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Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-state and Tribal-federal Court Relations

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WELCOMING TRIBAL COURTS INTO THE JUDICIAL FRATERNITY: EMERGING ISSUES IN TRIBAL-STATE AND TRIBAL-FEDERAL COURT RELATIONS

B.J. Jones†

"Whether tribal court, state court or federal court, we must all strive to make the dispensation of justice in this country as fair, efficient and principled as we can."

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I. INTRODUCTION

With these remarks, the Honorable Sandra Day O'Connor joined a host of other federal and state judges who have begun to acknowledge the vital role Indian tribal courts play in the delivery of justice in Indian communities across this country. Indian tribal courts are institutions charged with the daunting task of providing forums for both Indians and non-Indians to air increasingly complicated disputes that arise in Indian country, oftentimes doing so

2. See Letter from Chief Judge Richard Arnold to Office of Policy Development, Department of Justice (July 1, 1997) (on file with author). On June 25, 1997, the Judicial Council of the United States Court of Appeals for the Eighth Circuit voted unanimously to establish a Committee on Tribal Justice. The Council voted this way in response to a report from United States District Court Judge Lawrence Piersol. Judge Piersol had been unofficially appointed by Chief Judge Richard Arnold of the Eighth Circuit to explore the possibility of creating a federal-tribal judges' forum similar to the Ninth Circuit's Ad Hoc Task Force on Tribal Courts chaired by Senior Circuit Court Justice William C. Canby. See id. In the letter to the Office of Policy Development, Chief Judge Arnold indicated that the federal judges perceive the establishment of the committee as "an important step in the improvement of the administration of justice, that we can learn from the tribal judges and, perhaps, be of some help to them." Id.

3. See id. The Minnesota state and tribal judges have begun the process of creating a Minnesota State Court/Tribal Court Committee. See Minnesota State Court/Tribal Court Committee, Minutes from Meeting at Prairie Island Community (July 18, 1997) (on file with author). The initial meeting of the Committee was held on July 18, 1997 on the Prairie Island Indian Community and several joint committees of state and tribal court judges were created including: a Jurisdiction/Education subcommittee; a December Judicial Workshop subcommittee; a Family and Children's Law Issues committee; a Judicial Exchange Committee; a Full Faith and Credit and Comity Committee; and a Court Administrators Committee. See id. It appears from a review of the minutes of that initial meeting that the turnout among tribal judges and officials was most impressive, strongly suggesting a belief among both tribal and state judges of the importance of their joint venture. See id.

4. See Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987). The United States Supreme Court recognizes, under the "presumptive" jurisdiction rule, that civil jurisdiction over disputes arising in Indian country, including those involving non-Indians, presumptively lies in the tribal courts, unless affirmatively limited by a treaty or federal statute. See id. A related rule is the "tribal court exhaustion"
on a meager judicial budget. ⁵

With this emerging acceptance of Indian tribal courts as players in preserving and cultivating the judicial landscape, there comes a concomitant need on the part of tribal, state and federal courts to convene to examine issues of common concern, both in order to promote an orderly administration of justice and to address the inevitable territorial disputes that arise when three different court systems potentially have jurisdiction over claims that arise in Indian country. Rather than seeking to resolve the "morass of doctrinal and normative incoherence"⁶ through judicial decision-making, the tribal, state, and federal judges who undertake this dialogue do so cognizant of the capability of these judicial mechanisms to share and reflect on the tensions that exist between the three governments. The role these respective judiciaries can play

rule, which requires disputes arising in Indian country to first be litigated in tribal court before the exercise of federal court jurisdiction. See Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412, 1420 (8th Cir. 1996) (citing National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985)). The "presumptive" jurisdiction rule, combined with the "tribal court exhaustion" rule has magnified the significance of the tribal court's exercise of jurisdiction in cases which formerly would have been brought exclusively in a federal forum. See id. at 856-857; see also United States v. Tsosie, 92 F.3d 1037, 1044 (9th Cir. 1996) (requiring the United States to first exhaust tribal court remedies in a trespass case); Prescott v. Little Six, Inc. 897 F. Supp. 1217, 1224 (D. Minn. 1996) (holding litigant must exhaust a federal claim arising under ERISA first in tribal court).


6. See Philip P. Frickey, Adjudication and Its Discontents: Coherence and Conciliation In Federal Indian Law, 110 HARV. L. REV. 1754, 1754 (June 1997) (characterizing the field of Indian law as incoherent). This article contains a ringing endorsement for the use of negotiation between conflicting sovereigns utilizing the principles of Indian law conceptualized by the federal courts, rather than using those principles to stake out positions in a conflagration of litigation. See id. at 1757.
in resolving differences is a more optimal use of judicial resources than the traditional route of decision making, which by its very nature, especially in the area of Indian law, often breeds more confusion and distrust between the competing governmental interests.\(^7\)

A judicial dialogue between the state and tribal courts is also the natural offspring of recent federal legislative enactments that require tribal and state courts to accord deference and respect for each other’s judgments in particular cases.\(^8\) Congress appears to have an increasing predilection for treating tribal courts similarly to state courts in the promulgation of legislation regarding cross-border activity.\(^9\) Congress finally has become conversant with the

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7. See State v. Stone, 557 N.W.2d 588, 592 (Minn. Ct. App. 1996) (holding that Minnesota’s driver’s license, seat belt, child restraint and mandatory insurance requirements are not enforceable against Indians in Indian country), aff’d, No. C9-96-1291, 1997 WL 761278 (Minn. Dec. 11, 1997). This case provides an example of the panoply of recent Minnesota Court of Appeals decisions regarding the extent to which Public Law 280 vested the state courts of Minnesota with jurisdiction over traffic offenses and regulatory offenses that occur in Minnesota’s Indian country. See id.; see also State v. Jackson 570 N.W.2d 503, 503 (Minn. 1997) (reversing the court of appeals and stating that Minnesota law requiring proof of insurance is not enforceable in Indian country). But see Bray v. Comm’r of Pub. Safety, 555 N.W.2d 757, 761 (Minn. Ct. App. 1996) (finding that Minnesota’s implied consent law was prohibitory in nature and thus enforceable against an Indian in Indian country); Matter of Welfare of B.F.W., 570 N.W.2d 502, 502 (Minn. 1997) (deciding that an offense of a minor in possession of an alcoholic beverage is a regulatory offense not enforceable against an Indian minor in Indian country). These cases evidence the confusion that exists regarding the extent to which states can enforce their laws against Indians on reservations in Public-Law-280 jurisdictions and exemplify the need for some tribal-state dialogue on assuring the safety of reservation highways. See id. Although the state in these cases insists that it should be able to enforce laws such as driving under the influence and financial responsibility offenses, the tribes counter by contending that such offenses are “regulatory” in nature and thus outside the scope of Public Law 280’s grant of state authority. Notwithstanding the conflict, all sides agree that some law enforcement agency and judiciary should have the authority to adjudicate such cases to provide safety for the highways that run through Indian country. See Bray, 555 N.W.2d at 761 (finding Indians are subject to Minnesota implied consent laws).

8. See 28 U.S.C. § 1738B (1994) (requiring state and tribal courts to honor and enforce each other’s child support orders); see also 18 U.S.C. § 2265(b) (1994) (requiring states and tribes to honor and enforce domestic violence protection orders entered by the respective court systems). Additionally, the National Conference of Commissioners on Uniform State Laws have proposed an amendment to the Uniform Child Custody Jurisdiction and Enforcement Act to include tribal court custody orders as orders to be enforced by state courts and vice versa. See UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, § 104 (7th draft) (March 21, 1997).

9. See 18 U.S.C. § 2261(a)(2) (1994) (finding it a crime for a person to cross a state border, or into or out of Indian country, when an act of domestic violence is committed with intent). Although this crime is called “interstate domestic vio-
reality that a third sovereign, Indian tribes, exists which exercises substantial authority in Indian country\textsuperscript{10}. The ultimate success of such federal enactments will inevitably hinge upon the ability of state and tribal, as well as tribal and federal courts, to accommodate each other's interests.\textsuperscript{11}

Similar dynamics engineer the relations between tribal and federal courts, with the federal judiciary, rather than Congress, being the primary conductor. The tribal court exhaustion rule, a "prudential rule,"\textsuperscript{12} formulated by the federal courts to facilitate the development of tribal court jurisprudence while offering the federal judiciary the opportunity to examine a dispute through a tribal lens, has synergized the relationship between federal and tribal
courts. In many instances, tribal courts are being called upon to develop the factual record and offer a tribal perspective on a conflict that is inevitably destined for federal court review. Although this exhaustion rule was originally designed to permit the inchoate tribal court assessment of the extent of a tribal court's adjudicatory authority over a non-Indian litigant, it has proven to be quite elastic with certain federal courts, and even some state courts, staying their hands in deference to tribal court jurisdiction in disputes that do not directly implicate jurisdictional issues.

13. See Burlington N. R.R. v. Red Wolf, 106 F.3d 868, 871 (9th Cir. 1997), vacated, 118 S. Ct. 37 (1997) (refusing to intervene to stay a $250,000,000.00 tribal court judgment against Burlington Northern until the railroad exhausted its appellate remedies, even in the face of substantial due process arguments). The Burlington Northern case provides an example of how deferential federal courts have become to tribal court adjudications. See id.


15. Even the United States, almost invariably a participant in federal litigation only, has been required to litigate its interests in tribal court in certain contexts. Several cases have held that the federal government must exhaust its tribal court remedies when attempting to eject a trespasser from Indian trust land. See United States v. Tsosie, 92 F.3d 1037, 1041 (10th Cir. 1996); United States v. Plainbull, 957 F.2d 724, 727-28 (9th Cir. 1992).

16. See Klammer v. Lower Sioux Convenience Store, 555 N.W.2d 379, 384 (Minn. Ct. App. 1995). Klammer shows that Minnesota's judiciary has given the tribal court exhaustion rule only a lukewarm acceptance. In Klammer, a panel of the Minnesota Court of Appeals held that a suit brought by a patron of a tribally-owned business against the business involving the business involving on-reservation activity should initially be brought in the tribal court, notwithstanding clear state court jurisdiction under Public Law 280, because the lawsuit involved an issue of the sovereign immunity of the Tribe. See id. Another panel in a similar dispute brought against the same Tribe's business interests disagreed and held that the state court should not defer to the tribal court's exercise of inchoate jurisdiction. See Granite Valley Hotel Ltd. Partnership v. Jackpot Junction Bingo & Casino, 559 N.W.2d 135, 138 (Minn. Ct. App.), review denied, (Minn. April 15, 1997); see also Gavle v. Little Six, Inc., 534 N.W.2d 280, 286 (Minn. Ct. App 1995), aff'd, 555 N.W.2d 284 (Minn. Oct. 31, 1996) (holding that state courts in Minnesota need not abstain from the exercise of valid state court jurisdiction over a suit against an enterprise of an Indian tribe involving on and off-reservation activity when the enterprise claims immunity from suit). See infra, Part II.C. for an interplay between the Minnesota abstention rule and full faith and credit and comity issues.

17. See Abdo v. Fort Randall Casino, 957 F. Supp. 1111, 1114 (D.S.D. 1997). Abdo involved a suit of an ex-casino manager against a tribal casino, which was independently cognizable under the Indian Gaming Regulatory Act and subject to tribal court exhaustion rule. See id. Abdo also provides an example of the sover-
Expansion of the tribal court exhaustion doctrine demands attention to the nuances of tribal-federal court interaction. This includes an examination of the degree of consideration, if any, a federal court should give to tribal court interpretations of tribal law, federal law, or in some circumstances state law. The development of standards through federal judicial decision-making has been inconsistent to this point. This inconsistency reveals the necessity for tribal-federal court dialogue regarding how the tribal court record will be treated by the federal judiciary, and how the federal courts can avoid the replication of effort in developing a factual record in order to dispense justice to litigants in a more expedient manner.

18. See Nevada v. Hicks, 944 F. Supp. 1455, 1466 (D. Nev. 1996). The court in Hicks was confronted with the question of whether tribal courts can exercise jurisdiction over a cause of action against a state official, a case implicating the Eleventh Amendment immunity of state officials from suits in foreign courts, and opted to defer to tribal court jurisdiction. See id. But see Yellowstone County v. Pease, 96 F.3d 1169, 1176 (9th Cir. 1996) (holding that a tribal court lacked jurisdiction to enjoin county officials from assessing and collecting an ad valorem tax on fee land owned by tribal members within reservation boundaries).

19. These inconsistencies are evident in the Eighth Circuit's cases discussing the appropriate standard of review of tribal court decisions interpreting tribal law. In Twin City Construction Co. v. Turtle Mountain Band of Chippewa Indians, the entire court was badly split on the question of whether a tribal court could exercise civil jurisdiction over a non-Indian litigant in the face of a tribal constitutional provision that seemed to prohibit the exercise of jurisdiction. 857 F.2d 1177 (8th Cir. 1988), vacated en banc, 866 F.2d 971 (1989), cert. denied, 490 U.S. 1085 (1989), vacated, 911 F.2d 137, 140 (1990). The en banc court split on the issue, resulting in the affirmance of a district court order enjoining the tribal court from continuing to exercise jurisdiction. See Twin City Constr. Co., 866 F.2d at 972. Later, after the tribe changed its constitution, the court directed the district court to vacate the injunction against the tribal court. Twin City Constr. Co., 911 F.2d at 140. This somewhat less than deferential standard should be compared to the Eighth Circuit’s decision in City of Timber Lake v. Cheyenne River Sioux Tribe, where a panel of the court confronted a tribal court exercise of jurisdiction in apparent contradiction to a constitutional provision similar to the one in Twin City Construction restricting tribal court jurisdiction over non-Indians. See City of Timber Lake, 10 F.3d 554, 558 (8th Cir. 1993). In City of Timber Lake, the panel ruled that it must defer to the tribal court interpretation of its own constitution and thus affirmed the exercise of jurisdiction. Id. at 559.
Congress has thrown another interesting cog into the tribal-federal machinery by the enactment of legislation conferring federal court jurisdiction over disputes that once were within the exclusive province of tribal courts. \(^20\) This creates the need to examine how to avoid the duplication of litigation in federal and tribal court and whether a mechanism can be created to laterally transfer proceedings from one jurisdiction to another.

