STRENGTHENING TRIBAL SOVEREIGNTY THROUGH PEACEMAKING: HOW THE ANGLO-AMERICAN LEGAL TRADITION DESTROYS INDIGENOUS SOCIETIES

by Robert B. Porter*

Three Killed in Gunbattle Triggered by Seneca Feud

—Headline, *The Buffalo News*[1]

State Court jurisdiction over the type of internal dispute present here would set a dangerous precedent that could severely undermine the [Seneca] Nation's sovereignty, usurp the authority of the Nation's courts, and erode the power of the Nation's leaders to govern for generations to come.

—Bowen v. Doyle[2]

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1. Agnes Palazzetti, *Three Killed in Gunbattle Triggered by Seneca Feud*, Buff. News, Mar. 26, 1995, at A1.

2. Bowen v. Doyle, 880 F. Supp. 99, 137 (W.D.N.Y. 1995).

INTRODUCTION

Until March 25, 1995, the Seneca Nation of Indians[3] had existed for almost 150 years as a constitutional republic without one of its members being killed in a domestic political dispute. Recently, however, the Seneca Nation has been paralyzed by internal conflict, including several months of open civil warfare,[4] that not only has resulted in a loss of life but has nearly destroyed the Seneca government.[5] This "civil war," which began as a dispute between the newly-elected President and two tribal Council members in 1994, was spawned by years of festering disagreements over politics and money that grew to envelop the entire political, social, and economic fabric of the Seneca Nation. While the risk of further internal violence since has decreased, the

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3. Originally a member of the Iroquois Confederacy, or "Haudenosaunee," the Seneca Nation of Indians is a representative democracy that was formed in 1848 and is now a nation politically separate from the Confederacy, recognized as such by the United States. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 60 Fed. Reg. 9250 (1995). *See generally* Sharon O'Brien, American Indian Tribal Governments 97-118 (1989). The Seneca Nation is comprised of approximately 7,000 members, approximately half of whom reside on the Allegany, Cattaraugus, and Oil Springs Reservations in western New York State (together constituting approximately 50,000 acres). *See generally* Thomas S. Abler & Elisabeth Tooker, Seneca, *in* Handbook of North American Indians 505-17 (William C. Sturdevant ed., 1978) [hereinafter Handbook]. Seneca People who did not pursue the elected form of government in 1848 remain a member of the Confederacy and are known as the "Tonawanda Band of Senecas." *See* Indian Entities Recognized, *supra*. *See generally* Abler & Tooker, *supra*, at 511-12. Other Senecas who moved from aboriginal Seneca territory in the nineteenth century to the Indian Territory are known as the "Seneca-Cayuga Tribe of Oklahoma," *See* Indian Entities Recognized, *supra*. *See generally* William C. Sturdevant, Oklahmoa Seneca-Cayuga, *in* Handbook, *supra*, at 537-43. There are also Senecas residing on the Grand River Reserve in Ontario, Canada. *See* Sally M. Weaver, Six Nations of the Grand River, Ontario, *in* Handbook, *supra*, at 525-36.

4. *See* Robert D. McFadden, *Seneca Feud Boils Over; 3 Are Slain*, N.Y. Times, Mar. 26, 1995, at A41.

5. For example, the Seneca Council did not conduct any substantive business between October 17, 1994 and September, 1995 because it regularly failed to obtain a lawful quorum. The President at the time, whom an illegally constituted Council tried to impeach, had focused exclusively on the crisis issues facing his administration and had given little attention to the business of either administering the 800 employee tribal bureaucracy or conducting official governmental business.

underlying issues that led to the conflict have not been resolved, and the dispute continues to the present day.[6]

The Seneca Civil War is worthy of study because it demonstrates the extremes to which some people will go to effectuate their personal political agendas. It was clearly the case that the disputing parties were willing to take reckless actions that could lead to a loss of life. It is also clear that they were willing to escalate the tragedy by taking the dispute to a foreign court system and thereby sacrifice Seneca sovereignty.

Unfortunately, it cannot be said that the Seneca Civil War and its resultant impact on Seneca sovereignty is a unique occurrence within Indian[7] country. In recent years, there has been a significant increase in intratribal violence[8] and deadly internal political disputes.[9]

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6. *See* William Glaberson, *For Indian Leader, Fighting a War on Two Fronts*, N.Y. Times, Apr. 22, 1997, at A16. The internal division within the Seneca Community has fueled a dispute with New York State over collection of state taxes within Seneca territory.

7. The term "American Indian," "native," or "indigenous" will be used throughout this article to describe the living descendants of the aboriginal inhabitants of the American continent. In the author's experience, native people generally refer to themselves as members of their own particular nation, tribe, community, pueblo, or village and frequently use the term for themselves found in their own language. If the need arises to refer to themselves as part of the greater population of indigenous people, the chosen term is invariably "Indian." "Native American" is a term of relatively recent origin and most likely reflects the "politically correct" trend to be inclusive of all native people within American society. In my view, the term further perpetuates colonial efforts to subordinate indigenous sovereignty to mere ethnicity, as in the case of African-Americans or Irish-Americans.

8. In addition to the Senecas, other Indian nations in New York have experienced violent internal political conflict. In the 1980s, the Oneida Indian Nation underwent a vigorous leadership dispute in which the Oneida bingo hall was burned down. *See* Clifford D. May, *Divided Oneida Tribe Seeks End to Feud*, N.Y. Times, Dec. 29, 1986, at B1. More recently, the Tonawanda Band of Senecas resorted to banishment to deal with internal political conflict. *See* Dan Herbeck, *Banished Indians Seek Reversal From Judge; Federal Suit Is Uncommon Step in Dealing With Treason Dispute on Reservation*, Buff. News, Nov. 26, 1992. The Onondagas have resorted to blocking highways to enforce its tax on reservation businesses. *See Highway Access to Onondaga Reservation Is Restricted in a Tax Dispute*, N.Y. Times, Sept. 15, 1993, at B6. Indian people outside of New York have also experienced similar internal problems. *See, e.g.*, Richard C. Paddock & Mark Arax, *Stakes Raised In Old Tribal Feud; Gaming: Money, Control Of Reservation Split Impoverished Pomo Nation, Leading to Gun Battle That Has Ceased—For Now*, L.A. Times, Oct. 15, 1995, at A3; *Orders in Tribal Dispute Upheld; Four Dissident Members of the Houlton Band of Maligeet Indians Had Been Barred by Court Order From Interfering With Tribal Business*, Portland Herald Press, Jan. 7, 1997, at 4B; Lisa

In some cases, like that of the Senecas, the disputing parties in these disputes have sought to resolve their disagreements by destroying the very sovereignty that they purport to protect.[10]

My argument in this Article is that Indian nations are losing their sovereignty—that is, their ability to self-determine their own future and survive as distinct peoples—because they have lost or are losing their inherent ability to resolve the disputes that arise within them. Most indigenous communities today now rely upon formal court systems modeled after the Anglo-American legal system as their mechanism for resolving disputes within their territories. In recent years, tribal courts have developed so dramatically in this direction that they have been acknowledged as the cornerstone of tribal sovereignty.[11]

But while it is true that those Indian nations that rely upon the Anglo-American legal tradition ultimately may grow stronger in their ability to redress disputes that arise within their territories, and thus become more sovereign, they do so at the expense of becoming more assimilated into American society.[12] The longer that native people

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Richardson, *Bullet With Threat Sent to Tribal Chief Dispute*, L.A. Times, Mar. 23, 1997, at B2.

9. In the late 1980s, the Navajo Nation, the largest Indian nation in the United States, experienced a leadership dispute in which two people were killed during a riot. *See Two Dead As Navajos Clash With Police*, N.Y. Times, July 22, 1989, at A7. The following year, two Mohawks were killed as the result of infighting over gambling and smuggling at Akwesasne. *See* Sam Howe Verhovek, *Two Mohawks Killed in Feud Over Reservation Gambling*, N.Y. Times, May 2, 1990, at B5. *See generally* Rick Hornung, One Nation Under the Gun (1991).

10. *See* David Melmer, *Sovereignty Set Back?*, Indian Country Today, Feb. 26, 1996, at A1. Impeached tribal officials of the Turtle Mountain Band of Chippewas sought federal court review of Indian Civil Rights Act violations by arguing for the reversal of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The action was later dismissed. *Id*; *see also Cherokees Divided by Dispute: Some Fear Conflict Put Tribe's Sovereignty at Risk*, Dallas Morn. News, Apr. 18, 1997, at 33A.

11. *See* Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. Rev. 49, 71 (1988) (stating that tribal courts are "the primary tribal institutions charged with carrying the flame of sovereignty and self-government"); *see also* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225, 232–33 (1994).

12. *See, e.g.*, Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 Judicature 134, 135 (1995) ("[T]ribal courts do and should differ substantially from courts of the non-Indian world. . . . America, in its attempts to correct what it perceives as a rampant injustice in Indian America, creates a greater injustice by forcing its culture upon Indian peoples.").

deviate from organic notions of tribal justice and methods of dispute resolution, the closer they will be to losing their distinct identities. Without a persuasive justification to distinguish Indians from other Americans, it seems inevitable that extinction—as perceived by American society and maybe even by the Indians themselves—will occur.

My concern arises from the fact that I am a Seneca who recently witnessed the disintegration of my tribal government. Because it is obvious that native people generally, and Senecas specifically, are taking actions that have the practical effect of destroying our own nations, I am greatly concerned about the fate of tribal sovereignty and our ability to self-determine the future. I hope that my recent experiences, analyzed against the backdrop of general historical and legal developments, may be helpful to the Senecas and other native people as we struggle for a better future for the coming generations.

This Article is about the past, present, and future of indigenous dispute resolution process. While there are equally troubling and encouraging developments that exist on the subject of substantive tribal law development, treatment of that issue is beyond the present scope of this Article.[13] Part I of this article discusses the traditional and contemporary methods of Seneca dispute resolution. Part II discusses peacemaking and the other traditional dispute resolution methods that native people utilized prior to the domination of the United States. Part III explains how these traditional dispute resolution mechanisms were affected by American colonization and how native people came to establish modern judiciaries based upon the American legal system. Part IV explores the consequences of the transformation of indigenous dispute resolution. Part V concludes with recommendations for addressing the challenge to tribal sovereignty that is associated with the adoption of the Anglo-American legal tradition by native people.

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13. *See, e.g.*, Gloria Valencia-Weber, *Tribal Courts' Use of Non-Indian Law*, Federal Bar Association Indian Law Conference at Albuquerque, N.M. (April 12, 1996).

I. TRADITIONAL AND CONTEMPORARY SENECA DISPUTE RESOLUTION

A. The Tradition of Seneca Peacemaking

The Seneca People have a peacemaking tradition that is hundreds of years old and coincides with the establishment of the Six Nations Iroquois Confederacy, or Haudenosaunee,[14] under the Great Law of Peace.[15] For the Haudenosaunee, peace was not simply the absence of war, it "*was* the law" and an affirmative government objective.[16] So dominant was this philosophy that its pursuit affected the entire range of international, domestic, clan, and interpersonal relationships of the Haudenosaunee.

According to Haudenosaunee history, the Great Law was a gift from the Creator that had the purpose of saving the people of the Six Nations from destroying themselves.[17] Against the grisly backdrop of cannibalism and civil war, a young man, born of mysterious circumstances and known outside of Iroquois ceremonies only as the "Peacemaker," brought a powerful message to the survivors of this

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14. *See* Basic Call to Consciousness 67 (Akwesasne Notes rev. ed. 1982). *See generally* Elisabeth Tooker, The League of the Iroquois: Its History, Politics, and Ritual, *in* Handbook, *supra* note 3, at 418–41.

