polecat has a main chief, three assistant chiefs, four councilors, four feathermen, two-day dance singers, and a ground's speaker, to name a few positions. If that much work must be done or that many positions must be filled, and if there are only a handful consistently present, then the survivability of a traditional society becomes more and more difficult. The large amount of knowledge which should be spread among numerous people will inevitably see some loss. There is simply too much to know and but a few to carry it all forward. This likely happened during our low point at Polecat in the 1950s and 1960s. Ultimately, a vibrant society needs people.

The tribal towns, the Muscogee counterparts of Polecat, were the foundations of the Creek Confederacy that coalesced in the late 1700s to form the Muscogee Nation. While the tribal towns originally were also of a political nature, they now primarily continue only their religious and spiritual functions.<sup>72</sup> After surviving the Trail of Tears during removal from Georgia and Alabama in the 1830s, some forty-four tribal towns re-kindled their fireplaces in the Muscogee Nation's new home in Indian Territory.<sup>73</sup>

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72. In the Mvskoke language, the same term, *etv/wv*, continues to be used to refer to tribal towns in all their iterations and to tribes, in general.

73. Mekvlke Yargee, Proctor, and Thompson all noted that while forty-four towns rekindled their fire places upon arrival in Indian Territory, other tribal towns simply folded their fire back into their "mother" fire/ground or simply ceased to exist.

Each town retained its own fireplace and ceremonies.<sup>74</sup> There were likely more towns and sub-towns prior to removal. Some were either not rekindled or folded back into their mother grounds that arrived in Indian Territory.

In recent times, the number of grounds continue to dwindle. Many of the ceremonial towns that survived removal saw their dances cease and their sacred fires extinguished, especially during the period between 1930 and 1970. Ceremonial grounds within the Muscogee (Creek) Nation increasingly face the survival versus sustainable issue. World War II accelerated the disruption to the traditional structures, not only due to men leaving for military service, but also due to both men and women relocating for jobs and educations during the war. This pattern continued after World War II and the return of the Muscogee and Euchee soldiers. One example is an elderly Euchee Chief that served in World War II. Upon his return from overseas, he was approached by his uncles to learn the traditional medicines to doctor Eucheas. As he had a family and job, he deferred his training. When he finally wished to learn the medicines and songs, his uncles were no longer able to teach him. Thus, that part of Euchee society has ceased.

At present, there are between thirteen and fifteen active grounds within the Muscogee Nation, three of which are Euchee. Just as with Polecat in the early 1960s, several existing Muscogee grounds' survivals are of concern as they have not danced the last few years. When the grounds do not hold their regular annual dances or taking of medicine, they may be considered inactive. That can happen for a variety of reasons, including death of a member, lack of someone with knowledge of how to prepare the necessary medicines, or property disputes. Being inactive, though, is not the same as the ground's "fire having gone out." By that phrase, it is inferred the town's fireplace is no longer alive, the medicines are gone, and dances can no longer be held. As a ground disappears, the traditional norms and relationships unique to that particular ground also disappear. Obviously, it will no longer be sustainable as a society. After the tribal town ceases, those people who formed that tribal town likely maintain their Muscogee identity and may still identify as coming from a particular town. However, those communal town relations will disappear. How those grounds uniquely view relationships, history, values, and how those systems comprise a society, are lost.

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74. The forced removal story is all the more amazing in the untold tale of how the tribal towns in the 1830s transported their embers, coals, ashes, or medicines from their ceremonial fireplaces in Alabama and Georgia to their new homes in Indian Territory. Each amazing effort depended on the requirements of the tribal town and the fire.



Over the last dozen or so years, the Mekvlke and their assistants and councilors of the remaining active Muscogee and Euchee ceremonial grounds have met during the winter months to discuss the above issues and other areas of common concern. Chief among those concerns is the need to continue our way of life. In January of 2015, my grounds, the Polecat Euchee Stomp Ground, hosted such a meeting near Kellyville, Oklahoma. The meeting was attended not only by Euchee and Muscogee ceremonial chiefs and councilors, but also several of our friends and relations<sup>75</sup> from the Shawnee and Cherokee grounds. With the three Euchee grounds, six Muscogee grounds, plus Shawnee and Cherokee grounds, there were about thirty ceremonial chiefs, councilors, and leaders in attendance. Each of the grounds spoke to problems they face in carrying on their ceremonies. It quickly became apparent the concerns of each ground were common to all those in attendance.<sup>76</sup> Each concern addressed what the Mekvlke considered duties they had to their ceremonies and their members. The Mekvlke had thought considerably about these issues, as the problems go to the heart of who they are and their ability to survive as an active ceremonial people (or society). They see a duty to carry on what had been given to them by their elders, a way of life going back far before the time of removal in the 1830s.

*A. Shawjwane (Rabbit) and Gojithla (Monster), a Jurisgenerative Tail*

A long time ago, when the old people used to be here, they used to tell this story.<sup>77</sup> That was when all the animals still spoke Euchee. (They all spoke Euchee because they were wise animals in those days.) The animals were all gathered together to discuss a problem. It seems *Gojithla* had been roaming about eating all the animals. So, they met in council to discuss how

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75. "Relations" here is used in the traditional sense, which does not necessarily mean any blood relations but instead a traditional relationship that infers obligation and reciprocity that often is as deep as blood relations.

76. As discussed in more detail at *supra* Section III.A.

77. *Di'ile* in Euchee refers to stories or legends, usually about animals, that were traditionally told to children at bedtime. See *supra* note 23. See also GUNTHER WAGNER, YUCHI TALES *passim* (1931), [https://archive.org/details/rosettaproject\\_yuc\\_vertxt-2](https://archive.org/details/rosettaproject_yuc_vertxt-2). These stories usually began with the Euchee phrase "gae-sthaw-la aw-ha-e-ha" and would usually conclude with a similar phrase. This served as a marker that the story told was not originated by the teller, was of ancient origin, and had authority as coming from "ones who have gone on." Thus, the introduction served as a traditional citational source. From personal experience working with elders in the early 1990s, it appears not all families told them. Perhaps this was due to breakdown in family structures, or perhaps some were just not story tellers. However, these are of the type the elders might have also told or referred to among themselves. It was also formerly customary that the teller spit on the ground after the telling.

something had to be done. They each looked to see who might go forth and take care of (kill) *Gojithla*. *Da-thlah* (Wolf) wasn't willing. *Sage* (Bear) just hung his head and said nothing. Snake was worried he would be eaten. *Shawjwane* (Rabbit), meanwhile, was flirting with the girl sitting next to him.<sup>78</sup> *Shawjwane* heard the girl say, "All those others are so scared, isn't anyone brave enough to save us from that monster?" *Shawjwane*, wanting to impress the girl, jumped up and said, "I'll do it! I'll do it if you just make my lunch for the journey,<sup>79</sup> I'll take care of *Gojithla*." They were all so excited that they patted him on the back and congratulated him. *Shawjwane* felt very proud of himself. Bright and early the next morning, the animals got up and fixed Rabbit's lunch for the trip and gave it to him. He threw it over his shoulder, and down the road he went.

As *Shawjwane* went down the path, he began to shake as he got more and more scared thinking about what he got himself into. *Gojithla* was very big and *Shawjwane* did not want to be eaten. He would rather be flirting with the girls. Pretty soon, though, he saw Monster coming down the path towards him. So, Rabbit yelled out, "*Digawdi! Digawdi!* (My friend! My friend!) *Dzogawla! Dzogawla!* (My cousin! My cousin!) How are you?" *Gojithla* looked at him and said, "Brother Rabbit, how are you today?" Rabbit told Monster, "Good, good, nothing's wrong. Sit, sit, let's visit a while, I haven't seen you in a long time." They then sat and visited. They talked and pretty soon it was getting late and they were getting hungry. They decided to eat their lunch. Rabbit opened his lunch and he had some carrots, celery, and such. Monster opened his lunch and asked Rabbit if he wanted to share, but *Shawjwane* saw a foot in there for *Gojithla*'s lunch. When Rabbit saw that, he started getting a little sick and told him no, he did not want any.

After they finished eating, they visited longer and soon it was getting late. Rabbit said: "It's almost dark, why don't we dance a while?" Monster said that would be good, so they started a fire. They were about to get started when Rabbit asked Monster, "I am just curious my friend, we don't get to visit much, what's it take to hurt you? I bet there isn't anything that

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78. Mary Linn explained about *Shawjwane* that:

Among the Yuchi, Rabbit understands both nature and culture but regularly seeks to subvert either or both. He is a great singer and dancer, but he is also a ne'er-do-well who seeks to obtain wives, meals, and social prestige via clever schemes that sometimes achieve their ends but also further Rabbit's poor reputation.

JACKSON, *supra* note 15, at 45.

79. Lunch or eating always appeared to be an important part of Rabbit's concerns.

can kill you, you're so big and strong." Monster said, "Well you know if you chop off my big toe that would be the end of me." Monster looked at Rabbit and asked him, "What about you?" Rabbit looked down, saw a little bug going by, and said, "Well, if somebody were to smash this little bug it would be all over for me." Monster looked at Rabbit and stepped away. They started dancing around the fire, having a good time. One would lead and the other followed. Then the other would lead for a while and the other would follow. After a while, Monster was really leading. He had his head thrown back singing. Rabbit grabbed his hatchet, and next thing you know, he chopped off that monster's toe. Monster started to jump around screaming and hollering. That scared Rabbit, and he ran off into the woods shaking with fear. Finally, he didn't hear anything, so he came back. There was Monster, dead. Rabbit took out his axe and chopped off *Gojithla's* head, put it in his bag, and went back to where all the other animals were. When the animals saw *Shawjwane* they were all very excited. They had a big dance, a big celebration, and Rabbit got to flirt with all the girls. That is what they used to say when they were all here.

This *Di'ile* was one of many that Euchee parents and grandparents told to children and each other. Now, however, it likely is not told much and certainly not in the Euchee language. Besides being a story, it also tells us some things about the Euchee. It says that although those animals were all different, still they gathered together in council to deliberate and address their common issues. It tells that when a person transgressed the norms of society, others in the society could resolve to take action. *Gojithela* and *Shawjwane* also show that not all tribal societies believed in restorative justice. We, Euchee (and Creeks), believed in punishment and revenge that could be decided upon by the whole.<sup>80</sup>

The concept of kinship is also illustrated in this story. Along his journey, Rabbit greets Monster as his friend and relation, which in Euchee made the old people laugh because *Shawjwane* calls *Gojithla* friend and relation

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80. See, e.g., LAWS OF THE CREEK NATION Law 1st, at 17 (Antonio J. Waring ed., 1960) (from a compiled set of Creek laws dated March 15, 1824) ("Murder shall be punished with death the person who commits the act shall be the only one punish and only upon good proofs."). This appears to be a significant shift in Creek law, as blood retribution was the old custom whereby if the Creek perpetrator fled, one of the perpetrator's family or clan relations would be substituted for punishment. This punishment streak remained through the closing years of the nineteenth century and final days of the Muscogee Courts' first incarnation with the jury trial and sentence of death for Timmie Jack in 1896. *Id.* at 17 n.1; see *A Trial and Execution Among the Creeks*, 12 CHRON. OKLA. 142, 142-44 (1934), <https://cdm17279.contentdm.oclc.org/digital/collection/p17279coll4/id/4225/rec/51>.

(whom Rabbit is sent to kill). That Rabbit so lightly throws these terms about shows part of Rabbit's nature. The old women who retold this tale always laughed hardest at this part because it was so incongruous for Rabbit to be claiming Monster as his cousin even as he plotted to kill him. Kinship is an important concept within tribal society with great meaning and weight. These two words seem to be related in Euchee. "*Dzogawlaw*" is "my relation" (or infers the English equivalent of "my cousin"), and the other is "*Digawdi*" for "my friend." They appear to have the same root, being tied together somehow. In Euchee, friends and relations are connected in that they require duties to others. So this little *Di'ila*, what some might call a children's story, shows that society addresses problems through council meetings, what is expected of its males, the results of transgressions against society, the nature of punishment, and what the concept of friends and relations demands.<sup>81</sup> Because this one simple story derives from and is imbued with the nature of Euchee society, there are many things which we can learn from it about how Euchee people are supposed to act.

This narrative form is also seen in our ceremonial life. An outsider watching our stomp dances or our main Green Corn day dances at Polecat might see some of the beauty we feel, but it would likely not appear overly complicated to them. However, almost everything done has a story that explains what, why, or how it came to us, though some of those stories are no longer known. These stories, more so than *Shawjwane*, can define the relationship between the living and the deceased, duties to others, and why certain plants are used for which purposes. While I will not go into those stories, one example is of the Lizard Dance with its explanation of doctoring, use of cedar, and other Euchee beliefs.<sup>82</sup>

Within our ceremonial grounds, stories are used to explain each part of our grounds, attendant ceremonies, dances, and the requirements we must adhere to therein. When one begins to go through all the stories, the dances begin to take on a depth that cannot be comprehended from a casual observation. We know there was at one time explanations for all of our ceremonies. Unfortunately, there are many stories or explanations that we no longer know regarding the things we still carry on. These ceremonial roles and stories often explain our life and proper conduct, telling us who we are. As such, they are foundational principals of our traditional jurisprudence. If they make a coherent whole, so be it. Regardless, these stories and explanations continue to comprise what we believe and use to

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81. And, of course, it shows that you should really never trust Rabbit.

82. See JACKSON, *supra* note 15, at 180-94.

order our society. In so doing, for Indian advocates with a traditional perspective, this accomplishes two functions. First, it instructs as to the potential nature of our society. Secondly, it may illustrate impediments such as loss of stories, language, and sustainability to the survival of traditional societies. Thus, after we raise this knowledge to consciously comprising part of a jurisprudence, we can then explore problems facing the continuity of those beliefs as a living system.

These stories illustrate another aspect of traditional society that I unknowingly understood as important to true efforts to strengthen this traditional society. Among the Euchee and the Muscogee, the use of long form narration seems to be a common theme in traditional explanation of meanings. As noted, for Euchee ceremonies, each dance, function, or meaning is explained with a story that teaches what we do. In my experience, when business is discussed in traditional meetings, again extended narration occurs, usually without interruption until each participant has spoken. The Mekvlke meetings tend to take this form of each speaking to conclusion without interruption or questions, and then, after all have in their turn spoken, discussion will occur.<sup>83</sup> If we are to find a way to continue the substance of traditional society and respect that society, the processes of that society should, if not utilized, at least be recognized. The process by which one achieves a goal is often as important as the goal and can shape the goal itself. This obvious process seems less used than it should if any anecdotal attendance of legal forums on sacred sites is an indicator.