This article attempts to examine some of the issues that confront tribal, state, and federal judges. These judges have begun the process of engaging fellow judges in a dialogue intended to promote the objective of delivering justice for all litigants, Indian and non-Indian alike. One caveat about judicial forums that must be remembered by all judges who engage in this important work is that members of the respective judiciaries will not, and should not, attempt to resolve the substantive issues that oftentimes bedevil the respective executive and legislative branches of tribal, state and federal governments. If judges enter into forums with the hope and expectation of using the forum blueprint to reallocate jurisdiction or resolve long-standing treaty enforcement issues, their hopes will invariably be dashed. Instead, the agenda must be one that concedes the existing authority of each governmental entity and attempts to facilitate the exercise of that authority by the removal of judicial impediments. Judges who do not have the political stomach to accept the somewhat muddled landscape Indian law represents in its present form, and who believe that a competing jurisdiction should merely come around to his or her perspective, as an alternative to interpreting cryptic congressional enactments and court decisions, probably will find tribal-state or tribal-federal forums unsatisfying and unyielding. Conversely, even those judges who cannot discern "heads or tails" from baffling Supreme Court decisions such as \textit{Brendale}\(^{21}\) and \textit{Wold Engineering}\(^{22}\) but can identify a

\(^{20}\) See Act of Nov. 5, 1990, Pub. L. No. 101-512, 107 Stat. 1416 (codified as amended at 25 U.S.C. § 450(f) (1990)) (making tribal employees federal actors for purpose of the Federal Tort Claims Act); FGS Constructors v. Carlow, 64 F.3d 1230, 1230 (8th Cir. 1995) (ruling that project engineer was not Indian contractor, therefore, the United States was not liable for negligent performance); LeSueur v. United States, 21 F.3d 965, 970 (9th Cir. 1994) (holding that National Park Service's power to exempt tribe's river tours from regulation was within the discretionary function exception to sovereign immunity under the FTCA).

\(^{21}\) See \textit{Brendale} v. Confederated Tribes & Bands Of Yakima Indian Nation, 492 U.S. 408, 409 (1989) (holding that the Tribe does not have authority to zone land owned by non-members within the reservation).

\(^{22}\) See \textit{Three Affiliated Tribes Of the Fort Berthold Reservation} v. Wold
common interest in ensuring access to at least one forum for a litigant involved in a dispute in Indian country, may find the forum concept a richly rewarding experience.

This article first attempts to catalog the issues that certain state and tribal forums have identified and concentrated their efforts on resolving through judicial cooperation. In many ways the issues are driven by the state of federal law impacting a particular state, notably Public Law 280, especially with regard to which court exercises jurisdiction over disputes arising in Indian country in that particular state: state courts, tribal court, or both under a concurrent jurisdiction scheme. Understandably, in a state where state courts exercise virtually no jurisdiction over Indian country, the tribal and state courts located there have different issues on which to deliberate than those in a state where the state exercises primary jurisdiction and the tribal courts have narrow authority. There does appear to be some universal issues, however, that span this Public Law 280 breach.

Next, this article addresses tribal-federal court issues, while noting the differences in states where the federal courts exercise very limited jurisdiction over Indian country compared to those in which the federal courts exercise extensive criminal and civil jurisdiction under various federal statutes.

Eng'g, 476 U.S. 877, 888 (1986) (explaining that the state jurisdictional law is inconsistent with federal law and imposes undue burden on federal and tribal interests).


24. See 25 U.S.C. § 1321 (1994). One impact of Public Law 280 was to relieve the federal courts of the primary burden of adjudicating major criminal violations on Indian reservations and place that obligation on state courts. See id. (granting consent to any state not having criminal jurisdiction over Indians in Indian country); see also Bryan v. Itasca County, 426 U.S. 373, 380 (1976) (holding federal courts still have a role to play in criminal prosecution of applicable crimes that occur in Indian country); United States v. Stone, 112 F.3d 971, 972-73 (8th Cir. 1997) (showing a federal court prosecution of Indians for violating the Airborne Hunting Act, which is not violative of Public Law 280).
II. TRIBAL-STATE FORUMS

A. The Forum as An Educational Tool

For non-tribal judges, one exciting prospect about inviting tribal judges into judicial forums is the opportunity to explore the native paradigm of justice and possibly borrow from that paradigm to dispense justice in non-Indian courts. Many state and federal judges are eager to participate in forums with tribal judges simply because they know little about tribal justice techniques and are interested in developing relationships with the tribal judges in the area. The state and federal judges want to glean how tribal judges go about resolving disputes, possibly with an eye towards synthesizing those methods with their own.25 A Minnesota example of this process is the working agreement between the Mille Lacs Band of Ojibwe and the Mille Lacs County District Court to deal with certain non-violent criminal offenders by referring them to a “Sentencing Circle.” This program was started by the Tribe to develop community input into the appropriate sentences for certain offenders, with an emphasis on the offender making restitution to the community.26 Developing such contacts, and fusing the native paradigm of justice with the traditional Anglo law, is especially important for state judges in those areas where many litigants who appear before them are native people. Understanding the history of how those native people resolved conflicts may bring extra credibility to the state court judge and may, in the long run, make her job easier.

However, understanding the historical development of tribal courts and how they attempt to integrate customary practices and traditions into their court systems is a difficult proposition. Explaining how disputes are resolved extra-judicially among any group of people is a little akin to empirically describing how one puts his pants on in the morning: it is done subconsciously without attributing some method or technique to the experience.27 Yet, the

25. See, e.g., O’Connor, supra note 1, at 14 (contemplating the possibilities of state and federal courts modeling their alternative dispute resolution practices on the Navajo Peacemaker Court system).
27. Chief Justice Robert Yazzie of the Navajo Tribal Court describes this character of Indian law: “Indian law is different. It does not rely on ‘paper knowl-
Anglo legal system abhors a system of unwritten law based upon customary practice and tradition.\(^{28}\) It is fundamentally based on the notion that the law is to be published so that the populace is put on notice both of the substance of the law and the procedures utilized to reach results.\(^{29}\) This may explain the disappointment of some people who examine a tribal code for the mysteries and ingenuity of traditional and customary law, only to discover codes surprisingly similar in many respects to state and federal codes.\(^{30}\) This may also explain the reluctance of practitioners to participate in tribal court litigation because of a perception that the applicable law is not readily accessible, thus not susceptible to crafting in order to champion a client’s claim. It is thus important for those inexperienced in tribal justice systems to understand the historical


\(^{29}\) See Kolender v. Lawson, 461 U.S. 352, 357 (1983) (holding that “the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement”); BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1591 (1996) (holding that “while strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, basic protection against judgments without notice afforded by due process clause is implicated by civil [statutory and administrative] penalties”).

\(^{30}\) There are tribal codes that attempt to articulate in written form the cultural and normative basis for Indian law. An example is the Mille Lacs Band Statutes, interestingly enough published by West Publishing, which describe the traditional theory of the Mille Lacs Band:

> The theory of law of the Non-Removable Mille Lacs Band of Chippewa Indians is based upon a high regard for the concept of sha wa ni ma. It is one of our ways of life according to custom. The purpose of sha wa ni ma is to keep the people together as one. This purpose is good for all people. It serves to balance the forces of life and brings stability to all the people. To achieve this way of life, 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.

\(^{24}\) MILLE LACS BAND STAT. ANN. § 2003 (West 1996).
evolution of tribal justice in order to appreciate their present status.

B. History of Tribal Courts

1. Blame It on Crow Dog

How then did many tribal courts reach their present station where the written law they apply is analogous, in many regards to state and federal laws, yet the judges in those courts are expected to apply a particular native paradigm of justice sometimes at variance with those written laws? This incongruity can be blamed on Crow Dog, a Brule Sioux who killed another Brule, Spotted Tail, in the early 1880s, on what is now the Rosebud Sioux Indian reservation in South Dakota. At the time of the killing, the band had no formalized court system to resolve disputes that were traditionally resolved by the tiospayes, or extended families, that respected each side in a conflict. Nor were there special territorial courts with specific jurisdiction to resolve disputes among those Indians who had been relegated to Indian reservations. The band, invoking traditional custom and practice, resolved the killing by requiring Crow Dog to provide certain necessities for Spotted Tail’s family, a type of restitution that restored the loss of Spotted Tail.

Into this fray stepped the Dakota territorial government who prosecuted Crow Dog for murder in a territorial court and con-

31. Balancing this need to appease the non-Indian world by providing justice in a manner that comfortably fits into Anglo notions of due process, while simultaneously adjudicating in a manner that is loyal to the practices and customs of a tribe, is one of the prevailing dynamics of tribal court jurisprudence today and has been the subject of numerous commentaries. See generally Robert Laurence, Dominant-Society Law and Tribal Court Adjudication, 25 N.M. L. REV. 1 (1995) (arguing that although the notion of tribal sovereignty has been greatly reduced by the United States Supreme Court over the years, the Navajo Nation continues to be a sovereign nation); Frank Pommersheim, Liberation, Dreams and Hard Work: An Essay on Tribal Court Jurisprudence, 1992 Wisc. L. REV. 411 (1992) (analyzing the difficulties in reconciling the dominant Anglo-American and Native American Jurisprudential viewpoints); Gloria Valencia-Weber, Tribal Courts: Custom and Innovative Law, 24 N.M. L. REV. 225 (1994) (commenting on the Anglo-American legal training on tribal cases and the sovereignty of tribal courts).

32. See SYDNEY L. HARRING, CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW AND UNITED STATES LAW IN THE NINETEENTH CENTURY 100-01 (1994).

33. See id. at 104-05.

34. See id. at 105.
victed and sentenced him to death. The United States Supreme Court reversed the conviction and held that the territorial courts of the United States had not been vested with the jurisdiction over criminal offenses committed by one Indian against another within an Indian reservation. The Fort Laramie Treaty of 1868 also did not give the federal government such authority. The result of this decision was that the Brule band of the Dakota were left to their own principles of justice when determining punishments for those band members who committed crimes against other Indians.

The federal government enacted the Major Crimes Act to fill what was perceived as a void in the enforcement of law created by the Crow Dog decision. The Major Crimes Act specifies certain felonies committed by one Indian against another in Indian country, and vests the federal and territorial courts with jurisdiction over such offenses. This Act did not, however, fulfill the need for a reservation-based dispute resolution method, both for reservation Indians and for those non-Indians increasingly encroaching upon Indian land. Into this breach stepped the Bureau of Indian Affairs (BIA), who began to establish “Courts of Indian Offenses” in 1883. These courts, hoped federal officials, would lead to the acculturation and assimilation of Indian people into the non-Indian world.

36. See id. at 571-72.
37. See id. at 572.
38. See id.
39. See 18 U.S.C. § 1153 (1994). Congress obviously felt that the type of restorative justice meted out by the Brule to Crow Dog was not punitive enough and felt that more severe measures were needed. This is not surprising because throughout the history of the immigration of Europeans into the North American continent there have been various references to the people occupying the Americas as “lawless.” See Elk v. Wilkins, 112 U.S. 94, 106 (1884).
40. See 18 U.S.C. § 1153. The constitutionality of Congress’ exercise of authority to enact the Major Crimes Act was upheld in United States v. Kagama, a particularly odious decision to Indian tribes because the court concocted the “plenary authority” doctrine. 118 U.S. 375, 377 (1886). The court held that Congress can legislate with regard to Indian tribes with relative impunity. See id. at 378.
41. See Frank Pommersheim, Braid of Feathers 62 (1995) (citing William Hagen, Indian Police and Judges 145 (1966)). These courts were not models of justice, as the only requirement to be a jurist was that a person not be a polygamist. See id.
43. See id. at 151. The Bureau of Indian Affairs (BIA) began setting up Courts of Indian Offenses on many reservations without the express authorization of Congress, which inevitably led to challenges in their authority. None of these
The Courts of Indian Offenses, also known as Code of Federal Regulation Courts (C.F.R. Courts), were not “tribal” courts in the sense that the values and mores reflected in the laws promulgated by the Bureau of Indian Affairs were “tribal” values. Instead, these courts were the agents of assimilation, and followed laws and regulations designed to assimilate the Indian people into both the religious and jurisprudential mainstream of American society. Non-Indians, however, could not be compelled to appear in such courts unless they expressly stipulated to civil jurisdiction. This restriction still exists in the present Code of Indian Offenses, despite clear United States Supreme Court pronouncements recognizing the inherent authority of tribal courts to exercise jurisdiction over non-Indians. The restriction also made its way into several tribal constitutions and codes after tribes adopted their own tribal codes.

2. Precursors to Modern Tribal Courts

Only with the enactment of the Indian Reorganization Act of 1934, and the subsequent promulgation of a revised Code of Indian Offenses for Indian tribes, which expressly recognized for the challenges were successful and the BIA reigned as the ultimate arbiter of what laws and polices would be enforced through the CFR courts. See id. at 205-06; see also Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 95 (8th Cir. 1956) (holding Indian tribal courts have authority under 18 U.S.C § 1152); United States v. Clapox, 35 F. 575, 577 (D. Or. 1888) (holding the United States is the ultimate guardian of Indian tribes).

44. For example, one of the early CFR ordinances, violation of which could subject an Indian to incarceration provided that “if an Indian refuses or neglects to adopt habits of industry, or to engage in civilized pursuits or employment, but habitually spends his time in idleness and loafing, he shall be deemed a vagrant.” HAGEN, supra note 41, at 120. In the first challenge to the authority of the Bureau of Indian Affairs to create and maintain court systems for Indians, the federal district court in upholding that authority clearly intimated the function of these courts as “mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian.” Clapox, 35 F. at 577. The same court described an Indian reservation as an institution “in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.” Id.

47. See Twin City Constr. Co. v. Turtle Mountains Band of Chippewa Indians, 911 F.2d 137, 138 (8th Cir. 1986). (holding the tribal court had proper jurisdiction of all issues for construction company case).
first time the right of Indian tribes to supplant the Code of Federal Regulations (C.F.R.) by the adoption of their own code of laws,\textsuperscript{49} did Indian tribes receive the federal government's imprimatur to create and operate their own court systems. Not surprisingly, because of the need of Indian tribes to receive permission from the Department of Interior to supplant the C.F.R with their own code, many tribes parroted many of the provisions of law contained in the C.F.R. courts to appease the Department of Interior.\textsuperscript{50} As a result, many of the laws contained in the old C.F.R. resemble many of the constitutional and statutory provisions contained in modern-day tribal codes.\textsuperscript{51}

Two additional federal statutory provisions need to be examined to fully appreciate the evolutionary process of Indian tribal courts. In 1953, Congress, concerned about the apparent void in criminal misdemeanor jurisdiction on some Indian reservations, enacted Public Law 83-280\textsuperscript{52} conferring jurisdiction over most criminal and civil actions arising in Indian country to the courts in five particular states. These states included California, Minnesota (with the exception of the Red Lake Indian reservation), Nebraska, Oregon (with the exception of the Warm Springs reservation) and Wisconsin (with the exception of the Menominee reservation).\textsuperscript{53} Those states not vested with jurisdiction were given the option of accepting jurisdiction by amending any constitutional limitations on jurisdiction and by affirmatively accepting jurisdiction through legislative enactment.\textsuperscript{54}

\begin{itemize}
  \item \textsuperscript{49} See 3 FED. REG. 952-59 (1938) (codified at 25 C.F.R. § 11 (1997) (giving both substantive and procedural Indian law).
  \item \textsuperscript{50} See 25 C.F.R. § 11.103 (1997).
  \item \textsuperscript{51} See id. An example of this is tribal constitutional and statutory restrictions on tribal court civil jurisdiction over non-Indians. Many tribal codes until recently required a stipulation from a non-Indian before civil tribal court jurisdiction could be exercised over him. See id; see also City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 558 (8th Cir. 1993) (ruling that an Indian tribe could impose liquor control and business license ordinances on non-Indian operators of liquor establishments on fee-patented lands in cities within the reservations).
  \item \textsuperscript{53} See id.
  \item \textsuperscript{54} See 25 U.S.C. §§ 1321-22 (1994). This section of Public Law 280 was amended by passage of the Indian Civil Rights Act, which now requires an affirmative vote by the tribal electorate before states can assume any further jurisdiction. See 25 U.S.C. § 1326 (1994). Before that amendment, however, ten states accepted some form of jurisdiction over Indian country. See FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 28 (1982).
\end{itemize}
Public Law 280 has proved to be an impediment to tribal court development both in those mandatory states and in optional states where some form of state court jurisdiction was adopted. It has also heightened the level of jurisdictional ambiguity that exists in Indian country. Because many tribes and the Department of Interior perceived that Public Law 280 stripped tribal court systems of jurisdiction, efforts among those tribes to adopt tribal codes and inject money into tribal justice systems were all but stymied.55 In addition, the Bureau of Indian Affairs, up to that point the principal funders of tribal justice systems, also believed that it no longer needed to fund tribal court systems and C.F.R. courts on Public-Law-280 reservations because one of the objectives of Public Law 280 was to defray federal costs for tribal law enforcement by turning those functions over to state and county governments.56

It has been demonstrated in Minnesota recently,57 however, that tribal court development remained integral even among those Public-Law-280 tribes, both because of the jurisdictional limitations expressed in Public Law 280,58 and because Public Law 280 did not confer jurisdiction over “regulatory” as opposed to prohibitory criminal matters.59 Additionally, laws passed subsequent to Public Law 280, such as the Indian Child Welfare Act,60 permitted all Indian tribal courts, including those in Public-Law-280 states, to exercise substantial jurisdiction both inside and outside Indian country, but the exercise of jurisdiction was contingent upon the existence of tribal dispute resolution forums.61

55. See id.

56. See Bryan v. Itasca County, 426 U.S. 373, 379 (1976) (discussing the concern for lawlessness on Indian reservations as the reason for enacting Public Law 280).