15. The Great Law, or "Kayanerenhkowa," has been handed down through the oral tradition of the Haudenosaunee for over 500 years. *See* Paul A.W. Wallace, The White Roots of Peace 32–33 (1946) [hereinafter White Roots]. Beginning in the nineteenth century, the Great Law was transcribed by both Indians and non-Indians. *See., e.g.,* Arthur C. Parker, The Constitution of the Five Nations, or the Iroquois Book of the Great Law (1916). The White Roots was prepared in reliance upon three different English versions of the Great Law. *See* White Roots, *supra*, at vii. As with any tradition of oral law, the different variations are attributed to unique teaching which the recording speaker received.

16. *See* White Roots, *supra* note 15, at 7 ("Peace *was* the law.").

17. [W]hen the Confederacy was formed, it was a time of great sorrow and terror for the Haudenosaunee. All order and safety had broken down completely and the rule of the headhunter dominated the culture. When a man or woman died . . . [t]he aggrieved family then sought vengeance and a member set forth with the purpose of finding [an] unsuspecting and arguably innocent offender and exacting revenge. That killing sparked a spiral of vengeance and reprisal which found assassins stalking the Northeastern woodlands in a never ending senseless bloodletting.

Id. at xvi (prologue by John C. Mohawk).

tribal warfare: "all peoples shall love one another and live together in peace."[18]

In addition to his substantive message, the Peacemaker also proposed a governmental structure through which his message could be brought into practice.[19] The longhouse, or the traditional Haudenosaunee dwelling, had many fires, but was designed to ensure that those residing within it could "live together as one household in peace."[20] This structure reflected a philosophy designed to ensure that the Haudenosaunee would "have one mind and live under one law" and was based upon the ideal that "thinking shall replace killing, and [that] there shall be one commonwealth."[21]

As might be expected, given the times, the Peacemaker's message was not universally or quickly accepted. It took years for there to be an appreciable acceptance of his message of peace.[22] While the

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18. *Id.* at 15. The Peacemaker's message of peace had three parts—Righteousness ("Gaiwoh"), Health ("Skénon"), and Power ("Gashasdénshaa")—with each part having two messages:

> Righteousness means justice practiced between men and between nations; it means also a desire to see justice prevail.
>
> Health means soundness of mind and body; it also mans peace, for that is what comes when minds are sane and bodies cared for.
>
> Power means authority, the authority of law and custom, backed by such force as is necessary to make justice prevail; it means also religion, for justice enforced is the will of the Holder of the Heavens and has his sanction.

Id.

19. *Id.* at 16.

20. *Id.*

21. *Id.*

22. In the course of his work, the Peacemaker confronted many challenges. The first involved his efforts to convince a ruthless cannibal to end his evil ways and to accept the Great Law. This cannibal, whom the Peacemaker named Hiawatha, became his primary spokesman. *See id.* at 17-18. Later, as the Peacemaker and Hiawatha attempt to convince Atotarho, the evil wizard leader of the Onondagas, to accept the Great Law, Hiawatha's wife and daughters are killed. It is through the condolence of Hiawatha that the Peacemaker rehabilitates his Good Mind from that stricken by grief, thereby showing that reason can return to all men. *See id.* at 23-25. In their final attempt to unify the League by convincing Atotarho, the Peacemaker and Hiawatha present all of the other chiefs of the Five Nations who had accepted the Great Law. Only upon seeing the power of the Great Law to bring together this number of leaders and the offering to him of the leadership of the Confederacy does Atotarho accept the Great Law and dedicate his life to the pursuit of reason and peace among all people. *See id.* at 27-29.

process was slow and time consuming, the Peacemaker eventually was able to bring together the leadership of what was to become the Mohawk, Oneida, Onondaga, Cayuga, and Seneca nations. Solely on the basis of his teachings, these five nations formed a great alliance that was dedicated to perpetuating the message of peace through unity and strength.[23]

Pursuing peace was relevant not just to the establishment of the Haudenosaunee, but also to its perpetuation. Foremost, the Great Law was a tool of government and frequently has been referred to as the Iroquois Constitution.[24] As such, it set forth a variety of mechanical rules governing the process by which the member nations addressed confederate affairs,[25] including the management of diplomatic and military relations with the other continental powers, trade relations with governmental and private interests, and colonial relationships with client tribes.

The manner in which the Haudenosaunee arrived at decisions is evidence of their commitment to peace. Unlike the system of majority-rule utilized by the Anglo-Europeans,[26] the Haudenosaunee relied upon a governing process that was both dependent upon and designed to achieve consensus. Actions could not be taken unless there was unanimity and its leaders of "one mind."[27]

In order to facilitate consensus, the longhouse, the location at which Grand Council meetings were held, was structured so that all

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23. The Peacemaker's message was profound and effective for many reasons. The message was simple and easily communicated and understood by those willing to listen. It appears, however, that it was the source of the power upon which the message was based that proved most influential: "[A]ll human beings possess the power of rational thought and that in the belief in rational thought is to be found the power to create peace." *See id.* at xvi.

Moreover, while the Peacemaker's message was itself powerful in substance, it was also clear that he had an incredibly effective style of persuasion. He was both positive and visionary, and perhaps most important, able to communicate in a manner directly related to the cultural foundations with which his listeners were familiar. *See id.* at xvii.

24. *See id.* at 3.

25. *See id.* at 33-34. For example, Grand Council discussions did not occur at night to prevent "frayed tempers and hasty judgements." *See id.* at 35. Moreover, public discussion on an important matter could not occur on the same day it was received in Council. *See id.* If it appeared that serious disagreements existed, committee discussions were held first. *See id.* at 36-37.

26. *See id.* at 34.

27. *See* Lewis H. Morgan, League of the Iroquois 111 (1851) [hereinafter League].

debate took place "across the fire."[28] Discussion on a particular subject would be carried through three separate and elaborate stages until consensus was reached.[29] As might be expected, there was often disagreement which impeded the discussions.[30] Depending upon the stage at which the discussion broke down, the matter would be referred back to the point at which the process ceased. If, however, it was not possible to achieve unanimity, the matter was laid aside until a later time.[31] Unreasonableness in this process was not tolerated and any "sachem"[32] so acting would have "influences . . . brought to bear on him which he could not well resist."[33]

The Haudenosaunee decision-making process ensured that the official positions it took would carry the full support of all the member nations. Ultimately, when decisions were reached, they had been extremely well discussed, with each of the nations fully informed of the competing considerations. This deliberative process facilitated the compromises and accommodations necessary to achieving "one mind" regarding any planned actions.

Because it was not possible for the Haudenosaunee to act without all nations being in agreement, there was no risk that a decision could be perceived by a political minority as being illegitimate. Commensurately, the fact that minority positions had veto power

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28. *See* White Roots, *supra* note 15, at 40. The Mohawks and Senecas sat on the east side of the fire; the Oneidas and Cayugas sat on the west side. The Onondagas served as mediators and sat on the north side of the fire. *See id.*

29. Wallace describes the process as follows:

> First, each national delegation discussed the proposition and came to a conclusion so that it might speak with one voice. Second, the national unit compared its conclusions with that of its "brother" (the Mohawk with the Seneca, the Oneida with the Cayuga), in order that each side of the fire might speak with one voice. Then the Mohawks, as representing the Elder Nations, handed the joint decision of Mohawks and Senecas across the fire to the Oneidas, who received it on behalf of the Younger Nations. If the Younger Nations agreed, the matter was handed back across the fire to the Mohawks, who announced the agreement to the Onondagas, and the presiding officer, who inherited the title of "Atotarho", declared the matter settled.

Id.; *see also* League, *supra* note 27, at 112.

30. White Roots, *supra* note 14, at 40; *see also* League, *supra* note 27, at 112.

31. *See* League, *supra* note 27, at 113.

32. This term was used to describe the Haudenosaunee chiefs, as opposed to the "local" national chiefs.

33. *See* League, *supra* note 27, at 113.

ensured that power was exercised wisely and deliberately.[34] This consensus oriented decision-making process allowed for such a concentration of political strength that the Haudenosaunee was the dominant military presence in the eastern portion of the North American continent for over 300 years.[35]

This dominance often confused outsiders into thinking that the Haudenosaunee was strong solely as the result of their use of force. The reality, however, was that the Haudenosaunee made peace their objective and relied heavily upon diplomacy to achieve it, utilizing force only when necessary to enforce their law.[36]

This philosophy characterized the Haudenosaunee approach to international relations. According to the Great Law, an invitation was held out to any nation, including the hostile ones, to join the Haudenosaunee upon acceptance of the Great Law.[37] If a hostile nation refused an offer of peace, it would be met with a declaration of war and conquest,[38] which occurred occasionally.[39]

Because of its foundational belief that all human beings have the power of rational thought and that all significant decisions must be achieved through consensus, Seneca society was afflicted with little interpersonal conflict and transgressions of community norms.[40]

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34. *See* White Roots, *supra* note 15, at 36.

35. *Id.*

36. It was not by force alone that the Iroquois held this vast region under their Peace. It was by statesmanship, by a profound understanding of the principles of peace itself. They knew that any real peace must be based on justice and a healthy reasonableness. They knew also that peace will endure only if men recognize the sovereignty of a common law and are prepared to back that law with force—not chiefly for the purpose of punishing those who have disturbed the peace, but rather for the purpose of preventing such disturbance by letting men know, *in advance* of any contingency, that the law will certainly prevail.

Id. at 3.

37. "When the proposition to establish the Great Peace is made to a foreign nation, it shall be done in mutual council. The foreign nation is to be persuaded to come into the Great Peace." *Id.* at 53.

38. *See id.*

39. It is reported that the Iroquois destroyed the Hurons, the Neutrals, the Eries, the Susquehannocks, and the Tobacco Nation. *Id.* at 56. Others survived, but as client states of the Iroquois upon their acceptance of the Great Law.

40. *See* Anthony F.C. Wallace, The Death and Rebirth of the Seneca 25 (1969) [hereinafter Death and Rebirth]; League, *supra* note 27, at 330, 333.

Individual behavior was governed by a strong unwritten social code that relied upon social and psychological sanctions, such as ridicule and embarrassment, as the primary methods of enforcement.[41]

Behavior was governed not by published laws enforced by police, courts, and jails, but by oral tradition supported by a sense of duty, a fear of gossip, and a dread fear of retaliatory witchcraft.[42]

Public opinion, therefore, proved an effective deterrent because it related directly to the central problem facing the community—the weakness of the criminal.[43] These types of corrective sanctions, however, did not generally escalate to complete ostracism.[44]

Most disputes in Seneca society were resolved by mutual consent.[45] Instances of extreme violence, such as murder or the practice of witchcraft, were punishable by death[46] or by restitution to the victim's family. If the wrongdoer repented, he could offer goods and services, and the matter would be resolved.[47] Liquor usually was the primary source of social discord.[48]

Major disputes in Seneca society were resolved with the assistance of a peacemaker. The peacemakers, who might be the chiefs, elders, or other respected persons, relied upon their position, as well as precedent (for example, legends and stories from the community) to

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41. *See* League, *supra* note 27, at 333 (Theft was handled by "the lash of public indignation, the severest punishment known to the redman, [which] was the only penalty attached to this dereliction from the path of integrity.").

42. Death and Rebirth, *supra* note 40, at 25.

43. *See id.* An example of how this system worked is demonstrated by the following story:

> A young warrior steals someone else's cow—probably captured during a raid on a white settlement—and slaughters it to feed his hungry family. He does this at a time when other men are out fighting. No prosecution follows, no investigation, no sentence: the unhappy man is nonetheless severely punished, for the nickname "Cow-Killer" is pinned to him, and he must drag it rattling behind him wherever he goes. People call him a coward behind his back and snicker when they tell white men, in his presence, a story of an unnamed Indian who killed cows when he should have been killing men.