In exploring where and how to find traditional normative indicators, lessons learned from *Shawjwane* may in fact be illustrative of how we must begin to proceed. This may well be a jurisgenerative moment as articulated by Kristen Carpenter and Angela Riley for the potential to create new substantive law through use of the UNDRIP.<sup>84</sup> Carpenter and Riley forcefully argue that this is the moment to 1) bring indigenous norms and values to the international level; but also, 2) bring reform to tribal governments by inserting human rights into the tribes.<sup>85</sup>

My perspective, as tempered by the above examples, is slightly different but is perhaps simply the internal corollary that before Indigenous advocates can bring Indigenous norms to anyone else, we must act to rediscover or recover the traditional norms and discursive structures we

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83. See also discussion *supra* Section III.B.

84. Kristen Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 175 (2014).

85. *Id.*

may still have but are not utilizing. For many tribes, this moment is on the verge of slipping away (as noted in the discussion of sustainability). What must occur in much of Indian Country, immediately before the moment passes, is to have a traditional *renaissance*—a rebirth of those best parts of our culture. This is a moment to create or recover processes which generate law with traditional forms learned from the subjects of our advocacy.<sup>86</sup> It is not enough to require the international community to recognize our rights without accepting our responsibility to our own societies. The use of long form narration to explore traditional jurisprudence, as done with the Rabbit *diele*, respects both the substance and processes of Indigenous society. This needs to be a jurisgenerative moment that inserts indigenous norms into the federal and international level, but also a resurrection of traditional indigenous values and processes—<sup>87</sup> a *juris-regenerative* moment for tribal institutions.

#### B. Ceremonial Grounds as Law

In the spring of each year, Polecat Euchee Ground begins its annual ceremonial cycle that ultimately leads to the new year ceremonies in July, commonly referred to as Green Corn. The other two Euchee grounds likewise begin their cycle around the same time, as do the remaining Muscogee grounds. Polecat begins its season at Easter with its members gathering at the square grounds to play the first of four Indian football games.<sup>88</sup> A few years back at one of these early games, the then-Chief of

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86. This realization has allowed me to understand Meko Yargee's explanation of how speakers at the ceremonial ground practice regarding the speeches they must make: "You should look at a tree, pick a branch and begin talking, following that branch till it reaches the next branch, then speak about the next thing which must be said. You continue like this from branch to branch till you have said all that you need to say." Personal conversation with Meko Yargee. I began to understand that what he meant might be described as a traditional methodology of explanation. I also realized I was trying to use this process herein, using stories to illustrate why the UNDRIP needs to be developed within tribal law and pushed into federal law.

87. This is happening to some extent in the resurgence of peacemaking models in court systems. Many tribal courts utilize peacemaking as an alternative dispute resolution mechanism that seeks to restore harmony with the tribal community based on traditional norms (for the most part). It turns out non-Indian state courts are interested in this process, too.

88. Indian football is an old traditional game the Polecat Grounds has played for as long as anyone knows. It is not related to American football or soccer. While I will generally not go into details of how our ceremonies or traditional activities are conducted, doubtlessly, it is easily found out about through other sources. Indian football is an activity greatly looked forward to by Polecat Ground members.

Polecat Grounds spoke to the members in order to address several issues.<sup>89</sup> He was in his late-sixties at the time and spoke of how he grew up at the grounds, of all the old people there during that time, and of the difficulties they encountered in keeping our ceremonial life going. He discussed the roles a person might hold at our grounds and what it took to perform such function. He spoke of the women's dances and the role they had in our ceremonies. He discussed the chiefs' and committee members' duties and the respect that must be given to them. He covered the way in which boys and girls were to be educated and how they were to grow up in the grounds. He also touched upon how we were to conduct ourselves in each of the families' camps around the square ground. He did not go into depth about each of these duties but was simply speaking of our duties within the grounds. That moment led to a revelation resulting in this Article: that, for the Euchee, religion and society at one time were one. The Chief was unknowingly explaining how our society had been structured. The Chief was discussing how young people were to be trained and educated, how people were to treat each other, what was to be done when a dispute arose, and what we needed to do to continue as a people. These could be understood as obligation and duty to family, tribe, and the square ground. In briefly explaining the history of our grounds, he was laying out the rules of how traditional Euchee civil society had operated. Explaining how one's society orders itself and what rules apply is at the core of jurisprudence. It explains the laws of a society. Thus, learning about traditional Euchee ceremonial grounds means learning about elements necessary to lay out a traditional Euchee jurisprudence.

The ceremonial grounds had divisions between the chiefs' and warriors' arbors, with each playing their role in decision-making and conduct of the square ground's business. Each of these roles had both a procedural and spiritual aspect. Those spiritual and physical functions are tied together but can be understood as derived from the towns' historical conduct of tribal business. As described above, each tribal town had its chiefs' and warriors' arbors. Each arbor and its members therein had specific roles within the town. Some were deliberative, some were decisionmakers, while others were law-enforcers. The Euchee and Muscogee tribal towns had laws governing conduct long before joining into confederation and had laws of

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89. Interestingly, the traditional form of a chief speaking to his members is by using his speaker to tell what he wishes to be communicated. However, as with all things, the *usual* process is not *always* the process.

nationwide effect for the confederacy written down as early as 1817.<sup>90</sup> The chiefs and headmen would meet in council and would, when necessary, act as an adjudicative body, even prescribing the death sentence.<sup>91</sup> For example, in 1825, Chief William McIntosh violated the confederacy law against signing treaties without the National Council's approval and received a death sentence from the body.<sup>92</sup> With that knowledge, one can look at the Muscogee Nation's 1867 Constitution in a different light from that commonly described in American history. The Muscogee Nation is often referred to as one of the Five Civilized Tribes, a term used because they appeared to readily adopt Western systems, including a tripartite governmental system.<sup>93</sup> The 1867 constitution created a two-part legislative branch composed of a House of Warriors and a House of Kings (article I), an executive branch headed by a principal chief (article II), and a judiciary (articles III and V). However, the 1867 process looks similar to that which the Muscogee and Euchee historically had in the tribal town, despite outsiders not having realized this fact.<sup>94</sup>

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90. See LAWS OF THE CREEK NATION, *supra* note 80, at 17-27 (alternately titled "Laws of the Muscogee Nation" in this source); see also *McIntosh v. Beaver*, 6 Okla. Trib. 158, 161 n.2 (Muscogee (Creek) Supreme Ct. 1999), 1999 WL 33589146, at \*1 n.2 (referencing William McIntosh, Coweta mekko, and treaties done outside of tribal authority).

91. See LAWS OF THE CREEK NATION, *supra* note 80, at 10 (editor's introduction).

92. *Id.* It should be noted that separation of powers was not always an English rule, as the King's Courts were, as the name implies, the king's agencies, and not an independent branch:

The Court of the King Before the King Himself[] was an English court of common law in the English legal system. Created in the late 12th to early 13th century from the *curia regis*, initially following the monarch on his travels, the King's Bench finally joined the Court of Common Pleas and Exchequer of Pleas in Westminster Hall in 1318, making its last travels in 1421.

*Court of King's Bench (England)*, WIKIPEDIA, [https://web.archive.org/web/20181101235340/https://en.wikipedia.org/wiki/Court\\_of\\_King%27s\\_Bench\\_\(England\)](https://web.archive.org/web/20181101235340/https://en.wikipedia.org/wiki/Court_of_King%27s_Bench_(England)) (last visited Nov. 1, 2018).

93. ANGIE DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* 5 (rev. ed. 1972) (1940).

94. See COHEN, *TRIBAL CONSTITUTIONS*, *supra* note 62, at 32 ("A two-chambered legislature was adopted by four of the Five Civilized Tribes, that is . . . the Muscogee (Creek) Nation with a House of Kings and a House of Warriors . . . . In each case this plan was adopted because of admiration for the United States Constitution rather than because of any consideration of the special needs of the Indians concerned."). There is remarkably little about the internal political or religious structures from early European-tribal interactive period. Most commentators looked only at external relations, or the internal political disputes, without discussing the internal structures or comprehending the corollary spiritual



Harmony within the tribal town was a sought-after goal as shown by the four guiding principles of Alabama grounds: *Ekvncvpecetv* (humble), *Enhonretv* (*vkvsvmkv*) (faith), *Eyasketv* (happy), and *Vnokeckv* (love). As Meko Yargee explains, you must have the first three in order to have the last one. He reminds his members to keep this in their minds as they go about their duties that they must have love for each other.<sup>95</sup>

Another story from a Muscogee grounds is perhaps illustrative of how *Shawjwane*'s mission is also in line with Euchee or Muscogee traditional justice. Although "restorative justice" is common in much of Indian Country, as exemplified by peacemaking courts, such efforts must be tribal-specific and not generically done. For instance, during a dance in the 1990s at one Muscogee ground, a member showed up drunk, which was not allowed. He was directed to leave but did not. One of the male warriors had been given the task of enforcing the Meko's orders, illustrated by his carrying a traditional ball stick made out of hickory wood. These sticks are the ones used in the traditional ball game<sup>96</sup> and are quite effective weapons. This warrior was directed to remove the drunk. When the drunk again would not comply, the warrior hit the drunk on the head with his ball stick, knocking the individual unconscious. The warrior at first worried he had seriously injured the person, but he turned out to be fine. The warrior's father, a respected traditional leader at another ground, had long before this incident told the warrior not to worry about such incidents as "there is no arguing with a drunk." At the time of the incident, another elder told the warrior not to worry, repeating what the warrior's father said. When the drunk later tried to get the Muscogee Nation to bring assault charges, the Nation declined, as "it was a grounds issues and the Meko handled it."<sup>97</sup>

Another example of the nature of duty and perspective and how stories may impose requirements comes from Polecat's Over-the-Hill Dance. This dance is only done at the Polecat Euchee grounds; neither of the other two

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roles specific to Muscogee institutions. They seemed to be unaware of the religious functions within the tribal towns.

95. This comes from conversations with Meko Bobby Yargee of Alabama Grounds. Perhaps other grounds had different rules, or no such rules. However, it is illustrative of the specific contextual morals that will be lost if tribal towns continue to disappear.

96. Often called in English "the little brother of war," these games among the Muscogee are ceremonial, social, and are tied to the grounds. One variant of this game used to settle disputes between tribal towns and could be quite violent, resulting in serious injury or death. My understanding is that sometime around the 1950s, the Meklke decided to put this version away as it was no longer needed. The other version is still played and still can result in injury.

97. This story was told to the author by a Muscogee warrior.

Euchee grounds or any of the Muscogee grounds perform this dance. There are Euchee stories about how this particular dance came about, but one requirement of the dance is that it be done at straight up noon as the sun is directly overhead. Our old stories tell that the Euchee are descended from the sun, and thus, the old Eucheers believed the sun would look down every year to see if the dance was still happening. If the sun did not see the dance, it meant there were no longer any Euchee and the sun would cry, set back in the east, and the world would end. Thus, Polecat danced not just for us, but for all others in order to carry on our people and the world.

Among the Euchee who still maintain these dances, there is often discussion of what it means if we no longer have either our language or our ceremonial dances. While most of us may no longer believe the world would literally end if neither continue, in a cultural sense the world would end for the ceremonial Euchee. For those old people, there might continue to be people of Euchee descent but there would not be *Euchee*.<sup>98</sup> Thus, the Over-the-Hill Dance shows how obligations were, and continue to be, imposed on the Euchee for the world around us and carried out through our ceremonial functions. This is perhaps the perfect exemplar of Vine Deloria, Jr.'s quote that "[t]here is no salvation in tribal religions apart from the continuance of the tribe itself."<sup>99</sup> This obligation is not only to the Creator, but also to other Euchee. It is integral to continuing Euchee society. It exemplifies both a world view and societal obligation.

One Green Corn, many years ago now, my elderly aunt was helping my wife at our camp. Perhaps she was shucking corn, or maybe mixing flour for the fry bread. Regardless, one of our relations that only occasionally participated came with his non-Euchee wife. She introduced herself to my aunt and immediately proceeded to ask her what she thought about one of the broad national Indian questions, whether it concerned Indian prisoners, treaty rights, or some other such pan-Indian cause of the moment. My aunt replied, "Oh my! . . ." and nothing more.<sup>100</sup> There were certainly those of us dancing that day involved in that or similar issues, and my aunt was

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98. This perspective would seem to validate the concerns of Sam Deloria regarding political extinction if culture disappears, discussed in Sam Deloria, *supra* note 45, at 313-14. However, a significant difference is that the Euchee belief comes from the Indians, not an outside party.

99. VINE DELORIA, JR., *GOD IS RED* 194 (1994).

100. Her reply, and similarly my mother's, always meant to us she heard and understood the question or comment and had definite thoughts, but she was not about to voice them. This was at least until later when we were not around anyone else, or perhaps only later when she was around another Euchee elder and they could talk in Euchee.

probably aware of such issues. However, she was a full-blood Euchee woman, born, raised, and still speaking Euchee. She was doing things that day which we had done for thousands of years. Our camp was full of women preparing for the evening. Children were doing whatever they do, and the men were on the square grounds attending to the medicine. Each person had their place and function, which they happily fulfilled. Every function needed to be done so that others could do theirs. This was the understanding we had since long before removal in the 1830s. We all knew this was a special place, and we all know it was a gift that would not sustain itself. Thus, the question asked was simply not relevant at that time as to whether we, Eucheas, would continue. We were not looking to the outside. We were focusing upon that which we were given to do.<sup>101</sup> Those are two very different perspectives that simply cannot be adequately expressed in words or writing without seeing it in action. Thus, our existence flows from our continuing to exist as Eucheas. To be blunt, just as with Chitto Harjo's movement, once our "ancient ways" cease, mere political existence is irrelevant to those who are of that traditional life.

Given all the above, it is also true Indians live broadly within the mainstream society. That may be truer in some locations than in others. In Oklahoma, with its checkerboarded Indian Country,<sup>102</sup> many tribes lack a minimum blood quantum for citizenship. Due to socio-economic changes, such as the high number of intertribal and non-Indian marriages, when tribal-ness comes out is not easily predetermined. As an example, I may be watching television or doing work researching laws and statutes, and one of my chiefs will call or stop by to talk. Our talk may cover ceremonial related matters, veer off to football or family, and then come back to how we understand the meaning of certain of our doings.<sup>103</sup> This explanation of how

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101. This is an issue with having our young people travel to support other tribal issues. We need activists and need to recognize that attacks upon another tribe's rights impact our ability to resist transgressions against our own concerns. However, a problem exists when those members support exterior traditional causes but then fail to attend our own ceremonies. While raising awareness of indigenous rights in a broad context, it is all too easy to see one's own tribal ceremonies slip away from lack of participation.