61. See Native Village of Venetie IRA Council v. Alaska, 944 F.2d 548, 562
The impact of Public Law 280 explains why many tribal courts, including those in Minnesota, are of very recent vintage. Ignorance over the fallout from Public Law 280 may also explain the misperception many courts have over the recent development of tribal courts among the Sioux tribes and bands of the Minnesota Chippewa Tribe in Minnesota. There has been some insinuation that tribal court development, in some states where tribes have been successful in gaming ventures, is the product of the desire to shield the tribe from suits in state and federal courts concerning its gaming operations. Theoretically, the creation of tribal courts would resolve such disputes in favor of the tribes. Although this influx of commercial contacts may explain in part the increasing interest among Minnesota tribes in the development of judicial systems, it is just as likely that many of these tribes, mired in poverty before gaming, are only now reaping the economic gains necessary to support judicial systems not supported by the Department of Interior because of Public Law 280. Other tribes are attempting to create and maintain court systems in order to regain the sovereign authority stripped from them by the passage of Public law 280, or to exercise the jurisdiction over their children recognized by the Indian Child Welfare Act (ICWA) of 1978.

(9th Cir. 1991). In Native Village of Venetie IRA Council, the United States Court of Appeals for the Ninth Circuit held that Indian tribal courts in Alaska retained the concurrent jurisdiction to render adoption decrees which had to be recognized by the state under the Indian Child Welfare Act.

62. See Krempel v. Prairie Island Indian Community, 125 F.3d 621, 622-23 (8th Cir. 1997) (holding that exhaustion by the Prairie Island Indian Community Tribal Court was not necessary for litigant because the Tribe did not have an operational court system).

63. See Pat Doyle, Judge Challenges Tribal Sovereignty, STAR TRIB. (Minneapolis), Feb 19, 1996, at 1A.

64. See id.

65. In addition, the Department of Interior inhibited the development of tribal courts among the constituent bands of the Minnesota Chippewa Tribe by previously declaring that the Minnesota Chippewa tribal constitution prevented the constituent bands from creating their own court systems. This opinion was nullified on August 16, 1994 when the Department took the position that the constituent bands could create their own court systems. See Memorandum from Michael Anderson to Ada Deer (Aug. 16, 1994) (on file with author).


67. See 25 U.S.C. § 1911 (1994). There are some indications that the recent
One last federal statutory enactment which plays a major role in the molding of modern-day tribal courts is the Indian Civil Rights Act (ICRA) of 1968. The ICRA is the basis for the inherent ambiguities that exist in modern tribal justice systems. It forces Indian tribes to base their judicial systems upon Anglo-American notions of due process by superimposing many of the fundamental rights of the United States Constitution upon tribal justice systems, even if the values expressed in the Bill of Rights are foreign to native people. The ICRA, by 1) compelling Indian tribes to give jury trials to any person charged with a criminal offense containing a possible penalty of incarceration; 2) conferring upon the accused the right to remain silent; and 3) debasing the resolution of disputes by consensus rather than by confrontation, forces Indian tribes to mimic their judicial systems upon state and federal courts or face coercion by the federal government.

This history of externally imposed justice is not an auspicious foundation for the development of indigenous justice systems, and may explain why the uninitiated may find tribal justice systems

push of the individual bands of the Minnesota Chippewa Tribe to develop their own tribal justice systems was the result of an increased interest in exercising jurisdiction over off-reservation Indian children who were the subject of custody proceedings under the Indian Child Welfare Act. See Letter from Thomas C. Jacobs, Office of the Solicitor for the United States Department of Interior, to Anne McKieg, Assistant Hennepin County (Minnesota) Attorney (July 18, 1995) (on file with author) (regarding right of individual Bands of the Minnesota Chippewa Tribe to exercise jurisdiction over Indian child custody proceedings and to accept transfers of jurisdiction).

68. See 25 U.S.C. §§ 301-1341 (1994)). Before the enactment of the Indian Civil Rights Act, it was generally recognized that the United States Constitution did not regulate an Indian tribe’s treatment of its members or non-members. See Talton v. Mayes, 163 U.S. 376, 384 (1896).


70. See Granite Valley Hotel Ltd. Partnership v. Jackpot Junction Bingo & Casino, 559 N.W.2d 135, 144 (Minn. Ct. App. 1997). A contemporary example of this tension arose on the Red Lake Indian reservation where the Tribal Council, in the face of continuing jury nullification in drug cases, enacted an ordinance permitting a tribal judge to overturn both a jury conviction and acquittal and impose the opposite verdict should she believe that the jury verdict was the result of passion or prejudice. See id. at 145 (Randall, J. concurring). In the face of a federal action seeking a writ of habeas corpus, the tribal court backed down and allowed the defendant to plead to a lesser offense. See id.

especially confounding. Escaping the chains of historical suppression, however, many Indian tribes have returned to their indigenous roots and regained a sense of tradition in the dispute resolution practices they currently utilize.72

3. Modern Tribal Courts: Reconciling the Old and the New

Modern tribal courts73 are faced with the difficult proposition of resolving increasingly complex disputes in a manner that is both loyal to tradition, and responsive to Anglo notions of due process. Tribal courts, perhaps more than any tribal institution other than educational programs, are in a unique position to rediscover tribal customs and traditions as a manner of resolving disputes and reintegrating those values into modern Indian life. The resolution of a dispute in tribal court, however, must always be administered with a dose of Anglo due process because of the need to have tribal judgments respected and enforced by outside court systems. A typical dispute in tribal court today could involve a question involving the misuse of a revered native spiritual leader’s name to market a malt liquor;74 the right of an heir of a treaty signer to sell an original replica of the treaty;75 a multi-million dollar personal injury

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72. See generally Frederic Brandfon, Tradition And Judicial Review In The American Indian Tribal Court System, 38 UCLA L. REV. 991 (1991) (analyzing both traditional dispute resolution techniques and modern tribal court systems); Gloria Valencia-Weber, Tribal Courts: Custom And Innovative Law, 24 N.M. L. REV. 225 (1994) (reviewing those tribal courts which have attempted to implement traditional dispute resolution techniques).


74. See Estate of Tasunke Witko (Crazy Horse) v. G. Heileman Brewing Co., 23 Indian L. Rep. 6104, 6113 (Rosebud Sioux Sup. Ct. 1996) (reversing trial court’s dismissal of cultural and legal claims brought by estate against New Jersey brewery for lack of personal jurisdiction). It should be noted that this case went before the United States Court of Appeals for the Eighth Circuit after a federal district court in South Dakota enjoined the Tribe from continuing to exercise jurisdiction over the non-Indian brewery. See Hornell Brewing v. Whiting, No. 96-3038, slip op. at 10 (D.S.D. Dec. 3, 1996). The appeals court recently ruled the Rosebud Sioux Tribal Court lacked adjudicatory authority over the dispute arising from the Breweries’ use of the Crazy Horse name in the manufacturing, sale, and distribution of Crazy Horse Malt Liquor outside the Rosebud Sioux Reservation. See Hornell Brewing Co. v. Rosebud Sioux Tribal Court, No. 97-1242, 1998 WL 9176, at *6 (8th Cir. Jan. 14, 1998).

75. See In re Guardianship of William Bell, No. ___, slip op. at 2 (Fort Berthold Tribal Ct., March 24, 1997) (enjoining the conservator of the estate of an incapacitated tribal member from selling the original replica of an 1851 treaty on
dispute; or the authority of a Tribe to operate a nationwide lottery system. Resolving such disputes traditionally with a touch of judicial pragmatism is the challenge facing modern tribal courts.

4. State and Federal Courts as Models for Tribal Courts

Cultural and legal education in the judicial forum is by no means a one-way street. Tribal judges have much to learn from state and federal judges who participate in judicial forums. Although tribal courts may be just as talented in rendering cogent and just decisions, state and federal justice systems are far more advanced in the accouterments of justice. Tribal courts are frequently hindered by the lack of a thorough compilation of tribal court decisions from other jurisdictions, a lack of electronic resources to manage and retrieve court information, and a lack of ability to access funding for things such as foster care placements, juvenile diversion programs and probation services. The Anglo justice system has developed a much more interdisciplinary approach to dispute resolution than tribal justice systems where the judge often must render a decision and then personally go out and solicit the necessary services to implement his ruling. Because of these structural weaknesses in tribal court systems, state and federal judges are in an ideal position to educate tribal judges about accessing and utilizing resources, including training resources.

the ground that it is cultural patrimony and that the incapacitated person was only the holder, not owner of treaty).


77. See Cour d'Alene Tribe v. AT&T Corp., 23 Indian L. Rep. 6060, 6061 (Cour d'Alene Tribal Court 1996) (involving a suit brought by the Tribe to compel AT&T to provide it with the necessary phone service to operate a nationwide phone lottery.)

78. Although there is an Indian Law Reporter which compiles tribal court decisions, as well as federal and state law decisions involving Indian law issues, the decisions contained therein are voluntarily submitted by tribal courts and there is no regulated method of gathering tribal court decisions.

79. See 42 U.S.C. § 620 (1994). For example, children placed by state courts in foster care are eligible for foster care services under Title IV-E of the Social Security Act if the court order has the necessary language in compliance with federal law. Children placed by tribal courts are not eligible for foster care services, unless they access them through a cooperative agreement with a state government. See Native Village of Stevens v. Smith, 770 F.2d 1486, 1489 (9th Cir. 1985).

80. Unlike the federal courts, which have the Federal Judicial Center and the state courts, which may utilize the National Center for State Courts, there is no one entity that is specifically designated to provide assistance, including technical assistance and training, to tribal court judges. There are regional organizations,
amples of such cooperative ventures may include: 1) inviting tribal judges to the annual Judicial Institutes sponsored in most states; 2) state administrative officials assisting tribal courts in designing and maintaining court files and information electronically and allowing tribal police and others in need to access such files electronically; 3) facilitating cooperative agreements to allow tribal courts to access Title IV-E and medical assistance benefits for Indian children placed by tribal courts; and 4) assisting tribal courts in utilizing child support enforcement services available to state courts under Title IV-D of the Social Security Act.

C. Full Faith and Credit or Comity between Tribal and State Courts

After tribal and state courts have learned a little about how each operates, a cornerstone issue that must be addressed and resolved is how each court will treat the judgments and orders of the other. In many ways, this issue is just as important as questions of jurisdiction. This is especially true in a state where state and tribal concurrent jurisdiction may be the norm, because deferring to another court’s exercise of jurisdiction may be specious if not accompanied by the granting of a degree of deference to that court’s adjudication. Minnesota, where the state courts have adopted somewhat of an abstention rule when determining the appropriate scope of state court jurisdiction for disputes involving tribes or their members arising in Indian country, provides an example.81 In states applying a form of abstention with respect to tribal court jurisdiction, merely deferring to the tribal prerogative to exercise initial jurisdiction is vacuous if not accompanied by a certain level of

including the author’s organization, and the National Indian Justice Center, but the funding for these programs is far short of what is needed for a nationwide organization that serves the some 170 tribal courts now in existence.

81. See Matsch v. Prairie Island Indian Community, 567 N.W.2d 276, 278 (Minn. Ct. App.), review denied, (Minn. Sept. 18, 1997). “Where two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy, and no court of coordinate power is at liberty to interfere with its action. State ex rel Minnesota Nat’l Bank v. District Court, 195 Minn. 169, 173, 262 N.W. 155, 157 (1935). “This rule rests upon comity and the necessity of avoiding conflict in the execution of judgments by independent courts, and is a necessary one because any other rule would unavoidably lead to perpetual collision and be productive of the most calamitous results.” Id.

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deference owed to the ultimate decision of the tribal court. Similarly, if a state court has valid jurisdiction to resolve a dispute, yet its resolution will be ignored by a tribal court whose jurisdiction may be necessary to enforce the state court resolution, resolving the jurisdictional conflict only leads to more conflicts regarding enforcement.

In some instances, the United States has directed the state and tribal courts to honor each other’s orders. Examples include laws requiring states and Tribes to honor each other’s child support orders, domestic violence protection orders, and child custody orders. A federal circuit court, as well as at least one tribal court, have concluded that the federal Parental Kidnapping Prevention

82. The type of abstention exercised by federal courts vis-a-vis state adjudications is very deferential because federal courts must grant the same preclusive effect to a state court judgment as the state court. See 28 U.S.C. § 1738 (1994). Therefore, when a federal court abstains in favor of state court adjudication, rather than deferring its jurisdiction, it is forever precluding federal court review of the state court decision, with the limited exception of United States Supreme Court discretionary review, if a federal question is involved, or perhaps habeas corpus jurisdiction in limited cases. See 28 U.S.C. § 2254 (1994). However, many state courts, including Minnesota, do not have a controlling standard of review for tribal court decisions. Thus, it is possible that a state court could abstain from exercising jurisdiction over a case arising in Indian country, but then refuse to either enforce or honor the tribal court judgment because of the lack of a federal or state law requirement to do so.

83. Examples of this may include the enforcement of valid child support orders entered by state courts against reservation-domiciled Indians who work for tribal entities through wage withholdings.


87. See In re Larch, 872 F.2d 66, 68 (4th Cir. 1989); see also Dement v. Oglala Sioux Tribal Court, 874 F.2d 510, 514 n.4 (8th Cir. 1989) (declining to determine whether the term “territories” in the federal Parental Kidnapping Precaution Act applies to Indian tribes because the plaintiff had not yet raised the issue in the tribal court).