Id. at 25–26.

44. The above story was about the Seneca leader Red Jacket, who "vindicated his courage in later wars, became the principal spokesperson for his nation, and was widely respected and revered. But he never lost his nickname." *Id.*

45. *See id.* at 26.

46. *See id.*; League, *supra* note 27, at 330–31.

47. *See* Death and Rebirth, *supra* note 40, at 26.

48. *See id.* at 26–27.

move the parties toward reconciliation. For example, if a husband and wife were unable to resolve matters between them, the mothers of the married pair would intercede to facilitate a reconciliation.[49] Throughout the dispute resolution process, the restoration of peace—amongst the disputing individuals and within the community as a whole—was paramount.

Despite the fact that pursuing peace was the foundation of Seneca and Haudenosaunee strength, it was also its weakness. With the coming of the Revolutionary War, the Haudenosaunee was torn apart because of the tension between its long-standing relationship with Great Britain and the earnestness of the American struggle for freedom. Unable to maintain a unified diplomatic position, within 25 years after the War the Haudenosaunee had lost almost all of their land holdings and its membership was scattered throughout small reservations in upstate New York and Canada.[50]

As a tool of governance, the Great Law required a total commitment to peace and a commensurate commitment to achieving peace through reason. For the Senecas, it facilitated the establishment of a society that made disputes rare, and when they did occur, readily resolvable by peacemaking and social pressures. This effective dispute resolution was undoubtedly a key to internal, and thus external, strength. As a result, the Senecas were able to govern themselves with considerable success for over 300 years.

B. The Origin and Evolution of the Seneca Judiciary

The Seneca peacemaking tradition, as with Seneca society as a whole, underwent considerable change following the demise of the Haudenosaunee as a military power at the end of the Revolutionary War. By 1797, the Senecas had relinquished nearly all of their title to western New York State and were left with only four main settlements and a few small reservations along the Genesee River. Forced by necessity to alter their lifestyle and settle into reservation life, Seneca society and its governing mechanisms grew weak as American society and culture began its ascendency.[51]

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49. *See* League, *supra* note 27, at 324.

50. *See* William T. Hagan, Longhouse Diplomacy and Frontier Warfare 55-56 (1976).

51. *See* Death and Rebirth, *supra* note 40, at 184.

By the mid-nineteenth century, the Senecas' condition had reached its low point. In 1838, Seneca chiefs signed a treaty providing for the sale of all remaining Seneca lands and the removal of all Senecas to Kansas. It was this transaction, and a subsequent treaty four years later that substantially mitigated the effect of the earlier treaty, that set in motion a series of revolutionary changes.[52]

It was widely believed and documented that the chiefs signing the 1838 Treaty of Buffalo Creek had taken bribes. In combination with allegations that the chiefs had pocketed the treaty annuities allocated for individual Senecas, the Seneca people moved aggressively over the next few years towards deposing the chiefs, removing themselves from the Haudenosaunee, and creating, in 1848, a constitutional republic called the Seneca Nation of Indians.[53]

The 1848 Constitution was similar to the American Constitution.[54] It called for a government with three branches, including an elected executive (the "President"), an elected legislature (the "Council"), and an elected judiciary (the "Peace Makers"). Elected officials were vested with broad governmental powers and served fixed terms of office.[55]

Although loosely modeled after the American form of government, the new Seneca Constitution nonetheless retained a few aspects of the traditional form of government established under the Great Law. For example, while there were three distinct branches of the government, there did not exist a pure separation of powers. The President presided over the Council[56] and set its agenda while the Council served as the Appellate Court.[57] Moreover, while the Council could make treaties, they had to be ratified by "three-fourths of all the mothers of the Nation."[58] This framework was consistent with traditional notions of government under the Great Law that power

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52. *See* Tooker, *supra* note 14, at 511.

53. *See* Thomas Abler, Factional Conflict within the Seneca Nation of Indian, 1838-1895: An Ethnological Analysis (1964) (unpublished doctoral thesis: University of Toronto) (on file with author).

54. The 1848 Constitution was drafted by Chester Howe, "Attorney for the Nation." *Id.* at 109.

55. *See* Declaration of the Seneca Nation of Indians, §§ 1-4, 10 (December 4, 1848) (on file with the author) [hereinafter 1848 Constitution].

56. *See id.* § 3.

57. *See id.* § 4.

58. *See id.* § 6.

should be shared and decisions should not be reached until consensus was achieved.[59]

Perhaps the foremost of these adaptations was the carrying forward of the peacemaker concept through the establishment of a Peacemakers Court as the Nation's judiciary. The Peacemakers served as the Nation's court of general jurisdiction, except with respect to "proof of wills" and probate which were within the jurisdiction of the Surrogate Court.[60] The Peacemakers, of which there were three for each of the Allegany and Cattaraugus Reservations, were elected by and from the Nation membership and were charged with the responsibility of resolving disputes amongst tribal members.

Despite the long tradition of Seneca peacemaking, the adoption of the 1848 Constitution signaled the partial adoption of American society's adversarial legal system. The 1848 Constitution required that New York State law govern the procedures to be followed in the Peacemakers Court.[61] Despite this constitutional requirement, however, for most of the Seneca Nation's history, the Peacemakers Court continued to rely upon peacemaking to some degree to resolve disputes.[62] A tradition developed early on in which matters were not always tried in strict accordance with the "rules" but instead were often addressed informally. The Peacemakers, then, simply facilitated a

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59. *See* League, *supra* note 27, at 81, 106, 108-09.

60. *See* 1848 Constitution, *supra* note 55, § 4.

61. *See id.* ("The jurisdiction, forms of process and proceeding in the Peace Makers Courts shall be the same as in courts of the justices of the Peace of the State of New York."). The 1848 Constitution was adopted premised upon the mistaken assumption that the State of New York was able to legislate with respect to internal Seneca affairs. *See id.* pmbl. ("We . . . implore the Governments of the United States and the State of New York to aid in providing us with laws under which life shall be possible" and appeals shall be made "to the council, and to such courts of the State of New York as the Legislature thereof shall permit."); § 5 ("All causes of which the Peace Makers have not jurisdiction, may be heard before the council or such courts of the State of New York as the Legislature thereof shall permit."); § 14 ("The council shall have power to make any laws not inconsistent with the Constitution of the United States or the State of New York."); § 15 (relating to punishment for crimes in accordance with State law). Prior to the adoption of the 1848 Constitution, New York was requested to "provide laws" for the Senecas. *See* Abler, *supra* note 52. Such laws were ratified by the 1848 Constitution. *See* 1848 Constitution, *supra* note 55, § 19.

62. Under the 1848 Constitution, a party could appeal a Peacemakers Court decision to the Council. However, the Council minutes from 1856 to the present revealed that this process occurred infrequently, suggesting satisfaction with justice at the Peacemakers Court level.

process in which the parties themselves were mainly responsible for finding a resolution to their conflict.

By the 1950s, changes occurred which had a significant effect on the Peacemakers Court and how it conducted its proceedings. In the late 1940s, Congress had begun to implement its infamous Termination Policy.[63] In 1948, criminal jurisdiction over all of the Indian territory in New York was granted to the State,[64] and in 1950, civil adjudicatory jurisdiction over cases involving Indians was granted to the State courts.[65] With respect to the civil provision, Congress established concurrent jurisdiction between the State courts and the Peacemakers Court.[66] The purpose for this legislation was to extend State jurisdiction in order to "lead to the gradual assimilation of the Indian population into the American way of life."[67]

Consistent with the tenor of the times, the Committee Report to § 232 makes derogatory references to both the Seneca government and the capabilities of the Peacemakers Court.[68] At the committee hearings on the legislation, the Nation President acknowledged that enforcement of judicial decisions was weak, that laws were not adequately published, and that unwritten customs were not written down.[69] Nonetheless, commitments were made to address these problems and to develop a Seneca criminal justice system. Considerable testimony was given by Senecas who acknowledged the authority of the Peacemakers Court[70] and believed that the legislation would violate the

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63. *See* H.R. Doc. No. 2503, 67 Stat. 132 (1952); *see also* Vine Deloria, Jr. & Clifford M. Lytle, *American Indians*, 1983 American Justice 17.

64. *See* Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232).

65. *See* Act of Sept. 13, 1950, ch. 947, § 1, 64 Stat. 845 (codified at 25 U.S.C. § 233).

66. *See generally* Robert B. Porter, *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233*, 27 Harv. J. on Legis. 497, 533-42 (1990).

67. H.R. Rep. No. 2720, 81st. Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong. Serv. 3731-32.

68. "Whereas neither the Federal Government nor the Indian residents of the reservations within the State of New York have formulated an adequate system of laws for the government, protection, and regulation of such reservations or for the regulation of relations between Indians and other residents of the State." H.R. Rep. No. 2355, 80th Cong, 2d Sess., *reprinted in* 1948 U.S. Code Cong. Serv. 2284, 2285.

69. *See id.* at 50 (statement of Calvin John, President of the Seneca Nation of Indians).

70. *See id.* at 55 (statement of Dean Williams, Treasurer of the Seneca Nation of Indians).

treaties between the Senecas and the United States.[71] This testimony was to no avail, the legislation passed, and the State courts were opened to suits involving Indians.[72]

Shortly thereafter, the Seneca Nation adopted its own rules to govern proceedings in the Peacemakers Court. These rules, while limited, focused the power of the Peacemakers to render judgments, rather than facilitate disputes. Nonetheless, the fact that the Peacemakers were elected from the community and not legally trained preserved an informality (and cost-effectiveness) that continued to emphasize a "peacemaking" approach to resolving problems, rather than a strict adjudicatory one.

It was not until 1985, when the Seneca Council adopted the modern version of the Peacemakers Court Civil Procedure Rules (S.N.I.C.P.R.),[73] that the Peacemakers Court made the complete transformation to the American style of justice. The new rules were lengthy, complicated, and apparently modeled after the New York State Civil Practice Law and Rules.[74] The resulting procedural structure obviously was designed to replicate the adversarial method of dispute resolution common to the Anglo-American legal system.[75]

The eighty single-spaced pages of the S.N.I.C.P.R. do not mention peacemaking or even suggest that the Peacemakers may engage in any process other than ensuring that litigation is conducted fairly.[76] In the clearest of terms, the rules state that the Peacemakers

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71. *See id.* at 21-27 (statement of Alice Lee Jemison); *id.* at 94-101 (statement of John L. Snyder) (submitting petition of opposition signed by over 200 Senecas); *id.* at 207-09 (statement of Mrs. Nellie K. Plummer).

72. In the absence of this statute, suits involving Indians arising within Indian territory are within the exclusive jurisdiction of the tribal courts. *See* Williams v. Lee, 385 U.S. 217 (1959).

73. *See* Resolution of August 8, 1985, as amended on September 26, 1988, October 17, 1988, May 4, 1994 and May 9, 1994 (records on file in the S.N.I. Clerk's Office) [hereinafter S.N.I.C.P.R.].

74. For example, the S.N.I.C.P.R. sets forth provisions governing "actions" and "special proceedings." *Compare id.* § 1-103(b) *with* N.Y. Civ. Prac. L. & R. 103 (McKinney 1994).