102. Checkerboarding refers to the cut-up jurisdiction created by the allotment of the tribal domains in the late 1800s and subsequent sale, or theft, of the Indians' allotments into non-Indian hands. This resulted in mixed Indian/state jurisdiction within an area of land that resembles a checkerboard.

103. At present, Euchee and Muscogee stomp dance society exists most fully on weekends throughout Muscogee territory. Participants return to their regular lives during the week, mostly unbeknownst to our non-Indian neighbors and often to other Indians.

members of traditional Euchee society interact illustrates a pattern of continuance for a society that requires cross-cultural competence.

The earlier example of the work detail to gather wood for our dances, and to a lesser degree, the example of my chief stopping over, show that when we gather, we have the ability to visit and talk about the grounds and our ceremonial ways. During our dances, each of us has responsibilities that we must focus upon, which ironically means we may not be able to discuss the stories and meanings of what we are doing. To the extent ground members participate in all aspects of our traditional society, they will more fully comprehend what we have as Euchee. They hear more stories, see more of what it takes to carry on our ceremonies, and comprehend how it all fits together to create a Euchee way of life. While we now tend to discuss these as “helping out” with grounds’ work, they actually flow from obligations owed to each other and the grounds itself to carry on that which we were given. My aunt’s reaction to the question posed to her at Green Corn is illustrative of this imperative obligation. As such, it seems it could be used to understand jurisprudential obligations and duties to others and the tribe.

The free flow across cultures is part of our life, as it should also be in our court system.<sup>104</sup> The tribal courts in which I work do not usually differ much from the processes used in state and federal courts.<sup>105</sup> The actual differences can vary depending on the tribe and the issue. At the Kickapoo Tribe of Oklahoma, arraignments and hearings are regularly done in Kickapoo because of lack of English fluency. The procedural codes<sup>106</sup> mimic federal rules, but many criminal hearings are often more attuned to the close traditional structure of the Kickapoo through less formality. The court, though, is keenly aware to protect the parties’ rights and perhaps spends more time on personalized understanding. Another more generic example is that if one wants to conduct business in Indian Country, there

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104. And in our tribal legislative efforts, too. Each of these arguments herein would seem to be equally valid for the legislative and executive branches. However, I am a lawyer and a judge, so that is the perspective I am trying to develop.

105. I had originally used the term “whiteman’s court.” That is how most Natives refer to state and federal courts. It is a fairly accurate, if racially defined, term in that those courts are predominately run by white males and dominated by mainstream cultural values derived from European and Anglo-American backgrounds. That is not to say the state and federal courts are inherently unfair, but rather merely an accurate observation of the cultural origin.

106. See KICKAPOO TRIBE OF OKLAHOMA CRIMINAL PROCEDURE (n.d.), <http://www.kickapootribeofoklahoma.com/forms/criminalprocedures.pdf>.

are only so many ways to write and interpret business contracts.<sup>107</sup> The same is generally true for child support issues or simple divorces.<sup>108</sup> But, the percentage of cases that are different separates tribes from having a native court and in form being little more than an Indian-run state court. Where that difference occurs cannot always be easily written into law, nor can it be predetermined when or how it will occur.<sup>109</sup>

If the court's jurisprudential sources (*i.e.*, the judges) do not have people with traditional foundations or who live within the ceremonial cycle, no amount of codification can reflect how certain processes should be interpreted to infect them with traditional tribal values (*i.e.*, the tribe's

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107. There is a Model Tribal Secured Transactions Code that is similar to those used in the states, thus the term "model". See MODEL TRIBAL SECURED TRANSACTIONS ACT (UNIF. LAW COMM'N 2017), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=45988e34-537b-57d7-6360-2e55ae44863e&forceDialog=0>. Often the issues really are an uncritical adoption of foreign law. As Winona Single notes, too often adoption of laws, such as a model tribal commercial code, will within it refer to other tribal laws that were not adopted or were also blanket adopted without tailoring to the tribal specific situation. Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL'Y 357, 361 (2006). This occurs in more ways than just adoption of "foreign" or western law, as the author has reviewed codes from tribes which were adopted from another tribe that did not delete or change the name of the original tribe. KICKAPOO TRIBE IN KANSAS TRIBAL CODE tit. 6, § 5(e) (1990) (Civil Procedure), [https://www.ktik-nsn.gov/site/assets/files/1155/tribal\\_code\\_title\\_6\\_civil\\_pro.pdf](https://www.ktik-nsn.gov/site/assets/files/1155/tribal_code_title_6_civil_pro.pdf) ("Tribal Legislative Body" means the Business Committee of the Sac and Fox Nation . . ."). This, however, is often the result of tribes simply not having the resources to review, develop, and amend codes and other regulations. The states and federal government, despite budget woes, have staffs devoted to such matters. Such is rarely the case in tribal settings, with the exception of the very largest or most successful of tribes.

108. I am well aware that often there are distinctive indigenous characteristics of personal relationships that can dictate a more tribal process in tribal courts. See Paul Spruhan, *The Meaning of Due Process in the Navajo Nation*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 31, at 119, 123 (noting that the Navajo exerted personal jurisdiction over a Utah official for intercepting Navajo welfare benefits because the Utah official "interfered with the domestic relations of Navajos, a subject with strong cultural ties" (citation omitted)). However, it is also true that in many instances, relationships between people are not all that different across both tribal and mainstream cultures. These should neither be under nor over played. Regardless, it should be for the tribe to determine what, if any, differences exist.

109. Richland's discourse on Hopi tribal court proceedings, see RICHLAND, *supra* note 12, shows how easily and unexpectedly Hopi internal jurisprudential pathways may arise in court proceedings. The means and success with which those are blended into a process nominally patterned on Anglo-American forms depends much upon whom is conducting the hearings.

common law). Paul Spruhan discussed how the Navajo Nation and the Navajo courts in particular developed definitions of due process based upon Navajo societal traditions of fairness.<sup>110</sup> He interprets the Navajo courts as “looking to the good of the community as well as the individual.”<sup>111</sup> Just as the Navajo courts look to their society, within our context herein, ceremonial people understand process because traditional law requires proper ways of doing things. Our ceremonies or work must start at sun up. A dance must go over the hill at straight-up noon. Some ceremonies are done in eight days and others by dusk. These are things that must be done and be done in a certain manner. They must proceed from A, to B, to C, and then D. If these things are not done properly, then the ceremonies must cease, and the end has come.

There are processes which order both the spiritual world and our civil society. These processes go to the manner in which disputes were resolved. In Anglo-American proceedings, when a personal conflict of interest arises, decisionmakers must step back. In contrast, at the Euchee grounds, the chief had “no choice” but to decide a dispute, even if it involved his own family. For our chief, the ground comes before all else, even family. In discussions with several Muscogee Mekvlke, I found they also believe similarly. Traditional society may not use the terminology of due process but nonetheless understands the necessity of having to use proper procedure to achieve results. This is the essence of due process. It is the task of Indian lawyers to know and explain how traditional concepts form due process.

Fortunately, the modern Muscogee (Creek) Nation courts, even while using a system generally based upon Anglo-American forms, have continued to uphold Muscogee processes and institutions that predate the United States. The Muscogee variations from American procedures are still imbued with the purpose of achieving justice and granting due process, albeit from a different cultural context. In *Beaver v. Okmulgee Indian Community*,<sup>112</sup> the Muscogee Supreme Court wrote:

Traditionally, when a dispute exists between Muscogee citizens, the mekko and the tvstvnvke of the citizens’ tribal towns meet, and give everyone involved a *full* opportunity to present *all* of their arguments, in a civil manner. This tradition was recorded long before Removal when General James Oglethorpe of

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110. Spruhan, *supra* note 108, at 119-30.

111. *Id.* at 127.

112. 4 Mvskoke L. Rep. 183 (Muscogee (Creek) Supreme Ct. 1999) (No. SC-99-03).

Georgia observed that Creek leaders, when discussing disputed issues, gave everyone the “liberty to give their opinions.”<sup>113</sup>

The Court then went on to explain how these traditional values should be carried forward into modern Muscogee Court proceedings:

While many aspects of the Anglo system of adversarial jurisprudence are used by the Muscogee (Creek) Nation courts today, this Court supports the tradition that tribal courts should let litigants present their opinions, as freely as possible, consistent with fairness and civility. Of course there must be timeframes established for responsive pleadings. But should there be differences of opinion regarding Court Rules, fairness to all parties requires that they be able to at least present their arguments to the Court. Rule 1 of the Judicial Appeals Tribunal Rules for the Cherokee Nation says that its rules “shall be liberally construed”. This court believes this concept is sound because the purpose of the Muscogee (Creek) Nation Courts is to decide conflicts on the basis of fairness to all litigants.<sup>114</sup>

The Muscogee court’s substantive decision is in conformity with the process discussed earlier that the Mekvlke use in their meetings.<sup>115</sup> This decision reflects the impact of the Muscogee (Creek) Nation having over the last twenty-five years consciously appointed members of the ceremonial grounds to the Nation’s supreme court. The right to use these Muscogee forms is recognized throughout the UNDRIP,<sup>116</sup> and needs to be recognized as a federal right instead of a courtesy. This *procedure* should be considered for use by tribal advocates when they discuss development of traditional tribal rights.

The Muscogee Nation is not only a leading casino developer utilizing modern technology, but as discussed here, has a vibrant traditional society represented by the ceremonial grounds and their Mekvlke. Both are part of our identity and neither can occur without active support in the challenges they face. We tend to speak of traditional matters and courtroom matters as if they are separate concerns, but it is all a continuum. Thus, even though tribal court matters may be similar to Anglo courts, just as we switch between football and ceremonies in personal conversations, the court, by

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113. *Id.* at 185.

114. *Id.* at 186.

115. *See supra* text accompanying note 83.

116. *See* UNDRIP, *supra* note 4, arts. 5, 14, 18-20.

having traditional awareness, can flow to or from traditional jurisprudence as it did in *Beaver*.<sup>117</sup> This is no different than in federal or state courts. To read today's United States Supreme Court opinions is to interpret the Federalist Papers written 225 years ago.<sup>118</sup> The Federalist Papers are still a valid part of American jurisprudence, despite their age. So it should be with our tribe(s): to know who we are today and where we need to go, we must be fluent in our origins and how those manifest themselves in the present. If we are to argue for a right under international human rights, as previously discussed, then we have a corresponding duty to know and give life to the tribal processes we demand others recognize.

As another example, the Muscogee and Euchee recognize their veterans of the armed services. Indian tribes have always had veterans, they were just called warriors in history books. In our culture, the Euchee and Muscogee warriors have a specific place under our arbors and duties within our tribal towns. There is not a difference between how veterans and warriors had a duty to serve their people. My mother, who was ninety-five when she passed away in 2016, had three brothers, a brother-in-law, an uncle, and cousins. They were all veterans of the armed services, many who saw combat, some of whom were wounded. While not all of our old Indian relations who were veterans served in the U.S. Armed Forces, they all fought and died for this land nonetheless. My mother sometimes spoke of her grandfather, Jimmi Wildcat, a full blood Euchee, who rode with Chitto Harjo. My mother was told that while riding with Chitto Harjo, Grandpa Jimmi somehow died (or was killed). She was told that in order for the soldiers to not know the numbers of men that Chitto Harjo still had, Grandpa Jimmi was buried under a cabin in the hills. As she was proud of her brothers' and cousins' service for this country, she was also very proud of her grandfather's sacrifice.

These Euchee and Muscogee warriors and chiefs understood the threat to their way of life, what should be the nature of the relationship to the United States, and articulated the problem and fought for their beliefs. In 1906, a Special Senate Investigating Committee held public hearings in Tulsa on

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117. 4 Mvskoke L. Rep. 183.

118. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 92 (1996) (Stevens, J., dissenting) (“Hamilton offered his view [in Federalist No. 81] that the federal judicial power would not extend to suits against unconsenting States only in the context of his contention that no contract with a State could be enforceable against the State's desire.”); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 275 (1985) (“The Federalist Papers were written to influence the ratification debate in New York.”); *see also* *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806-09, 839 (1995).



the conditions resulting from allotment of the Five Tribes.<sup>119</sup> Harjo testified to the Committee:

[The federal agent said] 'I will protect you in all things and take care of everything about your existence so you will live in this land that is yours and your fathers' without fear.' That is what he said and we agreed upon those terms . . . . He said as long as the sun rises it shall last; as long as the waters run it shall last; as long as the grass grows it shall last. That was what it was to be and we agreed upon those terms . . . . I think there is nothing that has been done by the people should abrogate them. We have kept every term of that agreement. The grass is growing, the waters run, the sun shines, the light is with us and the agreement is with us yet for the God that is above us all witnessed that agreement . . . .

Now, coming down to 1832 and referring to the agreements between the Creek people and the Government of the United States. What has occurred since 1832 until today? . . . I could live in peace with all else, but they wanted my country and I was in trouble defending it. It was no use. They were bound to take my country away from me. It may have been that my country had to, be taken away from me, but it was not justice. *I have always been asking for justice. I have never asked for anything else but justice. I never had justice.* First, it was this and then it was something else that was taken away from me and my people, so we couldn't stay there any more . . . . What was to be done was all set out yonder in the light and all men knew what the law and the agreement was. It was a treaty—a solemn treaty—but what difference did that make? I want to say this to you today, because I don't want these ancient agreements between the Indian and the white man violated . . . .<sup>120</sup>

Chitto Harjo understood his treaties and explained them in a way that was meant to protect his tribal society.<sup>121</sup> Even assuming the variance in

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119. John Bartlett Meserve, *The Plea of Crazy Snake (Chitto Harjo)*, 11 CHRON. OKLA. 899, 900-04 (1933), <https://cdm17279.contentdm.oclc.org/digital/collection/p17279coll4/id/2971/rec/50>.

120. *Id.* at 902-04 (emphasis added).

121. Chitto Harjo continued his armed battle against the allotment process until 1911, when a meeting was called at Harjo's home. Harjo had directed Charlie Coker not to use violence at that point. Somehow, the U.S. Marshals appeared at the meeting and shot Harjo.

translation from Mvskoke to English, Chitto Harjo frames his arguments on the basis of justice and treaties. These legal arguments are as valid today as when made. The question is this: have we finally come to a time that others can understand Chitto Harjo's positions as he explained them, and do we now have a mechanism(s) that can begin to assure compliance therewith?