Act requires states and tribes to honor each other’s custody orders. There are also obscure provisions of federal law that seem to mandate some state court allegiance to tribal law, although their exact import is not clear.

Even with regard to those subject matters clearly covered by federal law, however, merely imposing by federal legislative fiat the requirement of full faith and credit does not make the practice reality. State and tribal courts cannot recognize each other’s judgments if there is no system developed to share information regarding the existence of such orders. This may be particularly important in an area such as domestic violence where the cognizance of the existence, vel non, of a valid order of protection is critical to law enforcement officers who need to make split-second decisions regarding protecting a victim. In those cases state and tribal courts need to cooperate on the development and maintenance of central registries of orders accessible by both court systems and law enforcement officers on and off-reservations. Additionally, there must be protocols developed for the registration of state and tribal court orders entitled to federal full faith and credit in each court system to assure effective enforcement.

Some state courts, as well as early federal courts, have con-

90. The National Conference of Commissioners on Uniform State Laws have proposed an amendment to the Uniform Child Custody Jurisdiction and Enforcement Act to include tribal court custody orders as orders to be enforced by state courts and vice versa. See UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, § 104 (7th draft) (Mar. 21, 1997).
91. Examples include Public Law 280 itself, which mandates that state courts apply the laws of a tribe, including customary laws, as long as they do not conflict with state law, in resolving a private dispute. See 25 U.S.C. § 1322(c) (1994) (requiring states to give full force and effect to any tribal ordinance or custom, exercised in the tribal authority, in determination of constitutional civil causes of action, so long as it is not inconsistent with applicable civil law of the state); 25 U.S.C. § 483(a) (1994) (requiring a state court to defer to tribal court jurisdiction in a foreclosure of a mortgage on trust land).
92. See Sheppard v. Sheppard, 655 P.2d 895, 902 (Idaho 1982) (holding that a tribal decree of adoption is entitled to full faith and credit as a decree of a territory under 28 U.S.C. § 1738 (1994)); Jim v. CIT Fin. Serv. Corp., 533 P.2d 751, 752 (N.M. 1975) (holding that the laws of the Navajo Nation are entitled to full faith and credit); Halwood v. Cowboy Auto Sales, 946 P.2d 1088, 1090 (N.M. Ct. App.), cert. denied, 944 P.2d 274 (N.M. September 24, 1997) (holding that New Mexico trial court must honor a tribal court’s award of punitive damages against a non-Indian for wrongful repossession); Chischilly v. General Motors Acceptance Corp., 629 P.2d 340, 344 (N.M. Ct. App. 1980); In re Adoption of Buehl, 555 P.2d 1334, 1342 (Wash. 1976); see also Walksalong v. Mackey, 549 N.W.2d 384, 387 (Neb. 1996) (indicating that a tribal court order is entitled to full faith and credit in each court system to assure effective enforcement.)
cluded that the federal full faith and credit statute applies to tribal court judgments as judgments of “territorial courts,” and thus they are as entitled to full faith and credit as state and federal court judgments. Other courts, however, including the Minnesota Court of Appeals in Desjairlait v. Desjairlait, rejected this notion and concluded that Indian tribes were not even contemplated in the grand federalist design that underlies principles of full faith and credit and comity. As one commentator on the question of full faith and credit between state and tribal courts has proclaimed: “Indian tribes never entered into or consented to any constitutional social contract by which they agreed to be governed by federal or state authority, rather than by tribal sovereignty.”

under the Uniform Enforcement of Foreign Judgments Act, although the court concluded that the tribal court lacked jurisdiction); Jackson County ex rel. Smoker v. Smoker, 445 S.E.2d 408, 411 (N.C. Ct. App. 1994) (recognizing the concurrent jurisdiction of a tribal court to establish child support obligation of reservation-domiciled Indian obligor); Barrett v. Barrett, 878 P.2d 1051, 1055 (Okla. 1994) (holding that state courts must honor tribal court judgments but that the trial court erred in not allowing a party to attack a tribal court order based upon fraud); City of Yakima v. Aubrey, 931 P.2d 927, 929 (Wash. Ct. App. 1997) (holding that a tribal court order was not entitled to full faith and credit due to the lack of subject matter jurisdiction); cf. Brown v. Babbit Ford, Inc., 571 P.2d 689, 694 (Ariz. Ct. App. 1977) (holding that Arizona state courts were not required to give full faith and credit to enactments of a Navajo tribal council); Lohnes v. Cloud, 254 N.W.2d 430, 433 (N.D. 1977) (holding that the full faith and credit clause only applies between states and not Indian tribes).

93. See United States ex rel. Mackey v. Coxe, 59 U.S. 100, 103 (1856) (implying that an Indian tribe is a domestic territory whose “laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union.”); see also Cornells v. Shannon, 63 F. 305, 306-07 (8th Cir. 1894).


95. See, e.g., Tracy v. Superior Ct. of Maricopa County, 810 P.2d 1030, 1051 (Ariz. 1991) (finding that a subpoena to appear in a Navajo Court should be enforced under the Uniform Attendance of Witnesses Act). See generally Daina B. Garonzik, Full Reciprocity for Tribal Courts From a Federal Court Perspective: A Proposed Amendment to the Full Faith and Credit Act, 45 EMORY L.J. 723, 768-69 (1996) (arguing that that tribal courts should be treated essentially as federal courts, and in return give up some of their inherent sovereignty).

96. 379 N.W.2d 139, 144 (Minn. Ct. App. 1985) (holding that full faith and credit was intended between the states, not between tribal courts and states).

97. Robert N. Clinton, Tribal Courts And The Federal Union, 26 WILLAMETTE L. REV. 841, 847 (1990). It should be noted, however, that notwithstanding the lack of tribal consent to join the federalist scheme, of which full faith and credit is an integral part, Professor Justice Clinton is an advocate of including tribal courts into the full faith and credit requirements as evidenced by his decision as a Cheyenne River Supreme Court Judge. See Eberhard v. Eberhard, No. 96-005-A, passim (Cheyenne River Sioux Tribal Ct App. Feb. 18, 1997).
lack of consent renders suspect any notion that Indian tribal governments were the intended beneficiaries of 28 U.S.C. § 1738.98

Not only have many state courts rejected the notion that section 173899 was intended to apply to tribal court orders,100 but tribal courts also have hesitated to accord state court orders full faith and credit under that federal statute.101 This is not because of a distrust of state courts, but because of the perception that construing general federal laws as abrogating tribal sovereign perogatives would often result in a diminution of tribal sovereignty.102 There is a commingling of obligations and duties inherent in section 1738,103 and tribes may feel that they should have a voice in deciding when their courts have a federal obligation to honor state court judgments, even though they welcome the prospect of having their court orders enforced by state courts.104

Absent some express federal congressional directive to both tribes and states to honor each other's judgments, the issue of the

98. 28 U.S.C. § 1738 (1994) (using terms such as "State, Territory, or Possession of the United States").
99. See id.
100. See Wippert v. Blackfeet Tribe, 654 P.2d 512, 515-16 (Mont. 1982) (holding that a tribal court judgment was not a territorial judgment under the federal statute); Desjairlait v. Desjairlait, 379 N.W.2d 139, 144 (Minn. Ct. App. 1985).
102. There is currently a split in the federal circuits on the question of whether a federal statute of general applicability, that omits any reference to Indian tribes, applies to Indian tribes and their entities. See Donovan v. Coeur d'Alene Indian Tribal Farm 751 F.2d 1113, 1116 (9th Cir. 1985) (holding that OSHA applied to tribal farm); Smart v. State Farm Ins., 868 F.2d 929, 936 (7th Cir. 1989) (applying ERISA to tribal pension plan); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 177 (2d Cir. 1996) (adopting the "Tuscarora approach", named for dicta utilized by the United States Supreme Court in Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 118 (1960), in which the Court applied a presumption that a law of general applicability does apply to Indian tribes). The Eighth and Tenth Circuits, conversely, have applied a standard treaty abrogation analysis to find that such laws do not apply to Indian tribes unless they are specifically referenced. See EEOC v. Fond Du Lac Heavy Equip., 986 F.2d 246, 249 (8th Cir. 1993); Donovan v. Navajo Forest Prods., 692 F.2d 709, 712 (10th Cir. 1982). The Eighth Circuit's analysis in United States v. Stone, where the Court held that the Airborne Hunting Act, a federal law of general applicability not referencing Indians or their treaty rights, applied to tribal members hunting on the White Earth Indian reservation, may portend a shift of that position towards the Tuscarora approach. 112 F.3d 971, 974 (8th Cir. 1997).
104. See generally B.J. Jones, Tribal Considerations In Comity and Full Faith and Credit, 68 N.D. L. Rev. 689 (1992) (discussing the application of full faith and credit to tribal court decisions from the perspective of tribal courts).
degree of deference a state or tribal court owes to another court system welcomes either a legislative or judicial response. As several state courts have noted, it is within the inherent powers of a court to honor foreign court judgments under the doctrine of comity, notwithstanding the lack of statutory guidance on the issue. In a few states and several tribes, the legislatures have taken the initiative, often in response to judicial opinions discussing comity and full faith and credit vis-a-vis foreign courts, to define the parameters for state and tribal recognition of judgments. At least one state legislature has actually circumscribed the granting of comity to tribal court judgments by state courts, in apparent reaction to a state supreme court decision.

More commonly, however, in the state domain the issue has been broached through the process of court rule promulgation, which in certain states was the product of state-tribal court cooperation. These court rules vary from jurisdiction to jurisdiction with some states restricting recognition to those tribal courts within state boundaries, while others tend to recognize any court order


109. See N.D. Admin. R. 37 (West 1997) (referencing the final report of the North Dakota Tribal/State Court Forum and the March 25 meeting minutes of the Court Services Administration Committee). The North Dakota Supreme Court rule, requiring state courts to honor North Dakota tribal court judgments, was drafted and proposed to the North Dakota Supreme Court by its committee on tribal and state court affairs, consisting of state and tribal judges in North Dakota. See id.

of a federally-recognized tribe.\textsuperscript{111} Some rules restrict recognition to a certain class of cases,\textsuperscript{112} while others are far-reaching and would apparently apply to any tribal court order provided certain requisites are met.\textsuperscript{113} Some rules specifically authorize the state courts to honor tribal court orders only upon a showing that the tribal court recognizes state court orders,\textsuperscript{114} while others require recognition without determining if reciprocity exists.\textsuperscript{115}

Obviously, among those states and tribes which have yet to resolve the issues surrounding recognizing and enforcing foreign judgments in tribal and state courts, there is a great deal of flexibility afforded the judiciary itself to come up with a solution.\textsuperscript{116} A tribal-state forum may be the ideal setting for the resolution of the

\textsuperscript{111} See MICH. CT. R. 2.615; OKLA. ST. DIST. CT. R. 30; WASH. SUPER. CT. CIV. R. 82.5.

\textsuperscript{112} Arizona, for example, has a court rule dealing with the recognition of tribal involuntary commitment orders, while several states have enacted court rules or statutes pertaining to tribal court orders which must be honored under the newly enacted provisions of the Violence Against Women Act. See 18 U.S.C. § 2265 (1994); ARIZ. TRIBAL CT. COMMIT. ORDERS R. 2; see also ARK. CODE ANN. § 9-15-302 (Michie Supp. 1995) (granting protection orders); MASS. GEN. LAWS ANN. ch. 209A, § 1 (West Supp. 1997) (allowing protection orders); N.M. STAT. ANN. § 1-4-5.1 (Michie Supp. 1997) (providing for protection orders in voter registration); VA. CODE ANN. § 16.1-279.1 (Michie 1997) (affording protection orders). At least one state governor vetoed legislation requiring the state courts of that state to honor tribal court protection orders. See S. 93, 72nd Leg., Reg. Sess. (S.D. 1997).

\textsuperscript{113} See supra note 110.

\textsuperscript{114} See MICH. CT. R. 2.615(B)(1); OKLA. STAT. ANN., tit. 12, ch. 2, App. Rule 30 (West Supp. 1998); WASH SUPER CT. CIV. R. 82.5 (requiring a state court to honor a tribal court order unless the tribal court does not reciprocally provide for the recognition of state court judgments); WISC. STAT. ANN. § 806.245 (1)(e) (West 1994).

\textsuperscript{115} See N.D. CT. R. 7.2.

issue because if consensus can be reached there, both tribal and state court orders will be honored and the reciprocity, which appears to be at a premium, especially to state legislators, can be achieved. Additionally, state judicial bodies, and possibly tribal judicial bodies, are in a better position to implement consensus achieved through rule making authority rather than having to present proposals to legislatures. This is because state legislatures are often consumed more with the political squabbling surrounding issues of Indian tribes and their sovereign rights, rather than with focusing on achievable objectives.  

It is not only important to develop the parameters for the application of full faith and credit and comity among state and tribal courts; it is equally important to develop conventions for the registration of foreign judgments in the respective court systems and the dissemination of such orders to the foreign courts. As previously indicated, this is true even in those areas where federal law defines the parameters of full faith and credit because federal law is conspicuously silent on methodology to achieve the federal objective. Methodology thus left to state and tribal officials, of whom judges and clerks who deal with registration issues frequently are the ideal audience to develop the protocols and dissemination methods, whether they be central registries or simply periodic notifications about tribal and state court orders. Some states appear to allow tribal court judgments to be filed under the Uniform Enforcement of Foreign Judgments Act, while others appear to require the filing of an independent state court action.  

Full faith and credit is an integral issue to tribal courts because without it tribal courts lack the credibility and enforcement powers to truly dispense justice for all litigants. Similarly, it is important to state courts because of the frequent need to enforce state court judgments through tribal forums. This issue, if resolved by a tribal-state court forum, may lay the foundation for future successes on other fronts.

D. Jurisdictional Agreements

Allocating jurisdiction among state and tribal courts, by con-
sensus, is an area fraught with potential pitfalls and the possibility for sharp disagreements. Tribal courts tend to be very jealous about the exercise of their valid jurisdiction, simply because they see that jurisdiction as an extension of their sovereignty and erosions upon it as threats to their survival as distinct nations. Similarly, many state courts may take the position that the exercise of state court jurisdiction over the entire state achieves a uniform application of laws and ensures consistency state wide, securing all the state’s citizens, Indians and non-Indians alike, a similar brand of justice. In most non-Public-Law-280 states, placing this issue on an agenda for tribal-state forums is a non sequitur because the courts have no authority to redraft federal law and vest tribal or state courts with jurisdiction they may not validly exercise under federal law, except in very limited areas, such as the Indian Child Welfare Act.

In Public-Law-280 states, however, where jurisdiction between state and tribal courts is often concurrent, and where confusion reigns regarding the extent to which state courts can exercise jurisdiction over certain types of disputes, confronting the meddlesome issue of jurisdiction allocation may be preferable to ignoring it and having to adjudicate under unclear judicial precedent. Resolving jurisdictional ambiguity by consensus may also avoid no-forum issues that have arisen in states such as Minnesota and California.

