Montana Law Review

Volume 45
Issue 2 *Summer 1984*

Article 4

July 1984

Harmony among the People: Torts and Indian Courts

James W. Zion
General Counsel, National American Indian Court Judges Association

HARMONY AMONG THE PEOPLE: TORTS AND INDIAN COURTS

James W. Zion*

I. INTRODUCTION

The legal systems of Indian peoples were based upon the idea of maintaining harmony in the family, the camp, and the community. During the time before contact with Europeans and before Indian nations were confined to reservations, reserves, and the poor districts of cities, Indian groups had many sophisticated methods for halting bitter disputes and reconciling wrongdoers to the community.[1] The methods of achieving these difficult goals were many, but they were often based upon an acceptance of religious values and ways of making individuals accept the need for good relations with others. Often social control was expressed in terms of the moral precepts of doing things in a good way or being in harmony with the universe.

Following the imposition of reservation courts upon Indian nations, Indian communities were forced to accept different methods of handling disputes—new methods based upon English and American customs embodied in the common law and criminal regulations.[2] Those new methods were forced upon Indians in an attempt to "civilize" them, and the old systems of enforcing community harmony were disrupted or destroyed in some communities.

Over time, notwithstanding the conscious efforts of the United States government to destroy Indian cultures, the old ways have persisted in many tribes, and today there is a revival of those old ways.[3] Not only have they been remembered, but they have gained

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* B.A., College of St. Thomas, 1966; J.D., Catholic University, 1969. Mr. Zion, a former Solicitor to the Courts of the Navajo Nation, presently resides in Helena, Montana, where he is General Counsel of the National American Indian Court Judges Association.

This article was originally prepared, in a different form, for the Conference on Contracts and Torts of the National American Indian Court Judges Association in Gallup, New Mexico, in 1982. In the hope that information and ideas about tribal courts will be disseminated to the widest possible extent, the author makes no claim of copyright to any part of this article.

1. *See* Mandelbaum, *The Plains Cree*, in 37 ANTHROPOLOGICAL PAPERS OF THE AMERICAN MUSEUM OF NATURAL HISTORY 230, 232 (1940); G. GRINNELL, BLACKFOOT LODGE TALES 220 (1962); Van Valkenburgh, *Navajo Common Law* (pts. 1, 2, & 3), 9 MUSEUM NOTES 17 (1936), 10 MUSEUM NOTES 51 (1937), 11 MUSEUM NOTES 37 (1938).

2. W. HAGAN, INDIAN POLICE AND JUDGES (1966); F. PRUCHA, AMERICANIZING THE AMERICAN INDIANS (1978); Barsh & Henderson, *Tribal Courts, the Model Code, and the Police Idea in American Indian Policy*, in AMERICAN INDIANS AND THE LAW 25 (Rosen ed. 1976).

3. V. DUSENBERRY, THE MONTANA CREE (1962); A. HULTKRANTZ, THE RELIGIONS OF THE

a new vigor because of the longing of Indian peoples for dignity through the use of their own cultural ways.

Tort law is a good subject to use as an example of how Indian cultures are interpreting general Anglo-American values, and how Indian culture can be applied in the context of Indian court systems, which are generally patterned after American state and federal courts. Tort law has been developed through social theory; the needs of society have affected the growth of specific rules.[4] Individual Indian justice systems should reflect the social trends of their own tribes as found in customs and traditions, and Indian judges should be looking to identify the needs of their societies when developing rules of tribal law.

The various tribal courts are struggling to meet demands that they use general American common law and state statutes, but they are also being asked to provide justice as defined by the needs and expectations of their own Indian communities. General American tort law is being tempered to serve an increasingly complex society, and tribal courts are seeking appropriate ways to apply the outside law to their own peoples. The attempt to use alien legal principles that do not fit Indian needs or values has created many conflicts within the tribal courts. One means of resolving those conflicts is the development of Indian common law indigenous to each Indian nation.

