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Affirming a Pragmatic Development of Tribal Jurisprudential Principles

Todd R. Matha

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**AFFIRMING A PRAGMATIC DEVELOPMENT OF TRIBAL
JURISPRUDENTIAL PRINCIPLES**

Todd R. Matha[†]

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I. INTRODUCTION

In theory, if not reality, each tribal judiciary attempts to conscientiously serve the community that created it. This simple proposition likely binds jurists from across the globe regardless of race, ethnicity, or nationality. Beyond that similarity, tribal court systems differ in structure and substance, sometimes significantly and sometimes dramatically.

[†] Citizen of the Ho-Chunk Nation; Mille Lacs Band of Ojibwe Solicitor General; Ho-Chunk Nation Supreme Court Chief Justice; University of Minnesota Law School Adjunct Professor (Indian Law, 2016–2017). Additionally, the author has served in a judicial pro tempore capacity for eight tribes in Michigan and Wisconsin. The author does not profess a unique personal knowledge of tribal tradition and custom but has consistently attempted to infuse this essential law into judicial opinions entered over the course of nearly eighteen years on the bench. The viewpoints expressed herein represent the individual perspective of the author and not the official position of any of the author’s employers. As an affirmation of tribal sovereignty, the author uses each tribal court’s citation method when citing to each sovereign’s statutes and court opinions.

A tribal judiciary may emerge through tribal legislation or,¹ at times, trace its origin to a constitutional source.² In either instance, a tribal court functions pursuant to law, written and unwritten.³ This unique body of law, along with corresponding procedures,⁴ produces clear distinctions between tribal judiciaries. In fact, the jurisprudential distinctions that arise may appear more pronounced than those that exist within and between the federal and state systems. Some commonalities emerge,⁵ but similarities are easily overstated.

1. *See, e.g.*, 5 MLBSA §§ 1–2 (2011) (identifying the legislative formation of the Mille Lacs Band of Ojibwe Court of Central Jurisdiction in 1981, comprising separate trial and appellate level tribunals that derive authority from the Band Assembly, a successor to the monocratic Reservation Business Committee). The Mille Lacs Band of Ojibwe is a federally recognized Indian tribe and constitutes one of six distinct sovereign bands that compose the Minnesota Chippewa Tribe. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019, 5021 (Jan. 29, 2016). The acronym “MLBSA” refers to Mille Lacs Band Statutes Annotated, which are accessible in current form on the Band’s website at <http://millelacsband.com/tribal-government-home/band-statutesordinances/>.

2. *See, e.g.*, HCN CONST. art. III, § 2, <http://www.ho-chunknation.com/government/the-constitution-of-the-ho-chunk-nation.aspx> (establishing a four-part governmental structure in 1994, including the Ho-Chunk Nation Judiciary, which technically formed in 1995 and comprises separate trial and appellate level tribunals and a Traditional Court that consists of recognized hocak clan and Native American Church leaders). The Ho-Chunk Nation is a federally recognized Indian tribe formerly known as the Wisconsin Winnebago. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. at 5021.

3. *See* HCN CONST. art. VII, § 5(a) (“The Trial Court shall have original jurisdiction over all cases and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws, customs, and traditions of the Ho-Chunk Nation”); 5 MLBSA § 111(c) (2011) (demarcating the subject matter jurisdiction of the Court of Central Jurisdiction, which extends to “any cause of action that may arise from unwritten cultural law or a violation thereof”).

4. *See* HCN CONST. art. VII, § 7(b) (“The Supreme Court shall have the power to establish written rules for the Judiciary”); 5 MLBSA § 105(a) (2011) (“The Court of Central Jurisdiction shall have the power to prescribe by general rules, the forms of process, writs, pleadings, rules of evidence and motions and the practice and procedure of the District Court and Court of Appeals”).

5. A tribal judiciary, for example, must afford litigants the protections afforded by the Indian Civil Rights Act of 1968. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 n.6 (1978) (citing Indian Civil Rights Act of 1968, Pub. L. No. 90-824, § 202, 82 Stat. 73, 77–78 (codified as amended at 25 U.S.C. § 1302(a)–(d) (2012))) (“The Indian Civil Rights Act . . . extends to ‘any person’ within the tribe’s jurisdiction certain enumerated guarantees of the Bill of Rights of the Federal

Consequently, one cannot examine a few, to even several, tribal court systems and offer a meaningful critique of tribal judiciaries in general.⁶ Extrapolation of common and consistent doctrines, principles, and theories within a single tribal system oftentimes proves difficult due to largely unpublished or fairly inaccessible case law.⁷ For this reason or others, most commentators do not typically dedicate attention to a single tribal judiciary. Perhaps such emphasis would not generate a sufficient audience, but an expanded survey risks losing genuine insight and usually affords only some rudimentary conclusions.⁸

That being said, every tribal court encounters core issues when performing a judicial function. Each pursues an evolutionary arc, whether intentional or not, during its institutional development. As an initial matter, tribal courts primarily confront and resolve cases

Constitution.”); *see also* HCN CONST. art. X, § 1(a); 1 MLBSA §§ 1–11 (2010).

6. While not intended as a critical examination or comparative analysis of two tribal judiciaries, the focus of this article will remain on the Mille Lacs Band of Ojibwe and the Ho-Chunk Nation in order to elicit and endorse certain fundamental premises.