These stories, each of a different nature, including the depopulation hinted at in the Di'ila about "How Wolves Came to Be,"<sup>122</sup> show possible insights into the past and where knowledge of stories, traditional and modern, might be found. When these stories and others from Euchee (or Muscogee) history and culture are understood, one can begin to piece together a Euchee (or Muscogee) jurisprudence. These may seem to be mere ethnographic information, but they actually explain something of how we view obligations and to whom they are owed and by whom they are owed, as well as societal duties, the nature of family, continuity and commitment, and how traditional law may conceptualize a different basis for law. If one listens to the above stories with a critical ear that has some traditional knowledge filters, one might begin to understand how modern native society, with elements of traditional jurisprudence, can still be structured.<sup>123</sup>

#### IV. Federal Indian Law

We have seen where traditional law might be found and a few examples of what that law might show about the nature of relationships and obligations within indigenous society. We next turn to the impediments to traditional jurisprudence's resurrection, continuance, or implementation for Indian communities within the dominant American legal system. Scholars have done exceptional work in showing how federal Indian law was shaped by racism<sup>124</sup> and/or is inherently centered upon a nationalistic perspective

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Coker then considered his restriction ended and returned fire, wounding several Marshals. Coker fled with the wounded Harjo across the Arkansas River. Harjo was reported by most sources as having fled to Choctaw Country and died in 1911. However, Phillip Deere had in his home a large picture of Harjo that he claimed was from circa 1917. This information comes from conversations with Phillip Deere.

122. *See supra* note 23.

123. I purposely use "listen" and "ear" because while written, here the information's validity stands in part because it was acquired through traditional methods, i.e., listening, attendance, and participation in traditional life.

124. *See WILLIAMS, supra* note 55. Williams traces Western civilization's use of the concept of savage, barbarian, and like concepts as to outsiders that justified actions taken

that prohibits Indians from ever truly asserting their right to self-determination.<sup>125</sup> Yet the courts still fail to truly acknowledge tribal jurisdiction.<sup>126</sup> This section stands in the federal court doors and looks at its laws and history. The section critiques that body of law's inherent inability to protect Indians not only under the United States' foundational precepts, but also its resistance, or inability, to recognize indigenous concepts of jurisprudence. To begin, a discussion of how my approach came about will be useful.

*A. What's Wrong with This Scene?*

Knowing many Native legal scholars caused me to realize several things. Though the number of Indian legal academics is relatively few, they have an illustrious combined resume: deans and professorships at leading law schools, numerous articles and books, and national and international task forces and commissions.<sup>127</sup> Each of these scholars obviously thought deeply with regards to the law and federal Indian law, in particular. Hearing of their accomplishments, a person practicing daily in tribal law cannot help but be inspired with what Indians achieved in the legal profession. Though I graduated before most of these friends, as a young law graduate, I too had thought I might pursue academia. As the years passed, it appeared such was not my fate. I simply could not wrap my mind around the various themes that run through federal Indian law in such a way as to make sense out of the United States Supreme Court's jurisprudential treatment of Indians. For instance, I could only describe the language used in *Tee-Hit-Ton Indians v.*

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against exterior forces as being incorporated into American Indian jurisprudence in a way that inherently devalues American Indians' and tribes' rights.

125. See WALTER ECHOHAWK, *IN THE LIGHT OF JUSTICE* (2013) [hereinafter ECHOHAWK, *LIGHT OF JUSTICE*].

126. See Transcript of Oral Argument at 5-7, *Dollar General v. Miss. Choctaw Tribe*, 136 S. Ct. 2159 (2016) (No. 13-1496) (per curiam) [hereinafter Oral Argument, *Dollar General*] (comments of Justice Kennedy) (questioning whether tribal courts had any jurisdiction over non-Indians). The lower court decision was affirmed by an equally divided court due to the passing of Justice Scalia. But for his passing, it seems likely tribal court jurisdiction over non-Indians, even in civil matters, would have taken a serious blow.

127. As an example, being an American Indian graduate of Harvard Law School (HLS) in 1985, to the best that can be determined, I was only about the twelfth modern era Indian HLS graduate. However, in the period since my graduation, those Native graduates have served in law professorships at the University of California, Los Angeles (UCLA), University of New Mexico, University of Arizona, University of Colorado, and Harvard law schools, as well as on the boards or commissions of the St. Lawrence Seaway, National Legal Services Corporation, and the United Nations.

*United States* as racist and paternalistic, and yet it remains valid Supreme Court precedent:

No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.<sup>128</sup>

I continued to follow the federal case law developments but did not attempt to write articles on the Court's decisions. It seemed to me that regardless of how one dressed up the Supreme Court decisions, the only common precept was that Indians lost, which is hardly the stuff of fifty-page law reviews.<sup>129</sup> While true that there was the occasional win for the tribes, during my coming of age as an attorney in the 1980s through the present, the Supreme Court seemed relentless in its anti-Indian rulings.<sup>130</sup>

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128. 348 U.S. 272, 281-82 (1955). The Court in *Tee-Hit-Ton* went on to say:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.

*Id.* at 289-90. Yet this case remains cited precedent. See *Idaho v. United States*, 533 U.S. 262, 277 (2001); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 162 n.4 (1982) (Stevens, J., dissenting).

129. See ECHOHAWK, 10 WORST INDIAN LAW CASES, *supra* note 56, at 423 (noting "[t]he Rehnquist Court (1986-2005) ruled against Indian tribes in 88% of the cases" and the current Roberts Court appears to be following suit with no discernable doctrine).

130. Although there have been victories, the definite trend has been negative: *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that tribal courts lack jurisdiction to criminally prosecute non-Indians for crimes on tribal lands); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that tribal courts could not entertain civil action against an allegedly negligent non-member driver and driver's employer for accidents that occurred on a state highway right-of-way on the reservation); *Nevada v. Hicks*, 533 U.S. 353 (2001) (holding that a tribal court lacked jurisdiction over tribal member's civil rights and tort action filed against state officials in their individual capacities for alleged violations in executing search warrants on reservation); *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (holding that Native Americans' religious freedom rights were not violated by Oregon employment law prohibiting Indians' sacramental peyote use); *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (permitting Forest Service timber harvesting despite its impact upon three tribes' traditional religious use). The expected

All the various forms of Supreme Court doctrine—preemption, original intent, inherent rights, stare decisis—seldom seemed to apply to tribal cases when the doctrinal application would require a ruling in favor of Indians or tribes. The cases all just seemed paternalistic or worse, racist.

At the Federal Bar Association Annual Indian Law Section Conference in April of 2013, Professor Robert Williams discussed his book, *Savage Anxieties*.<sup>131</sup> I had not at that time read his book, but what I took from his talk was that the roots of federal Indian law's treatment of Indians and Indian tribes grew out of Western civilization's creation of a savage mythos regarding outsiders. My understanding was that this "savage" narrative goes back to the earliest point in Ancient Greek/Western ideology, tracing forward from Homer's *Iliad* and *Odyssey*. From that point forward, the West saw those people outside of its borders as savages: unschooled, illiterate, and without a civil form of society, merely wandering across the lands they occupied. I heard the argument that the West had perceived itself as having been in a constant struggle with these "savages." Whatever interrelationship the West had with, or whatever was done to, the savages, was justified. This looking to the "other" not only shaped Western society but explains the nature of federal Indian law when reviewing United States Supreme Court decisions. What I took from his presentation was that from the time of Chief Justice John Marshall<sup>132</sup> forward, the Supreme Court conceptually perceived Indians as falling outside the contours of "civil" society. Indians were viewed merely as a people wandering across open spaces without a society owed legal respect.

Regardless of whether this is precisely what Professor Williams meant, it gave me a context to look at federal Indian law by dialectic juxtaposition to our ball game meeting when my Chief had briefly laid out the nature of our Euchee society.<sup>133</sup> As well-respected scholars have already written extensively about the nature of Indian law, there is little need to cover in depth the federal case law. Nonetheless, to understand an alternative approach to law recognizing an indigenous peoples' jurisprudence, one must include a critique of federal Indian law. These critiques arise from

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negative outcome in *Dollar General*, 136 S. Ct. 2159 (2016), was certainly at the top of Indian advocates' recent fears.

131. WILLIAMS, *supra* note 55.

132. John Marshall, the fourth Chief Justice of the United States Supreme Court, served from 1801-1835. His court laid the foundations of federal Indian law in the cases of *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

133. See *supra* Section III.B.

federal Indian law being internally inconsistent as well as containing self-generated justifications of federal actions. Federal Indian law generally lacks moral or ethical treatment of Indians. Other critiques are derived from its basis in prior federal, English, or European doctrines founded in colonialism and/or racism.<sup>134</sup> This is most particularly exemplified by the plenary power that allows Congress to take actions towards tribes, such as termination of their tribal status, without risk of the actions being found unconstitutional.<sup>135</sup> This is because the federal-tribal relationship is political in nature and thus not reviewable by the federal courts.<sup>136</sup> Accordingly, let

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134. “Colonialism” and “racism” are not lightly used terms here. “Colonialism” is the ideology that justifies an exterior people in using force to appropriate land, resources, and even people for the benefit of themselves and at the expense of the original people of the locale. “Racism” is the suppression or subjugation of a people by another merely due to their race. Both ideologies come into play with Native Americans.

135. Plenary power was articulated in *Cotton Petroleum* as deriving from the Indian Commerce Clause: “[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.” *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (citations omitted) (citing *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); FELIX COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 207-08 & nn. 2, 3, 9-11 (Rennard Strickland et al. eds., 1982)). Some Indian scholars, though, now argue that “Congressional plenary power is nothing more than the power necessary to govern Indian affairs.” MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 43 (2016); see also *id.* at 43-45. For instance, the Supreme Court in *United States v. Lara* used the plenary power to find Congress had the authority to legislate tribal criminal jurisdiction over non-member Indians: “Congress, with this Court’s approval, has interpreted the Constitution’s ‘plenary’ grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority.” 541 U.S. 193, 202 (2004). However, even as the Court is finding plenary power as a source for congressional authority that enhances tribal jurisdiction, the Court goes on in the same paragraph to clearly lay out how this power, even if in some instances limited, betrays the right of tribes to true self-determination:

After all, the Government’s Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time. See, e.g., Cohen 48. And Congress has in fact authorized at different times very different Indian policies (some with beneficial results but many with tragic consequences). Congressional policy, for example, *initially favored “Indian removal,” then “assimilation” and the breakup of tribal lands*, then protection of the tribal land base (*interrupted by a movement toward greater state involvement and “termination” of recognized tribes*).

*Id.* (emphasis added). Thus, the Supreme Court noted Congress’s authority to act in the “needs of the Nations,” even when tribes obviously did not approve or desire such actions and where the actions were not in the tribes’ best interests.

136. *Id.* at 205.

us first understand the perspective with which U.S. law has approached Indian nations. Once this is recognized we can see if some other approach might differ, and upon this awareness, seek to understand an “other” jurisprudence.

Professor Williams’s argument was in line with Supreme Court cases that had bothered me since my undergraduate and law school classes. One need only look at some Supreme Court cases to see references to the “savage” nature of Indians and the justification for treatment of Indians. Thus, in *In re Heff*, the Supreme Court stated:

In the early dealings of the government with the Indian tribes the latter were recognized as possess[ing] some of the attributes of nations, with which the former made treaties, and the policy of the government was, sometimes by treaties and sometimes by the use of force, *to put a stop to the wanderings of these tribes and locate them on some definite territory or reservation*, there establishing for them a communal or tribal life.<sup>137</sup>

In contrast, the Court in *United States v. Joseph* had doubts as to whether certain laws applied to the Taos Pueblo because, to the U.S. Supreme Court, the Taos seemed scarcely Indian in nature:

Their names, their customs, their habits, are similar to those of the people in whose midst they reside, or in the midst of whom their pueblos are situated. The criminal records of the courts of the Territory scarcely contain the name of a pueblo Indian. In short, *they are a peaceable, industrious, intelligent, honest, and virtuous people. They are Indians only in feature, complexion, and a few of their habits*; in all other respects superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized thereof.<sup>138</sup>

Fortunately for the Pueblos’ status as Indians, by the time of *United States v. Sandoval*, the Court found the Pueblo Indians “like reservation Indians in general; that, although industrially superior, they are intellectually and morally inferior to many of them.”<sup>139</sup> Thus, the Court felt justified in

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137. 197 U.S. 488, 498 (1905) (emphasis added).

138. 94 U.S. 614, 616-17 (1876) (emphasis added).

139. 231 U.S. 28, 41 (1913).

determining the Pueblos were subject to the rules applied to other Indians.<sup>140</sup>

To me, Professor Williams's analysis made sense as he tracked the flow of Western civilization's reaction to the "other," the savages. This went a long way towards explaining why I could not find a rational thread to explain Supreme Court Indian law precedent. It also clarified that much of the great recent scholarship is looking at Indian law to see out of where it grew and how it relates to others.<sup>141</sup> Professor Williams looks to the development of Western civilization.<sup>142</sup> Other works look to how current Supreme Court law ignores the foundational cases and relationships with the tribes at the beginning of the United States<sup>143</sup> or where current indigenous rights (whether cases, administrative, or statutory) fit within the developing international norms.<sup>144</sup> Each of these genera are necessary to understanding the need to revisit the foundation of Indian law. However, it was not how I had internalized Indian law.

These problematic Supreme Court doctrines are not simply remnants of a past, disavowed legacy. The 2016 grant of certiorari in *Dollar General v. Mississippi Band of Choctaw Indians*<sup>145</sup> crystallized my concerns of all the problems still running through federal Indian law. The oral arguments before the United States Supreme Court laid out the proposition from several justices that tribes constitutionally lacked authority over non-Indians:

CHIEF JUSTICE ROBERTS: You say this is in the heartland? We have never before recognized Indian court -- court jurisdiction over a nonmember, have we?

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140. These cases go to the arguments both for and against culture as sovereignty. The Supreme Court already used culture to decide whether Indians were Indians. Unfortunately, the Court decided being Indian meant they were culturally inferior.

141. Admittedly, mine is a rather limited sphere of knowledge as I did not, and do not, review legal scholarship on a regular basis. However, my friends that are respected scholars in the field of Indian law keep me generally abreast of their writings.

142. See WILLIAMS, *supra* note 55, at 8-9.

143. See ECHOHAWK, *LIGHT OF JUSTICE*, *supra* note 125.

144. S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 *AZ. J. INT'L & COMP. LAW* 13, 14 (2004).

145. 136 S. Ct. 2159 (2016).



JUSTICE SCALIA: That's dictum. Dictum is dictum. Dictum doesn't make something a heartland.<sup>146</sup>

JUSTICE KENNEDY: — can't get off square one.

MR. GOLDSTEIN: . . . I'm very pleased to discuss the threshold point, and that is that, with respect to nonmembers, the Tribes do not have the authority to subject us to such sweeping tort law duties.<sup>147</sup>

*Dollar General* presented a clear view of just how broad the attack upon tribal court jurisdiction over non-Indians was in the Supreme Court. The *Dollar General* attack was only spared through the death of Justice Scalia resulting in a four-to-four Court decision, thus affirming without decision the Fifth Circuit's ruling in favor of tribal jurisdiction.<sup>148</sup> As Congress has plenary power over tribes, and the justices have expressed doubts as to tribal jurisdiction over non-Indians, I, as a tribal judge, was left to wonder where any protections remained for tribal courts and native institutions in general.