II. The Development of Modern Tribal Courts

While Indian justice systems predated the English common law system transplanted into America, assimilationist theories of the United States Indian policy largely created today's Indian justice systems.[5] Once the policy of negotiating treaties with the Indian nations and confining them to reservations had been implemented in the nineteenth century, the United States tackled the new problem of "civilizing" the Indian in preparation for assimilation.

One of the actors in the legislative and policy efforts to deal with reservation Indians was Henry M. Teller. Teller was elected to the United States Senate in 1876, representing Colorado, and he took an active interest in Indian affairs.[6] Teller was appointed Sec-

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American Indians (1976); J. Jorgensen, The Sun Dance Religion (1972).

4. W. Prosser, Handbook of the Law of Torts 1416 (4th ed. 1971).

5. An estimated 18 traditional courts are still in existence, most of them long-standing systems of the Pueblos of the Southwest. B. Morse, Indian Tribal Courts in the United States: A Model for Canada? 11 (1980).

6. W. Hagan, *supra* note 2, at 107.

retary of the Interior in 1882, and one of his first acts of office was to write to Hiram Price, the Commissioner of Indian Affairs, to make some suggestions about dealing with reservation Indians.[7] The principle thing that bothered Teller, which he complained of in the letter, was "a great hindrance to the civilization of the Indians, viz, the continuance of the old heathenish dances."[8] Teller reminded Price that feasts, dances and other traditional Indian practices interfered with the "civilizing" process. Teller asked that Price formulate rules to abolish traditional feasts and dances, regulate marriage and divorce, prohibit the practices of medicine men ("who are always found with the anti-progressive party"), and teach the value of property.[9]

By the spring of 1883, Price had worked out a plan acceptable to Teller, and on April 30, 1883, Teller approved rules for Courts of Indian Offenses.[10] In 1892, the rules were repromulgated, and they provided for Indian judges in at least three districts of a reservation.[11] The judges were to be "men of intelligence, integrity, and good moral character, and preference shall be given to Indians who read and write English readily, wear citizens' dress, and engage in civilized pursuits."[12] Polygamists were specifically excluded from judgeships. The rules provided for appeals to a three-judge Indian panel, and the crimes to be prosecuted and punished included: (1) engaging in certain traditional dances; (2) plural or polygamous marriage; (3) practicing as a medicine man; (4) theft and property destruction; (5) "immorality," including payment of a brideprice for traditional marriage; (6) intoxication and the introduction of intoxicants; and (7) misdemeanors defined by state or territorial law, with the offenses of refusing to perform road duty and vagrancy thrown in for good measure.[13]

Another interesting aspect of the rules was the provision that "[a]ll mixed bloods and white persons who are actually and lawfully members, whether by birth or adoption, of any tribe residing on the reservation shall be counted as Indians."[14] This shows that as of 1892 the Commissioner of Indian Affairs recognized tradi-

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7. *Id.* at 107-08.

8. Teller, *Courts of Indian Offenses*, in AMERICANIZING THE AMERICAN INDIANS 295-96 (F. Prucha ed. 1978).

9. *Id.* at 296-99.

10. W. HAGAN, *supra* note 2, at 109.

11. Morgan, *Rules for Indian Courts*, in AMERICANIZING THE AMERICAN INDIANS 300-01 (F. Prucha ed. 1978).

12. *Id.* at 301.

13. *Id.* 302-05.

14. *Id.* at 301.

tional membership standards of Indian peoples as well as the extension of criminal jurisdiction over non-Indians. This suggests that *Oliphant v. Suquamish Indian Tribe*[15] was wrong in holding that Indian tribes have no inherent criminal jurisdiction over non-members and that such jurisdiction was not recognized in the past.