7. The Ho-Chunk Nation Judiciary posts the full text of all substantive appellate opinions entered in its twenty-one-year history on its website at <http://www.ho-chunknation.com/government/judiciary/supreme-court-opinions.aspx> (last visited Dec. 13, 2016). In contrast, the Mille Lacs Band Court of Central Jurisdiction offers single paragraph descriptions of ten appellate decisions issued since 1981. *See Precedent Case Laws*, MILLE LACS BAND OF OJIBWE, <http://millelacsband.com/tribal-government-home/tribal-courts/precedent-case-laws/> (last visited Dec. 13, 2016). Otherwise, each court system provides open access to its trial and appellate level case law, but the prospect of conducting timely and meaningful research is challenging. *See* 1 HCC § 1.5b (2015) (“The Judiciary shall complete a permanent record of all proceedings and decisions Absent protective orders granted for good cause or Legislative enactments to the contrary, these records shall be open to the public.”); 24 MLBSA §§ 2010–2011 (2012) (requiring that “proceedings of the Court of Central Jurisdiction shall be open to the public except in matters involving minors” and obliging the Court to “maintain a record of all proceedings . . . , which shall include . . . the judgment”). The acronym “HCC” refers to Ho-Chunk Code, which is accessible in current form on the Tribe’s website at <http://www.ho-chunknation.com/Ho-ChunkNationLaws.htm> (last visited Dec. 13, 2016).

8. The sheer number of tribal courts poses an issue to large surveys due to the potential for a huge amount of variation among them. *Cf.* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 73 n.79 (2013) (speculating that the number of tribal judicial systems totals approximately 250 to 300).

arising squarely under tribal,⁹ rather than federal,¹⁰ law. More commonly, a tribal judiciary will tangentially address federal Indian law issues in cases that derive from or coincide with state proceedings subject to overarching federal prerogatives.¹¹

In this article, the author provides a candid glimpse into the development of a tribal jurisprudential philosophy, drawing upon his unique experience as a tribal jurist and in-house legal counsel. The article examines the difficulty inherent in shaping and sustaining a tribal judiciary necessarily moored in tradition and custom yet integrating characteristics essential to all courts of competent jurisdiction. Part II briefly examines the doctrine of subject matter jurisdiction, which, at its core, must serve as a requisite to the exercise of judicial power. However, this fundamental, extrinsic doctrine—as well as others—has unfortunately become an amalgam of constitutional constraints and prudential considerations. The resulting confusion that permeates federal and state case law can easily confound a fledgling tribal judiciary’s attempt to resort to such persuasive authority even when seemingly called for by underlying tribal constitutional or statutory law. Moreover, the incorporation of or reliance upon external judicial analyses proves more problematic in a tribal setting since the respective courts must balance competing concerns largely absent within judicial systems of federal and state counterparts.

Part III focuses on the intersection between tribal tradition and custom in western jurisprudence. The degree of significance due to either common law tradition must vary depending upon the circumstances. The author highlights two tribal cases to illustrate the hazards of unwisely gravitating toward one tradition and seemingly

9. *See, e.g.*, HCN CONST. art. VII, § 5(a) (“The Trial Court shall have original jurisdiction over all cases and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws, customs, and traditions of the Ho-Chunk Nation.”).

10. In over twelve years on the Ho-Chunk Nation Trial Court bench, the author presided over fewer than five cases that one would regard as raising substantial federal Indian law issues. Similarly, in over five years as chief in-house counsel for the Mille Lacs Band of Ojibwe, the author’s office has not defended a single matter in the Court of Central Jurisdiction that one would immediately conceive of as a federal Indian law case.

11. For example, tribal courts routinely consider and accept child protection cases involving Indian children that first arise within the state system. *See generally* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 93 Stat. 3071 (codified at 25 U.S.C. §§ 1901–1963 (2012)).

excluding the other. Tribal courts must instead cautiously traverse the legal landscape, embracing and revitalizing sources of indigenous law while carefully assimilating foreign law to complement the emergence of a decidedly tribal jurisprudence.

II. FUNDAMENTAL PRINCIPLES: SUBJECT MATTER JURISDICTION AND RELATED INQUIRIES

When traversing more familiar ground, a tribal court, as any court, must preliminarily deduce whether it may exercise subject matter jurisdiction over a dispute.¹² The inquiry should remain elemental, as commonly required by tribal law,¹³ and, therefore, may correspond with federal and state practice. However, a tribal judiciary must carefully scrutinize the development of external case law in order to avoid the unwarranted incorporation of matters beyond the scope of simply determining the presence of subject matter jurisdiction.

12. If a case presents federal Indian law concerns, the jurisdictional inquiry takes on a further dimension. In a civil matter sounding in contract, for instance, a tribal court must remain ever mindful of the extent of its tribal adjudicatory jurisdiction as acknowledged within federal common law. *See Montana v. United States*, 450 U.S. 544, 565 (1981) (“Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations A tribe *may regulate* . . . the activities of nonmembers who enter consensual relationships with the tribe . . . through commercial dealing, contracts, leases, or other arrangements.” (emphasis added)). In a subsequent case the Court held that a “tribe’s adjudicative jurisdiction” could not surpass the permissible extent of tribal regulatory jurisdiction. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). The Court, in dicta, later equated adjudicatory jurisdiction with subject matter jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 367 n.8 (2001). But “[t]he Court’s ‘consensual relationship’ analysis under *Montana* resembles the Court’s Due Process Clause analysis for purposes of personal jurisdiction.” *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1138 (9th Cir. 2006). Consequently, the federal inquiry incorporates elements traditionally associated with both subject matter and personal jurisdiction. *Id.* at 1137. The above-stated first *Montana* exception erects the metes and bounds of tribal adjudicatory jurisdiction in a contractual matter, but a secondary examination must occur to determine whether specific non-member conduct falls within those common law parameters. *See Attorney’s Process & Investigation Servs. Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 934–38 (8th Cir. 2010). The intersection of these two inquiries reveals a matter over which a tribal court may exercise its reserved inherent authority.