The plenary power doctrine is often used by Indian advocates as a mechanism to push state interference out of Indian Country.<sup>149</sup> However, while being a potential tool, this still runs the risk that plenary power can be turned against tribes at any time. In this respect, plenary power is no different than what a powerful, respected, traditional Muscogee Indian doctor (i.e., medicine man) once asked me:

Do you know why the people down south (meaning Muscogee people) respect me as a doctor? It is not because I am good, it is because I am powerful. These medicines can be used for good or bad, it is the person who is good or bad.<sup>150</sup>

This is what some of my elder Euchees meant when they said that while we no longer have some of those old medicines, we also do not have to worry about them being misused. Plenary power puts a powerful tool in the hands of people whom we have no idea as to whether they are good or bad and over whom we have no control as to how they may use their tool.

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146. Oral Argument, *Dollar General*, *supra* note 126, at 29-30.

147. *Id.* at 7-8.

148. *See Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014).

149. *See supra* note 135.

150. Personal Conversation with Muscogee Doctor (early 1980s).

*B. Shawjwane Tries to Be a Bear*<sup>151</sup>

Felix S. Cohen appeared to recognize early on the potential problem of the American judiciary being unable to comprehend the nature of traditional governmental structures' legitimacy and thus the need to orient towards that which was familiar in Anglo-American terms. In *Drafting of Tribal Constitutions*,<sup>152</sup> while discussing the place of traditional chiefs in creating tribal constitutions pursuant to the then-new IRA legislation, Cohen makes relevant notes in passing. Despite the number of tribes with fading traditional structures leading to lesser applicability, Cohen makes comments that certain terms "are offered as examples of the way in which ancient powers may be given modern names that a white man's court and white officials are likely to respect."<sup>153</sup> Still, Cohen made attempts to accommodate the place of these traditional officials and institutions within the proposed constitutional considerations under the new IRA governments.<sup>154</sup> It appears, unfortunately, the actual drafters of tribal constitutions in the 1930s (the BIA and consultants) failed to follow Cohen's lead of utilizing traditional systems where such were still relatively intact.

Current federal law works to provide protections to Native peoples and yet creates systemic processes that suppress development of indigenous institutions. The Violence Against Women Reauthorization Act of 2013 (VAWA)<sup>155</sup> allows tribal court criminal prosecution of non-Indians for violations of protective orders protecting Indians within Indian Country.<sup>156</sup> Indian Country suffers a disproportionate rate of domestic violence, primarily against women. There are many causes for this, but one factor is that many incidents of violence are from non-Indian males against Indian women. However, under the Supreme Court ruling in *Oliphant v. Suquamish Indian Tribe*,<sup>157</sup> tribes cannot criminally prosecute non-Indian perpetrators. VAWA was an overdue change in allowing tribes to potentially control their territory. Federal law cracked the door again, allowing some instances where there is tribal criminal jurisdiction over non-

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151. In another *di'ile*, when Rabbit has his friend Bear over, he tries to mimic Bear while cooking but in doing so, ends up hurting himself. Bear has to remind his friend that he is Rabbit and not to do the things Bear does.

152. COHEN, TRIBAL CONSTITUTIONS, *supra* note 62.

153. *Id.* at 38.

154. *Id.* at 37-39.

155. Tit. IX, Pub. L. No. 113-4, 127 Stat. 54 (codified at scattered sections of U.S.C.).

156. *Id.* sec. 904, § 204, 127 Stat. at 120 (codified at 25 U.S.C. § 1304).

157. 435 U.S. 191 (1978).

Indians.<sup>158</sup> The hope for Indian tribes is, of course, that successful implementation of VAWA will allow further reversals of *Oliphant's* limitation of tribal courts' jurisdiction over non-Indians.

To take advantage of VAWA's prosecution over non-Indians, the tribe must adopt strict due process rights specified in the Act. Most of what a tribal court does resembles the work of state or federal courts, but the differences are what make tribal courts unique.<sup>159</sup> Regardless of whether a tribe provides fairness using its own process, Congress determined tribes must track the federal system such that VAWA incorporates a near identical process to those of the federal courts. These requirements are occasionally more rigorous than state requirements. In criminal proceedings subject to enhanced sentencing of non-Indian defendants, this requires that the judge presiding over the criminal proceeding have sufficient legal training to preside over criminal proceedings.<sup>160</sup> There is no such requirement found in Oklahoma law. Further, the judge must be "licensed to practice law by any

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158. I write "again" as despite the Court's musings in *Oliphant*, in the earliest days of the republic, at least some Indian tribes clearly were recognized as having the right to punish non-members:

If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands allotted to the Wiandot and Delaware nations in this treaty, except on the lands reserved to the United States in the preceding article, such person shall forfeit the protection of the United States, and the Indians may punish him as they please.

Treaty with the Wiandot, Delaware, Chippawa, and Ottawa Nations, art. V, Jan. 21, 1785, 7 Stat. 16.

If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the Creeks lands, such person shall forfeit the protection of the United States, and the Creeks may punish him or not, as they please.

Treaty with the Creek Nation, art. VI, Aug. 7, 1790, 7 Stat. 35.

If any person or persons, citizens or subjects of the United States, or any other person not being an Indian, shall presume to settle upon the lands confirmed to the said nations, he and they shall be out of the protection of the United States; and the said nations may punish him or them in such manner as they see fit.

Treaty with the Wiandot, Delaware, Ottawa, Chippewa, Pattawatima, and Sac Nations, art. IX, Jan. 9, 1789, 7 Stat. 28.

159. See *supra* text accompanying notes 106-14. See also RICHLAND, *supra* note 12 (showing how the Hopi Court uses an adversarial process adopted from the American legal system to settle disputes between Hopi claimants, yet incorporates traditional law and presentation into the court proceedings).

160. 25 U.S.C. § 1304 (Westlaw through Pub L. No. 115-231).

jurisdiction in the United States”<sup>161</sup> (which would exclude most traditional practitioners from the bench). VAWA requires that a tribal court enhanced special criminal jurisdiction jury must “reflect a fair cross section of the community”<sup>162</sup> (meaning the jury must include non-Indians, i.e., non-citizens of the tribe), whereas federal or state courts may exclude non-citizens from their juries.

The requirements that come along with enhanced sentencing authority all install an Anglo-American system and thus normalize non-traditional systems. This also makes review by a federal court easier, as tribal court procedures must track federal process. Any variance from the standard used in federal court prosecutions and American jurisprudence seems more likely to be a basis for tribal court reversal. If the tribal statutory process must track the federal system, a tribal court case varying from the process used by the federal court would naturally mean something was done incorrectly, even if the tribal action was clearly articulable based on traditional indigenous due process. The variance in process would seem all too likely to be fatal to the tribal proceeding. This does not mean tribal courts would have systems different from U.S. courts, but they are now prohibited from consideration of such indigenous processes if they wish to implement VAWA jurisdiction over non-native domestic violence perpetrators. Thus, fear of reversal on a federal habeas proceeding will have a chilling effect, meaning either the tribal court must move towards an Anglo-American system or try to create a bifurcated system where Indians get one system and non-Indians get another.

By combining a growing awareness of a tribal jurisprudence with knowledge of Supreme Court case law, a pattern emerges. The Supreme Court’s line of reasoning seems to run: Indians are inferior because they are different;<sup>163</sup> since Indians are different, they cannot be trusted;<sup>164</sup> if Indians are like us we *might* trust them;<sup>165</sup> and, since they do not really have any

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161. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, § 234(c)(3), 124 Stat. 2261, 2280 (codified at 25 U.S.C. § 1302).

162. Violence Against Women Reauthorization Act of 2013, tit. IX, Pub. L. No. 113-4, sec. 904, § 204, 127 Stat. 54, 120 (codified at 25 U.S.C. § 1304).

163. *United States v. Sandoval*, 231 U.S. 28 (1913).

164. Oral Argument, *Dollar General*, *supra* note 126, at 11-17 (acknowledging that the Choctaw tribal court deserves respect, but that others have no respect due them). “There are, however, many tribes, everyone agrees, that don’t have anything like that.” *Id.* at 11; *see also* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210-11 (1978) (holding that the tribes might try non-Indians by an external and unknown code (as the federal courts do Indians) and thus criminal jurisdiction over non-Indians is not part of tribal sovereignty).

165. *See* 25 U.S.C. § 1304.

culture left, we can ignore their claimed special rights as merely being racial classifications.<sup>166</sup> Since so much is at risk, the fear is we Indians must not raise culture as foundation for our rights. That risks us losing our sovereignty when we no longer have that culture. Of course, if we are unable or unwilling to raise our culture as a basis for our right to continue when that was a basis for so many of our battles, such as Chitto Harjo and his movement, then we have already lost our political sovereignty. We would be acceding to the reasoning of those who wish to take away our existence. We must create a federal legal ecosystem that allows traditional jurisprudence to grow. Currently, that is not the case. This must change.

As W. Richard West explains, “[p]olitical sovereignty and cultural sovereignty are inextricably linked, because the ultimate goal of political sovereignty is protecting a way of life.”<sup>167</sup> Cultural sovereignty is a fact with the Euchee and Muscogee. Despite being punished for speaking the language, having our ceremonies deemed “Satan’s work” or outlawed, and having our traditional ways suppressed, we have continued to dance and speak our language during the period from Oklahoma’s statehood in 1906 to the present. In contra-distinction, when our courts were outlawed and governments suppressed by the Curtis Act of 1898, our tribal politicians for the most part disappeared or acquiesced in the federal system. Our traditional ceremonial leaders never asked permission to be Indian. That is a lesson worth remembering when determining to whom we look for guidance on whether current federal law protects us.

#### *V. The International Effort and Traditional Jurisprudence*

We looked at how to find sources of traditional jurisprudence and a few examples of what those sources can teach.<sup>168</sup> We then saw how, in contrast, current federal law, through its foundation in racism, lack of respect, and the ability to subject tribes to total defeasance, limits the recognition of Indian institutions and traditional jurisprudence. Assuming success in discovering or articulating Indians’ traditional jurisprudence, how do we succeed in assertion of Indians’ traditional rights: those communal, culturally-based conceptions of law? I believe that the UNDRIP must be

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166. See Coffey & Tsosie, *supra* note 12, at 202.

167. *Id.*

168. A Cherokee language instructor (probably Durbin Feeling) used to say that in Cherokee, difficulties, problems, or hard times were also called “teachers” (*dideyohsgi*), literally meaning “the one that handles broken things,” per David Comingdeer, chief at the Cherokee New Echota Ceremonial Grounds. This certainly seems applicable to the road faced by traditional practitioners and implementation of their legal concepts into Indian law.

used by us sitting in our tribal arbors, camps, and communities (*i.e.*, those of us still trying to live in our tribal societies). I will look at an effort to implement the UNDRIP internally and how seeking to domesticate the internal and international human rights dialogues into federal Indian law may create a sustainable future for traditional societies.

Huge challenges exist in achieving recognition of rights that diverge from mainstream conceptions, such as a communal ownership that the ceremonial fireplace belongs to no one but rather is, itself, a living part of the tribal town with the rights of a living being.<sup>169</sup> Walter Echohawk, in *In the Courts of the Conqueror*, discusses in depth four cases that illustrate the state and federal courts' current inability to recognize, comprehend, or protect traditional Native American religious or spiritual rights.<sup>170</sup> These issues arise, at least in part, because of the occasionally significant differences between ours and the United States' fundamental perceptions of religion and spirituality.

Prime among these, at least for Eucheas and Muscogees, are differences between the Stomp Dance religion and Christianity. The following oversimplification illustrates a basic distinction from our point of view. Christianity can be a belief-based system; that is, it mostly requires one to believe something as opposed to requiring one to take action. In contradistinction is the stomp dance/Green Corn religion, where the *actions* themselves are part of that which is sacred. Thus, outsiders cannot force Christians to just stop believing in Christ. However, with the Stomp Dance religion, if you are unable to carry out a particular dance, at a particular place (the stomp grounds), at a certain time, you may be unable to continue your religion.<sup>171</sup>

This notion is best illustrated by our dances at the Euchee Polecat Grounds. Those dances must be done at our stomp grounds with our fireplace that we brought with us from our last tribal grounds near Columbus, Georgia, in the 1830s. We have obviously moved the grounds in the past, the last time being in 1936. Doing so was a hard and spiritual undertaking. Unfortunately, those Euchee who knew how to properly move

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169. This grant of rights to spiritual beings, while foreign to Anglo-American law, has now occurred in New Zealand law with a river being granted human rights. "The New Zealand parliament passed the bill recognising the Whanganui River, in North Island, as a living entity." *New Zealand River First in the World to Be Given Legal Human Status*, BBC (Mar. 15, 2017), <http://www.bbc.com/news/world-asia-39282918> (last visited Dec. 11, 2017).

170. ECHOHAWK, 10 WORST INDIAN LAW CASES, *supra* note 56, at 237-394.

171. See *infra* Section III.B (discussing issues raised at Kellyville Mekvlke meeting).

the fireplace and the grounds are no longer with us. If for some reason we no longer have access to the place the fire is now located, we cannot dance. From what I have been told by my Muscogee friends, that is true for them, as well. If we cannot dance, then we do not have our religion. These sacred site issues<sup>172</sup> are fundamentally different than religious practices typically understood, and protected, in western legal thought.<sup>173</sup> In traditional tribal religions, at least within the Muscogee and Euchee, it is not merely belief, but location, action, and continuation of the songs, dances, and the relationship to the ceremonial fireplace, that are fundamental aspects of the religion.<sup>174</sup>

Traditional societal precepts are just beginning to receive legitimate consideration in various western legal systems, as shown by the initial proceedings in the World Intellectual Property Organization (WIPO) regarding traditional cultural expressions, traditional knowledge, and genetic resources.<sup>175</sup> These otherwise dry, technical, international conventions and their national counterpart, the United States' Patent and Trade Office, deal with property rights going to the heart of many traditional indigenous concerns. As a result, the National Congress of

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172. Curiously, until I began the MDRIP project, I had not thought of our grounds in terms of "sacred site" issues. To me, it was simply the grounds where we held our dances, had our family camps, and looked forward to gathering to visit with family and friends while carrying on our people. Sacred sites, in contrast, were what other Indians had at places like Kootenai Falls, Bear Butte, or the Navajo's sacred mountains. Thus, this work helps to both focus thoughts and conceptualize how some of our own ways fit within the larger, exterior context.