The Courts of Indian Offenses became popularly known as "C.F.R. Courts," named for the Code of Federal Regulations. While Indian courts began under the authority of rules of the Commissioner of Indian Affairs, the Snyder Act of 1921 recognized them as a statutory matter, authorizing the Commissioner to employ Indian judges.[16]

The Indian Reorganization Act provided for a new kind of Indian court when it made provision for tribes to adopt constitutions fixing governing powers.[17] Many tribes adopted constitutions that either established tribal courts as a branch of government or made provision for establishing them by resolution or ordinance. Tribal governments gradually took steps to remove their courts from federal control, and now there are 117 tribal courts and twenty-three Courts of Indian Offenses in operation in the United States.[18]

The legal authority of Indian courts has been tested at times. In 1934, parties to a suit in the traditional Seneca Nation Peacemaker's Court attempted to restrain those proceedings in a federal action. The federal district court held that Indian courts are "courts of a foreign jurisdiction, over which we have no control."[19] The case also found that tribal courts and not federal courts have the right to determine internal affairs, unless Congress bestows such jurisdiction on the latter.

In 1956, an attack on the Pine Ridge Oglala Sioux Court asserted that since Indian courts are not provided for in the United States Constitution, they can have no power.[20] The Eighth Circuit Court of Appeals held "that not only do the Indian Tribal Courts have inherent jurisdiction over all matters not taken over by the federal government, but that federal legislative action and rules promulgated thereunder support the authority of the Tribal Courts."[21]

Thus the federal judiciary has recognized sister forums of the

15. 435 U.S. 191 (1978).
16. 25 U.S.C. § 13 (1983).
17. 25 U.S.C. §§ 461-479 (1983).
18. The figures are those of Ralph Gonzales, the Judicial Services officer of the Bureau of National Affairs. *See* 9 INDIAN COURTS NEWSLETTER 7 (1983).
19. Washburn v. Parker, 7 F. Supp. 120 (W.D.N.Y. 1934).
20. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).
21. *Id.* at 96.

various Indian nations as tribal courts, and the authority of the Commissioner of Indian Affairs under his statutory powers has been held to include establishing the Courts of Indian Offenses.[22]

One hundred years after the establishment of Courts of Indian Offenses on April 30, 1883, there has been a shift away from federal paternalism and attempts to "civilize" Indians through the laws applied on reservations. The Indian courts are now becoming aware of their inherent authority and powers, and they are exercising them.[23] Indian courts are clearly competent, and as is the case with state courts, they normally exercise general subject matter jurisdiction. The problem is that tribal courts have assumed the trappings and form of state courts, and the question has been asked whether that is appropriate.

The Indians of the United States have the choices of Courts of Indian Offenses (under federal control), Western-style tribal courts, traditional courts or systems, or combinations of all of them. Justice is often the product of fulfilled expectations, and the problem with Indian courts is finding those expectations and satisfying them.

III. Anglo-European Custom is Used in U.S. Courts, So Why Can't Tribal Custom be Used in Indian Courts?

The law of torts is a product of history, and many of its doctrines are founded on principles of common law developed over the centuries.[24] There is some debate over the use of tribal custom in Indian courts,[25] but a large amount of American law is, in theory if not in fact, based upon the idea of "Anglo-European custom."

Sir Matthew Hale, examining English law in a comprehensive fashion in the mid-seventeenth century, said there were certain "unwritten laws or customs" called the common law that have obtained their force by "immemorial usage or custom."[26] Sir William Blackstone agreed that the common law was a collection of ancient maxims and customs, and said that a custom is "good" and a part of the common law where it has been observed for "time out of mind" or "time whereof the memory of man runneth not to the

22. *See also* Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965); 25 U.S.C. § 2 (1983).

23. *See, e.g.*, Deal v. Blatchford, 3 Navajo Rep. 159 (Ct. App. 1982), holding that Navajo courts are courts of inherent jurisdiction that have inherent authority to exercise jurisdiction over non-Indians in civil cases.

24. W. Prosser, *supra* note 4, at 19-21.

25. *See* Barsh & Henderson, *supra* note 2, at 51, 56-60.

26. 1 M. Hale, History of the Common Law 12 (5th ed. 1974).

contrary."[27] For him the common law consisted of general customs, used throughout a country, or particular customs, used by the people in a certain area.[28]

We are well aware that the custom origin of American common law is largely a false justification for it, and that American judges have often ignored the prior legal customs of the European settlers in order to develop a truly American law based upon the needs of Americans.[29] Whatever the historical or legal accuracy is of custom as a basis for common law, the important point is that American judges have historically developed flexible rules of law, keeping the needs and expectations of their communities fully in mind.