121. See Jones, supra note 104, at 692.
122. See id.
123. See id.
124. See 25 U.S.C. § 1322 (1994). Because of the amendment to Public Law 280 made in 1968 through the enactment of the Indian Civil Rights Act, state courts cannot assume further jurisdiction over Indian country absent a valid tribal election wherein the tribal electorate opts for the extension of state court jurisdiction. See id.; see also Kennerly v. District Court, 400 U.S. 423, 429 (1971) (stating that it is most likely not possible for a state to permit a tribal court to exercise jurisdiction beyond its inherent authority because most questions regarding jurisdiction in Indian country are subject matter jurisdiction issues, which cannot be given by consent).
126. See State v. Stone, No. C9-96-1291, 1997 WL 761278, at *6 (Minn. Dec. 11, 1997). Stone outlines several recent Minnesota court decisions restricting state court jurisdiction over regulatory infractions occurring on state highways running through several of the Minnesota Chippewa Indian reservations. See id. These decisions, even if correct, create a quandary for law enforcement because on many of the reservations involved, the tribes have not acted to regulate highway safety nor have they vested their courts with the jurisdiction to enforce regulatory traffic laws.
127. See sources cited supra note 58 (discussing the lack of state court jurisdic-
and avoid the race to the courthouse door, which always exists in a concurrent jurisdictional regime. Unlike non-Public-Law-280 states, where the allocation of jurisdiction among state and tribal courts may be proscribed by federal law, no such impediment exists in Public-Law-280 states because jurisdictional allocation would involve deferring the exercise of one court’s valid jurisdiction to another forum which similarly has valid jurisdiction, rather than creating jurisdiction out of whole cloth. Several examples of potential jurisdictional allocation exist, which may be the appropriate topic for tribal-state court forums.

1. Indian Child Welfare Act

The Indian Child Welfare Act was enacted by Congress in 1978 to curtail the massive removal of Indian children from their homes, primarily by state agencies and courts, and to ensure that
those children who had to be removed would be placed in homes that reflect their unique cultures and traditions. The Act strives to keep Indian children in their homes by placing certain procedural requirements on parties in state courts and on the courts themselves, before the removal of Indian children or the termination of parental rights. It also imposes substantive requirements upon state courts and social service agencies seeking to place children in foster or adoptive care.

In those states where state courts could exercise no jurisdiction over reservation-domiciled Indian children prior to 1978, the Indian Child Welfare Act reaffirms that tribal courts have exclusive jurisdiction over any child custody proceeding involving a reservation-domiciled Indian child. Additionally, tribal courts have pre-

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See id.

133. See id. In addition to the severe removal rate of Indian children from their families, Congress was concerned that 85% of Indian children were placed in non-Indian foster homes, and in the state of Minnesota, for example, 90% of Indian children in adoptive placements were placed in non-Indian homes. See id.

134. See 25 U.S.C. § 1911(a) (1994) (restricting state court jurisdiction over Indian children domiciled on Indian reservations; requiring state courts to transfer jurisdiction over child custody proceedings involving non-reservation domiciled Indian children to tribal courts; and allowing Indian parents and tribes to intervene in state court proceedings); 25 U.S.C §1912(a) (1994) (governing involuntary placements by state courts and requiring Indian tribes to receive notice of proceedings; requiring parents to be appointed counsel; and establishing the burden of proof and requisite evidentiary showings before a foster care placement or termination of parental rights can be accomplished in state court); 25 U.S.C. § 1913(c) (1994) (governing the requirements for a voluntary placement of an Indian child in foster care or a voluntary termination of parental rights).


136. See 25 U.S.C. § 1911(a) (1994). The phrase "child custody proceeding" in domestic relations vernacular is generally thought to mean a custody dispute between parents in a divorce or other proceeding. See id. Under the Indian Child Welfare Act, custody proceedings between parents are explicitly exempted from coverage. See 25 U.S.C. § 1903(1) (1994) (exempting custody disputes in divorce proceedings); see also In re Defender, 435 N.W.2d 717, 721 (S.D. 1989) (exempting custody disputes between unwed parents from Indian Child Welfare Act coverage). Under the Indian Child Welfare Act, the phrase "child custody proceeding" means any voluntary or involuntary placement of an Indian child outside his home where custody of the child cannot be regained upon demand (foster care placement); a proceeding that results in the termination of the pa-
sumptive jurisdiction over child custody proceedings arising off the reservation, which proceedings should be transferred to the tribal courts absent good cause to the contrary.

There are two areas of the Indian Child Welfare Act very amenable to tribal-state court agreement on the allocation of jurisdiction. First, because the Indian Child Welfare Act recognizes that in Public-Law-280 states, the state courts will continue to exercise jurisdiction over child custody proceedings that arise in Indian country, absent a retrocession of exclusive jurisdiction back to the tribal court, determining which court system, tribal or state, should exercise initial jurisdiction over a child custody proceeding arising in Indian country presents an issue ripe for resolution through a forum. It makes little sense for a state court proceeding to be commenced and then transferred to a tribal forum under the provisions of the Indian Child Welfare Act if the tribal court has a competent court of jurisdiction to entertain the action initially. Such allocation of jurisdiction agreements is specifically sanctioned by federal law and may achieve a uniform protocol regarding the protection of the welfare and culture of Indian children. An example may be an agreement made between the courts and social services agencies of a particular county, located exclusively within the exterior boundaries of an Indian reservation, and the tribal court and social services agency. The agreement would specify which entity would investigate the alleged abuse and neglect of Indian children and which court would be the appropriate forum for

rental rights over an Indian child, either voluntary or involuntary; a placement after termination of parental rights but prior to adoption; and lastly an adoptive placement. See 25 U.S.C. § 1903(1)(i-iv) (1994).

137. See Miss. Band of Choctaw Indians, 490 U.S. at 36.
140. See 25 U.S.C. § 1918 (1994) (authorizing a tribe to petition the Department of Interior to reassert exclusive jurisdiction over child custody proceedings arising within Indian country); see also Native Village of Venetie v. Alaska, 918 F.2d 797, 808-11 (9th Cir. 1990) (finding that Public Law 280 did not deprive tribal courts of their inherent concurrent jurisdiction over child custody proceedings).
142. It is the author’s understanding that several of the Tribes in Minnesota and the state are attempting to address issues surrounding jurisdiction and other important factors in implementing the Indian Child Welfare Act in Minnesota through a cooperative social services agreement.
the initiation of a petition to protect the child.

The second appropriate topic under the Indian Child Welfare Act for resolution by judicial agreements is the transfer of jurisdiction issues involving off-reservation children, and in Public-Law-280 states, on-reservation children. Although such agreements cannot supersede the right of an Indian parent to object to a transfer to tribal court, many state and tribal courts have reached understandings regarding the transfer of jurisdiction issues. Some state courts have even allowed tribal courts to utilize their courtrooms while conducting tribal court hearings, better accommodating the witnesses and parties.

2. Abstention Agreements

Another area where state and tribal judges can perhaps reach a consensus regarding an appropriate allocation of jurisdiction is where the state and tribal court have concurrent jurisdiction. In these cases prudence dictates that either the tribal court or the state court first address the issue involved in the litigation. The exercise of state court jurisdiction would impair the ability of the Tribe to make its own laws and to be governed by them, or in the case of tribal court jurisdiction, would result in the tribal adjudication of a case without the aid of tribal substantive law. Again, the

144. See 25 U.S.C. § 1911(b) (1994) (giving a natural parent of an Indian child the absolute right to veto a transfer of jurisdiction to a tribal court). See generally Matter of Appeal of Maricopa County Juvenile Action No. JD-6982, 922 P.2d 319, 324 (Ariz. Ct. App. 1996) (finding that even though the natural mother of a child was schizophrenic and the guardian ad litem for her consented to transfer, court erred in transferring case to tribal court over mother's objections).

145. The author represented an Indian tribe from Alabama, the Mowa Band of Choctaw Indians, which successfully gained a transfer of jurisdiction over a proceeding pending in Hughes County, South Dakota, where the tribal court was allowed to conduct a hearing in the Hughes County Courthouse after transfer. But see Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 154 (Tex. Ct. App. 1995) (finding that tribal court could not sit outside of its jurisdiction).

146. See e.g., Granite Valley Ltd. Partnership v. Jackpot Junction Bingo & Casino, 559 N.W.2d 135, 142 (Minn. Ct. App.), review denied, (Minn. April 15, 1997) (discussing the nature of the relationship between state and tribal courts where concurrent jurisdiction over an action exists in Minnesota, and under federal law)

147. For example, in Gavle v. Little Six, Inc., the Minnesota Supreme Court held in a suit against a tribal entity (a corporation created to operate the Tribe's casino) involving activities that occurred both on and off the reservation, that the prudential rule of abstention did not require the state court to stay its hand on ruling whether the tribal entity could invoke sovereign immunity as a defense. 555 N.W.2d 284, 292 (Minn. 1996) The court then ruled that the tribal entity was cloaked with immunity in state court. See id. The court, however, strongly sug-
allocation of jurisdiction in this area would be permissible under federal strictures if both the state and tribal court can legitimately claim jurisdiction under Public Law 280. Nothing in federal law, then, would preclude a jurisdictional allocation protocol. 48

This may be a difficult area about which to reach a consensus, however, since litigants will always interject interesting nuances into cases, which may bring the case either within or without the sphere of cases where prudence may dictate abstention. Therefore, attempting to identify an agreement-specific case, which should be subject to abstention, is almost impossible. However, general policy agreements between state and tribal judges may serve to facilitate the decision regarding which court should retain jurisdiction. An example where a tribal court may defer its jurisdiction to a state court would be a case involving a subject matter that the tribe lacks in its code but the state regulates. For example, if a non-Indian merchant on an Indian reservation violated clearly established state usury laws in extending financing to a tribal member, but the Tribe itself does not regulate consumer credit, prudence may dictate that the tribal court defer to the state court for an action brought against the merchant. 149 Abstention may actually protect tribal members by enlisting the assistance of state consumer protection laws. Allowing the state court to adjudicate the case would not impair the tribal courts because they have not been charged with adjudicating such cases by tribal government.

Other examples may include the enforcement of state education or anti-discrimination laws where the gravamen of the complaint does not implicate tribal sovereignty and is clearly based upon state law in an area where the Tribe has not regulated. In such cases, especially where the defendant is a non-Indian who may attempt to challenge tribal jurisdiction over him, deferring to state

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149. Of course, nothing would prevent the tribal court from applying state law in adjudicating the case, provided tribal law did not prevent such an incorporation. This is also assuming that usury laws are not regulatory in nature. If they are regulatory, the merchant, Indian or non-Indian, may legitimately claim that such laws do not apply to him.
court jurisdiction will allow the Indian litigant much more latitude in applying favorable state law and may save the Tribe the expense of regulating an area already extensively regulated by state law.

It is too facile to expect, however, that a Tribe or its court system may allocate jurisdiction to a state court in order to resolve the present predicament in many states over the interpretation of Public Law 280 and its restrictions on regulatory jurisdiction. These restrictions are a product of federal law. Even if a tribe and a state concur that the state courts should be able to apply state regulatory laws to matters occurring in Indian country, federal law would prohibit this absent a tribal election, which is an unlikely occurrence. Tribes may, however, as perhaps the best alternative, adopt state regulatory laws as their own and apply their laws in the tribal courts.

State courts may likewise opt to abstain from exercising their valid jurisdiction in favor of tribal adjudication in certain cases. As the Minnesota Supreme Court indicated in *Gavle v. Little Six, Inc.*, abstention by a state court is appropriate when the exercise of state court jurisdiction would "undermine the authority of the tribal courts over Reservation affairs" or "infringe on the right of Indians to govern themselves." Interestingly, the rule that the Minnesota Supreme Court adopted for assessing the appropriateness of abstention is the same rule that non-Public-Law-280 states use for determining whether state court jurisdiction is precluded. Again, it may be difficult for state and tribal judges to reach a consensus on the categories of cases that should be subject to abstention in state courts. The parties involved in cases may feel that prearranged agreements regarding jurisdiction have deprived

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150. See 18 U.S.C. § 1162 (1994); see also discussion supra note 7.
152. 555 N.W.2d 284 (Minn. 1996).
153. Id. at 291 (quoting Williams v. Lee, 358 U.S. 217, 223 (1959)).
154. Id.
155. See, e.g., Agri West v. Koyama Farms, Inc., 933 P.2d 808 (Mont. 1997), reh'g denied, (March 20, 1997) (establishing the rule of abstention that "when a tribal court asserts jurisdiction over certain causes of action, we defer to that assertion by applying the doctrine of abstention as a matter of comity").
them of forums they are entitled to under federal law, claiming it is very difficult to apply general principles of agreement to unique fact situations. Additionally, state courts may be troubled by what they perceive as a dearth of tribal substantive law in a particular area and may hesitate to defer to a court with no clear statutory guidance. As with potential tribal court abstention cases, however, there are some cases where state court abstention may be appropriate.

State courts could review federal court decisions discussing the exhaustion of the tribal court remedies rule to determine which cases should be subject to abstention.\(^{156}\) For example, if the resolution of the underlying dispute involves interpretation of the tribal law, there seems to be an emerging consensus among federal courts to defer to tribal courts even if federal court jurisdiction may appropriately lie in a case. Examples include questions regarding the legality of tribal gaming management contracts under tribal law, even where the parties previously agreed to arbitration and federal court jurisdiction;\(^{157}\) cases involving the application of federal and state labor laws to tribal governmental entities;\(^{158}\) cases involving whether a tribe has waived its sovereign immunity under tribal law;\(^{159}\) cases involving the interpretation of tribal constitutional law;\(^{160}\) and cases where a tribal governmental entity or busi-

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156. Of course, a distinction between the federal court exhaustion rule and the state court abstention rule may be that the federal courts assume they have the ultimate authority to review tribal court decisions in exhaustion cases, whereas it is unclear under what authority a state court would review anew a case adjudicated through the tribal court, especially in a state that has adopted some form of full faith and credit for tribal court orders.

157. See Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412, 1421-22 (8th Cir. 1996).


159. See Davis v. Mille Lacs Band, No. 5-95-187, slip op. at 3 (D. Minn. Jan. 16, 1996) (granting a stay). In Davis, the federal district court judge, when confronted with an argument that the Tribe had voluntarily waived its immunity from suit in a sexual harassment lawsuit by agreeing to a cross-deputization law enforcement agreement with the State, abstained to allow the tribal court to first decide the question. See id. This is not to suggest that a state court should stay its hand every time an Indian tribe or one of its entities invokes sovereign immunity in a dispute where state court jurisdiction clearly lies. However, if the argument surrounding the waiver of immunity involves interpretations of tribal constitutional or statutory law rather than abrogation by the federal government, abstention may be appropriate to permit tribal courts to first resolve the issue.