13. *E.g.*, HCN CONST. art. VII, § 5(a) (“The Trial Court shall have original jurisdiction over all cases . . . arising under the Constitution, laws, customs, and traditions of the Ho-Chunk Nation.”).

To begin, no court can act outside the bounds of its established subject matter jurisdiction.¹⁴ Essentially, a court may exercise subject matter jurisdiction over a cause of action if constitutionally or statutorily empowered to hear such cases in the abstract.¹⁵ “Jurisdiction of the subject-matter, is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question.”¹⁶

While tribal litigants can, and often do, raise subject matter jurisdiction as an affirmative defense,¹⁷ a failure to do so should not constitute a waiver.¹⁸ In this respect, subject matter jurisdiction markedly differs from its corollary—personal jurisdiction. “The concepts of subject-matter and personal jurisdiction . . . serve

14. See, e.g., *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (reversing and remanding with instructions that the case should be dismissed for lack of jurisdiction).

15. *United States v. Cotton*, 535 U.S. 625, 630 (2002) (citing *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)).

16. *Hunt v. Hunt*, 72 N.Y. 217, 229 (1878); see also *Mills v. Commonwealth*, 13 Pa. 627, 630 (1850) (“Jurisdiction in courts is the power and authority to declare the law. The very word, in its origin, imports as much; it is derived from *juris* and *dico*; I speak by the law.”). Generally speaking, earlier judicial decisions capably addressed core principles, such as subject matter jurisdiction, in unambiguous, elemental terms:

[Subject matter jurisdiction] is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial.

Richardson v. Ruddy, 98 P. 842, 844 (Idaho 1908) (quoting TIMOTHY BROWN, COMMENTARIES ON THE JURISDICTION OF COURTS § 1a (1891)).

17. See, e.g., HCN R. CIV. P. 6(A), <http://www.ho-chunknation.com/government/judiciary/judicial-rules.aspx> (“The *Answer* shall . . . state any defenses to the *Complaint*.”).

18. This jurisdictional underpinning must continue to exist at every stage of the litigation, including throughout an appeal. See, e.g., *Sadat v. Mertes*, 615 F.2d 1176, 1188 (7th Cir. 1980) (“[I]t has been the virtually universally accepted practice of the federal courts to permit any party to challenge or, indeed, to raise sua sponte the subject matter jurisdiction of the court at any time and at any stage of the proceedings.”). A court should independently monitor whether subject matter jurisdiction persists since a judicial act taken in its absence is presumptively null and void. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

different purposes, and these different purposes affect the legal character of the two requirements.”¹⁹ More precisely, “the personal jurisdiction requirement recognizes and protects an individual liberty interest,” and “[b]ecause the requirement . . . represents first of all an individual right, it can, like other such rights, be waived.”²⁰

Although other rights, functioning as affirmative defenses, are subject to waiver, courts have confusingly expressed or held that successful movants have deprived the respective courts of “jurisdiction,” in general terms.²¹ This characterization has regrettably led to courts conflating subject matter jurisdiction with immunity,²² justiciability,²³ and timing defenses,²⁴ to name a few.

19. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982).

20. *Id.* at 702–03.

21. In *Compagnie des Bauxites de Guinee*, the Court carefully avoided this morass but chastised the appellants for their carelessness: “Petitioners fail to recognize the distinction between the two concepts—speaking instead in general terms of ‘jurisdiction’—although their argument’s strength comes from conceiving of jurisdiction only as subject matter jurisdiction.” *Id.* at 701.

22. *See, e.g., E.F.W. v. St. Stephen’s Indian High Sch.*, 264 F.3d 1297, 1302–03 (10th Cir. 2001) (“Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss.” (citations omitted)). *But see, e.g., In re Prairie Island Dakota Sioux*, 21 F.3d 302, 305 (8th Cir. 1994) (“[S]overeign immunity is a jurisdictional consideration separate from subject matter jurisdiction”); *see also United States v. Cty. of Cook, Ill.*, 167 F.3d 381, 389 (7th Cir. 1999) (“[W]hat sovereign immunity means is that relief against the [sovereign] depends on a statute; the question is not the competence of the court to render a binding judgment, but the propriety of interpreting a given statute to allow particular relief.”).

23. *See, e.g., infra* text accompanying note 30. *But see, e.g., Md. Waste Coal., Inc. v. Md. Dep’t of the Env’t*, 581 A.2d 60, 61 (Md. Ct. Spec. App. 1990) (“Standing is concerned with whether the parties have the right to bring suit. Subject matter jurisdiction is concerned with whether the court has the power to hear a case.”).

24. *See, e.g., State v. Pearson*, 858 S.W.2d 879, 886 (Tenn. 1993) (“[S]ome state courts hold that the expiration of the statute of limitations is jurisdictional and need not be raised in a pre-trial motion.”). *But see, e.g., Md. Cas. Co. v. Beleznay*, 245 Wis. 390, 397 (1944) (Fowler, J., dissenting) (“In every case wherein the statement has been made that the running of the statute [of limitation] extinguished a right it extinguished it because and merely because the one in whose favor the statute has run asserted his [or her] right to interpose the statute as a defense.”). *See generally Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) (comparing the timely filing of an EEOC discrimination complaint with the statute of limitations and reasoning that neither are prerequisites to jurisdiction, but both are subject to waiver, estoppel, and equitable tolling).