The law of torts is a particular example of a legal method founded upon and affected by the needs of society and the necessity of balancing the interests of different parts of that society.[30] The law of torts has become a means of trying to keep the general American society in balance and harmony, and that is precisely the thing early Indian systems did.

When the Indian judge gets to the real foundation of the law, he or she will realize that law was meant to fit the needs of the people who come before the Indian court. In 1881, a young lawyer by the name of Oliver Wendell Holmes stepped to a lecture platform in Boston, Massachusetts, and began a series of public lectures that made people begin to think differently about law. He opened the lecture series with these words:

> The life of the law has not been logic: It has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.[31]

The experience Holmes said was the foundation of law can mean a great deal in the tribal situation. It can be an experience founded upon ancient traditions developed over centuries of struggle with nature, or it can be the experience of Indian judges and lawyers acting against backgrounds formed by the very different life of an Indian reservation. The rules of Indian traditions certainly developed out of a long experience and, when looked at

27. 1 BLACKSTONE'S COMMENTARIES 67 (Chitty ed. 1966).
28. *Id.*
29. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 17-25 (1973).
30. W. PROSSER, *supra* note 4, at 15-16.
31. O.W. HOLMES, THE COMMON LAW 1 (1881).

closely, they often make a great deal of sense. Indians also developed a number of practices and beliefs after tribes were confined to reservations, to fit the changed conditions the people had to face.[32] Coming from reservation cultures forced to adapt in special protective ways, Indian judges should be free to develop rules based upon the Indian experience and the expectations of their own people.

Indian courts are already taking steps to develop their own interpretations of law based upon community need. Many tribal courts order time payments on judgments, taking the defendant's income and assets into account.[33] This is not the normal procedure in American state courts, unless done as a matter of settlement. Unless a defendant has the advantage of liberal execution exemption statutes or is able to negotiate time payments, the rigors of property and wage executions typically are carried out. The Indian court has a more rational approach to making certain judgments are satisfied, in which the plaintiff benefits from assurances of being paid and the defendant is required to live up to his legal obligation in a way he can afford. The reality is that in poor communities seizures of property by a tribal police officer are completely ineffectual because defendants often lack major assets, equity in property, and bank accounts. Indian judges have used their experience to solve a problem that would otherwise make creditors refuse credit to Indians or cause popular dissatisfaction with the courts.

Indian judges have found ways around the strict and harsh application of "law and order" regulations. In some areas criminal laws have been applied in a "civil" manner to take care of property disputes. In other areas Indian judges would refuse to carry out criminal law but would handle matters in more traditional ways.[34] One part of the reservation experience is the possibility that the rules and requirements of White outsiders can be avoided by a number of clever devices. Indian courts have a long experience in modifying the harshness of Anglo-European law and its inappropriate use, but unfortunately there has been a hesitance to move on to develop positive Indian common law.

What must be recognized is that there are valuable principles and rules of the common law of individual Indian peoples that can and should be used. Some of these may be applicable in much the

32. Among these developments are protective devices such as Pow-Wows, the Gourd Dance, the Enemy Way of the Navajo, the Sun Dance, and the Native American Church.

33. The author has observed this practice in tribal courts of the Navajo, Blackfeet, and Salish-Kootenai Tribes.

34. Barsh & Henderson, *supra* note 2, at 39, 42.

same way they were used in pre-reservation society, while others will need to be modified to fit existing situations and Indian court procedures. The point is that there are principles that should be found and used.