75. The S.N.I.C.P.R. provides that a "plaintiff" must file an "action" against a "defendant" by the filing of a "complaint" and "summons" before the court may "hear" and "decide" the dispute. *See, e.g.*, S.N.I.C.P.R., *supra* note 73, art. 5 ("Commencement of an Action"); *id.* art. 8 ("The Parties"); *id.* art. 10 ("The Hearing"); *id.* art. 11 ("The Judgment").

76. The only reference to "peacemaking" in the S.N.I.C.P.R. is the description of the Court itself.

must render judgments rather than effectuate peace.[77] Amazingly, the Senecas, despite almost 500 years of tradition by which disputes were resolved informally and through peacemaking, have imposed upon themselves a dispute resolution system that is virtually indistinguishable from that used by the dominant society.[78]

To be sure, by gravitating towards the American form of government and its legal system, the Senecas were heavily influenced by their desire to have a form of government in which they could hold their leaders accountable. The constitutional model, while obviously reflective of American cultural influence, was ultimately adopted by the Senecas with no direct influence by the United States. While there is some evidence that the New York State government interfered in Seneca affairs in the years prior to its adaptation,[79] it was the Senecas themselves who adopted both the constitution that requires disputes to be resolved by litigation and the court rules that dictate how such a process is to take place.

II. PEACEMAKING AND OTHER TRADITIONAL NATIVE DISPUTE RESOLUTION MECHANISMS

A. The Elements of Peacemaking

Peacemaking is the primary method of dispute resolution traditionally found in indigenous communities.[80] Peacemaking is the process of resolving disputes by involving respected third parties who induce disputing parties to find common ground and restore their underlying relationship by utilizing a variety of social, spiritual,

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77. *See* S.N.I.C.P.R., *supra* note 73, art. 10 ("The Hearing"); *id.* art. 11 ("Judgment").

78. In practice, particularly with respect to matters involving families and children, the Peacemakers will often try to "make peace" and not render a decision. Unfortunately, this process is in contravention of Seneca law.

79. See, for example, the similarities between the New York state rules of procedure and the S.N.I.C.P.R. discussed *supra* note 73.

80. *See, e.g.*, Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 Ariz. L. Rev. 225, 231 (1989) ("What holds us together is a strong set of values and customs, not words on paper. I am speaking of a sense of community so strong that, before the federal government imposed its system on us, we had no need to lock up wrongdoers.").

psychological, and generational pressures.[81] There are a number of characteristics that define peacemaking and distinguish it from litigation.[82]

First, peacemaking is concerned with justice as it relates to the benefit of the community, and not just for the benefit of individual members.[83] Accordingly, the dispute resolution system assumes a role directly related to the protection of tribal norms and values for the benefit of the group and not for the primary benefit of the individual.[84] Viewed this way, one's clan, kinship, and family identities are part of one's personal identity, and one's rights and responsibilities exist only within the framework of such familial, social, and tribal networks. Since one of the most important values for native people is the ability to be integrated within the community,[85] peacemaking requires emphasis on the perpetuation of the disputing parties' relationships. The focus on relationship takes on increased significance as the size of the native community decreases.

Second, peacemaking is not an adversarial process but is instead a mediation process in which a peacemaker works actively with the parties to help them find a mutually beneficial solution.[86] The process revolves around an appreciation of and sensitivity to the

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81. Issues relating to commonly used social and psychological sanctions, such as ridicule and banishment, will be discussed more in terms of their utilization as peacemaking tools, rather than as peacemaking in and of themselves.

82. *See generally* Robert Yazzie, *Life Comes From It: Navajo Justice Concepts*, 24 N.M. L. Rev. 175 (1994); Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 Judicature 126 (1995).

83. *See* James W. Zion, *The Navajo Justice and Harmony Ceremony*, 10 Mediation Q. 327 (1993).

84. [N]ative peoples see humans as inherently social beings. As social beings, people never exist isolated from others in some mythic, disorganized state of nature. Rather human beings are born into a closely linked and integrated network of family, kinship, social and political relations.

Robert N. Clinton, *The Rights of Indigenous Peoples As Collective Group Rights*, 32 Ariz. L. Rev. 739, 742 (1990).

85. [T]he Indian concept of the human being is one in which all aspects of the person and his or her society are integrated. Every action in daily life is read to have meaning and implication to the individual and guides how he or she interacts with tribal society or fulfills obligations imposed by society, law, and religion.

Vicenti, *supra* note 12, at 135.

86. *Id.* at 342.

interests of both parties against the backdrop of respect for community norms.[87] As a result, there is no "winner" or "loser." Instead, successful peacemaking benefits the tribe as the parties come to an understanding that will allow them to carry on without the risk of further disruptions.

Third, peacemaking does not involve lawyers or representatives but requires the parties to the dispute to engage in the dispute resolution process directly.[88] This requirement ensures that parties are directly involved in the process and not insulated from the give-and-take that is characteristic of a peacemaking session. This dynamic is critical because subtle behavior altering mechanisms such as shame, embarrassment, anger, and satisfaction play an important part in the process of finding compromise. The absence of lawyers facilitates the ability of the parties to modify previously assumed negotiating positions.

Fourth, peacemaking involves an interested mediator and not a disinterested decision maker.[89] Usually the peacemaker is a political or spiritual leader, or elder relative, from the community who knows and is known by the disputing parties. The existence of a prior relationship, involving respect for the peacemaker, allows the peacemaker to rely upon his or her own personal moral power to urge the parties toward resolution. Thus, scoldings and lectures, rather than any type of more obvious physical coercion, assists in restoring the relationship between the disputing parties.

Fifth, while peacemaking relies upon the use of substantive norms, these norms are transmitted orally rather than through written edicts.[90] The effect of this formal difference is that the "law" can be utilized by the parties as more of a guide to achieving substantial justice, rather than as an additional source of rigidity that might prevent the parties from adjusting their positions towards a point of compromise. Emphasis is not on guilt or innocence, but rather on redress of the problem and the restoration of the disputing parties' relationship. This equitable approach, while it may seem to minimize the importance of the norms, in fact suggests greater respect for them because the parties are able to effectuate their own solution to accommodate the norm. The peacemaker thus assumes a critical role

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87. *Id.*

88. *Id.*

89. *Id.* at 334.

90. Michelle L. Duryea & Jim Potts, *Story and Legend: Powerful Tools for Conflict Resolution*, 10 Mediation Q. 387, 388-89 (1993).

ensuring that the parties' solution is consistent with that of the community.

Finally, peacemaking relies upon a different method of enforcement than does litigation.[91] In a tribal community, coercive pressure arises through response mechanisms such as ridicule, ostracism, and banishment. Unlike the American enforcement mechanism, which is based on physical coercion at the hands of the state, the subtle forms of native psychological sanction utilize societal pressure to play upon the wayward member's need to remain in good stead within the community.[92] As a result, remedies avoid coercive governmental pressure and the perception of illegitimacy often associated with it. Thus, peacemaking avoids the need for government legitimacy because it is not the government that has the enforcement function.

In sum, peacemaking is a process in which respected community members assist disputing parties, who participate without legal representation, to find a compromise to their dispute. The restoration of relationship is the primary concern and is effectuated by disregarding fault and blame and instead ensuring that the community norms are respected. Successful dispute resolution by peacemaking maintains the wholeness of the individuals involved and ensures strength and unity within the tribal community.

B. The Utilization of Peacemaking and Other Traditional Native Dispute Resolution Processes

Indigenous people of North America maintained order within their communities in a significantly different manner than the European settlers who later colonized their aboriginal territory.[93] So foreign were their justice systems—due to the absence of easily observable and written institutions and procedures—that the colonists concluded that they were without law or justice.[94] The reality, however,

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91. *See* Emily Mansfield, *Balance and Harmony: Peacemaking in the Coast Salish Tribes of the Pacific Northwest*, 10 Mediation Q. 339, 344 (1993).

92. Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 Gonz. L. Rev. 393, 405 (1991/92) ("The traditional law and narrative of many tribes, and most certainly, the Sioux Tribes of South Dakota, place emphasis on community, cooperation, and relatedness.").

93. *See* Deloria & Lytle, *supra* note 63, at 111-13.

94. *See id.* at 80-82.

was that the Indians did value law and justice and relied upon a variety of methods and systems in order to ensure that those objectives were satisfied.

The key to understanding traditional native justice systems lies in the closed nature of tribal communities and the obligations of individual tribal members to perpetuate established norms. Only then can ridicule, ostracism, banishment, punishment, and peacemaking—all processes utilized by indigenous people to ensure that individual misconduct was corrected and the community norms respected and perpetuated—make sense. Each of these sanctions was integrally related to an overall process of keeping the peace and ensuring that internal disputes were minimized and the functioning of the community undisturbed. Simply put, maintaining good relationships between tribal members was the embodiment of traditional native dispute resolution.[95]

In aboriginal times, peacemaking was a non-deliberative process that the people instinctively understood as members of the community. Through the traditional educational system—parents, family, and community—the peacemaking system perpetuated itself. It was not that there were not norms or mechanisms to redress misconduct, it was simply that precedent—that is, oral tradition—was conveyed to all members through the social network.[96]

How, exactly, did peacemaking work? Because of the absence of courts, lawyers, judges, and written laws, it was easy for Anglo-Americans to conclude that traditional native systems lacked formal institutions. The reality, however, was that the norms governing individual behavior and the methods utilized to ensure that those norms were perpetuated were very much institutionalized within a particular tribe.[97] The indigenous "legal system" was more difficult to comprehend than the Anglo-American system precisely because there was no written record—success was dependent upon the ability of tribal leaders to call upon their memory of how problems within the community had been previously addressed.

Comfort with the system, or more precisely, total understanding and acceptance of the system was an integral component to why peacemaking worked to resolve internal disputes.[98] Peacemaking, by its

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95. *See* Yazzie, *supra* note 82, at 182.

96. *See* Karl N. Llewellyn & E. Adamson Hoebel, The Cheyenne Way 239–45 (1941) [hereinafter The Cheyenne Way].

97. *See id.*

98. *See id.* at 239.

very nature, served to reaffirm, and perhaps even redefine, the norms that were critical for tribal survival.

Prior to contact with the European colonists, indigenous people had little choice but to accept and live by the norms established by their communities. The primary reason was that effective dispute resolution was critical for individual and group survival. Excessive acrimony in such close-knit societies was disastrous to the effective functioning of the family and clan. The ripple effect of interpersonal conflict could easily result in other families and extended family members being drawn into matter originally concerning only a few people. Thus, unsettled acrimony led to disfunction, which threatened the basic ability of the tribe to engage in its fundamental activities of survival, such as hunting, farming, and diplomacy. In a very real sense, the failure of disputing parties to respect tribal norms contributed to the weakening of the tribe and jeopardized their lives and the lives of other tribal members.

Because of reliance on oral tradition, our knowledge of traditional peacemaking systems is limited to what the descendants of the native people remember and may still practice, and what the anthropologists and other colonists may have recorded. It is clear, however, that a variety of different Indian nations addressed intratribal conflict through peacemaking.[99] One of the best examples is the Navajo, who are now engaged in an active process of incorporating their ancient peacemaking methods into their modern judicial system.[100]

For the Navajos, justice was directly related to life, and the process that one engaged in to achieve justice has been described by Navajo Nation Chief Justice Robert Yazzie as akin to healing.[101] Navajo justice values, therefore, placed primary emphasis on respect, community solidarity, and harmony, rather than coercion and punishment.[102] As a result, the traditional Navajo values did not include "guilt" (or even such a word in the Navajo language) because there was no need to imply moral fault or the resulting need for retribution.[103]

How people were persuaded to compromise their differences was dependent upon what the Navajos called "k'e," which is a deep

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99. *See* National American Indian Court Judges Association, Justice and the American Indians 18 (1978).