The United States Supreme Court, at times, has also engendered or compounded the confusion. By 1998, in *Steel Co. v. Citizens for a Better Environment*, the Court lamented that jurisdiction “is a word of many, too many, meanings.”²⁵ Therefore, it sought to restore primacy to the core concepts underlying subject matter jurisdiction.

[As] . . . reflected in a long and venerable line of our cases[:] “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Ex parte McCordle*, 74 U.S. 506, 514 (1868).^[26] “On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.” *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900).^[27] The requirement that jurisdiction be established as a threshold matter “spring[s] from the nature and limits of the judicial power” . . . and is “inflexible and without exception.” *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884).²⁸

25. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

26. The *McCordle* Court confronted an instance where Congress repealed the provision upon which the plaintiff based the cause of action. *Ex parte McCordle*, 74 U.S. 506, 514 (1868) (“[W]hen an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.”). As such, the case purportedly involved a federal question inquiry, which equates with the Ho-Chunk Nation’s preliminary examination under article VII, section 5(a). See *supra* note 13.

27. The *Jones* Court encountered a question of diversity jurisdiction for which tribal courts have no analogue. This second category of federal subject matter jurisdiction can converge with an examination of personal jurisdiction, but the two doctrines are not coterminous.

28. *Citizens for a Better Env't*, 523 U.S. at 94–95. *But cf.* *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422 (2007) (allowing a court to first address abstention concerns since a venue examination does not involve an assessment of the merits); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577–78 (1999) (permitting a precedential review of personal jurisdiction, especially when considerably less onerous than a subject matter jurisdiction inquiry).

Then, following a forceful admonition,²⁹ the Court diverted from the cited authority and incorporated the standing inquiry—a component of the doctrine of justiciability—into the Court’s examination of jurisdiction. In particular, “[the] triad of injury in fact, causation, and redressability constitutes the core of [the] case-or-controversy requirement, and the party invoking . . . jurisdiction bears the burden of establishing its existence.”³⁰ So, regardless of its motivation, the United States Supreme Court has not retained the purity of analysis once expected of an examination of subject matter jurisdiction. Moreover, the Court has sanctioned the preliminary, albeit limited, consideration of defenses arguably unconnected to subject matter jurisdiction.³¹

III. ROLE OF TRIBAL TRADITIONS AND CUSTOMS AND FOREIGN LAW IN TRIBAL COURT DECISIONS

The U.S. Supreme Court’s *Citizens for a Better Environment* decision should caution tribal court systems against indiscriminately relying upon or incorporating external case law even when seeking guidance on seemingly fundamental doctrines. Yet, despite prudential and other considerations sometimes corrupting supposedly incorruptible concepts, a tribal judiciary should not simply disregard federal precedential authority developed over centuries. This becomes even more important when tribal constitutional drafters, legislators, and voters either choose or sanction the inclusion of foreign concepts within the written law. A tribal court would be unwise to ignore common law that has furnished meaning to phrases such as “subject matter jurisdiction,”³² “personal jurisdiction,”³³ “cases and controversies,”³⁴ “cause of

29. “For a court to pronounce upon the meaning or constitutionality of a . . . law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.” *Citizens for a Better Env’t*, 523 U.S. at 101–02.

30. *Id.* at 103–04.

31. *See supra* note 28 and accompanying text.

32. 2 HCC §§ 15.3d, 4a (2005); 5 MLBSA § 111 (2011).

33. 2 HCC §§ 15.4b, 5 (2005); 5 MLBSA § 113 (2011).

34. HCN CONST. art. VII, § 5(a).

action,”³⁵ “law and equity,”³⁶ and “injunctive and declaratory relief.”³⁷

Tribal court judges and justices must observe a principal duty to interpret the law.³⁸ In doing so, a judge or justice should not presumptively graft tribal tradition and custom with a foreign concept to create a more palatable alternative.³⁹ At times, such a practice could yield unanticipated or nonsensical results.⁴⁰ Also, the integration of customary and statutory law better befits the legislative process, which would enable adequate consultation, deliberation, and reflection.⁴¹

Still, a tribal judiciary cannot forsake its constitutional or statutory responsibility to adjudicate matters arising under tradition

35. 2 HCC § 14.3 (2005); 5 MLBSA § 111(b)–(c) (2011); 24 MLBSA § 2005 (2012).

36. HCN CONST. art. VII, §§ 5(a), 6(a); 5 MLBSA § 101 (2011).

37. HCN CONST. art. VII, § 6(a); 5 MLBSA § 111(d)(2) (2011).

38. HCN CONST. art. VII, § 4; 5 MLBSA § 104 (2011).

39. In this regard, the Mille Lacs Band Assembly has prohibited the Court of Central Jurisdiction from the use of state law that conflicts with tribal tradition and custom. *See* 24 MLBSA § 2007(a) (2012).

40. *See, e.g.,* Topping v. HCN Grievance Review Bd., SU 09-08 (HCN S. Ct., July 1, 2010) at 10–14 (requiring observance of the traditional principle of *wojgixate*, i.e., treating everyone with respect and compassion, in conjunction with the provision of due process and concluding that the tribal employer must “be sure that no further accommodations were possible” before terminating an individual with a health condition). A subsequent inability to agree upon and adhere to the Court’s seemingly stringent standard necessitated three appeals before finalizing the discharge from employment initiated over six years earlier. Topping v. Martin, SU 14-03 (HCN S. Ct., Jan. 16, 2015).