Three examples of traditional legal principles may be valuable to an understanding of how an Indian court should operate. In Cree tradition, when a dispute arose among some people, they would be taken to a tipi and compelled to take and hold a Sacred Pipe.[35] Since the Pipe had a sacred meaning and one had to dispel his anger in its presence, there was a religious authority and sanction to quell the dispute. That custom could be used to settle a dispute where the parties to the dispute agreed about the Pipe's sacred nature and the meaning attached to it. While some Cree people would not put aside their anger today in the presence of a Sacred Pipe, the question is whether there are values that attach to things in the community in a similar fashion. The use of this custom would require knowing the beliefs of the community and, if individuals did not accept the old way fully, knowing what community authority would be respected. Therefore an alternative could be a Holy Man, who has the respect of the community, sitting down with the people and forcing them to settle their differences. The underlying basis for using this custom today would be the Cree respect for holy things.

In Blackfeet tradition the private advantages of a person had to be surrendered to public good. Police regulations allowed every individual to enjoy equal rights to common benefits, so that no individual could claim or have special privileges.[36] Societies of the Blackfeet would administer public discipline and make certain that the rules regarding equal rights would be obeyed. The idea of warrior societies may be completely impractical today, but the Blackfeet concept still has value.[37] Given the poverty of the reservation, a developed set of rules about access to public benefits and the means of enforcing the access would more than likely appeal to tribal members. In place of a warrior society there could be the tribal court to carry on the old tradition of the warrior society.

As was the case in many Indian societies, the Navajo concept of criminal justice was to require the offender to compensate the

35. Mandelbaum, *supra* note 1, at 230-32.

36. *See generally* G. GRINNELL, *supra* note 1.

37. In talking with Blackfeet leaders and tribal members, I have often heard complaints about unfairness in allocating common resources and inequality in distributing benefits. While these are commonly heard complaints in Indian communities, the Blackfeet have specific traditions they can use to combat problems.

victim and the clan of the victim.[38] The person who refused to accept the rule would be shunned from the community. This very important principle of course grew out of a lack of jails and a recognition that physical punishment or some other form of punishment did not help the victim very much. The Navajo developed a more sophisticated method of obtaining a public recognition of wrong, deterring through requiring the payment of a penalty in the form of compensation (as well as a form of punitive damages in some cases) and getting the matter over quickly so the offender could return to the community in harmony. This principle is important today, and the Navajo tribal courts have the opportunity to put it to work in creative ways. The Navajo courts do have the authority to require victim compensation as a part of criminal punishment.[39] Recognizing that there is not an identifiable "victim" in situations such as public drunkenness or other alcohol offenses, the court could point out that the tradition was intended to serve the community and require an offender to pay "restitution" into a fund to provide alcohol rehabilitation services.

The conclusion to be drawn from the fact that Indian judges can and do apply principles derived from experience is that the individual experience of Indian judges can be used to develop an appropriate and independent tribal law. To date this experience has been applied on a case-by-case basis and has not evolved into a comprehensive body of law. This is sadly due to a lack of reported tribal court cases.[40] When Indian nations recognize that the time has come to record valuable tribal experience for use as law, case law and tribal codes will develop to serve the needs of the people of those nations. For now, Indian judges should exercise their role as community leaders and the custodians of tribal custom in the development of an appropriate body of law.

IV. An Outside Legal Foundation for Indian Common Law

Throughout the history of Indian courts, outside intruders have interfered with court operations and limited their activities. In order for a tribal court to develop its own common law with any security, the justification for that common law must be found.

Many Indian courts are clearly permitted to apply their own

38. Van Valkenburgh, *Navajo Common Law* (pt. 3), 11 Museum Notes 37 (1938).

39. 17 Navajo Tribal Code § 220, 1191.

40. Four notable exceptions are the Tribal Court Law Reporter, published by the American Indian Lawyer Training Program (but discontinued), the Indian Law Reporter, the Navajo Reporter (reports of the Navajo tribal courts), and The Navajo Law Journal (a loose-leaf publication of decisions, legal opinions, and other materials).

tribe's customs and usages as civil law.[41] Those remaining Indian courts directly under the Bureau of Indian Affairs as Courts of Indian Offenses are also permitted to apply tribal customs in civil cases.[42] The problem is that most of the tribal statutory provisions and the federal regulation call for a "sliding scale" in the application of law in civil cases. That is, they require the tribal judge first to look for applicable United States law, then look to tribal statutes (also known as ordinances or resolutions) or customs for a solution, and then go to state law if no other law can be found. It often happens that there is no specifically applicable federal law to be used in a tribal court dispute, the tribal code is short and does not cover many areas, and no one even thinks of seeing if there is a tribal custom that can be applied. This results in the use of state statutes and case law which are confusing and which can be manipulated by law school-trained lawyers. In many instances the state rule of law does not adapt well to the circumstances on the reservation or it is harsh. The answer of course is in identifying a tribal custom or common law to be used.