100. *See* Zion, *supra* note 82, at 327.

101. *See* Yazzie, *supra* note 82, at 180.

102. *See id.* at 181.

103. *See id.* at 182.

emotional feeling of connection and relationship between an individual and his or her clan.[104] The Navajos believed that in dealing with a dispute, every person who is somehow affected by the dispute must be brought together for the purpose of "talking things out."[105] Failure to do so would prevent the restoration of the relationship.

In formal peacemaking, the discussion atmosphere was relaxed, there were no fixed rules, and people were free to speak either for themselves or on behalf of others.[106] The discussion was influenced by the introduction of Navajo community values[107]—through the use of stories, legends, prayers, and teachings with the intention to return disputing parties to a condition of solidarity, or "hozhooji."[108]

The peacemaking process was facilitated by trusted elders serving as peacemakers, or "naat'aanii."[109] Any authority that such persons brought to bear on the process was not physically coercive or commanding, but instead revolved around their leadership, wisdom, integrity, good character, and respect in the community.[110] The peacemaker served to guide the discussion of a problem to the desired conclusion.

It is the process of building consensus, and not physical coercion, that produced results in the Navajo system and is the lynchpin of modern efforts to revitalize Navajo peacemaking. Rather than focusing on the nature of the dispute, the Navajos relied upon the *process* by which the dispute might be resolved.[111] Fault or guilt was irrelevant to the pursuit of justice. Instead, reliance was upon distributive justice, or ensuring the well-being of all members of the community. As applied to individual behavior, it did not matter whether one was at fault for causing harm to another; it only mattered whether there was an acknowledgment of the continual responsibility to treat everyone as a relative and to deal with them accordingly.[112]

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104. *See id.*

105. *Id.* at 182.

106. This is allowed to ensure that "weaker" persons, such as those afraid or unable to speak in discussion, will not be "abused" by others. *See id.* at 183.

107. The Navajos refer to these values as embodied in their modern "common law." *See id.* at 187.

108. *See id.* at 183. This process was called "hozhooji naatah," or "the orderly discussion of making peace and forging consensus among peace advocates." *See id.*

109. *See id.* at 186.

110. *See id.*

111. *Id.* at 185.

112. *Id.*

In addition to the Navajos, peacemaking was common to other indigenous people in the Southwest,[113] including the Zuni.[114] Originally a theocracy, the Zuni retained an effective peacemaking method despite the existence of a form of litigation that was conducted before the Zuni Council.[115] To the extent that the Zuni relied upon such formal hearings, they were "exemplary only of those instances in which the normal methods of private settlement [broke] down."[116] Even in those instances, formal hearings were avoided as "the governor or other Council members discuss[ed] the matter privately with the parties and attempt[ed] to reconcile their differences. This [was] an informal and semi-official process, and [was] often productive of results."[117] As with the Navajo, the Zuni peacemaking process emphasized informality and was designed to ensure the highest value—harmony within the community.[118]

The Navajo and Zuni are but two of the many tribes that relied upon peacemaking as a central tenant of addressing interpersonal conflict and maintaining order with the society. Peacemaking was known to have been practiced among the indigenous people in the

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113. *See, e.g.*, Veronica E. Velarde Tiller, The Jicarilla Apache Tribe, A History 1846-1970 (1983). The role of peacemakers in Jicarilla society is described briefly as follows:

> Each local group had a leader who represented the interests of his followers. It was his responsibility to negotiate disputes with neighboring groups over matters of territory or revenge, and he arbitrated internal conflicts. Having no absolute authority, these leaders governed by persuasion, and their powers were only as great as their abilities to act in the capacity as advocate and to achieve a consensus and promote peaceful coexistence.

Id. at 14. *See* Vicenti, *supra* note 12, at 137-39.

114. *See* Watson Smith & John M. Roberts, Zuni Law: A Field of Values, *in* 43 Papers of the Peabody Museum of American Archeology and Ethnology 18 (1954) ("As far as Zuni law is concerned, private settlement of disputes is the rule.")

115. *See id.* at 104-12 (describing the informal "trials" held by the Zuni Council to resolve disputes).

116. *Id.*

117. *Id.* at 104.

118. *See id.* at 105 ("It is implicit in all this [peacemaking effort of the Zuni Councillors] that the achievement of harmony is a major objective . . . ."); *id.* at 108 ("[O]ne of the functions of the Council and its members individually is to seek private adjustment or compromise of disputes and thus to maintain general harmony in the society by preventing, insofar as possible, the overt eruptions of controversies at public hearings.").

Pacific Northwest,[119] the Plains,[120] the Southeast,[121] Alaska,[122] and Hawaii.[123]

It is true that peacemaking was not the only method by which native people resolved disputes. Adversarial and inquisitorial systems were also utilized, although the underlying objective of resolving the dispute and ensuring domestic tranquility within the tribe were primary considerations. For example, the Cherokees[124] relied upon public trials and the Tlingit were primarily concerned with determinations of guilt.[125]

In sum, it appears that notwithstanding the different behavior modifying mechanisms that were utilized and the degree to which these mechanisms were utilized, all indigenous people prior to the domination of the United States utilized a form of peacemaking and otherwise maintained effective dispute resolution systems of their own accord.

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119. *See, e.g.*, Northwest Intertribal Court System and the Sauk-Seattle, Skokomish and Swinomish Tribes, Traditional and Informal Dispute Resolution Process in the Tribes of the Puget Sound and Olympic Peninsula Region (1991) (structure of Northwest Intertribal Court System).

120. *See, e.g.*, The Cheyenne Way, *supra* note 96, at 12-15.

121. *See, e.g.*, Rennard Strickland, Fire and the Spirits: Cherokee Law From Clan to Court (1975). It is important to bear in mind, however, that the Eastern tribes were colonized much earlier than many of the Western tribes, and thus the traditional judicial methods were abandoned at an earlier time. Examples of these traditional dispute resolution systems are thus more difficult to locate.

122. Hepler v. Perkins, 13 Ind. L. Rep. 6011, 6016 (Sitka Tribal Ct. 1986) (explaining the practices of the Sitka Court of Elders.)

123. Manu Meyer, *To Set Right—Ho'oponopono: A Native Hawaiian Way of Peacemaking*, 12 Compleat Law. 30 (1995).

124. *See* Strickland, *supra* note 121. The Cherokee placed great value on social harmony; *see id.* at 22; and relied upon the spirits and trials to help ensure this harmony: "Deviations from established norms which offended community expectations were tried in the courts of the villages. A Cherokee trial was essentially a matter of oath saying." *Id.* at 25.

125. *See e.g.* William Brady, Alaska Native Tradition Dispute Resolution 1-2 (1992) (describing the Tlingit dispute resolution process: "Among the Tlingit, the goal of dispute resolution was to settle disputes between tribal members so that all could forgive and be able to live in tribal society together. The objectives were first, to ascertain guilt and second, to ensure restitution and compensation (through giving) to the victim and /or the victim's family.").

III. HOW INDIANS CAME TO DECIDE DISPUTES LIKE AMERICANS

A. The Elements of Litigation

Peacemaking is considerably different from litigation, the primary method utilized by Anglo-American society to resolve disputes.[126] In order to best explain the process in which native people came to decide disputes, it is important to have a clear understanding of the nature of litigation. In the Anglo-American legal system, litigation is driven by the pursuit of both procedural and substantive justice.[127] The following are six fundamental areas where peacemaking and litigation diverge.[128]

First, the American dispute resolution system is premised upon the vindication of the rights and claims of individuals. Indeed, America itself, and not simply the American legal system, is a reflection of the value placed by Americans on individual liberty.[129] As evidenced by the Bill of Rights, the American Revolution and the adoption of the Constitution were fueled by a strong distrust of government and the need to protect individuals from governmental abuse of basic fundamental liberties.[130] Accordingly, the American legal system achieves justice in a manner akin to a legal marketplace driven by the

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126. In recent years, increasing attention has been given to alternative dispute resolution ("ADR") in the form of mediation, arbitration, and mini-trials. *See generally* Thomas D. Rowe, Jr., *American Law Institute Study of Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 Duke L.J. 824. This development suggests the limitations of litigation even within American society.

127. *See* Introduction to the Law of the United States 371 (Tugrul Ansay & David S. Scott eds., 1992).

128. There are no doubt more than six ways in which the two systems diverge. The primary focus, however, is on critical theoretical differences in the approach to achieving justice, and not on whether there are merely differences in how the courts conduct their respective business.

129. *See* Joyce A. McCray Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedoms*, 35-36 How. L.J. 43(1993); *see also* James MacGregor Burns et al., Government by the People 5 (12th ed. 1984).

130. Burns, *supra* note 129, at 9.

individual consumer:[131] individuals pursue their legal self-interest, thereby achieving justice for the individual and society as a whole.[132]

Second, the American legal system is adversarial in nature. Parties to a dispute must engage in a form of civil combat in which prosecution, factual investigation, presentation of proof, and legal argument are required.[133] Success is determined by how well the complainant engages in such a process and how well the respondent frustrates the process. In this model, little recognition is given to the different circumstances of the parties and, therefore, the relative wealth of the parties, access to resources, and familiarity with the system are all irrelevant to the pursuit of justice. Fairness and the ultimate quest for justice are ultimately derived from either one of the parties quitting and settling, presumably on the merits (but not necessarily), or the dispute being sent to a decision maker for judgment. Thus, in simple terms, the pursuit of justice, American-style, is a process in which the "truth is more likely to emerge from the parties' investigation at their own timing, motivated by self-interest."[134]

Third, the American legal system places great emphasis on the disputing parties being represented by lawyers. The complicated nature of litigation, with its often arcane and impenetrable rules and discourse, makes retention of counsel a critical component of success.[135] Once the process begins, the parties are rarely required to face each other since all of the proceedings are conducted by their legal representatives.[136] Settlement negotiations and the actual litigation may take place without the parties ever even meeting face-to-face.

Fourth, in those cases in which the dispute is not settled and a trial is required, the American legal system is based upon the dispute being resolved by a neutral fact finder. Thus, the centuries old tradition of a judge or jury hearing the evidence and rendering a decision is the

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131. *See generally* Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 Iowa L. Rev. 769, 776-79 (1985); *see also* Burns, *supra* note 129.

132. Rosenfeld, *supra* note 131, at 779-86.

133. Introduction to the Law of the United States, *supra* note 127, at 372.

134. *Id.*

135. *See* Argersinger v. Hamlin, 407 U.S. 25, 31-34 (1972).

136. *Id.*

method in which the dispute is formally ended.[137] Justice, as the theory goes, is based upon the neutrality of the decision maker:

> Adversary theory . . . suggests that neutrality and passivity are essential not only to ensure an evenhanded consideration of each case, but also to convince society that the judicial system is trustworthy; when a decision maker becomes an active questioner or otherwise participates in a case, society is likely to perceive him as partisan rather than neutral.[138]

Prior knowledge and information about the case or the parties is presumed to be detrimental, and a multitude of legal and ethical rules guide the judge in ensuring that there is no threat of bias.[139] While some attention is paid to the biases that lay decision makers—the jurors—may bring to the case, by allowing the parties to strike potential jurors for whatever reason, there is no formal method by which parties can eliminate the inherent biases of a judge short of moving for recusal.[140] Maintaining the appearance of neutrality is deemed critical to assuring that the parties ultimately accept the final judgment.[141]

Fifth, the American legal system produces judgements that are based upon the existence of fixed legal principles, that is, the law. Substantive law is derived from a variety of primary sources, including federal and state constitutions, legislative and administrative rules, regulations, and decisions. In addition, a vast source of substantive law is judicially crafted by appellate courts.[142] Through *stare decisis*, judges seek to establish a uniform body of law by interpretation of positive law or the reiteration of common law that individuals and society can rely on in the course of their daily lives.[143] Accordingly, the American dispute

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137. *See* Stephan A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 Ohio St. L.J. 713, 725 (1983).