160. See Basil Cook Enter., v. St. Regis Mohawk Tribe, 117 F.3d 61, 68 (2d Cir. 1997) (declining to interpret tribal constitution to determine whether presiding tribal court judge was appointed in violation of the trial court constitution).
ness is involved but the suit does not address any off-reservation activity, thus implicating only tribal law.161

Another type of dispute where circumspection may ordain state court abstention is one involving purely intramural tribal governmental issues such as eligibility for enrollment with a tribe or eligibility to participate in tribal income distributions.162 Since eligibility for tribal enrollment is oftentimes implicated by paternity establishment, some state courts have also chosen to defer their jurisdiction to resolve paternity issues to tribal courts.163 A Minnesota appellate court refused to do so, however, holding that a state court had jurisdiction to adjudicate the paternity of a child born to reservation-domiciled Indian parents.164

Of course, determining state court abstention in any of these

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164. See Becker County Welfare Dep't v. Bellcourt, 453 N.W.2d 543, 544 (Minn. Ct. App. 1990). The court held that Public Law 280 vested state courts with the authority to adjudicate paternity actions arising on the reservations, except Red Lake, involving reservation-domiciled Indians. See id. The court based this conclusion on a belief that the Minnesota Chippewa Tribal Constitution does not permit the constituent bands to create court systems. See id. This position was later refuted by the Department of Interior. See Letter from Thomas C. Jacobs, Office of the Solicitor for the United States Department of the Interior, to Anne McKieg, Assistant Hennepin County (Minnesota) Attorney (July 18, 1995) (on file with author). In light of the Department of Interior's switch in position, and if the tribal courts are permitted to exercise jurisdiction over paternity actions through tribal legislative action, this case may well be worth revisiting. See id. (stating that "the Associate Solicitor intends to direct a fundamental review of the existing regulations").
types of disputes must be tempered by the realization that some tribal courts in Public-Law-280 states are not fully functioning courts of general jurisdiction, but remain courts with limited jurisdiction.\footnote{165} If a Tribe has opted not to confer jurisdiction over a particular subject matter, deferring to the tribal court may be precluded, although such failure does not necessarily preordain state court jurisdiction either.\footnote{166}

A possible alternative to abstention which has been raised by some individuals involved in state-tribal court relations is the development of a certification of law procedure between state and tribal courts whereby each can certify a question of law to the other when necessary to resolve a dispute.\footnote{167} At least one state, Arizona, permits its supreme court to answer questions of state law certified to it from tribal courts, although that state does not seem to allow certification to tribal courts.\footnote{168} This procedure, which happens frequently between state and federal courts, may be especially useful in Public-Law-280 states because of Public Law 280's command that state courts apply any tribal custom or tradition germane to the dispute that does not conflict with state policy.\footnote{169} If the state adopts the revised Uniform State Laws, and the tribe has a similar procedure, this may hold out some potential for resolving thorny issues of choice of law.\footnote{170} Tribal courts may legitimately fret, how-

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\item \footnote{165} See Minnesota State Court/Tribal Court Committee, Minutes from Meeting at Prairie Island Community (July 18, 1997) (on file with author). The court descriptions of the tribes of Minnesota, compiled for state courts in the newly formed tribal-state court forum, indicate that several tribes of the Minnesota Chippewa Tribe only have conservation courts that exercise limited jurisdiction. \textit{See id.}\ Other tribal courts, Grand Portage for example, do not exercise jurisdiction over domestic relations matters. \textit{See Grand Portage Band of Chippewa, Description of Grand Portage Band of Chippewa Tribal Court (1997) (on file with the Minnesota State Court/Tribal Court Committee).}
\item \footnote{166} See State v. Stone, No. C9-96-1291, 1997 WL 761278, at *6 (Minn. Dec. 11, 1997) (finding that Minnesota lacks jurisdiction over violations of certain driving traffic regulations which occur on the tribe's reservation).
\item \footnote{167} See Meeting Minutes of the National Conference of Commissioners on Uniform State Laws in Kansas City, Mo. (July 28-Aug. 4, 1995) (on file with author). The National Conference of Commissioners on Uniform State Laws proposed an amendment to the Uniform Certification of Laws Act to include tribal courts as states in the Uniform Child Custody Jurisdiction and Enforcement Act. \textit{See id.}
\item \footnote{168} See \textit{ARIZ. REV. STAT. ANN. § 12-1861 (West 1994).}
\item \footnote{170} See 24 \textit{MILLE LACS BAND STAT. ANN. § 3001 (West 1996) (providing an example of a tribal code).} The Mille Lacs code permits its court to certify and answer questions. \textit{See id.}
\end{itemize}
ever, that if a certification procedure were implemented, it would supplant both the abstention doctrine and the exhaustion of tribal court remedies doctrine by allowing state courts to bypass the more time-consuming deferral of jurisdiction in exchange for a more expeditious and efficient way of discovering tribal law.

Allocation of jurisdiction can be a massive undertaking in a state where jurisdictional disputes have been a sore point for state-tribal relations. However, if both state and tribal courts undertake this mission with the objective of ensuring every litigant access to at least one forum to resolve a dispute, some agreements may be reached without unnecessarily depriving either court of its jurisdiction necessary to dispense its obligations.

3. Domestic Violence and Child Support

An area that cries out for some judicial dialogue among federal, state and tribal judges is domestic violence within and across reservation boundaries. The new federal law on interstate domestic violence has several provisions that implicate federal, tribal and state court jurisdiction. For example, the full faith and credit requirement of federal law mandates that the protection orders of state and tribal courts “be accorded full faith and credit by the court of another State or Indian tribe and enforced as if it were the order of the enforcing State or tribe.” Ergo, if an individual who is subject to a tribal court protection order violates that protection order within state court jurisdiction, the state court must impose whatever criminal or civil sanctions it would for violating a similar state court protection order. This raises a whole host of intriguing jurisdictional problems in both Public Law 280 and non-Public Law 280 states.

In non-Public-Law-280 states, a state court may not have criminal jurisdiction to prosecute a non-Indian who violates a tribal court protection order to protect an Indian within Indian country. The United States Supreme Court has stripped tribal courts

172. See id.
173. See id.
174. See State v. Larson, 455 N.W.2d 600, 600 (S.D. 1990) (holding that the state lacks jurisdiction to prosecute an assault committed within Indian country by a non-Indian against an Indian); State v. Kuntz, 66 N.W.2d 531, 533 (N.D. 1954) (finding that the state has no jurisdiction over the crime of killing an Indian’s livestock, where the Indian lives on the reservation). The General Crimes Act has generally been construed to preclude state court jurisdiction over crimes involv-
of this criminal jurisdiction.\textsuperscript{175} There does not seem to be a federal statute that would allow prosecutions either, although there is a possibility of federal prosecution for misdemeanors as defined under state law.\textsuperscript{176} In such a scenario it may be beneficial to tribal and state courts to agree that Indian victims of domestic violence in Indian country should utilize state courts to gain protection orders against non-Indian perpetrators to ensure maximum law enforcement for violations, assuming state courts have criminal jurisdiction to punish a non-Indian violator of a state court protection order who violates it in Indian country.\textsuperscript{177}

Likewise, in Public-Law-280 states, tribal, state, and federal courts need to examine how domestic violence will be addressed within and across reservation boundaries, assuming domestic violence protection order proceedings, both civil and criminal, are not regulatory in nature. State judges may be reluctant to impose criminal sentences on non-Indian violators of tribal court protection orders, especially in light of the rather unclear nature of tribal court civil jurisdiction over non-Indians,\textsuperscript{178} and because state law may not specifically criminalize the violation of a tribal, as opposed to a state court protection order. State courts will also inevitably need the assistance of tribal court officials in prosecuting violations to lay the foundation for the introduction of necessary evidence, including the existence of a tribal court protection order.

Adding even more intrigue to this mix in Public Law 280 states is the import of the new federal crimes of “Interstate Domestic Vio-
These statutes are designed to federally criminalize interstate domestic violence, and interstate activity is defined to encompass cross-reservation activity. Thus, if an individual crosses into or out of Indian country with the intent to violate a protection order provision prohibiting acts or threats of violence, or to commit an act of domestic violence, he can be prosecuted for federal interstate domestic violence. The law provides no exception for Public-Law-280 states. This is odd because legislative history reveals that the law was premised on the congressional belief that an individual should not be able to go into another jurisdiction to violate a protection order. On Public-Law-280 reservations, however, crossing into Indian country does not always subject a person to a different set of laws because state law is still applicable. Therefore, in certain states a person who enters or leaves Indian country with the intent to commit an act of domestic violence could potentially be subject to prosecution in any of three jurisdictions.

The best manner for obviating the potential for cross-jurisdictional enforcement problems would be for state and tribal courts to develop a protocol for the immediate registration of foreign protection orders with adjoining jurisdictions, both tribal and state. This would ensure that violations of protection orders outside the issuing jurisdiction would be vigorously prosecuted and pursued with the full enforcement powers of the court that has jurisdiction over the violations. In this way a protection order issued by one court automatically becomes both a state and tribal court protection order. This would also avoid the necessity of

180. See id. § 2262.
181. See id.
185. The Indian tribes which are part of the Dakota Territory Tribal Chairmen's Council, including the four Dakota tribes in Minnesota, recently received a federal grant to develop central registries of protection orders via the Internet so that information about protection orders can be shared among the tribal courts in the Council and their law enforcement agencies. Working adjoining state and county jurisdictions into such a registry, or incorporating tribal court orders into a state central registry, could be a natural offspring of this development.
tribes and states having to address the messy question of extraditing a violator back to the issuing court's jurisdiction since extradition between tribal and state governments is another area crying out for some clarification.\footnote{186}{Absent an extradition agreement or statute, federal law does not compel state or tribal officials to return fugitives back to state or tribal jurisdiction. See Arizona ex rel. Merrill v. Turtle, 413 F.2d 683, 685 (9th Cir. 1969) (holding that a state's claim at jurisdiction would interfere with Navajo rights to self-government); City of Farmington v. Benally, 892 P.2d 629, 651-32 (N.M. Ct. App. 1995) (dismissing a case and holding that the arrest of an Indian on a reservation is illegal and the district court did not have jurisdiction to hear the case).}

Similar discussions can be had with regard to child support enforcement across reservation boundaries. The recent welfare reform legislation\footnote{187}{See 42 U.S.C. § 654(7) (1994).} for the first time recognized the ability of states and tribes to enter into cooperative agreements regarding the enforcement of child support obligations. These agreements, which if approved by the Federal Department of Health and Human Services, will be substantially funded by the federal government and will permit states and tribes to agree on areas such as wage withholding from tribal employees and the use of both federal and state tax intercepts to collect support for Indian children. A good starting point may be the mere acknowledgment by state courts and officials that the tribal courts will be utilized to enforce support obligations against tribal employees working within Indian country, thus eliminating the need for state wage withholding orders, which are always met with resistance by tribal governments who see them as an attempt to apply state law to Indian tribes.

In summary, the issues that confront state and tribal courts who wish to improve their interaction are challenging, yet surmountable, provided the necessary level of respect is afforded each as they go about discussing these important matters. Ideally, these issues will be the grist of tribal-state court forums, although certainly it may be more productive to address some of these issues in a more localized manner such as county to tribe.

III. TRIBAL-FEDERAL FORUMS

Surprisingly, state and tribal judges have experienced more dialogue regarding issues of mutual concern in recent years than federal and tribal judges.\footnote{188}{For example, a senior circuit court judge of the Ninth Circuit Court of Appeals wrote that until recently, and without the dialogue between state and} This is understandable in certain states
where state courts exercise paramount jurisdiction in Indian country. \textsuperscript{189} However, in states that don't follow Public Law 280, where the federal courts exercise a substantial degree of criminal and civil jurisdiction exclusive of the authority of state courts, the dialogue between federal and tribal judges is just as essential. This may explain why both federal \textsuperscript{190} and tribal judges \textsuperscript{191} in the Eighth Circuit have recently initiated discussions about the formation of a tribal-federal judges' committee to discuss the interrelationship of the tribal and federal courts. \textsuperscript{192} Just as with state and tribal judicial dialogue, the federal and tribal judges are broaching the subjects at hand with a certain degree of curiosity about how each court system operates, and with circumspection with regard to what can be accomplished. Just as with state and tribal judges, perhaps the most important objective of tribal and federal court forums should be the educational aspect whereby federal judges can learn about the types of caseloads tribal courts encounter and the severe budgetary constraints under which they operate. \textsuperscript{193} The tribal judges, conversely, may be enlightened by the opportunity to participate in the educational sessions federal judges attend and by the federal criminal and civil court processes. Other, more concrete, issues present themselves as likely targets of federal-tribal court dialogue and will be discussed in the following sections.

A. Tribal Court Exhaustion Rule

In two seminal decisions, \textsuperscript{194} the United States Supreme Court injected some much needed vitality into tribal court adjudicatory

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  \item \textsuperscript{189} See discussion supra note 2.
  \item \textsuperscript{190} See discussion supra note 2.
  \item \textsuperscript{191} The tribal judges in the states represented by the Eighth Circuit, through the Northern Plains Tribal Judges' Association have endorsed the concept of developing a working relationship with the federal judges and have created task forces to develop suggestions for possible topics of discussion.
  \item \textsuperscript{192} See supra note 2.
  \item \textsuperscript{193} See supra note 2.
  \item \textsuperscript{194} See Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15-16 (1987) (ruling that a tribal court should have the first opportunity to evaluate the facts); National Farmer's Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985) (holding that a tribal court should have an opportunity to determine its own jurisdiction).
\end{itemize}
authority by holding that litigants cannot proceed to federal court to challenge a tribal court’s jurisdiction without first exhausting tribal court remedies. This rule requiring tribal court exhaustion, as the Court has indicated recently, is not mandated by any constitutional or statutory principles, but is the creature of prudence, designed to strengthen tribal court systems by giving them the opportunity to examine their own jurisdiction and the authority of the Tribes to regulate certain reservation affairs. These decisions empowered tribal courts by preempting the efforts of litigants trying to avoid tribal court jurisdiction by invoking federal court jurisdiction. More contemporary decisions have expanded this prudential doctrine well beyond its original design, to permit tribal courts to initially resolve a variety of disputes, including actions brought by the United States government as well as those based on federal law.

From a tribal perspective, however, the tribal court exhaustion rule is a good news, bad news scenario. It represents the opportunity for tribal courts to initially resolve disputes within the realm of their jurisdiction. Ultimately, however, the federal courts will determine the appropriate scope of tribal court jurisdiction because of the Supreme Court’s determination in National Farmer’s Union that the extent of a tribal court’s civil jurisdiction over a non-Indian litigant is a “federal question,” justiciable in federal court under federal question jurisdiction. Accordingly, regardless of how effective and just a tribal court is in adjudicating a case, its viability as the ultimate arbiter of many disputes will depend upon the generosity of the federal courts. Making the federal courts aware of the workings of tribal courts and developing a collegial relationship with federal judges is of vital importance to tribal courts. These tribal court judges wish to remove the cloak of mystery surrounding tribal courts and convince the federal courts of the integrity of their dispute resolution methods.

196. See Kerr-McGee Corp. v. Farley, 115 F.3d 149, 1505 (10th Cir. 1997) (holding that tribal court jurisdiction was not so contrary to the Price-Anderson Act, 42 U.S.C. § 2011 (1994), as to preclude application of the tribal court exhaustion rule). But see Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458, 462 (8th Cir. 1993) (holding that tribes cannot regulate the transportation of nuclear waste across reservation highways and the case is not subject to the tribal court exhaustion rule).
The exhaustion rule spawns a cornucopia of issues for federal and tribal judges to discuss, ranging from the standard of review of tribal court decisions,\textsuperscript{199} to the mechanics for that review.\textsuperscript{200} These issues may prove to be more fruitful subjects for discussion than the broader issue of which cases should be subject to exhaustion, an issue which federal judges may feel is not subject to disputation, but instead is governed by Supreme Court and superior federal appellate court decisions.