Under general principles of the Indian affairs law of the United States, Indian customs are recognized.[43] Under the American rule of the reservation of sovereignty by Indian nations, tribes have the authority to regulate all areas within their governmental competence, and this may be done by means of custom if that is the choice.[44] Therefore a tribal court, ruling with the use of tribal common law (custom), is carrying out the inherent sovereignty of the Indian nation it serves, and its ruling is entitled to respect.[45]

It is important for everyone, but particularly the Indian judge, to understand that the customs and usages of Indian tribes are fully a part of the powers that the tribes have reserved. There may at times be conflicts and questions of whether a particular custom or a ruling based upon it conflicts with the laws of the overwhelming sovereign—the United States—but there is indeed the right to apply the original laws of a tribe or people in modern tribal courts.

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41. *E.g.* BLACKFEET TRIBAL LAW AND ORDER CODE ch. 2, pt. 1, § 2; CHIPPEWA CREE LAW AND ORDER CODE ch. 3, § 2; FORT MOJAVE INDIAN TRIBE ORDINANCES No. 16, § 110; 17 NAVAJO TRIBAL CODE § 204.

42. 25 C.F.R. § 11.24 (1983).

43. *See* Carney v. Chapman, 247 U.S. 102 (1918); *Ex parte* Crow Dog, 109 U.S. 556 (1883); *In re* Sah Quah, 31 F. 327 (D. Alaska 1886). *See also* 25 U.S.C. §§ 1901-1963 (1983) (Indian Child Welfare Act of 1978).

44. *See* United States v. Wheeler, 435 U.S. 313 (1978); Fisher v. Dist. Court, 424 U.S. 382 (1976).

45. Tribal courts have co-extensive sovereignty with the Indian nations that create them. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 94, 96 (8th Cir. 1956).

V. Searching for Indian Common Law

Several words have been used often so far, and it is important now to pin them down. The words "tradition," "custom," and "usage" are used in various tribal codes, and this article has used the words "common law." It is possible for a tradition not to be a custom or usage, and many customs and usages are not traditional. Some traditions may be a custom. Why is that so? One legal thinker has said that "custom is not *opinion*, it is *practice*. . . ."[46] Another view is that a "custom" consists of the prevailing beliefs and attitudes of a group about right and wrong, combined with a practice or regularity of conduct.[47] Therefore a "custom" for a tribal judge looking for an answer would be to find how his community feels about a certain thing and to see what is done in the community about it.

Given the confusion and argument about what custom is, which makes it hard to define, the word "usage" gives more flexibility for Indian practices and beliefs. A "usage" is something that is actually done in the community. It is possible that a tribal judge might know of an old ceremonial that would apply to a problem before the court, but unless that ceremonial is known, accepted, and used by the people of the present day, it will not be a custom or usage. Therefore it is possible for a tradition not to fall under the authority of the court to use as a custom or usage. On the other hand, a judge might know of a Native American Church practice used by people who have brought a dispute before the court, and that practice could be used as custom or a usage under the law even though the Native American Church belief is not traditional to the people's tribe.

"Tradition" implies the kind of ancient practice or belief that the English judges said existed "from time out of mind." However, the code provisions of many Indian nations do not provide for the use of tradition as such, but only customs and usages.

We have seen that early legal writers believed the common law to be ancient custom. We know that is not the case, because of the vast body of American law that in no way can be called "ancient." Therefore judges should look to their communities and see what people believe and accept as the tribal values of today, and see that there is a common law justified by the words "custom" and "usage." Common law is therefore what the community believes, needs, and follows.