41. If a tribal judiciary possesses rulemaking authority, it should responsibly endeavor to incorporate tradition and custom within its governing rules to the extent possible. *Cf. supra* note 4 and accompanying text. The Ho-Chunk Nation Supreme Court has engaged in an extended and ongoing consultation with the Traditional Court to integrate traditional principles into proposed criminal rules. Fellow Justices Samantha C. Skenandore and Tricia A. Zunker have principally and ably undertaken this responsibility. One intriguing suggested component to the rules would effectively enable an ever-evolving common law. The Supreme Court envisions an individual who is a clan leader and Traditional Court member accompanying tribal member criminal defendants to scheduled hearings. The Traditional Court member could inform the Trial Court judges of the presence of tradition and custom germane to a proceeding, if not comprehensively reflected in the law or corresponding rule. In addition, the Traditional Court member could serve as an invaluable resource in restoring harmony amongst the parties and within the community. As an aside, each jurist in the Ho-Chunk Nation Supreme and Trial Courts is a licensed attorney and enrolled Ho-Chunk tribal member.

and custom.⁴² Defendants may express some wariness over pleadings based on unwritten law, but, typically, articulations of tradition and custom are neither surprising nor controversial.⁴³ Rather, the tribal common law memorialized in judicial opinion represents the preservation of social mores and values for an enduring community.⁴⁴

On occasion, tradition and custom may complement or explain tribal statute or rule.⁴⁵ Customary defenses may also become

42. *E.g.*, Gardner v. Littlejohn, CV 10-47 (HCN Tr. Ct., Feb. 2, 2011) (acknowledging the traditional offense of defamation), *rev'd in part on other grounds*, SU 11-02 (HCN S. Ct., Oct. 5, 2011); *In re* Name Change of White, CV 06-44 (HCN Tr. Ct., Aug. 21, 2006) (permitting name change petition based upon traditional prominence of paternal lineage); Decorah v. Whitegull, CV 02-17 (HCN Tr. Ct., Mar. 1, 2002) (recognizing traditional authority of family matriarch to condition entry to household, thereby giving rise to a trespass action); Ho-Chunk Nation v. Olsen, CV 99-81 (HCN Tr. Ct., Sept. 18, 2000) (identifying customary contract principles); Whiteagle-Fintak v. Fintak, DV 99-01 (HCN Tr. Ct., Sept. 8, 1999) (identifying traditional abhorrence of domestic abuse); Mike v. Mike, CV 99-31 (HCN Tr. Ct., July 23, 1999) (identifying traditional abhorrence of elder abuse); *cf.* HCN Hous. Auth. v. Cont'l Flooring Co., CV 01-76 (HCN Tr. Ct., Feb. 19, 2002) (refusing tribal invitation to elevate traditional contract principles over existing written agreement between the parties); Arnett v. HCN Dep't of Admin., CV 00-60, 65 (HCN Tr. Ct., Jan. 8, 2001) (confirming the absence of a traditional concept of promissory estoppel), *appeal denied*, SU 01-01 (HCN S. Ct., Feb. 01, 2001). The two earliest cases cited above precipitated the passage of corresponding statutes: *Mike v. Mike* precipitated the passage of the Elder Protection Act of 2001, 4 HCC § 1, and *Whiteagle-Fintak v. Fintak* triggered the adoption of the Domestic Abuse Act of 2000, 4 HCC § 5.

43. The preceding six Ho-Chunk cases constitute the only instances since 1995 in which tradition and custom served as an independent basis for the exercise of subject matter jurisdiction. An exact number of Mille Lacs Band cases remains unknown due to reasons cited above, *supra* note 7 and accompanying text, but is likely comparable or fewer since plaintiffs may identify federal and state law causes of action if no relevant Band statute exists. *See* 24 MLBSA § 2007(a) (2012). That aside, Ojibwe tradition and custom are expected to guide every judicial proceeding. The traditional concept of *sha WA ni ma* must inform the adjudication of all matters. In particular, “the laws of the Band shall be construed to balance the rights of the individual with the need to continue to co-exist in peace and harmony with one another. In this way, order will be preserved and justice shall be accorded to each person.” 24 MLBSA § 2003.

44. In a similar manner, within the English courts of law, “traditions and customs . . . formed the substance of the common law.” Alden v. Maine, 527 U.S. 706, 735 (1999).

45. *See, e.g.*, Garcia v. Greendeer-Lee, SU 03-01 (HCN S. Ct., Apr. 30, 2003) (Hunter, C.J., concurring) (explaining foundation of *Wąksík Wošgą* traditional leave policy appearing in the former Personnel Policies & Procedures Manual); In the

available in certain contexts.⁴⁶ However, tradition and custom does not usually pervade tribal case law for various reasons, including, but not limited to, (1) inconsonant constitutional or statutory law, (2) unknowledgeable or uncertain jurists and litigants, (3) inadequate expert referral systems, and (4) unfortunate loss of tribal heritage and language.⁴⁷

Interest of the Minor Child: K.E.F., SU 97-03 (HCN S. Ct., Oct. 17, 1997) (comparing the customary opportunity to be heard with analogous due process requirement); *Dobbs v. Stacy*, CS 07-57 (HCN Tr. Ct., June 18, 2009) (regarding role of traditional spokesperson as referenced in the Rules for Admission to Practice); *White Eagle v. Ho-Chunk Casino*, CV 04-97 (HCN Tr. Ct., July 14, 2005) (construing the Employment Relation Act's Unpaid Leave of Absence policy to require leave approval when undertaking a traditional duty of care for one's ailing father-in-law); *In the Interest of C.A.D.*, CV 98-38 (HCN Tr. Ct., Apr. 15, 2002) (detailing familial and clan customary responsibility for incompetent members when interpreting provisions in the former Hoçak Nation Children and Family Code).