173. See ECHOHAWK, 10 WORST INDIAN LAW CASES, *supra* note 56, at 237-394.

174. Many of our elders who have gone on used to say that if you wanted to dance (i.e., stomp dance), you had a place where you could dance. By this, they meant that the ceremonial grounds were where you should dance, not out in public. There are some grounds that do have public fundraiser dances; however, there are a significant number of others who are opposed to such dances away from the fireplace.

175. See *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Thirty-Third Session*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=42298](http://www.wipo.int/meetings/en/details.jsp?meeting_id=42298) (last visited Nov. 4, 2018). WIPO's website explains:

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is, in accordance with its mandate, undertaking text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s), which will ensure the effective protection of traditional knowledge (TK), traditional cultural expressions (TCEs) and genetic resources (GRs).

*Intergovernmental Committee (IGC)*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/tk/en/igc/> (last visited Nov. 4, 2018).

American Indians (NCAI), the largest and one of the oldest national Indian organizations, enacted a resolution committing itself to participation and monitoring of WIPO efforts.<sup>176</sup> In confronting these issues, at least two of the Muscogee Grounds Mekvlke expressed opinions they wished to be understood by those who would present or represent Native interests to WIPO. Meko Bill Proctor and Meko George Thompson directed the author to submit their thoughts to a working group, which in part reads:

Our songs, these belong to our old medicine people. (*meaning the ones who have already passed on*) They are not to be played with. They (*songs / dances / medicine*) belong to the grounds, not out in public. Our Grounds are in remote areas, not out in public. We want people to come to us, not send our ways out in the public. Our old people used to say if you want to dance, you have a place. (*Meaning at the Ceremonial Grounds, and the Grounds only.*) This is how they look at these things belonging to them, not to others.<sup>177</sup>

These are issues which must be put forward under a new understanding of legal rights found in some exterior source, such as in the UNDRIP, for domestication into federal Indian law.<sup>178</sup> In relation to traditional society, it is a matter of fighting off extinction and understanding what we might yet retain from our past. That is why when we argue for the development of a new era of Indian rights, we must look in the first instance to the spiritual and cultural foundations that we bring from our traditional past. If we can validate these rights that made us what we are, then asserting our economic and governmental rights will also follow.

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176. The resolution states:

WHEREAS, the USPTO's WIPO negotiating positions and text assert that it has the authority to unilaterally abrogate, diminish or impinge upon tribal sovereign authority, by subjecting indigenous traditional knowledge and traditional cultural expressions to claims by non-tribal citizens, entities, and governments to access and use indigenous traditional knowledge and traditional cultural expressions without indigenous peoples' free, prior and informed consent, and in contravention of tribal treaties and other federal law . . . .

Nat'l Cong. of Am. Indians, Resolution #PHX-16-054, at 2 (Oct. 2016), [http://www.ncai.org/attachments/Resolution\\_ZIGiMHNGVtAbKpBODZObysfdKgbkPYPgDGnKYMSigaCfeNCnOIP\\_PHX-16-054%20final.pdf](http://www.ncai.org/attachments/Resolution_ZIGiMHNGVtAbKpBODZObysfdKgbkPYPgDGnKYMSigaCfeNCnOIP_PHX-16-054%20final.pdf).

177. The words in italics are my additions explaining the Mekvlke's words for those not present during the drafting.

178. See UNDRIP, *supra* note 4, art. 11, 12, 31 (concerning religious and spiritual rights).



In exploring the status of tribes, the various terms used are not always easily defined. The United States Supreme Court stated in *Santa Clara Pueblo v. Martinez* that Indian tribes remain “[s]eparate sovereigns pre-existing the Constitution.”<sup>179</sup> “Sovereign” recognizes the political status of tribes. However, “domestic dependent nation”, “tribe”, and even “sovereign nation”<sup>180</sup> are thrown about without agreement or understanding of precisely what such terms mean,<sup>181</sup> how they came about, or what they infer as to a change from a prior status at some reference point in the past. Some advocates prefer the term “nation” over the use of “tribe,” and it is likely that some tribes would seem to qualify for nationhood status (due to territory, population, and history), but for being within the current United

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179. 436 U.S. 49, 56 (1978).

180. The Court stated in *Cherokee Nation v. Georgia*:

[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.

30 U.S. (5 Pet.) 1, 17 (1831).

There are great difficulties hanging over the question, whether they can be considered as states under the judiciary article of the constitution. They never have been recognized as holding sovereignty over the territory they occupy. It is in vain now to inquire into the sufficiency of the principle, that discovery gave the right of dominion over the country discovered.

*Id.* at 22.

181. The Court stated in *Worcester v. Georgia*:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term “nation,” so generally applied to them, means “a people distinct from others.” The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

31 U.S. (6 Pet.) 515, 559-60 (1832).

States system.<sup>182</sup> Such an approach, however, affirms the argument that when we discuss a tribe, it is culturally inferior or less civil than status as a nation.<sup>183</sup> “Tribalism” is already used to infer a negative status, such as when a nation’s factions “descend into tribalism,” denoting internal battles. However, “tribal” should simply describe a different societal structure.<sup>184</sup> When grounds people think of the relationships and culture they wish to preserve, I believe they understand it in terms of tribal relations and see this indigenous structure under threat by mainstream society, whether directly or simply by immersion within the dominant society. For Euchee ceremonial people, “tribal” embodies the historic practices of the Euchee in a way that nation does not. To be clear, this does not mean a few, some, or most tribes are not nations.<sup>185</sup> Rather, we should be free to use whichever term, or terms, we wish, without regard to repercussions as to our continuity, rights, and place within the United States.

Perhaps, though, it helps to know what the Muscogee and Euchee originally had so we can understand what we do, or do not, have today. The Muscogee tribal towns had allegiances and affiliations with each other and joined into affiliations forming the Muscogee Confederacy (now Nation)

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182. The use of “Indian nations” instead of “Indian tribes” has political overtones in asserting an enhanced status beyond being a mere racial classification and is in line with Chief Justice Marshall’s decisions referring to Indians as “domestic dependent nations.” Indian tribes are also found within the treaty-making clause of the Constitution. U.S. CONST. art. II, § 2, cl. 2. Nations, not ethnic groups, make treaties.

183. Interestingly, Native advocates often push for use of the terms “Native American,” “Indigenous,” or “First Nations” (primarily in Canada) because “Indian” is perceived as mistakenly applied due to Columbus believing he had arrived in the far east or India. Yet, the use of “tribe” is readily abandoned despite it being so tied to indigenous institutions or structures.

184. See UNDRIP, *supra* note 4, art. 5 (“Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions . . .”). Whatever the nature of indigenous peoples’ societal structure, their inherent rights should remain.

185. It is likely true that some Indian nations/tribes are no longer tribal, or at least a significant portion of their membership is no longer tribal in the cultural/societal sense. Native American tribal culture and our vision of community flows from our traditional ceremonial life that bound together and created our tribal life. From that core, regardless of its spiritual source, came the unifying force of us as a people. As those traditions slip away, so too slips away our tribal existence. Thus, the worry of my old people about the end of our dances being the end of our world seems to have foreshadowed the world we now face. See also DELORIA, *supra* note 99, at 243 (discussing how tribes are no longer being formed on “social, religious, or cultural bases”).

prior to formation of the United States.<sup>186</sup> Each town had a Meko and council and governed itself. Even after joining into confederation, for a time at least, the towns could go to war independently of each other. At least by the 1820s, a stronger, unified system was in place such that treaties were not deemed valid unless agreed to by the confederacy's council.<sup>187</sup> The tribal towns do not seem to fit within a neat definition of nation, although the confederacy would certainly seem to have qualified at some point. The tribes are not alone in this ambiguity. The nation-state is a relatively modern construct, flowing out of Western political thought explaining the European transformation of kingdoms into centralized governments that led to colonizing governments.<sup>188</sup>

They, however, are not the only models of political organization derived from a Western political-historical context. The ancient Greek city-states were politically not nations, but rather collections of towns or villages ruled by various mechanisms (kings, tyrants, oligarchy, republic) that shared culture and (perhaps) language. Of course, northern Italy consisted of city-states at least through the time of European expansion in the fifteenth and sixteenth centuries. Thus, it should be irrelevant whether Indian tribes can be styled nations in their prior, free incarnations. Indigenous peoples should have the same right to existence and self-determination, regardless of whether their political structures were at one time tribes, city-states, nations, theocracies, or some other form.<sup>189</sup>

While UNDRIP article 3 recognizes our fundamental right to exist, the Declaration also affirms our right to use our own institutional definitions

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186. ANGIE DEBO, *THE ROAD TO DISAPPEARANCE: A HISTORY OF THE CREEK INDIANS* 4 (1941).

187. *See supra* text accompanying notes 90-92 (stating that Chief McIntosh was executed because of his signing without Confederacy authority a treaty with the United States).

188. According to the Wikipedia article on nation-states:

The idea of a nation state was and is associated with the rise of the modern system of states, often called the "Westphalian system" in reference to the Treaty of Westphalia (1648). The balance of power, which characterized that system, depended on its effectiveness upon clearly defined, centrally controlled, independent entities, whether empires or nation states, which recognize each other's sovereignty and territory. The Westphalian system did not create the nation state, but the nation state meets the criteria for its component states (by assuming that there is no disputed territory).

*Nation State*, WIKIPEDIA, [https://web.archive.org/web/20181105051239/https://en.wikipedia.org/wiki/Nation\\_state](https://web.archive.org/web/20181105051239/https://en.wikipedia.org/wiki/Nation_state) (last visited Nov. 4, 2018).

189. *See UNDRIP, supra* note 4, art. 3 ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

without worrying about political consequences. Perhaps, with a shift in the terminology under an alternative approach to indigenous people in the United States, such as via use of the UNDRIP, the term “peoples” can better recognize tribes’ internally derived structures and institutions. We may be sovereigns as recognized by treaty-making but adopting the use of “peoples” allows us to focus on strengthening and preserving our native institutions without the need to meet external criteria such as nationhood. We would not risk losing rights to our continued tribal existence. Professor James Anaya, former U.N. Special Rapporteur on the Rights of Indigenous Peoples, noted the various social or governmental structures used by indigenous peoples, yet those groups still fell within the context of human rights:

Indigenous peoples are entitled to be different but are not necessarily to be considered *a priori* unconnected from larger social and political structures. Rather, indigenous groups – *whether characterized as communities, peoples, nations, or other* – are appropriately viewed as simultaneously distinct from, yet part of, larger units of social and political interaction, units that may include indigenous federations, the states within which they live and the global community itself.<sup>190</sup>

While translating the UNDRIP into Mvskoke, the Mekvlke translators noted the tribal towns are referred to as “*etvlwv*.” This same word also refers to the Muscogee Nation and other tribes. It also means your (or others’) community or people and additionally could be used to generically refer to foreign nations or people.<sup>191</sup> Thus, not only can we define ourselves but better articulate to others what it means to be a “people” and in the process, perhaps, illustrate our human right to exist as a people as recognized in article 3 of the Declaration.<sup>192</sup>

With all the foregoing as background, the question remains: are there models for shifting federal law regarding Indian tribes? The Native American Rights Fund (NARF) has an ongoing Supreme Court Project that works to coordinate major Indian law litigation going up to or in the United

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190. Anaya, *supra* note 144, at 60 (emphasis added).

191. There was some uncertainty as to using *Etvlvv* to refer to foreign nations, though some seemed to feel it was appropriate. Perhaps this is only fair, as some legal scholars might be uncomfortable with the use of nation to refer to Indian tribes.

192. UNDRIP, *supra* note 4, art. 3 (recognizing indigenous “peoples” as having the right to self-determination means, in the United States, federally recognized tribes have an inherent right to exist, a far firmer existence than under current federal law).

States Supreme Court. However, the Supreme Court Project, a much-needed effort due to the Supreme Court's anti-Indian orientation over the last decades, is more tactical than strategic:

The purpose of the Project is to strengthen tribal advocacy before the U.S. Supreme Court by developing new litigation strategies and coordinating tribal legal resources, and to ultimately improve the win-loss record of Indian tribes.<sup>193</sup>

The Project works to coordinate a national tribal response to each case as it arises, and considering the negative bent of the Supreme Court, hopefully avoid further damaging court decisions.

Yet a strategic dialogue is needed to shift Indian law to a human rights basis that as a starting point recognizes our inherent right to exist, and that mandates true consultation and consent on matters affecting Indians. If one looks for such broad, coordinated, future-oriented planning, there is a remarkably empty landscape on the national level. The leading Indian advocacy organizations, Native American Rights Fund, National Congress of American Indians, Association on American Indian Affairs, National American Indian Court Judges Association, and National Indian Child Welfare Association, do not at this time appear to have such an effort.<sup>194</sup> Fortunately, Walter Echohawk lays out how to do this in *In the Light of Justice*.<sup>195</sup> He uses the example of the NAACP's civil rights game plan for erasing the legal yokes of "separate but equal" created by *Plessy v. Ferguson*.<sup>196</sup> The NAACP used strategy, organization, and litigation to lay the groundwork that ultimately resulted in *Brown v. Board of Education*.<sup>197</sup> Echohawk argues that tribes need to develop a similar plan to assert their right to self-determination by utilizing the Declaration.<sup>198</sup>

The next question, then, is what would a strategic plan for Indian Country entail? First and foremost is creating a dialogue on the Declaration

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193. *Tribal Supreme Court Project*, NATIVE AM. RTS. FUND, [http://sct.narf.org/?\\_ga=1.34983073.1420456592.1488306370](http://sct.narf.org/?_ga=1.34983073.1420456592.1488306370) (last visited Sept. 29, 2018).

194. The Native American Rights Fund (NARF) and the University of Colorado Law School (CU Law) appear to be in the proto-stages of developing a joint effort at a broad revision of Indian law based on domesticating the UNDRIP into the federal system. NARF and CU Law understand this will be a long-term project but are only in the very beginning stages of discussion as of the time of this writing.

195. ECHOHAWK, *LIGHT OF JUSTICE*, *supra* note 125.

196. 163 U.S. 537 (1896).

197. 347 U.S. 483 (1954).