138. *Id.* at 715.

139. *See* Model Code of Judicial Conduct Canon 3(c), (d) (1972).

140. *Id.*

141. "[T]he legitimacy of a decision is strongest, especially if one of the parties is the state, when it is made by an official who does not have, and does not appear to have, the type of psychological or bureaucratic commitment to the result that is implied in forming and pushing the case to its conclusion." *See* Introduction to the Law of the United States, *supra* note 127, at 128.

142. *Id.*

143. *See id.* at 82-83.

resolution system is designed to perpetuate and strengthen itself through the decisions and reasoning of prior cases.

Finally, the American legal system is predicated upon the power of the state to enforce judicial decisions. Throughout the litigation process, coercion and the fear of confronting state authority underlie all party actions.[144] Sanctions for failing to play by the rules of litigation can result in the denial of party requests, fines, and even incarceration for contempt. Foremost, however, is the knowledge that the prevailing party will actually be able to force the losing party to comply with the judgment that is rendered. Perhaps more than any other feature, the fear of coerced equitable and monetary relief is what drives the parties in the American legal system. So great is the power of the state to enforce judicial decisions, that parties with weak cases are induced to settle.

To summarize, then, the American dispute resolution mechanism is a process of structured aggression in which the parties, assisted by lawyers, engage in a self-interested pursuit of justice. A judge or jury is called upon to determine the underlying facts and evaluate them against a fixed legal standard and then render a decision as to who is the ultimate "winner," a result that is enforced by the state. Reliance upon litigation "is an indicator not of compliance with socially-arrived-at dispute settlements, but rather a lack of compliance."[145]

B. The History of the Indigenous Transition to Litigation

Despite the richness of the traditional native peacemaking process, most Indians today resolve disputes by litigation conducted in formal judicial systems.[146] While each Indian nation may have its own particular court structure and practice rules, all modern tribal court systems have the same common denominator—they are direct descendants of the Anglo-American legal tradition.[147] This section analyzes the history of the process in which Indians relinquished their

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144. *See generally* Russell Karobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 Mich. L. Rev. 107 (1994).

145. *See* Understanding Disputes: The Politics of Argument 46 (Pat Caplan ed., 1995).

146. *See* Deloria & Lytle, *supra* note 63, at 110-20.

147. *See* Russel L. Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. Mich. J.L. Ref. 277, 294 (1993) ("Indian and non-Indian institutions have converged far more than tribal leaders or scholars want to admit.").

traditional methods of dispute resolution and came to decide disputes like Americans.[148]

The over 500 different Indian nations have followed a number of different paths of governmental and legal development over the last 220 years. Originally utilizing their own forms of government,[149] most Indian nations today are governed in accordance with written constitutions. These constitutions were either willingly adopted by tribes who believed that it would best suit their future needs, or, as was the case with many tribes, forced upon them in an effort to assimilate them. Despite this pattern, however, there remain a handful of traditional Indian nations that have retained pre-colonial forms of governance and do not have written constitutions. Regardless of the manner in which most tribes adopted constitutions, there is little doubt that the colonizing influence of the United States has had the greatest effect on the manner in which indigenous people now govern themselves.[150]

As the dominant power on the continent, the United States heavily influenced those indigenous people who believed that assimilation was their best means of surviving the colonization of the continent. The Cherokees, for example, were the first to adopt a constitutional form of government in 1827, both as a reflection of their natural predisposition toward complex governing systems and as a deliberate decision to assimilate in order to assure their collective survival.[151] Soon thereafter, they adopted the first tribal statutory code.[152] With the change to a constitutional system, the Cherokees also adopted an adversarial based judicial system.

Because of their early and deliberate assimilation of American cultural values and institutions, the Cherokees were one of the most

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148. *See* Ada Pecos Melton, Developing a Tribal Justice Forum 1 (1992) ("It is important to understand the historical development of tribal governments to understand how contemporary Pueblo Indians exercise tribal justice and sanctioning measures."). For an overview of the history of federal-tribal relations, see generally Felix S. Cohen, Handbook of Federal Indian Law 47-206 (1982).

149. *See* Deloria & Lytle, *supra* note 63, at 81-82.

150. One commentator has suggested that the United States has engaged in "cultural abuse" of the indigenous people located within its borders. *See* Barsh, *supra* note 147, at 285 ("Colonialism is the abuse of an entire civilization for generations.").

151. *See* Strickland, *supra* note 121, at 79.

152. *Id.*

prominent Indian nations in the country.[153] Through the efforts of Sequoyah, the first Cherokee man to write the Cherokee alphabet and language, the Cherokees became literate in their own language and published a national newspaper both in Cherokee and in English.[154] The Cherokee legal system was elaborate and sophisticated and its prominence served as the focal point of Georgia's efforts to eradicate them in the early nineteenth century.[155]

Other Indian nations followed the path of the Cherokees. For example, the Creek[156] and Choctaw[157] also developed their own constitutional forms of government. While each constitution arose out of its own particular facts and circumstances, the American Constitution heavily influenced the process.[158]

Despite what seemed inevitable—that most Indian nations eventually would adopt some aspects of the American form of government—federal officials impatiently waited for native people to abandon their traditional methods of governance and assimilate into American society.[159] The main reason for this impatience was practical. Until the late nineteenth century, the United States had little alternative but to deal with the Indians on unfamiliar terms in native

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153. So adept were they at adopting even the worst aspects of Anglo-American culture, they even held slaves and were known as one of the "Five Civilized Tribes." *See generally* Kirke Kickingbird, *"Way Down Yonder in the Indian Nations, Rode my Pony Cross the Reservation!" From "Oklahoma Hills" by Woody Guthrie*, 29 Tulsa L.J. 303, 311 (1993) ("Cherokee, Creek, Choctaw, Chickasaw and Seminole Tribes of the Southeast which, because of their cultural 'advancement' and political sophistication, became popularly known as the Five Civilized Tribes."). *See generally* Grant Foreman, The Five Civilized Tribes (1934).

154. *See* Strickland, *supra* note 121, at 105–09.

155. *See id.* at 66–67 ("[T]he Georgia legislature prevented the Cherokees, whose land was within the boundaries of the state of Georgia, from acting as an independent government and extended state laws into Indian country."). The clarity with which the Cherokees governed themselves contributed to the first significant constitutional crisis in the United States when President Jackson refused to enforce the Supreme Court's decision that Georgia's laws were in violation of the Constitution. *See* Worcester v. Georgia, 31 U.S. (16 Pet.) 551 (1832).

156. *See* O'Brien, *supra* note 3, at 126.

157. *See id.* at 6.

158. For example the model constitution provided in the CFR was modeled substantially after the U.S. Constitution. Many tribes adopted the proposed draft with few, if any, modifications. *See* Indian Courts and the Future, Report of the National American Indian Court Judges' Association Long-range Planning Project (1978) [herinafter NAICJA Report]; *see also* discussion *infra* note 164 and accompanying text.

159. *See* O'Brien, *supra* note 3, at 203.

languages on native territory through mysterious decision making processes. The result was that federal negotiators often had considerable difficulty concluding agreements. The problems were such that many treaties (which were written by the American translators) contain provisions that could never have been agreed to in accordance with tribal law.[160] This confusion frustrated efforts to secure peace with the Indians, make available Indian lands for settlement, and facilitate westward expansion. American policy makers desperately wished for a form of tribal government more familiar to them so as to facilitate their exploitation.[161]

In addition to these practical considerations, the Americans were (and are) possessed of a fundamental belief that American culture was (and is) superior and that the Indians were savages who needed to be "civilized" and absorbed into the American polity.[162] To further this end, the United States funded missionary expeditions to the Indian country in order to bring Christianity to the indigenous population.[163] Official federal government action, including the establishment of boarding schools, police agencies, and prisons also took place as means of ensuring native assimilation as quickly as possible.[164]

One of the most important tools utilized by federal officials was the administrative court system, known as C.F.R. Courts (after the Code of Federal Regulations), and the administrative Code of Indian Offenses.[165] Implemented by the Secretary of the Interior, these courts introduced western justice and civil laws to Indian society "for the

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160. *See id.*

161. This perspective is reflected in the policy of the Dawes Act allotment plan which divested the tribe of communal property ownership and imposed instead the foreign European concept of personal property ownership.

162. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat) 543, 590 (1823) ("But the tribes of Indians inhabiting this country were fierce savages whose occupation was war, and whose subsistence was drawn chiefly from the forest."); *see also* The Declaration of Independence, para. 20 (U.S. 1776) ("the merciless Indian Savages . . ."). *See generally* David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 Va. L. Rev. 403, 416 (1994).

163. *See* Indian Tribes, A Report of the United States Commission of Civil Rights 19 (1981).

164. *See* Frank Pommersheim, *The Reservation as Place*, 34 S.D. L. Rev. 246, 256-57 (1989); *see also* Susan Shown Harjo, *Native Peoples' Cultural and Human Rights: An Unfinished Agenda*, 24 Ariz. St. L.J. 321, 322 (1992); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. Chi. L. Rev. 671, 719 (1989).

165. *See* NAICJA Report, *supra* note 158, at 9.

purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man."[166]

With little doubt, however, the most significant and dramatic of American assimilation efforts was the systematic dispossession of the Indians from their aboriginal lands.[167] The establishment of reservations effectively destroyed the traditional way of life for most tribes and, with it, traditional methods of governance. Even if the traditional governmental form was retained, the tribes had been stripped of some of their most important governmental functions by being placed on reservations. Moreover, the new reservation lands were often barren, introducing a slew of new social problems that they were wholly unprepared to deal with.[168] Yet, in the cruelest fashion, at the time that the native people needed to find ways to strengthen themselves, the United States adopted its most aggressive policy yet for securing title to the remaining native lands.

Reflecting both a desire to facilitate westward expansion and the continued need to bring "civilization" to the Indians, in 1887 Congress passed the General Allotment Act.[169] The Allotment Act allocated reservation lands to individual Indians in fee, for the purpose of facilitating the breakup of communal land holdings.[170] In accordance with the Jeffersonian tradition of the yeoman farmer, it was believed that establishing an agricultural foundation for the indigenous population would make it possible to "destroy the Indian and save the man"[171] and eliminate the ills associated with reservation existence.

The true justification for the Act, however, was found in one of its provisions that allowed an Indian who had held his land individually

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166. *See* United States v. Clapox, 35 F. 575, 577 (D.C. Or. 1888).

167. *See, e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970). *See generally* O'Brien, *supra* note 3, at 62, 213-15.

168. Most of the land taken from the Indians by the whites was the best farming land while most of the remaining Indian land was desert or semidesert. *See* James S. Falkowski, Indian Law/Race Law: A Five Hundred-Year History 112 (1992).

169. *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 7-18 (1995).

170. *See* Rebecca L. Robbins, Self-Determination and Subordination: The Past Present and Future of American Indian Governance, *in* the State of Native America: Genocide, Colonization and Resistance 87, 93 (M. Annette James ed., 1987) ("replacing the traditional mode of collective use and occupancy with the Anglo-Saxon system of individual property ownership").