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46. J. Gray, The Nature and Sources of the Law, at § 606 (1916).
47. E. Patterson, Jurisprudence: Men and Ideas of the Law 224-25 (1953).

The tribal court that wishes to develop its own body of Indian common law has the problem of how to find and recognize it. The first means of finding Indian common law is to go to the many volumes of historical and anthropological material written about various Indian peoples. Often these will provide useful information and, perhaps more importantly, a certain authority for a proclaimed customary rule of law. There are several problems with the use of studies, however, because the judge must have in mind what they were and were not designed to do. Many studies recount the situation of Indian peoples before the arrival of Europeans, and oftentimes contemporary Indians are horrified to read what the old methods of dealing with offenders were.[48] The judge must know that a traditional way may not meet the expectations and values of the people of today. The judge must also keep in mind that researchers depend on a limited number of informants, and thus may miss out on variations of customs and beliefs.

Many tribal codes have provisions similar to the federal provision for the use of custom: "Where any doubt arises as to the customs and usages of the tribe the court may request the advice of counsellors familiar with these customs and usages."[49]

Two leading authorities on tribal courts fear the federal regulation requires the pleading and proof of custom,[50] but the regulation is actually easy for the tribal judge to use. First of all, it is clear that a judge may take judicial notice of tribal custom. The use of counsellors hinges upon a "doubt" about a custom or usage, and the judge can use the doctrines of judicial notice of matters of common knowledge or certain verification and judicial notice of law. The judge can also take judicial notice of the domestic or local law of his or her own tribe.[51] If the judge does not know or is not able reliably to verify a custom, then there may be a doubt about it and a counsellor familiar with customs or usages can be summoned. Counsellors may include holy people, medicine men, elders, and even ethnologists or people from a tribal cultural history project.

The search for Indian common law is not very different from the search for common law in most state courts. Many principles of law are well understood and fairly undisputed, but often fine points of law must be found when disputants present conflicting

48. *See, e.g.*, Strickland, *American Indian Law and the Spirit World*, 1 AM. INDIAN L. REV. 33, 40-41.

49. 25 C.F.R. § 11.24(b) (1983).

50. Barsh & Henderson, *supra* note 2, at 51.

51. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 239, 330 (2d ed. 1972).

cases in support of varying positions. The judge's decision ultimately arises out of his own experience. That same situation is found in Indian courts, and the Indian judge does only what his White counterpart does: he or she seeks to find what the community expects in light of contemporary life.

VI. Tribal Court Tort Law

Tribal courts were not originally intended to be a forum for the resolution of civil matters, since they were established as instruments of control. However, tribal courts do hear civil matters (sometimes refusing to treat a criminal case in a criminal fashion), and it is important to see what the current rules of Indian tort law are and how they fit into the idea of Indian common law. The regulations of the Bureau of Indian Affairs concerning Courts of Indian Offenses are common to many American tribal courts, either directly through the regulations or indirectly through tribal code provisions copied from them, and there are only a few principles directly applicable to the area of tort law. It was wrongly assumed that tribal courts would usually use state law for tort cases, and only a few rules were made specifically to regulate the area.

The first standard for liability is: "Where the injury inflicted was the result of carelessness of the defendant, the judgment shall fairly compensate the injured party for the loss he has suffered."[52]

The standard is "carelessness" rather than "negligence," perhaps in order to avoid a confusing legal term. However, it has been said that "careless" is synonymous with "negligent."[53] It was probably assumed that the tribal judge must first connect a defendant's conduct with an actual injury and then decide whether that conduct was careless in light of the facts. The tribal judge need not be concerned with fine definitions of the standard of care a defendant owes, and the judge or the jury can hear the facts and decide whether the conduct appeared careless under the circumstances.