1. Developing a Federal Court Standard of Review for Tribal Court Decisions

With all the attention devoted in certain states to full faith and credit between tribes and states, there has been surprisingly little scrutiny of what degree of deference a federal court owes a tribal court's resolution of a dispute.\textsuperscript{201} For example, in a diversity case arising in Indian country, subject to exhaustion because of\textit{Iowa Mutual},\textsuperscript{202} if a tribal court renders a fair and just resolution of a dispute based upon tribal law, what role should a federal court play in reviewing the tribal court's decision? Should the federal court simply try the case anew, based upon state law,\textsuperscript{203} thus rendering the tribal court adjudicatory process superfluous, or should the federal court merely affirm the tribal court decision, thus arguably denying

\textsuperscript{199} See \textit{Iowa Mutual}, 480 U.S. at 19 (holding for the requirement that appellants first exhaust tribal court remedies before appealing tribal court jurisdiction to federal court, but failing to discuss the standard for federal appellate review); \textit{National Farmers}, 845 U.S. at 857 (omitting the standard under which a federal court should review a tribal court determination of its own jurisdiction).

\textsuperscript{200} See \textit{Iowa Mutual}, 480 U.S. at 19; \textit{National Farmers}, 845 U.S. at 857.

\textsuperscript{201} See \textit{Wilson v. Marchington}, 127 F.3d 805, 805 (9th Cir. 1997) (holding that a federal court need not give full faith and credit to a tribal court judgment, but it must provide comity).

\textsuperscript{202} See \textit{Iowa Mutual}, 480 U.S. at 15-16.

\textsuperscript{203} See \textit{Erie Railroad Co. v. Tompkins}, 304 U.S. 64, 78 (1938) (holding that federal courts are bound in diversity cases to apply the substantive law of the state where the action arose). If state law conflicts with tribal law, however, a federal judge may be in a quandary because it makes little sense to apply the law of a forum to a dispute, when that forum has no relation to the cause of action. However, that seems to be the prevailing trend in federal court diversity cases and federal tort claims cases arising in Indian country. See \textit{id}; see also \textit{Red Elk v. United States}, 62 F.3d 1102, 1104-05 (8th Cir. 1995) (applying state law to determine if tribal officer who raped youth while on duty was engaged in his course of employment at time of rape); \textit{Big Owl v. United States}, 961 F. Supp. 1304, 1309 (D.S.D. 1997) (looking to state law to determine if actions of tribal school board of not rehiring teacher rose to level of intentional or emotional infliction of emotional distress).
the litigants the access to a federal forum the diversity jurisdiction statute guarantees? Indeed, in those cases where the federal courts have applied the exhaustion rule to a dispute amenable to ultimate resolution under tribal law, it is conceivable that the federal courts may ultimately adopt a rule similar to the federal abstention doctrine, as applied to pending state litigation, to avoid rehearing such disputes in federal courts.

There are a plethora of issues that arise when a federal court reviews a tribal court decision after tribal court remedies have been exhausted. Unfortunately, most of the federal court decisions have discussed cases appropriate for exhaustion and paid less attention to the role of federal courts after exhaustion. One issue that appears clear is that federal courts will review any assertion of regulatory or adjudicatory authority over a non-Indian litigant anew, either under the standard set out in *Montana v. United States*, or under the more deferential standard set out in other Supreme Court precedents, with little preclusive effect to the tribal court’s legal rationale.

If tribal court jurisdiction is endorsed, however, under what principle of federal law would a federal court be empowered to proceed into an analysis of the tribal court’s resolution of the merits of a dispute? The federal question raised by a tribal court’s assertion of jurisdiction is the extent to which the court can exercise the jurisdiction, not whether the exercise of that jurisdiction produced a just result. An example of an actual case pending in the

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204. See *Younger v. Harris*, 401 U.S. 37, 41 (1971) (upholding the national policy which forbids federal courts from staying state court proceedings unless special circumstances exist).
205. See *State v. A-1 Contractors*, 117 S. Ct. 1404, 1416 (1997). The United States Supreme Court decision in *A-1 Contractors* offers little guidance for tribal and federal courts. *Id.* Even though the Court was reviewing a tribal court and appellate decision, they seemed to pay little or no attention to the tribal court’s findings of fact or reasoning in upholding its jurisdiction. *See id.*
206. 450 U.S. 544, 564 (1981) (stating the general rule that Indian tribes do not have authority over the conduct of non-Indians within a reservation, but retain authority only over the relations among tribal members).
208. See *Santa Clara Pueblo*, 436 U.S. at 71. In *Santa Clara*, the United States Supreme Court held that allegations of tribes violating due process rights under the Indian Civil Rights Act are only justiciable in federal court through habeas corpus, and not in an independent action to enforce the Indian Civil Rights Act. *Id.* This ruling would appear to preclude the federal courts from reviewing tribal court decisions alleging due process violations in tribal court proceedings. In *Duncan Energy Co.*, the United States Court of Appeals for the Eighth Circuit
Crow Tribal Court, which was the subject of a recent Ninth Circuit opinion, is *Burlington Northern Railroad v. Red Wolf*. If a Crow jury enters a substantial verdict against a non-Indian railroad based upon a system of justice which is arguably biased, yet the Tribe as well as its court system clearly had jurisdiction over the railroad, which appears likely because of a previous Ninth Circuit decision, what is the federal court to do in its review of the tribal court decision? The danger of allowing the federal court to review all the

stated that federal courts should not review the merits of a dispute that is properly within tribal court jurisdiction. 27 F.3d at 1300. They seemed to preclude federal court review of the merits of a dispute in tribal court by stating in dicta: "Once tribal remedies have been exhausted, the Tribal Court's determination of tribal jurisdiction may be reviewed in the federal district court. However, unless a federal court determines that the Tribal Court lacked jurisdiction, ... proper deference to the tribal court system precludes relitigation of issues raised ... and resolved in the Tribal Court." *Id.* (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987)).

209. 106 F.3d 868, 869 (9th Cir. 1997) (holding that a district court cannot enjoin tribal proceedings unless tribal remedies have first been exhausted), vacated, 118 S. Ct. 37 (1997). The Supreme Court vacated the decision for reconsideration in light of *A-1 Contractors v. Strate*, 117 S. Ct. 1404 (1997). It is unclear why the Supreme Court vacated the Ninth Circuit's decision in *Burlington Northern* for reconsideration in light of *A-1 Contractors*, since *Burlington Northern* did not involve the issue of when a tribal court can exercise jurisdiction over a non-Indian, but only whether a non-Indian can utilize a federal forum to enjoin a tribal court's exercise of civil jurisdiction prior to exhausting tribal court remedies. Perhaps the Supreme Court expects the Ninth Circuit to determine whether the invocation of tribal court jurisdiction in *Burlington Northern* is being made in "bad faith," which would trigger an exception to the tribal court exhaustion rule. See *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985). However, the Court itself expressly rejected an argument in *Iowa Mutual Insurance Co. v. LaPlante* that a litigant can avoid exhaustion by arguing bias or incompetence of the tribal forum. 480 U.S. 9, 18 (1987).

210. *See Burlington Northern*, 106 F.3d at 872. According to the dissenting opinion in this case, the tribal jury, before being impaneled, was instructed in Crow by a Crow appellate judge to remember the Crows killed by the railroads throughout the history of the invasion of the Crow nation. *See id.* (Kleinfeld, J., dissenting). The dissent also claimed that most of the jurors eventually impaneled were related to the plaintiffs and the decedents. *See id.* (Kleinfeld dissenting); *see also Crash History Boosts Plaintiffs' Case in Wrongful Death Trial*, 10 INSIDE LITIG. 4, 4-5 (1996) (describing history of the *Red Wolf* case).

211. *See Burlington N. R.R. v. Blackfeet Tribe*, 924 F.2d 899, 904 (9th Cir. 1991) (holding that the Blackfeet Tribe had the authority to tax the railroad's rights-of-way running through the reservation). Given the United States Supreme Court's recent declaration that the extent of a tribal court's adjudicatory jurisdiction should be based upon the tribe's regulatory jurisdiction, this decision appears to doom the railroad's argument that the tribal court lacked jurisdiction over it for a tort that occurred at one of its rights-of-way on the Crow reservation. *See Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1416 (1997).
particulars of a tribal court decision is that tribal courts will become inferior courts subject to unlimited federal court review, a result which will denigrate the tribal courts in the eyes of non-Indian litigants who will perceive tribal courts as forums to “dry-run” litigation, thus hindering the development of tribal law. Yet, it may be equally harmful for a federal court to be stripped of the authority to overturn blatant violations of tribal law because the merits of a particular resolution may color a federal court’s decision on whether a tribal court could exercise jurisdiction \textit{ab initio}. Thus a tribal court may lose its otherwise valid jurisdiction because of a federal court’s need to overturn a biased application of tribal law.

Conversely, there may be cases where the tribal court’s resolution of the merits is so laudable that it may sway a federal court’s interpretation of tribal regulatory authority. Such a case is \textit{City of Timber Lake v. Cheyenne River Sioux Tribe},\textsuperscript{212} wherein the court refused to follow one of its precedents\textsuperscript{213} and held that Indian tribes were vested with the authority by Congress to regulate the sale of liquor by non-Indians within the exterior boundaries of the reservation.\textsuperscript{214} The Eighth Circuit endorsed the notion that federal courts should not second-guess tribal interpretations of tribal law, even if the issue dealt with jurisdiction over non-members.\textsuperscript{215}

It is equally unclear how the federal courts will deal with tribal court application of federal substantive law, if the tribal court had

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\item \textsuperscript{212} 10 F.3d 554 (8th Cir. 1993); see also Cheyenne River Sioux Tribe v. Isabel City Package Liquor, 18 Indian L. Rep. 6079, 6087 (Cheyenne River Sioux Tribal Ct. Jan 8, 1991) (holding that the Tribe had authority to require a business license). The tribe’s court of appeals affirmed in an unpublished opinion. See Cheyenne River Sioux Tribe v. Dupree American Legion Club, No. __, slip op. at ___ (Cheyenne River Sioux Tribal Ct. App. Apr. 2, 1992).
\item \textsuperscript{213} See United States v. Morgan, 614 F.2d 166, 170-71 (8th Cir. 1980) (applying the limited definition of “Indian country” found in 18 U.S.C. §§ 1154(c), 1156 (1994), which excludes fee-patented lands in non-Indian communities from the definition of “Indian country”).
\item \textsuperscript{214} See id. at 558 (interpreting the scope of the term “Indian country”).
\item \textsuperscript{215} See id. at 559. The court, in response to the argument of the non-Indian liquor stores that the tribe’s constitution prevented the exercise of jurisdiction over non-Indians, stated: “The tribal courts interpreted the constitutional language as allowing the tribal courts to exercise personal jurisdiction over the appellants and we defer to the tribal courts’ interpretation, even though non-Indians are involved.” Id.; see also Sanders v. Robinson, 864 F.2d 630, 633 (9th Cir. 1988) (noting that tribal courts are recognized as appropriate forums for disputes affecting important personal interests of Indians and non-Indians); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987) (recognizing that promotion of tribal government and self-determination requires granting the tribal court the full opportunity to determine its own jurisdiction).
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jurisdiction over the underlying dispute. If, in those cases that arise under federal law are nonetheless consigned to initial tribal court review,\textsuperscript{216} the federal courts take the perspective that the tribal court fact-finding process and judgment is entitled to no regard in the ultimate decision, the exhaustion rule is wasting the valuable time of tribal courts and the litigants who are being charged with relitigating every case anew in federal court. Tribal courts are not strengthened by a doctrine that requires them to devote substantial time and effort to the resolution of an issue, only to see the federal court ignore their decisions.

Federal and tribal judges have a mutual investment in applying the exhaustion doctrine so as to lessen the litigation burden on both the courts and the litigants. Nothing prevents tribal and federal judges from doing this by agreement, rather than by attempting to discern what the other is thinking through their judicial decisions. The federal courts may want to adopt some type of preclusion rule for tribal law issues fully and fairly litigated in tribal court,\textsuperscript{217} similar to the preclusion rule that exists in federal court litigation implicating already-litigated issues in state courts.\textsuperscript{218} Such a rule would not prevent a federal court from relitigating a claim founded solely on tribal law properly brought before it as a challenge to tribal court adjudicatory authority, if the tribal court process is grossly unfair to one of the litigants, similar to the rule allowing federal court relitigation of a case litigated through the state system.\textsuperscript{219}

\textsuperscript{216} See cases cited and discussion \textit{supra} notes 14 and 16.

\textsuperscript{217} See, e.g., Basil Cook Enters. v. St. Regis Mohawk Tribe, 117 F.3d 61, 66 (2d Cir. 1997) (holding that the federal court should not address the argument that the St. Regis Mohawk Tribal Court is a nullity under the tribal constitution because it would require the court to construe tribal law); R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 983 (9th Cir. 1983) (finding it unnecessary to decide whether an action was attributable to the tribe as a governmental body).


\textsuperscript{219} See O'Connor v. O'Connor, 315 F.2d 420, 422 (5th Cir. 1963). The only potential problem with this assertion of federal court jurisdiction was pointed out by the Ninth Circuit in response to an argument that the federal court could review a tribal court decision for a determination of whether it complies with the due process clause of the Indian Civil Rights Act, where the court noted: "[t]his due process review would be unavailable if appellants later prevail on their argument that \textit{Santa Clara Pueblo v. Martinez}, 436 U.S. 49, 98 (1978), precludes private enforcement of the Indian Civil Rights Act, 25 U.S.C. § 1302(8), in federal court." Burlington N. R.R. v. Red Wolf, 106 F.3d 868, 870 n.2 (9th Cir. 1997), \textit{vacated}, 118 S. Ct. 37 (1997).
Currently the Ninth, Tenth, and Eighth Circuits have issued opinions on the degree of deference owed to tribal court decisions with all three adopting the approach of reviewing legal issues, with regard to the exercise of tribal court jurisdiction, de novo and accepting tribal findings of fact unless clearly erroneous. Such a standard avoids the necessity of relitigating factual issues in federal court and thus may be financially advantageous to the litigants. The Eighth Circuit opinions suggest, as does a recent Second Circuit decision, however, that determinations of tribal law should not be reviewed by federal courts.

2. Preparing the Tribal Court Record for Federal Review

Without an adequate record, tribal courts are risking the possibility of federal court ignorance of the basis of their decisions regarding jurisdiction and other important issues. In addition, liti-
gants can often slant a record to make it appear that the tribal court behaved in one way or another. Tribal courts are thus charged with preparing an adequate record for federal court review in those cases where tribal court jurisdiction is being challenged. The problem presented to tribal courts is that many of the decisions they issue that circulate back to federal court involve motions to dismiss for lack of jurisdiction. These hearings often lack the development of evidence for which the federal courts are looking. The federal courts, thus, may wish to defer their jurisdiction to permit the necessary development of the factual record in the tribal court, even when the underlying federal cause of action centers around an alleged arrogation of jurisdiction by the tribal court. These cases need to be addressed on general principles, perhaps, and not on a case by case basis. This is true because in many of the federal court challenges to tribal court jurisdiction, the tribal judge is listed as the defendant in federal court, thereby ethically precluding the federal judge from engaging the tribal court about its record.