46. *See, e.g.*, *Brown v. Webster*, SU 06-03 (HCN S. Ct., Feb. 9, 2007) (establishing that an individual could not traditionally pursue personal interest to the detriment of the tribe); *Gardner*, CV 10-47 (recognizing warrior's privilege, which affords absolute immunity to combat veterans in relation to public statements); *In re Effected Elder*, DV 09-01 (HCN Tr. Ct., July 9, 2009) (verifying the customary existence of grandparent visitation rights); *Mudd v. HCN Legislature*, CV 03-01 (HCN Tr. Ct., Feb. 13, 2003) (conferring standing upon combat veterans and family patriarch to assert interests of the tribe and female relatives, respectively), *rev'd on other grounds*, SU 03-02 (HCN S. Ct., Apr. 8, 2003).

47. The foregoing reasons may jointly contribute to a dearth of tribal jurisprudence with specific reference to tradition and custom. The Ho-Chunk Nation Judiciary is truly fortunate to include the Traditional Court, and while the judges, justices, and litigants may freely confer with this revered tribunal, the referenced cases herein represent the entire canon of traditional jurisprudence. *See* HCN R. Civ. P. 8(B) ("Upon a motion of the Court or by the party, the Trial Court may request assistance from the Traditional Court on matters relating to custom and tradition of the Nation . . ."). The cited case law does not contain those matters independently resolved by the Traditional Court, where a formal written decision is not issued. HCN R. Civ. P. 8(A) ("[A] party may request to appear before the Traditional Court on matters related to tradition and custom . . . , [and] must voluntarily consent . . . to be bound by its decision."). A single instance, however, exists where the Traditional Court accepted transfer of a case initiated in the Trial Court, because the proceeding involved a unique matter sounding entirely in tradition and custom. A Ho-Chunk veteran had passed away, and an unknowing funeral director conferred the United States flag for burial upon a surviving sister. Subsequently, the deceased's adult son, also a veteran, demanded possession of the flag. The Traditional Court undertook to resolve the matter, which proved to be of fundamental importance within the Ho-Chunk warrior society. In accordance with procedural rule, the Trial Court issued an abridged judgment, omitting any

Yet, even if tradition and custom do not appear on the face of a judgment, they likely aided in reaching the judgment. Litigants almost always encounter an atmosphere in tribal court that proves more conducive than state and federal courts to fostering compassion and understanding, if not unanimity.⁴⁸ A tribal court will generally afford a party significant latitude to express his or her position, even if for cathartic effect alone. That being said, a tribal judge or justice should not dispense with procedural and substantive requisites under the guise of such laudable purposes. An ostensible observation of tradition and custom must not become shorthand for judicial laziness.

Quite simply, the task of a tribal judge or justice is a daunting one. Most tribal judiciaries do not claim a lengthy pedigree, and, as expected, tribal jurists must resolve many issues of first impression. These jurists must typically attempt to dispense justice within close proximity of political influence given the relatively small population of tribes.⁴⁹ Furthermore, tribal court systems must operate with diminished resources, financial and otherwise, and perhaps a compromised ability to research tribal case precedent. Even further, many tribal courts rely on lay judges, who oftentimes perform an admirable job but must tackle the issues identified in this article, among others, with sometimes little internal assistance or external support.

Against this backdrop, a tribal judiciary must contend with the inherent tension that comes from sustaining tradition and custom

reference to particular tradition and custom. *Percy v. Swan*, CV 96-28 (HCN Tr. Ct., Apr. 2, 1998); *see also* HCN R. Civ. P. 70 (“All decisions of the Traditional Court will be summarized in writing by the Trial Court Judge.”). Given a history of exploitive interaction with cultural anthropologists, the Traditional Court has remained reluctant to divulge tradition and custom that pertains to interpersonal and clan-related duties.

48. *See* 24 MLBSA § 2002 (“The judicial philosophy of the Non-Removable Mille Lacs Band of Chippewa Indians is a product of . . . our customs of life since time immemorial . . . [P]roceedings in the Court of Central Jurisdiction shall not be adversarial but shall be a search for truth and justice.”); HCN JUD. R. ETHICS, § 4-1(C) (2015), http://www.ho-chunknation.com/media/35131/hcn_r_judicial_ethics_12-4-15.pdf (“A tribal court judge or justice should give to every person who is legally interested in a proceeding . . . a full right to be heard according to tribal law and tradition.”).

49. For example, the Ho-Chunk Nation declared an August 1, 2016, population of 7684 enrolled members. HCN LEG. RES. 07-06-16D, http://ho-chunknation.com/media/234312/07.06.16d_per_capita_declaration_for_august_1_2016.pdf

while incorporating external jurisprudential principles when appropriate. A tribal court will unnecessarily struggle if it selects to adopt a single methodology when a syncretic approach should predominate. Tribal courts should eschew a wholesale adoption of foreign case law seemingly done for purposes of expediency.⁵⁰ Similarly, tribal courts must exercise care when interpreting established legal doctrine through the lens of tradition and custom. The two case summaries below illustrate the pitfalls associated with either practice.

Each appellate court encountered issues of first impression and, more than likely, internally grappled with determining the most fitting approach to the respective controversies. Both factual scenarios required the courts to address a single tribal member's alleged betrayal or disruption of tribal societal norms. Each tribal member resorted to the Indian Civil Rights Act,⁵¹ and corresponding tribal law, in defense of their actions. The similarities then fall away, demonstrating, yet again, the inherent difficulty of offering generalizations in an academic discussion of tribal courts.