The second standard for liability is: "Where the injury was deliberately inflicted, the judgment shall impose an additional penalty upon the defendant, which additional penalty may run either in favor of the injured party or in favor of the tribe."[54]

The standards of ordinary common law intentional torts under general American law have not been repeated in the regulation, and punitive damages (to punish for the act) can be called for

52. 25 C.F.R. § 11.24(b) (1983).
53. Black's Law Dictionary 268 (rev. 4th ed. 1968).
54. 25 C.F.R. § 11.24(c) (1983).

where the injury was "deliberate," that is, "[w]ilfully; with premeditation; intentionally; purposely; in cold blood."[55] This standard actually needs no great elaboration because it also is one that will depend upon the facts.

The final standard given in the regulations is more troublesome. It states: "Where the injury was inflicted as the result of accident, or where both the complainant and the defendant were at fault, the judgment shall compensate the injured party for a reasonable part of the loss he has suffered."[56]

The meaning of this regulation is that where the court finds there was no carelessness causing the injury or where both parties were at fault, the court may still order the payment of a "reasonable part" of the damages.

Because of the fact that the federal regulations have avoided using sophisticated legal standards (possibly with the paternalistic attitude that they would confuse tribal judges), tribal judges are free to use community outlooks in tort cases. This is an area made for the development of jury trials in tribal courts because there need not be very elaborate jury instructions and the jury needs only to hear the evidence. The freedom of the standards is also important because tribal judges are free (using good conscience and acting in a good way) to hear cases and decide solely on the facts. Even if the judge is not satisfied that the injury was "careless," damages may still be awarded. The conduct or foolishness of two litigants can be balanced and measured in order to come to a fair decision.

What is more important about the shortness and simplicity of the regulations is that tribal courts are free to develop and apply their own rules of common law instead of turning to state law. Since the tribal codes and the regulations providing these rules for giving restitution to victims do away with a need for state law, tribal courts are invited to develop their own.

In common modern situations such as automobile accidents, with problems of measuring damages, insurance coverage, and other similar matters, a tribal court may well choose to resort to state law where it does not conflict with tribal law or values. Likewise judges may wish to consider the question on a case-by-case basis, considering such things as Indian versus non-Indian litigants, the involvement of non-Indians or professional attorneys in a case, or other unusual circumstances.

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55. BLACK'S LAW DICTIONARY 514 (rev. 4th ed. 1968).
56. 25 C.F.R. § 11.24(d) (1983).

The tribal judge, however, only sits in an Indian court because it was decided it would be better to have a member of the Indian community judge the cases of the people of that community, and Indian judges must continually reflect the community values they represent. Therefore, in the development of a truly Indian common law, the judge does have the choice of looking for and finding Indian common law in place of state law, in order that community values may be encouraged.

While non-Indian society may fear that the use of Indian custom is arbitrary, vague, and discriminatory, the tribal court that develops a body of law which can be read and which provides a means of predicting what will happen in court will gain the acceptance of many.[57]

VII. Indian Common Law is in the Hands of Indian Judges

If a truly Indian common law is to come into being it must be written down so it will be the same for all. While many members of a tribe know what their customs and beliefs are, many of the younger generation do not, and want to learn them. Likewise, non-Indian businesses demand to know what the rules of the game are so they can do business on reservations using them. Written court decisions are also necessary to keep the law consistent from one judge to the next.

As tribal courts mature the judges will be looked to as leaders in the law, and they should be active in developing tribal law. This will be done not only through written decisions, but in participating in the development of tribal codes. This requires telling the tribal government what is needed and what will or will not work.

Under the old common law system the judges were the persons who found and said what the customs of the country were. Tribal judges should take this role and oversee the development of a common law that fits the needs of their tribe. If only state law methods are used, there would be no need for Indian judges in Indian communities. Indian common law as a reality is in the hands of Indian communities, represented by their Indian judges.

57. On July 6, 1982, a group of primarily Anglo businessmen met at Window Rock, Arizona, to discuss whether there is a need for the Navajo to adopt a version of the Uniform Commercial Code. In discussing what laws can or should apply, the consensus among the non-Indian businessmen present was that *any* commercial law is adequate as long as it provides predictability in business planning.