198. *See* ECHOHAWK, *LIGHT OF JUSTICE*, *supra* note 125, at 221-48 (chapter 9, "March Toward Justice").

amongst tribal lawyers, advocates, and traditional and political leaders. Among the various actors, one prong of that change must originate in tribal courts. Tribal courts are always at the tip of the spear of attacks upon sovereignty.<sup>199</sup> Thus, they need to prepare for such attacks as part of a strategy to assert indigenous rights as a human right to self-determination. Although tribal courts are being attacked, they can also be a foundational pillar supporting tribal existence. An articulated tribal court use of traditional jurisprudence gives cover as to how we differ and why we deserve latitude to redevelop our own institutions. With the input of traditional people, tribal courts' discourse on traditional and human rights law might change social and legal understanding of tribal rights in the federal courts.<sup>200</sup> In this manner, assertion of culture merges with political sovereignty. By tribal courts enunciating fundamentals of our justice, especially those that are traditionally based, we lay out principles which explain the need to implement the UNDRIP and, perhaps, provide tools that Indian lawyers can utilize to correct Supreme Court jurisprudence attacking tribal court jurisdiction. It might also, if carefully articulated, give tribes the source of moral high ground, as freedom of religion is a foundational principle of American conceptions of justice.<sup>201</sup> Just as the NAACP used a strategy to overturn *Plessy*, tribal courts must play a necessary part in a coherent and coordinated effort to implement inherent human rights of indigenous peoples into federal law. A tribal court's explanation of the tribes' unique society, culture, and history as applied to a case it is handling protects tradition by respecting tribal institutions. For example, using precepts earlier discussed, a tribal court by metaphorical use of *Shawjwane* and *Gojithla* shows how tribal friendship norms were violated.

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199. See Oral Argument, *Dollar General*, *supra* note 126 (regarding tribal court tort claim over non-Indian on reservation activities); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding tribal court jurisdiction not allowed over Indian claim against non-Indian for car wreck on reservation right-of-way); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians).

200. See ECHOHAWK, LIGHT OF JUSTICE, *supra* note 125, at 235-36 (citing Thurgood Marshall and the effect that law had upon social change).

201. Most traditional based discussions would flow out of a tribe's religious or spiritual background. Paradoxically, the U.S. recognition of freedom of religion would thus be supporting the religion of the tribe. However, the tribes are not prohibited from having their own tribally recognized religion. See Indian Civil Rights Act § 202, 25 U.S.C. § 1302 (2012). While the Act tracks the federal Bill of Rights, it does not include prohibitions against the establishment of religion, as many tribes still merge their governmental and religious systems.

International human rights law, as laid out in the UNDRIP, recognizes indigenous peoples' right to their own institutions.<sup>202</sup> As such, the UNDRIP expresses that a state cannot unilaterally terminate tribal existence and that free, prior, and informed consent must be sought in matters that affect indigenous peoples as tribal peoples. Perhaps the UNDRIP's most important right of indigenous peoples is contained in article 3, which effectively recognizes the inherent right to exist: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>203</sup> Another powerful provision of clear consequence for tribes is the right to "free, prior, and informed consent" (FPIC) before states take actions that impact indigenous peoples.<sup>204</sup> This requirement of FPIC was, in part, the basis for the statement of November 4, 2016, on the Dakota Access Pipeline (DAPL) by Mr. Alvaro Pop Ac, Chair of the Permanent Forum on Indigenous Issues, and Dr. Dalee Dorrough and Chief Edward John, Expert Members of the Permanent Forum on Indigenous Issues, expressing their deep concerns over the DAPL and the effect upon the Standing Rock Sioux.<sup>205</sup> Taken together, the rights expressed in these articles could either overturn the concept of federal plenary power over tribes or at least restrict federal plenary power that authorizes unconsented action to the detriment of tribes.

*A. Mvskoke Declaration on the Rights of Indigenous Rights—MDRIP*

On September 29th, 2016, the Muscogee (Creek) Nation signed into law the *Mvskoke Este Catvlke Vhaky Empvtakv Enyekcety Cokv* (Mvskoke Declaration on the Rights of Indigenous Peoples).<sup>206</sup> While I had for some time been thinking of the UNDRIP and what it might mean to our

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202. UNDRIP, *supra* note 4, arts. 5, 18, 20.

203. *Id.* art. 3. Elsewhere around the world the problem is the state denying the existence of indigenous people. For instance, China and Russia both seem to have a proclivity to classify indigenous people as merely being minority or ethnic populations. See *China*, IWGIA, <https://www.iwgia.org/en/china> (last visited Sept. 30, 2018); *Who Are the Indigenous Peoples of Russia?*, CULTURAL SURVIVAL, <https://www.culturalsurvival.org/news/who-are-indigenous-peoples-russia> (last visited Sept. 30, 2018).

204. UNDRIP, *supra* note 4, arts. 10, 11(2), 19, 28, 29(2), 32(2).

205. U.N. Permanent Forum on Indigenous Issues, Statement on the Dakota Access Pipeline (North Dakota, USA) by Mr. Alvaro Pop Ac, Chair of the Permanent Forum on Indigenous Issues, and Dr. Dalee Dorrough and Chief Edward John, Expert Members of the Permanent Forum on Indigenous Issues (Nov. 4, 2016), [http://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/StatementDAPL\\_4Nov-2016.pdf](http://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/StatementDAPL_4Nov-2016.pdf).

206. UNDRIP, *supra* note 4 (Mvskoke translation).

ceremonial people within the Muscogee (Creek) Nation,<sup>207</sup> the catalyst for initiating meetings on a Muscogee DRIP (“MDRIP”) was the grant of certiorari in *Dollar General v. Mississippi Choctaw Tribe*.<sup>208</sup> This process began in November of 2015 when I invited several of the Mekvlke of the ceremonial grounds to meet and discuss the UNDRIP. The UNDRIP addresses many issues of concern to the Muscogee Nation, including, from the perspective of tribal courts, the right to our native institutions.<sup>209</sup> The UNDRIP, such as article 3 recognizing the inherent right to exist, is a natural source to counter current Indian law. I knew, though, the strength for Muscogee implementation would initially come from the ceremonial leadership. The Declaration repeatedly addresses Indian concerns on spirituality,<sup>210</sup> sacred sites,<sup>211</sup> medicines,<sup>212</sup> and language,<sup>213</sup> all of which are issues to grounds people. However, this process had to be done in a proper manner, so I contacted the Mekvlke from Alabama Grounds, Greenleaf Grounds, Hickory Grounds, and the Tvstvvnke of Arbeka Grounds. They came in and we talked informally about what the Declaration was, my concerns and issues from a tribal court perspective and as a grounds member, what their concerns might be, why it was important, and how it might be of use in the Muscogee Nation with its commitment to ceremonial life. I knew there were certain matters they were reluctant to publicly speak about, so I was careful we would respect their rules and thoughts.<sup>214</sup> They

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207. I had written a note to myself sometime in the year before hosting the first meeting raising the following point:

One issue I might raise with our chiefs is seeing what happens if we translate parts of the UN docs into Muscogee and the dialogue which follows in discussing it in Muscogee, and then re-translate that discussion back into English to learn what the Ceremonial Grounds understand as the import of the UNDRIP provisions. It could then be worth having a professor type meet with them, if they wanted, to discuss how these documents offer opportunity for protections for the concerns we have as traditional people.

Author notes.

208. 136 S. Ct. 2159 (2016).

209. UNDRIP, *supra* note 4, arts. 18, 20.

210. *Id.* arts. 8, 9, 11, 12, 25, 34.

211. *Id.* art. 11.

212. *Id.* arts. 24, 31.

213. *Id.* arts. 13, 14.

214. The Mekvlke generally are not interested in bridging the gap to mainstream society with their ceremonial knowledge. In fact, a significant portion of the Mekvlke want to keep it protected and preserved within the Muscogee people. They would rather their own people know it and keep it out of the hands of non-Muscogee. There are, of course, some who share



were understanding about the intent of the Declaration and how it might benefit them and were very supportive of translating the UNDRIP into Mvskoke. Thus, we continued to meet and discuss the UNDRIP. The Mekvlke were quick to understand the UNDRIP's intent and were extremely supportive of translating and implementing the UNDRIP at the Muscogee Nation.

After the first few meetings, we invited two of my friends and colleagues, Walter Echohawk, and the now deceased Professor G. William Rice, to meet with us and share their insights on the UNDRIP. They met with the Mekvlke and explained how the Declaration came about and how it fit in with international human rights. They explained how in 1977, Phillip Deere, a Mvskoke (from Nuyaka Ceremonial Grounds) that the Mekvlke knew well, went to Geneva, Switzerland, with a delegation of traditional Native Americans and presented to the United Nations on the need to protect indigenous peoples.<sup>215</sup> That 1977 presentation was partially responsible for initiating the process leading to the U.N. General Assembly adoption of the UNDRIP in 2007. Phillip's participation likely added a legitimacy to efforts we were now undertaking.

#### *B. Meeting of Mekvlke*

As part of the UNDRIP effort, the Mekvlke and their assistants met in January of 2016. Two things are worth noting about this meeting: the substance presented and the process used in the meeting. As with other Mekvlke meetings, there was generally a format common to discussion of grounds business. The Meko will normally have one of his assistants or members speak on his behalf, usually not speaking directly but rather indicating what the speaker wishes while also explaining the Meko's desires or points as he understands them. Each person will speak in turn, from start to finish, usually without interruption until all have spoken. Discussion may then occur regarding the matters covered. This is not an absolute format, but generally how matters proceed and how it occurred (for the most part) at Kellyville.

As to substance, we invited Walter Echohawk to explain how the UNDRIP might be of interest to the ceremonial grounds.<sup>216</sup> He talked about

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this freely and take it out to the general public, or at least share more than others. *See supra* text accompanying note 174 (statement of Mekvlke Proctor and Thompson).

215. Ingrid Washinawatok, *International Emergence: Twenty-One Years at the United Nations*, 3 N.Y. CITY L. REV. 41, 41 (1998).

216. G. William Rice was invited, but due to his health, was unable to attend. Unfortunately, he passed away shortly thereafter before being able to see these efforts begin

how the Declaration should be understood as aspirational, as it is not law, but how it could eventually be a mechanism to incorporate tribal law into federal law. He explained how it was conceived, crafted, and written with input from traditional indigenous peoples from around the world, including advocacy by Phillip Deere in 1977. He noted this was a potential lawmaking moment (jurisgenerative) for us to turn our traditional, internal laws into domestic law. While the other Mekvlke generally were not aware of the Declaration, they were very cognizant of issues the Declaration addresses. In listening to the Mekvlke's discussion, Echohawk analyzed their concerns and explained to them how the concerns they raised fell into several broad issues addressed by various articles in the Declaration. Echohawk noted if the UNDRIP carried the force of law, it would create a mechanism for legally raising the Mekvlke issues within the United States. Alternatively, even if not carrying the force of law, the UNDRIP raised these traditional issues to the level of human rights concerns that could require a formal response from the United States in international forums. These issues, as raised by the Mekvlke, the corresponding UNDRIP articles articulated by Echohawk, and how the articles cited by Echohawk might address the Mekvlke concerns, are as follows:

*Access to private land to gather medicine.* These concerns corresponded to rights articulated in articles 24 through 26. Here the grounds' perspective was that originally lands around them had been the Muscogee Nation's and the grounds used these lands to gather necessary ceremonial medicines since their arrival in Indian Territory in the 1830s. They looked at the medicines as belonging to either no one, or to all, under an indigenous perspective of traditional medicine plants. To them, these plants constituted an inherent right to continue their religion in a way that American law does not recognize. As more lands fall out of Indian ownership, finding access to plants needed for traditional medicines becomes more difficult. Even gathering of plants on highway easements has seen some grounds members threatened.

Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous

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to come to fruition. This type of undertaking was something we had discussed many times over the years as an undertaking needed to move Indian law into the next era.

individuals also have the right to access, without any discrimination, to all social and health services.<sup>217</sup>

These articles might affect the current private property law conceptions of plants necessary to accommodate continuing traditional lifestyles or perhaps accommodate a non-Western perspective as to law and religion. When coupled with the directives found in article 26(1) (“Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”),<sup>218</sup> a right begins to emerge that moves towards, at minimum, an accommodation of gathering rights for the Muscogee and Euchee.

*Continuing access to the Stompgrounds.* These same articles, along with articles 12, 24-26, and 28, might provide some rights for the continued existence of the ceremonial grounds. These rights include: protection against inaccessibility because of sale, inheritance, or simply locking the gated access to the grounds. In the recent past, certain ceremonial grounds were inaccessible because the square ground is on privately-owned land, and the individual owner was not allowing its use. At the time of allotment, the grounds were usually selected by individual ground members as part of their allotment. None of the square grounds were reserved under allotment to the tribe. Due to death, inheritance, partition, or sale, the land upon which the grounds are located sometimes passed to individuals who were either non-tribal members or were tribal citizens but anti-grounds. Attempts to buy or lease these properties were not always successful and at present there does not appear to be an easy way to force their sale to the Nation for ceremonial use.

*Enforcement of state laws.* Again, as some of the stomp grounds are in private, non-Indian land status, they are subject to state laws. During summer droughts when a state or county fire ban is issued, it is illegal to burn outside fires. This creates a direct conflict with the grounds, as the fireplace is central to the stomp dance ceremonies. In western Oklahoma, some accommodation has been made for ceremonial fires, such as at Native

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217. UNDRIP, *supra* note 4, art. 24(1). To the extent we have completed them, included are the Mvskoke translations of these articles. Article 24: “*Este catvlke nak emenakuece tayat ohfvctv heliswv ton nak sefvstev vrakkv, momen nak heliswv, vtakrv omakat, ponvttv, ton ekvrv ofv nak ocakat pumet estomet nak omvlkvt vchayecvke tayen omat meceyvres. Este catvlke omvlkat naken sevnice tayat omvlkat enakuecet, mowis este vpvlwat omekot eyvnice yvres nak enoketv cuko ocakat svpvken momen vpopokat.*”

218. *Id.* art. 26(1).

American Church meetings.<sup>219</sup> However, as some of the Mekvlke stated, they are never going to ask permission of any person to light their fire. The UNDRIP speaks to the concerns over ceremonial fires and local fire bans in article 12(1):

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.<sup>220</sup>

*Fake Indians.* A problem common to many tribes is non-Indians pretending to be Indians and attempting to act as indigenous nations and peoples. Ben Barnes of the Shawnee Tribe and of White Oak Shawnee Ceremonial Grounds has worked on these issues concerning individuals and groups claiming to be Shawnee, particularly in Indiana and Ohio. He argues that not only do such “Faux” Indians usurp real tribes’ efforts to repatriate remains of their ancestors, but they also siphon off millions of dollars meant for real Indians by falsely applying for grants.<sup>221</sup> That does not even address the issue of the “pre-tendians” conducting ceremonial or religious dances that are only to be conducted by the proper tribal entities, if at all. If the UNDRIP becomes domesticated into American law, tribes could find that by tribal law defining bona fide practices/practitioners, those protections could be incorporated into exterior federal law through article 31(1):

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their

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219. Okla. Forestry Servs., Guidelines for Oklahoma’s Ban on Outdoor Burning (Jan. 30, 2018), <http://www.forestry.ok.gov/Websites/forestry/images/Burn%20Bans/Burn%20Ban%20Guidelines%20January%2030%202018.pdf>.