In the first case, the elected leadership of the Ho-Chunk Nation sought to transform a bingo facility in Madison, Wisconsin, into a full-fledged casino, which the tribe had reserved as a possibility within its 1992 gaming compact with the state.⁵² The City of Madison set the matter for a nonbinding referendum scheduled for February 17, 2004, but former Governor James E. Doyle indicated he would accept the results as dispositive. In the midst of the referendum campaign, Ho-Chunk tribal member and supervisory gaming employee Daniel M. Brown, acting in his individual capacity, provided interviews after business hours to the local media, remarking that the Ho-Chunk Nation promoted discriminatory

50. At this juncture, most tribal jurists join established judicial systems and have not had an opportunity to participate in the formation of a given judiciary. Multiple reasons counsel against tribes perfunctorily adopting the judicial model of the oppressor, but valid arguments also exist for creating parallel or analogous governmental structures. These important issues remain outside the purview of this article.

51. "Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal courts . . . 'the guarantees are not identical' [to the Bill of Rights] . . ." *Nevada v. Hicks*, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring) (citations omitted). *But see supra* note 5 and accompanying text.

52. *Brown v. Webster*, SU 06-03 (HCN S. Ct., Feb. 9, 2007).

employment practices.⁵³ Whether these interviews impacted the referendum remains unknown, but Madison residents rejected the casino proposal.

Nonetheless, the Nation's Executive Director of Business terminated Mr. Brown in May 2004, in large part because of Mr. Brown's public statements. The trial court subsequently overturned the termination due to a clear violation of Mr. Brown's freedom of speech. The Supreme Court, however, reversed the trial level judgment, beginning with the sentiment expressed below:

Assuming *arguendo* that the free speech claim was a part of the complaint, it is a case of first impression. The Ho-Chunk Nation Court system is not required to fully adopt the precedents established by the United States Supreme Court as to the United States Constitution. Rather, the Ho-Chunk Nation Court system must rely on the Nation's laws and perhaps, the Nation's common law or tribal law.⁵⁴

Then, despite neither party raising the matter at trial,⁵⁵ the Supreme Court pronounced it would "view the conduct of Mr. Brown as violative of the concept *Wogixate*, which is a value that could be defined as respect."⁵⁶ The Supreme Court had never employed this traditional concept before, and its amorphous quality enabled wide-ranging effect.⁵⁷ In this case, *wojgixate* yielded the following consequence:

According to tradition, it is not the Ho-Chunk way for an individual who is part of this community to independently take action without being respectful to the Tribe and its

53. On this point, Mr. Brown misperceived the Nation's employment policies relating to Indian and Ho-Chunk preference, regarding such practices as racially discriminatory as opposed to the legitimate aims of a sovereign tribal government. *See Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974); *see also* 6 HCC § 5.5b (codifying Indian preference provisions).

54. *Brown*, SU 06-03 at 3.

55. In an earlier case, the Supreme Court refrained from addressing an issue on appeal that the trial judge had no opportunity to consider below. *Mudd v. HCN Legislature*, SU 03-02 (HCN S. Ct., Apr. 8, 2003) at 5 n.1; *see also* *Campbell v. Davol, Inc.*, 620 F.3d 887, 891 (8th Cir. 2010) ("It is old and well-settled law that issues not raised in the trial court cannot be considered by this court as a basis for reversal." (quotation and citation omitted)).

56. *Brown*, SU 06-03 at 5.

57. *Cf. supra* text accompanying note 40 (referring to a case in which the court analogized *wojgixate* with compassion to hold that an employer did not take sufficient steps to accommodate a disabled employee before terminating the employee).

leaders. For an individual to conduct themselves in such a manner in the past would have resulted in banishment. Here, for his conduct as demonstrated by the record, Mr. Brown suffered the loss of his employment, which is a significant punishment.⁵⁸

More specifically, “[t]he action of Mr. Brown in contacting the media constitute[d] an action motivated for his individual desires There is no need to determine whether the words and conduct of Dan Brown were protected, when his conduct ran so counter to those standards accepted by this tribal community.”⁵⁹

The Ho-Chunk Nation Supreme Court, therefore, avoided determining the degree of protection afforded by the constitutional Free Speech Clause.⁶⁰ The Court’s willingness to equate a sincere, albeit misguided, criticism of a tribal employment practice with a significant affront to the tribal community allowed it to characterize the case in a different manner. The Supreme Court also drew a direct parallel between the traditional leadership and popularly elected executive and legislative representatives without any surrounding discussion. Ultimately, a distinct prospect exists that one’s freedom of speech must succumb to the expressed will of tribal government, which proves highly problematic.⁶¹

In contrast, the second highlighted case involves a court actually considering the legitimacy of banishment or, at least, its contemporary equivalent—exclusion. In 2008, the Mille Lacs Band of Ojibwe promulgated an exclusion ordinance in response to increased criminality and violence on the reservation, especially as perpetrated by several emerging gangs.⁶² Darrick D. Williams Jr. was the sixth individual against whom the Band had filed an exclusion petition. The matter proceeded to the Mille Lacs Band Court of

58. *Brown*, SU 06-03 at 5–6.

59. *Id.* at 6.

60. “The Ho-Chunk Nation, in exercising its powers of self-government, shall not: (1) make or enforce any law . . . abridging the freedom of speech” HCN CONST. art. X, § 1(a)(1).