171. *Id.*

for twenty-five years to sell it to a non-Indian.[172] Many Indians did so, and through this process, non-Indians came to hold a significant portion of reservation lands. "Checker boarding" and the disestablishment of many reservations occurred.[173]

The connection between native survival and land obviously was not lost on the proponents of the Allotment Act. As agrarian or nomadic peoples, the indigenous population required the free use and enjoyment of large tracts of land in order to ensure their survival. Losing this foundation precipitated the decimation of their traditional ways of life and ordering of their tribal affairs.[174]

By the early 20th century, the Indians were a destitute and dependent people, and the allotment policy, while a wondrous success in acquiring native lands, was an obvious failure in improving their quality of life. Despite the fact that the reservation and allotment policies had actually worked in weakening the tribes, no one really expected that the indigenous population would actually survive them.[175]

As a result, the embarrassment and guilt associated with placing the continent's first inhabitants in such an impoverished condition precipitated federal efforts to facilitate tribal revitalization. Based upon the assumption that revitalization was dependent upon tribal reassumption of responsibility for their own affairs, Congress passed the Indian Reorganization Act in 1934 (IRA).[176] While the IRA repealed the General Allotment Act and proved influential in revitalizing many tribes,[177] its passage was yet another blow against traditional tribal governance.

The IRA provided that any tribe that adopted its provisions could establish a constitutional form of government that would be recognized by the United States.[178] Its provisions made it clear that

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172. *See* Royster, *supra* note 169, at 10-11.

173. *See, e.g.*, Hagen v. Utah, 510 U.S. 399, 410-12 (1994).

174. *See* Hodel v. Irving, 481 U.S. 704, 706 (1987) ("This legislation seems to have been in part animated by a desire to force Indians to abandon nomadic ways in order to 'speed the Indians' assimilation into American society.'")

175. *See supra* note 68.

176. *See* 25 U.S.C. §§ 461 (1994).

177. *See* NAICJA Report, *supra* note 158, at 37.

178. *See* Indian Reorganization Act, § 16, 48 Stat. 987 (codified as amended at 25 U.S.C. § 476 (1994)). *See generally* Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. Rev. 49, 55 (1988).

tribes had the option of availing themselves of its provisions.[179] Nonetheless, the process by which it was implemented strongly suggests that its enactment was intended to further American, rather than native, interests.[180] Eventually, nearly 200 tribes adopted IRA constitutions.[181]

The IRA "form" constitutions did not closely resemble the American Constitution, as they were characterized by a single branch of government—the Council.[182] If anything, they resembled municipal charters, as federal approval was required in order to finalize tribal lawmaking and constitutional revision.[183]

The IRA constitutions easily facilitated the development of American style judicial systems and the full adoption of the American legal process.[184] Primarily, the move to constitutionalism definitively replaced the traditional method of governance and limited the nature of the governmental function to what was provided in the constitutional text. In this respect, the IRA constitutions forced the fragmentation and compartmentalization of tribal affairs into a sort of constitutional "box," leaving behind a vast array of social, political, and spiritual elements traditionally associated with indigenous governance.

Moreover, these constitutions did not provide for an independent judiciary or a separation of powers; therefore, the tribal council had to take legislative action to establish the tribal judiciary. These tribal judiciaries ordinarily were modeled after the form and structure of the American court system with a district court and one or more appeals courts.[185]

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179. *See* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955, 962, 965 (1972).

180. The Indians were told to adopt the IRA constitutions or have their lands allotted and their treaty-provided benefits cut off. *See* Thorstenson v. Cudmore, 18 Ind. L. Rep. 6051, 6053 (Cheyenne River Sioux Ct. App. 1991) ("It is well established that these IRA constitutions were prepared in advance by the Bureau of Indian Affairs—almost in boilerplate fashion without meaningful input or discussion at the local tribal level."). *See generally* Russel Barsh & James Youngblood Henderson, The Road: Indian Tribes and Political Liberty 96-111 (1980).

181. *See* NAICJA Report, *supra* note 158.

182. *See* O'Brien, *supra* note 3, at 83.

183. 25 U.S.C. § 476 (1994).

184. *See* NAICJA Report, *supra* note 158, at 40.

185. *Id.*

Finally, the IRA tribal courts utilized American substantive law as governing rules of decision.[186] Thus, the mere presence of these formal judiciaries put considerable pressure on tribal judges to "borrow" both substantive and procedural American law. Because in most cases the laws and customs of the tribe were not written down, the tribal judges, eager to serve their "proper" function, often just borrowed the state laws and court decisions that were readily available.[187] As a result of these procedural and substantive adaptations, the structural transition from peacemaking to litigation as the method by which most indigenous people formally resolved disputes amongst themselves was easily facilitated.

Efforts to assimilate the native population, however, were far from over. By the mid-twentieth century, the pendulum had swung back in favor of weakening the Indian nations and assimilating their citizenship. The Termination Policy, which formally withdrew federal recognition to tribal sovereignty, was adopted and pursued, predicated upon the notion that tribes should be "freed from Federal supervision and control and from all disabilities and limitations specifically applicable to Indians."[188] By the time the Termination Policy was repudiated in the late 1960s, over 150 Indian nations were terminated and their members forced on the path of assimilation into American society.[189]

In addition to outright termination, Congress also took a less dramatic, but equally destructive measure—transferring "federal supervision" over the Indians for certain functions to the states. The most prominent of these efforts was Public Law 280[190] which had the twofold effect of vesting state courts with civil adjudicatory jurisdiction over causes of action involving Indians arising on Indian lands and extending criminal jurisdiction over Indian lands located within the particular state.[191] Public Law 280 applied in five states and the Alaska Territory, but it provided that any other state could unilaterally decide to accept jurisdiction over the Indian territory located within its

186. *Id.* at 39.
187. *Id.* at 44.
188. H.R. Con. Res. 108, 83rd. Cong., 1st. Sess. (1953).
189. H.R. Rep. No. 2720, *supra* note 67.
190. 18 U.S.C. § 1162 (1994); 28 U.S.C. § 1360 (1994).
191. *See generally* Carole Ambrose-Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. Rev. 535 (1975).

borders. It was preceded by similar legislation that applied to the Indian country in five other states.[192]

While the criminal jurisdiction provision of Public Law 280 appears to have been directed at legitimate public safety concerns on Indian lands,[193] the civil component was directed towards the weakening of tribal court systems and the assimilation of the native population. Public Law 280 established a system of concurrent jurisdiction between the state and tribal court systems.[194] As a result, the court where the action was first filed obtained jurisdiction over it.[195] The effect, as intended, was that the entire body of state civil law was applied to cases involving Indians, thus hastening their assimilation into American society.[196] It also appears that access to the state courts had the equally destructive effect of inducing tribal courts, in an attempt to "stay competitive," to adopt procedures analogous to what potential litigants might find in the state courts.[197]

By the 1960s, Congressional preoccupation with the civil rights of African Americans prompted a new focus on the civil rights of Indians subject to tribal governmental authority. Addressing the reality that the Indian nations were not subject to the Constitution and the Bill of Rights[198] and unable to ignore the testimony of individual Indians

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192. For Kansas, see Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U.S.C. § 3243 (1994)) (criminal jurisdiction); North Dakota, see Act of May 31, 1946, ch. 279, 60 Stat. 229 (Devils Lake Reservation only) (criminal jurisdiction); Iowa, see Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Sac and Fox Reservation only) (criminal jurisdiction); New York, see Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1994)) (criminal jurisdiction), Act of Sept. 13, 1950, ch. 947, 64 Stat. 845 (codified at 25 U.S.C. § 233 (1994)) (civil jurisdiction); California, see Act of Oct. 5, 1949, ch. 604, 63 Stat. 705 (Agua Caliente reservation) (repealed by Pub. L. 280).

193. *See* Ambrose-Goldberg, *supra* note 191.

194. *See* O'Brien, *supra* note 3, at 199-200.

195. *See, e.g.*, In re Jimerson, 255 N.Y.S.2d 959, 961 (App. Div., 3d Dep't 1965) ("[T]here is applicable the familiar rule that the court of concurrent jurisdiction 'which first obtains jurisdiction with adequate power to administer full justice should continue to exercise it.'"); *see also* O'Brien, *supra* note 3, at 206 ("[A] case involving a tribal member may be filed in either the state court or the tribal court. Once filed, a case may not be refiled in or appealed to the other court system.").

196. *See* H.R. Rep. No. 2720, *supra* note 67.

197. *See, e.g.*, Brakel, American Indian Tribal Courts (1978).

198. *See* Talton v. Mayes, 163 U.S. 376 (1896); United States v. Wheeler, 435 U.S. 313 (1978). *See generally* Robert Berry, *Civil Liberties Constraints on Tribal Sovereignty After the Indian Civil Rights Act of 1966*, J.L. & Pol'y 1, 17-18 (1993).

complaining of abuses by their own governments, Congress passed the Indian Civil Rights Act (ICRA).[199]

Adapted from the Bill of Rights, the ICRA imposed upon tribal governments the strictures of Anglo-American law at its most fundamental level—the rights of individuals. For the first 10 years following its enactment, the statute was interpreted as providing a cause of action against tribes and as a waiver of tribal sovereign immunity.[200] As a result, tribes were sued routinely for money damages in federal court. In 1978, however, these actions ended in the landmark case of *Santa Clara Pueblo v. Martinez*[201] in which the Supreme Court held that Congress had not intended a general waiver of sovereign immunity for actions in federal court.[202]

The ICRA introduced a jurisprudence of rights to the Indian nations that fundamentally changed the manner in which their tribal courts dealt with the cases that came before them. The requirements of due process and equal protection, while subject to tribal interpretation, nonetheless significantly altered the focus of attention away from the tribal community towards the individual. The significance of this change was not lost on Congress.[203] Thus, under the guise of strengthening tribal governance, Congress further imposed the Anglo-American legal tradition on the Indian nations through the ICRA and continued its 100-year attack on traditional methods of governance and dispute resolution.

Despite the deliberate and benign efforts to encourage Indians to resolve disputes like Americans, there is recent evidence that suggests that Congress may be aware of the deleterious effects of its previous legislation on peacemaking and other forms of traditional dispute resolution. The Indian Tribal Justice Act (ITJA),[204] enacted in 1994, was intended to provide funding and otherwise strengthen tribal

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199. 25 U.S.C. §§ 1301-03 (1994).

200. *See* Berry, *supra* note 198, at 24-25 ("During the decades following the passage of the act, federal courts . . . continued to locate their authority to settle controversies in a variety of jurisdictional statutes. The courts viewed the passage of ICRA as implying a waiver of the tribes sovereign immunity . . . .").

201. 436 U.S. 49 (1978); *see* Berry, *supra* note 198, at 58-59.

202. *Santa Clara Pueblo*, 436 U.S. at 59. Sovereign immunity in tribal court is a matter of tribal, and not federal, law. *See* Cheyenne River Sioux Tribe Board of Police Commissioners v. Thompson, 23 Ind. L. Rep. 6002 (Chy. R. Sx. Ct. App. 1995).

203. An examination of the legislative history of the Act points to a desire for further tribal assimilation on a national level. *See* Berry, *supra* note 198, at 21-22.

204. 25 U.S.C. §§ 3601-31 (1994).

court systems. While directed mainly at Anglo-American style tribal judiciaries, it explicitly anticipates that Indian nations will adopt and utilize their own forms of dispute resolution.

The ITJA recognizes that "traditional justice practices are essential to the maintenance of the culture and identity of Indian tribes"[205] and that tribal justice systems may include "traditional methods and forums for dispute resolution."[206] In passing the ITJA, Congress anticipated that the United States would take an affirmative effort in this process by providing funding for "traditional tribal justice practices."[207] Moreover, Congress explicitly renounced any intention to interfere with the methods in which Indian nations dispense justice.[208] Whether this legislation, which provides for $50 million per year but which has not yet been funded, will have any effect on the redevelopment of traditional justice systems, is yet to be seen.