220. UNDRIP, *supra* note 4, art. 12(1). Mvskoke translation: “*Este catvlke omvlkvt nak futcvn hecken, sem mvhayet, ohvtaliyet, momen emayetv mvhayet momen nak enkerretv emonkvrvs.*”

221. Barnes, *supra* note 33, at 8.

intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.<sup>222</sup>

*Hickory Ground Desecration in Alabama.* Hickory Ground's last traditional town site in the east was near Wetumpka, Alabama. Hickory Town had been the Creek Confederacy Capital prior to removal and was rediscovered in 1968. The Poarch Band of Creek Indians (PBCI), located in Alabama, were federally recognized in 1984, and the PBCI promptly acquired the Hickory site. The PBCI soon built a casino upon the historic tribal town, dug up the remains of Hickory Ground's ancestors, and stored them in plastic boxes in a shed. The remains were finally reinterred around 2016. Upon discovery of the historic site, the Hickory Ground members felt a traditional duty to care for their ancestors. Hickory Ground and the Muscogee Nation filed suit against the PBCI.<sup>223</sup> Fortunately, after a change in leadership at the PBCI, it appears the two Creek tribes are now discussing their issues. Hopefully they will reach an agreement that respects the duties the MCN Meko vke owe to their ancestors.<sup>224</sup> However, articles 11 and 12 might address such problems when they arise. Article 11(2) states:

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.<sup>225</sup>

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222. UNDRIP, *supra* note 4, art. 31(1). Mvskoke translation: "Este catvlke, ohfvnkv nak enwikate emetat vfastet, vcayecet, nak emayetv ohhvitaliyet, enkerettv momen emayetv, emvhakv, catv ocat Este Cate enake ton, nerkv, heliswv, nak onahoyvte, svhocihocvte, pokketcetv, yvhiketv tofvs emonkares." This is a fairly literal translation of this article. For more detailed discussion, see *infra* Section V.C.

223. Complaint, Muscogee (Creek) Nation v. Poarch Creek Band Indians, No. 2:12-CV-01079 (M.D. Ala. Dec. 12, 2012).

224. See A Tribal Resolution of the Muscogee (Creek) Nation Authorizing the Principal Chief and Meko George Thompson of Hickory Ground Tribal Town to Execute a Preservation Agreement Regarding Two Parcels in Elmore County, Alabama (No. MCN TR 17-161, Dec. 4, 2017).

225. UNDRIP, *supra* note 4, art. 11(2). Mvskoke translation: "Evkvn satkv rakko Este cate emetvlwv emayetv oca 'kat. Em vhakv vhopvnet, vkasvmeko, nake fytceko mehocvte fektv oce towares."

Article 12(2) states:

States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.<sup>226</sup>

*C. Adoption of the UNDRIP by the Muscogee (Creek) Nation*

In 2016, the Muscogee (Creek) Nation adopted the Muscogee DRIP as positive law of the Nation. About a third of the MDRIP was translated into *Mvskoke* at the time of adoption, primarily those articles dealing with traditional and sacred issues. Directives were given to translate the remaining portions. There was a symmetry to the adoption of the MDRIP as the UNDRIP process had been, at least partially, initiated by a Muscogee citizen. Some forty years later, and nine years after the U.N. adopted the Declaration, the Muscogee Nation adopted the MDRIP. As of winter 2019, the MDRIP is in an ongoing process of translation into *Mvskoke*, being about three-quarters completed.

The UNDRIP can fundamentally alter federal Indian law in more ways than just traditional rights. Article 3 recognizes that indigenous peoples have the right to self-determination, meaning tribes have an *inherent right to exist* and determine their own future, not the United States.<sup>227</sup> That, coupled with the UNDRIP's consultation requirements, would finally do away with, or at least greatly limit, the plenary power over tribes. In the past this power has included the ultimate power of terminating tribes. This, perhaps more than any other potential outcome, should motivate tribes to begin the process of pushing the UNDRIP into federal Indian law. This effort should form the top layer of a two-part effort that sandwiches federal Indian law between it, the foundational layer of the effort being tribal law that begins to incorporate human rights internally. If tribal law is to permeate into federal law, it must first explain *tribal conceptions* of society that constitute inherent human rights.

How this might work is shown in the process of translating UNDRIP article 31(1) into *Mvskoke*. The translation back into English brings to light conceptions of Muscogee rights and duties embedded in the language and culture, thus helping to develop an indigenous jurisprudence. As noted

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226. *Id.* art. 12(2). *Mvskoke* translation: “*Ekvntvcke estecvtvlke nak encahoyate emekvntv safyckety monkv este fone cahoyate yokfolecvrvs.*”

227. *Id.* art. 3.

above, article 31(1) has a *Mvskoke* translation that is fairly literal;<sup>228</sup> however, the Mekvlke discussed this section at length. They felt this particular directive was the essence of why they saw the need for the MDRIP: that those things which are ours, spiritually and culturally, should not be used or shared by others, even within the Muscogee, unless done in the proper traditional manner.<sup>229</sup> Thus, they added an additional translation of how they understood the *meaning* of article 31(1):

*Hiyomakat pum ayetv pum wihokat vcacvket omet sahkopanetvt  
okot omes.* (Now this is our ways that was given to us and is very  
sacred and is not to be played with.)

By this it is meant that our traditional ways come from a spiritual source. To conduct them, except when and where one is supposed to, is like one is mocking them and playing with them like children might play a game. This should not be done. Certain of these Euchee and Muscogee ways are what are called “medicine ways” and should not be done except by those who are authorized to do so pursuant to traditional methods of approval.

Also, as previously discussed, free, prior, and informed consent is an important component of the UNDRIP.<sup>230</sup> In going through the *Mvskoke* translation process, the translators agreed that *towares* was a necessary component of the *Mvskoke* phrase. That word’s translation or meaning was explained as “there is no room for discussion” or “it SHALL be” (emphatic). They explained that when it is used it means “there is no wiggle room.” The translators then wondered if this word was used in the *Mvskoke* translations of our treaties. If so, then it seemed the tribe’s treaties obviously were not followed by the United States, as the use of *towares* is an imperative statement. This small example of generating internal discussion of Muscogee terms and conditions becomes a learning experience of developing traditional understanding. It should lead to an infusion into federal and international process *if* properly followed through by indigenous advocates. However, until others undertake similar projects, tribal understanding of human rights will continue to flow from exterior sources, whether federally or internationally derived.

Thus, in the process of going through the UNDRIP, inherent *Mvskoke* conceptions of law and prohibitions are drawn out. Things were learned about the sacred and the profane, as well as responsibility, tribal duty, and

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228. See *supra* note 222.

229. See *supra* text accompanying notes 175-77 (regarding the Mekvlke submission on WIPO).

230. See *supra* text accompanying notes 203-05.

history. Traditional jurisprudence must be consciously developed because both international standards *and* tribal discourse must be used to imbue federal law with human rights concerns of indigenous people. This should be done through articulating indigenous traditional law that shows how Indian law fails, or is unable, to recognize the rights of native people.<sup>231</sup> This work can thus develop, articulate, and explain traditional law.

Adoption of the MDRIP was noteworthy for the Muscogee Nation. As with any citizenry, there is complaining about the actions of the governments. However, in October 2016, the entire elected National Council of the Muscogee Nation co-sponsored the MDRIP legislation and passed it unanimously by voice vote. That was a great moment for the Muscogee Nation because the Nation enacted an approach looking to long-term assertion of its rights. In this it was reminiscent of the work done in the late 1970s by a small group of Indian lawyers and tribal leaders that went to the tribal governments in Oklahoma to convince them they had Indian Country, that they had jurisdiction over that Indian Country, that they could assert their power over their lands, and that Indians had a right to tribal courts. The attorneys did not think the tribes were likely to get tribal courts for many years.<sup>232</sup> Despite these doubts, tribal Indian Country was soon recognized in *Oklahoma v. Littlechief*,<sup>233</sup> which meant tribal jurisdiction and tribal courts again became a reality in Oklahoma.<sup>234</sup> After the recognition of tribal jurisdiction in *Littlechief*, tribal courts were quickly resurrected throughout Oklahoma as tribal leaders asserted tribal jurisdiction and the right to control affairs within their territory.<sup>235</sup>

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231. See *supra* note 51 and accompanying text (illustrating current American law not comprehending traditional jurisprudence conceptions).

232. Prof. G. William Rice, An Overview of Tribal Courts' Position Within Indian Country During the Last 30 Years and Thoughts on What They Face in the Future (presentation at the Muscogee (Creek) Nation District Court CLE Conference, "Doing Business in Indian Country," Apr. 30, 2015).

233. 573 P.2d 263, 1978 OK CR 2.

234. "Again" is used because the tribes in Indian and Oklahoma Territories had established courts prior to their destruction by the federal government as a conscious attempt to force acceptance of allotment of the tribal lands. See SAC AND FOX CONST. OF 1885, art. V; MUSCOGEE NATION CONST. OF 1867, art. III.

235. The decision in *Littlechief* quickly threw tribal jurisdictions into chaos as the Bureau of Indian Affairs rushed to implement CFR courts for tribes in order to assert some criminal jurisdiction in the removal of state jurisdiction. Of course, the CFR courts were to be a stopgap measure until tribal courts could be implemented. CFR courts still operate thirty-five years later for some tribes and, in some instances, the BIA initially resisted allowing tribal courts to take over.



Enactment of the MDRIP or other tribal equivalents could be of similar importance (though likely a much longer process) in that it fundamentally shifts the indigenous law dialogue. It creates a formal framework in which to conceptualize indigenous rights, assert tribes' right to control their sovereignty (self-determination in the international sense), recognize rights to Native institutions, and assert the right to be consulted in processes (free and prior informed consent) that impact the Indian nations and their citizens. While tribes already assert these ideals, within federal law they are based upon fairness, federal statutes, regulations, or treaties. All of these mechanisms can be undone without tribal input through congressional plenary power.<sup>236</sup>

The Muscogee Nation, the fourth largest tribe in the country, has its elected National Council members, Principal Chief, and Second Chief<sup>237</sup> all expressing their intent to use the MDRIP in their dialogues with state and federal officials. Ceremonial Mekvlke travel to meetings around the country discussing the Declaration.<sup>238</sup> Perhaps the Muscogee Nation can be an example to other tribes that they should also use the UNDRIP or a tribal DRIP. As that begins to happen more frequently, the values expressed in those documents will become more widely accepted within and external to Indian Country. Thus, the enactment of the MDRIP by the Muscogee could be an example of how to begin moving towards a new age for tribal rights.

The Mekvlke Kellyville meeting shows that as the traditional leaders become aware of the UNDRIP and contemporaneously articulate their

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236. These fears are both real and present. In *Murphy v. Royal*, the Tenth Circuit laid out the current law: "In *Lone Wolf v. Hitchcock*, the Supreme Court said Congress has the power to unilaterally abrogate treaties made with Indian tribes. 'Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.'" 875 F.3d 896, 917 (10th Cir. 2017) (citations omitted) (quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)). *Murphy* concerned a habeas petition of a Muscogee citizen prosecuted in state court for a crime allegedly committed in the Creek reservation. The state argued there was no longer a reservation, and thus no Indian country, and that state jurisdiction was therefore proper. The *Murphy* court found the reservation had not been disestablished by allotment. However, Indians at the time of this Article fear that either the United States Supreme Court will reverse or, if upheld in the courts, Congress will intervene and disestablish or diminish the Creek reservation. These concerns go to both the unilateral power of Congress and the lack of free, prior, and informed consent regarding issues that so directly involve tribal and Indian rights.

237. This information comes from discussions with MCN Principal Chief James Floyd.

238. In September 2016, Mekvlke Yargee and Thompson traveled to Hawaii to meet with the International Treaty Council. In September 2017, Meko Thompson sent one of his warriors to attend the University of Colorado Law School's and the United Nations Permanent Forum on Indigenous Issues' celebration of the UNDRIP's tenth anniversary.

understanding of traditional law as related to sacred sites, traditional medicines, land tenure, and heirship, the time is ripe to push these positions into the UNDRIP. This would institutionalize indigenous interpretations of the Declaration into external structures. Thus, for instance, a right to medicines under article 24 of the UNDRIP must be understood in terms of the needs of indigenous peoples as explained by the concerned traditional peoples.<sup>239</sup> Presentations to the U.N. and requiring national response by the “State” are important to raising human rights and indigenous consciousness. However, international advocacy is ultimately not the tool needed to support continuity of traditional indigenous society. The Declaration needs to be raised in the federal system, if not as law, then as a moral structure using human rights standards arguing for the reinterpretation of current federal Indian law.

#### *VI. This Is Our House*

It is no coincidence that Chitto Harjo was from Hickory Ground, whose current Meko is actively working on the MDRIP. It is not surprising that Harjo’s righthand man was Charlie Coker, whose great grandson is on the MCN National Council and helped to introduce the MDRIP legislation. It is unsurprising that Phillip Deere, the Nuyaka Ground’s medicine man, went to Geneva, Switzerland, in 1977 to tell the United Nations they must address indigenous peoples’ human rights. Phillip’s daughter was a translator on the MDRIP and Phillip’s son-in-law is the Alabama Ground Meko pushing the MDRIP. The traditional people have always understood cultural integrity and political sovereignty are inextricably linked together. Federal Indian law fails to recognize our right to develop our own institutions and utilize our jurisprudence by containing an escape clause for the federal government through an unconstrained plenary power doctrine. Ultimately, until this changes, tribal success and the continuance of a traditional tribal society is a matter of luck, not right.

The UNDRIP now presents a means to alter this equation. The traditional rules on how we are to conduct ourselves in relation to each other and the relationship to things which we need to carry on constitute a traditional law. It is a jurisprudence derived from an internal tribal epistemology regardless of exterior obstacles or support. While the UNDRIP’s human rights, with its quintessential inherent right to self-determination, must be domesticated into federal Indian law, tribes must at the same time work to inculcate their laws with their traditional jurisprudence and push that understanding up

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239. UNDRIP, *supra* note 4, art. 24.

into the federal system. The UNDRIP can aid this process by acting as a light by which we see our own institutions more clearly. For those who are part of still-existing traditional structures, the UNDRIP can protect indigenous structures which we still retain. The Declaration makes that process easier, but it is only a tool to that end. It is neither the goal nor the mechanism itself by which our society survives. As the concurrent actions of exterior recognition of indigenous human rights and internal articulation are achieved, a jurisregenerative moment in tribal societies becomes possible. However, Euchee and other tribal societies will only survive because some refuse to accept exterior restrictions, demanding like *Golaha Millie*: this is our house and we will live a Euchee life. We still have places we can find our law if we seek them before it is too late.