61. Tellingly, Daniel M. Brown won elected tribal legislative office less than four months after issuance of the appellate judgment. *Ho-Chunk Nation Election Results*, HOČAK WORAK, June 13, 2007, at 1. Thereafter, the Ho-Chunk Nation Legislature voted overwhelmingly to designate Mr. Brown as tribal Vice President. *Legislature*, HOČAK WORAK, Aug. 22, 2007, at 13 (quoting HCN LEG. MINS. (July 5, 2007)).

62. *See* Band Governmental Power and Sovereignty, 2 MLBSA §§ 3001–3013.

Appeals on an interlocutory appeal, meaning that the trial court had not issued final findings of fact.⁶³

As a result, similar to *Brown*, the court of appeals avoided addressing the central issue. Instead, after acknowledging that it “ha[d] never addressed the issue of when a party may mount a facial challenge to a Band ordinance,”⁶⁴ the court of appeals found that the exclusion ordinance could implicate fundamental rights.⁶⁵ For instance, the court noted that Mr. Williams “expressed a desire to learn and practice the cultural and spiritual ways of the Anishinabe” at oral argument,⁶⁶ thereby effectively raising a free exercise claim and justifying a facial attack.⁶⁷

After the court established these predicates, it proceeded to closely scrutinize the exclusion ordinance before rendering it ineffectual. The opinion examines federal case law addressing the identified subject areas and then superimposes this law onto Band statute.⁶⁸ Yet, the governing statutory law actually obliges the presiding justices to interpret an ordinance by “consider[ing] and weigh[ing] unwritten cultural law, historical tribal legal opinions, and precedents of the Court of Central Jurisdiction.”⁶⁹ Unfortunately, the court of appeals seemingly bypassed this instruction and permitted a single individual to facially attack a law that tried to resurrect a customary practice of the tribe.⁷⁰

63. *Mille Lacs Band of Ojibwe Indians v. Williams*, 11-APP-06, 1–2 (MLB App. Ct., Jan. 18, 2012). *See generally* *Brown v. Chote*, 411 U.S. 452 (1973).

64. *Williams*, 11-APP-06 at 2.

65. *Id.* at 5.

66. *Id.* at 3.

67. “The Band Assembly for the Non-Removable Mille Lacs Band of Chippewa Indians in exercising the powers of self-government shall make no law which prohibits the free exercise of religion . . .” 1 MLBSA § 1(a) (2010). Both *Brown* and *Williams* raise constitutional concerns that should prompt an analysis of federal First Amendment jurisprudence, but each also raises questions about the application of tradition and custom. In *Brown*, the appellee could not elevate the exercise of his individual freedom over the common welfare of the tribe. Conversely, in *Williams*, the appellant not only could assert his individual rights, but also the rights of similarly situated individuals, at potential risk to the tribe. The cases demonstrate the inevitable tension that tribal judges and justices must try to alleviate.

68. *See Williams*, 11-APP-06 at 8.

69. 24 MLBSA § 2008 (2012).

70. Had the court of appeals rejected the facial challenge, it would have likely remanded the matter to the district court for purposes of deducing facts in connection with a surviving as-applied challenge. Currently, Darrick D. Williams Jr. is incarcerated at the Federal Transfer Center in Oklahoma City, Oklahoma. Mr.

Neither of the above-discussed cases presented an easy legal or factual scenario. Accordingly, each warranted thoughtful and deliberate consideration, which likely occurred, but other influences may have prevented a more comprehensive examination. Tribal law often demands more than a primary, secondary, or even tertiary analysis.

IV. CONCLUSION

In conclusion, tribal litigants will often assert various claims and defenses with lengthy and complicated pedigrees. A tribal judiciary must consequently endeavor to parse the ever-evolving jurisprudence—federal, state, and tribal—to discern fundamental concepts, doctrines, and principles. Each court must then correctly apply these standards and tenets within appropriate contexts lest it struggle with an inconsistent and tortured case history. Finally, tradition and custom can inform and transform each foreign concept if revealed by a court or the parties,⁷¹ and if it proves relevant to the matter at issue.

Williams pled guilty on May 8, 2012, to RICO conspiracy. He received a sentence of nine years, eight months, and his projected release date is July 9, 2020. *United States v. Williams*, 12-CR-026, at 1–2 (D. Minn. May 30, 2013) (sentencing judgment); *see* Andy Mannix, *Native Mob Gang Members Plead to Lesser Charges in Federal Case*, CITY PAGES (May 31, 2012), <http://www.citypages.com/news/native-mob-gang-members-plead-to-lesser-charges-in-federal-case-6541926>.

71. On the one hand, a tribal court must endeavor to enunciate and proliferate tribal tradition and custom. *Supra* note 3; *see also* HCN JUD. R. ETHICS, § 4-1(C) (2015) (“A judge or justice may . . . obtain the advice of a disinterested expert on federal law, tribal law, custom or tradition or on other sources of law applicable to a proceeding”); MLB JUD. CANONS, § 3(B)(7)(b) (2013), <http://millelacsband.com/wp-content/uploads/2013/06/Judicial-Canons-Court-Order-51.pdf> (“A judge may obtain the advice of a disinterested expert on federal law, state law, other sources of law, or tribal law, custom or tradition if the advice is applicable to a proceeding”). On the other hand, although a judge or justice must apply tradition and custom when appropriate, he or she must also remain an objective, neutral arbiter who cannot unduly advocate for any party. HCN JUD. R. ETHICS, § 4-1(D) (2015) (“A tribal court judge or justice should not assume an advocate role.”); MLB JUD. CANONS, § 3(B)(5) (2013) (“A judge shall perform judicial duties without bias or prejudice.”).

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