3. Determining What Law to Apply in Federal Court when

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Eighth Circuit rely heavily upon the role of the tribal courts as the finders of fact in these cases. See Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1299 (8th Cir. 1994). In Duncan Energy Co., the Court observed: "[t]hus, the requirement of tribal exhaustion contemplates the development of a factual record that will serve the 'orderly administration of justice in the federal court.'" Id. at 1300 (quoting National Farmer's Union Ins. Co. v. Crow Tribe of Indians, 471 U. S. 845, 856 (1985)).

225. See Burlington Northern 106 F.3d at 872. Burlington Northern held out the tribal record as proof that a Crow elder instructed the jury before being impaneled to punish the railroad for previous deaths it had caused on the reservation. See id.

226. See Iowa Mutual, 480 U.S. at 11; National Farmers, 845 U.S. at 847.

227. For example, the federal court that is presently reviewing whether the Rosebud Sioux Tribal Court has jurisdiction over the makers of Crazy Horse malt liquor issued an order staying the tribal court's exercise of jurisdiction, yet directed the tribal court to hold an evidentiary hearing on the question of the contacts the brewery had with the reservation. See Hornell Brewing v. Rosebud Sioux Tribal Court, No. 96-3028, slip op. at 10 (D.S.D. Dec. 3, 1996) (enjoining the tribal court from proceeding on the merits). That order was subject to an appeal by the Crazy Horse estate and tribe who claim that the federal judge should not have intervened until the tribal court was permitted to develop the record. The appeals court held that the Rosebud Sioux Tribal Court lacked adjudicatory outside the Rosebud Sioux Reservation. See Hornell Brewing Co. v. Rosebud Sioux Tribal Court, No. 97-1242, 1998 WL 9176, at *6 (8th Cir. Jan. 14, 1998).

228. See e.g., A-1 Contractors, 17 S. Ct. at 1408 (naming tribal courts judge as a defendant in an appeal).
Another troublesome issue that must be confronted by federal judges who are faced with challenges to tribal court adjudications is what law to apply in determining whether the tribal court exceeded its jurisdiction or violated federal or tribal law in rendering its verdict. This may not prove a difficult task in a case where a litigant challenges the tribe's exercise of regulatory authority or the extent of the tribal court's adjudicatory authority because there are some settled principles laid out by the United States Supreme Court to guide the federal court. However, when the underlying dispute arises under the diversity statute, the Federal Tort Claims Act, or a mix of federal and tribal law, federal courts may be bound by principles of stare decisis, which make little sense in the tribal context. For example, in a diversity case, the federal court is charged to apply the substantive law of the state where the cause of action arose. Doing so in a case challenging a tribal court's disposition of a diversity case is not appropriate, however, if tribal substantive law governed the actions of the litigants. To apply state law means to judge the actions of the litigants by standards that did not apply to them, a fundamentally unfair notion.

Similarly, in a case brought against the United States because of a tort committed by a tribal actor, applying state substantive law may be maladroit because the tribal law on a particular issue may differ from the state law. The existence of tribal law on a particular

229. 28 U.S.C § 1332 (1994).
230. Id. § 1346(b).
232. See Standing Rock Hous. Auth. v. Home Indem. Co., No. __, slip op. at 1 (Standing Rock Sioux Sup. Ct. December 13, 1993) (dismissing appeal). The author was involved in a case raising this interesting predicament. After a tribal court dismissed a wrongful death action on a statute of limitations grounds, which was affirmed by the tribal appellate court, the plaintiff proceeded into federal court on the basis of diversity and the federal judge applied the longer statute of limitations of the state where the action arose to find that the case was still viable. After the case was then settled in federal court, it made its way back to the tribal court when the insurer of the defendant was sued in federal court under causes of action arising under tribal law. The tribal court applied the doctrine of res judicata to find that the litigation was concluded in federal court. See id.
233. See Big Owl v. United States, 961 F. Supp. 1304, 1309 (D.S.D. 1997) (applying South Dakota law to determine whether a tribal school board intentionally or negligently inflicted emotional distress by not hiring back a teacher); see also Red Elk v. United States, 62 F.3d 1102, 1104 (8th Cir. 1995) (applying South Dakota state law to determine whether tribal police officer who raped a minor child while on duty was engaged in the course of his employment).
lar subject matter may not be readily accessible by a tribal judge, however, in the context of a claim under the Federal Tort Claims Act because such cases are not subject to the exhaustion requirement to which diversity and other cases are subjected. This is one area where a federal judge may wish to certify a question of tribal law to the tribal court, similar to the process by which the federal courts certify state law questions to a state's highest court.

The tribal court exhaustion rule has created a myriad of difficult questions regarding the role of the federal district court in reviewing a tribal court decision to determine whether the tribal court had jurisdiction and properly applied federal law. Many of these issues will have to be resolved ultimately by federal appellate courts and possibly by the United States Supreme Court. Pending that, however, the tribal and federal judges in a particular area may wish to discuss these issues in an effort to avert the potential problems that arise when one court is designated as the primary forum to develop the evidentiary record and another as the primary forum to resolve the underlying federal issues of jurisdiction when neither is inferior to the other.

B. Concurrent Jurisdiction Issues

Just as there are cases where state and tribal courts may exercise concurrent jurisdiction over Public-Law-280 reservations, frequently cases arise where both the tribal and federal courts may exercise jurisdiction over a criminal action, and less frequently over a civil action, that arises in Indian country in a non-Public-Law-280 state. Typically, these involve cases that the tribal court entertains initially, but then result in either a federal indictment or complaint, thus shifting the focus to the federal forum. These cases are distinguishable from the cases where tribal court exhaustion is mandated because in these cases the federal courts need not defer their jurisdiction to allow tribal court initial adjudication. However, they similarly present a fertile field for tribal-federal dialogue. Unfortunately, at present no mechanism exists to transfer a case

234. See Louis v. United States, 967 F. Supp. 456, 459-60 (D.N.M. 1997) (holding that that exhaustion requirement does not apply to action governed by the Federal Tort Claims Act); see also United States v. Yakima Tribal Ct. of the Yakima Indian Nation, 794 F.2d 1402, 1406-07 (9th Cir. 1986) (holding that tribal court lacks jurisdiction over federal employees and the federal government).

235. See Perkins v. Clark Equip. Co., 823 F.2d 207, 209-10 (8th Cir. 1987) (explaining when a federal court should certify a case to a state or tribal court).
from tribal to federal court when a federal issue arises which is not subject to the tribal court exhaustion rule. Thus, federal and tribal courts must adjudicate so as to not step on each other’s toes.

One area where federal courts typically handle matters previously heard by tribal courts involve criminal prosecutions where an Indian defendant appeared before the tribal court and entered a plea to a lesser-included offense in the federal prosecution. The federal courts are obviously distressed over how to deal with often non-counseled guilty pleas entered in tribal court which, although they may meet the standard for a voluntary plea under the Indian Civil Rights Act, which does not guarantee court-appointed counsel, does not satisfy the Sixth Amendment to the United States Constitution. The Ninth Circuit held that an uncounseled guilty plea should be inadmissible in federal court, except for impeachment purposes. Because of United States v. Wheeler, the double jeopardy clause does not bar a subsequent prosecution in federal court for criminal conduct previously prosecuted in tribal court, nor vice versa.

Some tribal judges may wish to have the pleas entered before them granted as much weight in federal court as possible. Others may wish that pleas entered in tribal court be ignored by federal judges. This may be an issue for the federal and tribal judges to discuss because tribal judges are more likely to be confronted with pro se defendants in tribal court questioning. The Tribal/Federal court discussion should include what impact a tribal plea will have if the defendant is indicted in federal court. Few tribal judges would like to be in a position of accepting a plea in tribal court after advising the pro se defendant, erroneously perhaps, that his or her plea will have no impact in federal court.

Persons who are still in the “constructive” custody of the fed-
eral courts, because of their status as probationers, frequently appear in tribal court on tribal charges that may result in the revocation of the federal probation. Tribal courts may not be aware of the status of these people when they appear before them and thus may not fully advise them of the ramifications of a plea of guilty. Dialogue between the federal officials and the tribal courts will thus aid the tribal courts in protecting the rights of accused persons who come before them.

Yet another area which has generated some recent attention from the federal courts, and quite possibly some justifiable concern from a tribal perspective, are issues regarding the violation of tribal law by federal actors investigating crimes on Indian reservations. Many federal criminal violations arising on Indian reservations are initially investigated and prosecuted by tribal officials charged with complying with tribal law and the Indian Civil Rights Act. Their investigative activities may lead to the laying of federal charges, however, which shifts the focus from tribal law to federal law. Two recent federal court decisions have endorsed the proposition that violations of tribal law cannot be utilized to suppress evidence obtained in apparent compliance with federal requirements. For example, in United States v. Hornbeck, the court upheld the admission of evidence in federal court obtained by tribal police in violation of tribal law. The court did so on the basis that federal standards govern the admission of evidence in federal court and the violation of tribal law was irrelevant.

Additionally, in United States v. Doherty, the court upheld the admission of a confession elicited from a suspect in a tribal jail who was not represented by counsel but had obtained a continuance for an arraignment in tribal specifically so he could retain counsel. The court held that the invocation of the right to retain counsel in tribal court did not trigger the right to remain silent or the right to counsel in federal court because federal charges had not yet been

242. See, e.g., United States v. Doherty, 126 F.3d 769, 772-73 (6th Cir. 1997) (refusing to suppress a confession elicited in violation of tribal law); United States v. Hornbeck, 188 F.3d 615, 617 (8th Cir. 1997) (refusing to suppress evidence obtained in violation of tribal search warrant requirement).
243. 118 F.3d at 617.
244. The tribal police officers failed to file a return to the search warrant within the tribally prescribed period of time leading the tribal judge to suppress evidence obtained.
245. 126 F.3d 769, 772 (6th Cir. 1997).
laid at the time the confession was elicited.246

Although these decisions may be sound as matters of federal constitutional law, they do implicate delicate issues impacting tribal-federal court relations, especially when they seem to condone violations of tribal law by tribal and federal officers who theoretically are bound by tribal law when conducting investigations regarding tribal law violations.

Another type of concurrent jurisdiction issue which has been the subject of some recent attention has been the adjudication of child sexual abuse cases arising in Indian country.247 These cases demand cooperation between federal and tribal judges because, although the perpetrators may eventually be prosecuted and incarcerated by the federal courts, the tribal courts are frequently called upon initially to protect the child from the perpetrator, especially if the perpetrator is a family member or a person in the community with easy access to the child.248 Tribal courts also provide the necessary services after the offense through child dependency and neglect proceedings or through tribal criminal proceedings.

Potential issues which need to be resolved include: 1) tribal courts ensuring that the perpetrators do not gain access to the children victims, either personally or through other family members, before trial to protect the integrity of the child’s testimony in the federal proceedings; 2) federal courts and officials notifying tribal court officials when perpetrators are released from pre-trial detention back to the reservation community; 3) federal-tribal coordination on investigating the crimes to ensure minimal emotional trauma to the child, and coordination on procuring the testimony of the child and post-trial victim impact statements; 4) ensuring the privacy of the mental health records of victims in tribal court files, when those records are not relevant to the defense of the perpetrator yet may be used to harass the child victim on the stand, possibly by federal courts making such files subject to federal protection orders until the federal judge can determine their relevancy; and 5) federal officials notifying tribal courts and tribal officials when sexual perpetrators are released from federal

246. See id.
247. The Federal Judicial Center conducted a joint training session for tribal and federal judges in the 10th Circuit on this topic. See Training Session for Tribal and Federal Judges in the 10th Circuit in Denver, CO (Sept. 9-11, 1996) (on file with author).
detention back into the tribal community. All of these issues serve to protect Indian children, already traumatized by being victimized, from further horrors.

C. Prosecution of Non-Indians for Misdemeanors Committed against Indians In Indian Country

A last issue, which has been in vogue recently on some reservations, is the dedication of more federal court resources to deal with the problem of non-Indians committing misdemeanors, such as spouse abuse or issuing bad checks, against Indian victims in Indian country. State courts are precluded from exercising jurisdiction over such offenses under the General Crimes Act, and tribal court jurisdiction has been deemed to be incompatible with their status as subjects of the federal government. Federal prosecutors, busy with prosecuting a variety of more serious crimes, perhaps have been remiss in devoting the necessary attention to the problems that arise when non-Indians commit offenses in Indian country, oftentimes with apparent impunity. At least one federal district, North Dakota, saw this as a serious enough problem to have several meetings about the topic. The Chief Judge of the district, the Honorable Rodney Webb, proposed and implemented a suggestion that one of the federal magistrates in that state be made a full-time magistrate to deal with crimes committed by non-Indians in Indian country. Likewise, a reservation in Oregon, the Warm Springs reservation, in conjunction with the United States Attorney for Oregon, the tribal court and the federal district court, established the first United States Magistrate Court located on an Indian reservation on June 9, 1995 to deal with non-Indian offenders. The federal government provides the magistrate, the U.S. Attorney

249. See State v. Larson, 455 N.W.2d 600, 601-02 (S.D. 1990) (holding that federal courts have exclusive jurisdiction over an offense committed in Indian country by a non-Indian).

250. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (holding that Indian tribal courts do not have inherent criminal jurisdiction to try and punish non-Indians, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress).


252. See id.

253. See Kristine Olson & Tim Simmons, Overview of the U.S. Attorney's Role in Tribal Courts, 9 TRIBAL COURT REC. 18, 19 (Spring-Summer 1996).
and the tribal court the facility for the functioning of the court.\textsuperscript{254} Further initiatives in this area can only serve to improve the working relationships of federal and tribal judges and to protect the tribal community.

IV. CONCLUSION

Because this article commenced with a quote from a respected non-Indian jurist, it is perhaps only fair to conclude with a quote from a renowned Indian "jurist,"\textsuperscript{255} the Hunkpapa Lakota leader, Sitting Bull, who advised his people: "Let us put our minds together and see what kind of life we can build for our children."\textsuperscript{256} The same admonition applies to tribal, state and federal judges who are charged with resolving disputes that arise in Indian country. These judges will eventually determine the legal climate under which future generations, both Indian and non-Indian, will live together. This article attempted to examine some of the issues that concern tribal, state and federal judges who preside over a judicial landscape where the rules appear confusing and ever changing. In no way is this list of topics exhaustive of the varied and sundry issues that confront these jurists. However, opening the dialogue is often just as important as the substance of that dialogue. Achieving a mutually satisfactory resolution of every issue discussed herein will probably never be possible, but the mere act of trying may be a rewarding experience for all judges.

\textsuperscript{254} See id.

\textsuperscript{255} Although Sitting Bull was not a jurist in the English common law sense, he was a leader of his people who was often called upon to quell disputes among his band. See Robert M. Utley, The Lance and The Shield: The Life and Times of Sitting Bull 76-89 (1993).