Despite this most recent evidence that the tide may be shifting, Congress has an extremely long history of engaging in both aggressive and passive efforts to replace traditional tribal values with American political and cultural values. As Justice Austin of the Navajo Supreme Court puts it, "federal Indian law makes no sense. . . . It is the law of oppression."[209] For this reason, Indian nations today have had their justice systems transformed into poor and weak copies of the American legal system. While recent Supreme Court decisions suggests that greater reliance will be given to tribal court systems,[210] such confidence seems predicated on the development of tribal courts in the shadow of the western legal tradition.

Despite the transformation of most Indian nations, there remain a number of tribes that have managed to retain their traditional forms of government and methods of dispute resolution. These tribes tend to be theocratic in origin and, as a result, very conservative towards

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205. 25 U.S.C. § 3601(7) (1994).

206. 25 U.S.C. § 3602(8) (1994).

207. 25 U.S.C. § 3611(c)(6) (1994); *see also* 25 U.S.C. § 3613(a) (1994).

208. *See* 25 U.S.C. § 3611(d) (1994) ("Nothing in this chapter shall be deemed or construed to authorize the Office [of Tribal Justice Support] to impose justice standards on Indian tribes."); 25 U.S.C. § 3631(4) (1994) ("Nothing in this chapter shall be construed to—alter in any way any tribal traditional dispute resolution forum.").

209. Brenda Norrell, *Federal Court System Alien to American Indians*, Indian Country Today, Feb. 15, 1996, at C1.

210. *See* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

change.[211] Examples include the Hopi,[212] the Onondaga Nation,[213] the Meskwaki,[214] and the various Pueblos.[215]

The history of tribal justice in the era of American colonization, in sum, is one of change from peacemaking to litigation. What that means for the future of Indian people and the sovereignty of their nations will be the subject of the remainder of this article.

IV. WHAT HAPPENS TO TRIBAL SOVEREIGNTY WHEN INDIANS RESOLVE DISPUTES LIKE AMERICANS

A. Generally

Given the contrast between peacemaking and litigation, it is not surprising that indigenous societies have been affected by the transition to Anglo-American style tribal court systems. Because of the disparity in the fundamental cultural values underlying native and American societies, it is reasonable to conclude that Indian nations that have adopted litigation as their sole or primary means of formally resolving interpersonal conflict increase the likelihood that their members will focus exclusively on the vindication of their individual rights, and thus, marginalize their relationship to each other and their communities.[216]

As this process continues and individual tribal members continue to adopt this defining aspect of American cultural behavior, it is likely that tribal communities will become increasingly indistinct from American society at large. Ultimately, tribal nationhood and sovereignty will deteriorate to the point where the dominant society, and maybe even the native people themselves, will no longer desire disparate treatment of indigenous people as members of separate

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211. *See* O'Brien, *supra* note 3, at 14.
212. *See id.* at 82-83.
213. *See id.* at 94.
214. *See id.*
215. *See id.*
216. *See* Barsh, *supra* note 147, at 305 ("If structure follows function, it is true that culture tends to follow structure.").

sovereign nations.[217] When that time comes, assimilation will have reached the point where the indigenous population has become extinct.

It is important to acknowledge that I realize that the legal system would not solely be to blame for this phenomenon and that there are a number of formidable forces already at work in assimilating native people into American society. To start with, one need only look at the body of existing federal Indian law. While the United States does recognize certain attributes of tribal sovereignty, Indians today struggle to maintain their separate existence despite having to deal with the after-effects of a variety of antiquated, but still viable, federal policies that were designed to "civilize" them and destroy their indigenous identity.[218] Notwithstanding the fact that the current federal policy is to encourage tribal self-determination, there seems little hope of ever achieving that objective if the reality is that most of your territory is allotted, your tribal government is so foreign in structure and operation that no one in the community trusts it, and the strictures of the American legal and administrative process hold you so tightly that any tribal ingenuity or initiative is discouraged and stifled.

While federal law and failed federal policies are but one problem facing indigenous survival, the forces eroding tribal relationships run

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217. In a 1978 study urging the elimination of tribal courts and the integration of native people into American society, a primary justification for the argument was the assimilated nature of tribal courts at that time: [T]ribal courts are little more than pale copies of the white system. . . . Efforts to improve the courts are toward making them more like white courts or, worse, like a stereotype of white courts. White academics and professionals provide training sessions for Indian judges; often inexperienced white lawyers and advisors expand or revise the tribal codes; Congress passes an Indian Bill of Rights that is modeled on the United States Constitution; the federal courts are acquiring a broader jurisdiction in Indian criminal cases; white judges or lawyers are being hired to sit on the "tribal courts"; Indian judges begin to wear black robes; courtrooms are built or remodeled to resemble "real" (i.e., white) courts; and so on. What relation do these practices have to Indian tribal culture?

Samuel J. Brakel, American Indian Tribal Courts: The Costs of Separate Justice 100-01 (1978). The text suggests that the author was reflecting his own personal bias against tribal sovereignty. *See id.* at 99-100 ("[I]t appears anomalous in the latter part of the twentieth century that one small ethnic group should be separated from the judicial system that extends to all other citizens of the United States."). Nonetheless, the points he raises and the purpose for which he raises them suggest a powerful reason to be concerned about how tribal courts develop.

218. *See infra* Part III.B.

deep into every facet of native life. For example, every day Indian children are sent to public schools that teach them more about how to achieve individual prosperity and be good American citizens rather than how to safeguard the future of their own Indian nation. This should be of little surprise, since for most of the history of the United States, forced assimilation was the official policy for dealing with the Indians. Unfortunately, the cruel reality is that native people are being prepared to live in a world that they may never live in—the dominant society—and are left ill-prepared to live in a world that they likely will live in—the native community.

It seems that in every conceivable manner, native people are confronted with the overwhelming forces of American society and culture. The law, the educational system, the economy, the media—defining American institutions—exert such power to change cultural foundations that it is hard to imagine any society not being influenced by them.[219] The indigenous people, the smallest and most fragile minority within the American polity, run the greatest risk of actually disappearing out of existence.[220]

Against this backdrop, it may seem questionable to suggest that how indigenous people resolve their disputes can even compare to the existing forces of indigenous cultural destruction. The law, however, is the common denominator in all human societies. How people resolve, or rather, how the legal system requires people to resolve, their disputes, has everything to do with what kind of people they are and what their children will become. Any one who has ever been a party to litigation can attest to its potentially devastating effect.

Despite what might seem to be an insurmountable challenge, I believe that more clearly identifying the disastrous effects of litigation on native societies may induce clearer thinking by native people and their lawyers as they develop their tribal dispute resolution mechanisms. If any energy is to be expended dealing with the problem

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219. *See* John Rockwell, *The New Colossus: American Culture As Power Export*, N.Y. Times, Jan. 30, 1994, at B1 ("[J]ust as some Americans have doubts about our pop culture—its propensity to celebrate violence, sexual stereotyping and sheer lowest-common-denominator crassness—those doubts multiply abroad, especially when the imports are seen as a threat to local cultural identity. Statistically, America's impact is overwhelming[,] . . . [b]ut such dominance can breed insensitivity to other cultures' fears that their traditional values may be lost.").

220. *See* Barsh, *supra* note 147, at 285; *see also* Francis Jennings, The Founders of America 399 (1993).

of native survival, it makes the most sense for native people to focus on their own communities and attempt to address problems that they have the most control over. While the United States must always be held accountable in the performance of its treaty and other legal obligations, sovereignty means that the Indians themselves must resolve their own problems and manage their own affairs. The first step in that process is for Indian nations to realize that the tribal dispute resolution mechanism has everything to do with how tribal members interact with one another, how capable they are of working with each other on common endeavors, and thus, how strong their families, clans, communities, and nations will be.

Movement in this direction is critical because the challenges that now face native people are of greater complexity than perhaps ever before. Unfortunately, at the same time it seems that the ability to work together to address these challenges is at an all time low. Much of this, it seems, has to do with the nature of what is being contested.

The pursuit of money and power—the obvious barometers of any "civilized" society—lies at the core of modern tribal political disputes.[221] While it has always been the case that non-Indians have thirsted for Indian land and natural resources, only recently has there been sufficient reason to believe that the Indians, too, could be rich on a grand scale. Gaming, because it must be conducted by the tribe, and other forms of economic development have precipitated great enthusiasm for tribal political office and the legal and illegal gains that it might represent. Unlike an earlier era in which the "pie" was only large enough for a few to eat, entire Indian nations are now fixated on the pursuit of material wealth. Not surprisingly, the conflict that this fixation has precipitated is unprecedented in its magnitude and significance.

At the same time that this high-stakes political conflict has developed, the "civilized" method of resolving disputes—litigation—has also grabbed a foothold in Indian country. Tribal courts are developing as they have never before, usually along the lines of their federal and state counterparts.[222] Thus, it is of little surprise that these political disputes find their way to the courts. With the Senecas, the underlying

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221. *See* Editorial, *Senecas, Struck By Violence, Must Work For Compromise—Big Money Lies Behind Big Trouble For Nation*, Buff. News, Mar. 28, 1995, at 2; Tracey A. Reeves, *Some Tribes Reporting Cases of Wrongdoing: Discord Related to Casinos*, Indian Country Today, Jan. 11, 1996, at A1.

222. *See* Vicenti, *supra* note 12, at 139-41.

dispute escalated rapidly and within weeks, lawsuits were filed in state and federal court, in addition to, the tribal courts. But despite the proliferation of this tribal political litigation, the courts—the most ineffective vehicles for resolving these deep and complicated disagreements—continue to be drawn into the fray.

As will be shown in this section, this type of misplaced reliance by native people can have fatal consequences—both for tribal members and their tribes.

B. Conceptual Analysis

In analyzing how litigation has the effect of weakening tribal sovereignty, it is important to first focus on how the fundamental differences in the two systems precipitate deleterious effects on the behavior of individual natives.

1. Emphasis on Individualism

The American legal system, and Anglo-American society, is based upon the primacy of the individual and his or her rights. In contrast, peacemaking is heavily dependent upon serving the justice needs of the community, not the individual. This difference in approach requires Indians to make radical changes in their behavior in order to make litigation work for them. Because litigation is heavily, if not fatally, distorted by reliance upon individual self-interest, parties to a lawsuit simply do not care about whether the "system" as a whole works or not or whether there are any negative side-effects on the greater community. They care only about themselves and their pursuit of victory. This emphasis on "winning at any cost" generates incentives for deception, gamesmanship, and other outrageous conduct. In the American legal system, civility has little value.[223]

The effect on indigenous people of this approach to justice is significant and caustic. While it may be the case that an Indian caught in the throes of litigation may start with a strong sense of responsibility to his community and the need to accommodate tribal norms, the message sent by the American dispute resolution system is: "Think only of yourself." Behavioral transformation at this fundamental level is ultimately fatal to tribalistic norms. While it is arguably the case that

223. *See* Henry Reske, *Scarlet Letter Sentences*, ABA Journal, Jan. 1996, at 16-17.

the United States can survive rampant individualism, tribes, by definition, cannot. This was well understood by the generations of federal officials who were responsible for imposing the CFR courts, the IRA, and state court jurisdiction on indigenous societies. Their actions and policies were based upon the knowledge that litigation would destroy tribalism.

2. Based Upon Adversary System

Unlike peacemaking, the American legal system actually requires that litigants *continue their dispute* in order for there to be a resolution. While an adversarial process may ultimately lead to resolution, the reason is usually because one of the parties has finally "broken-down," and not because a mutually beneficial solution has been achieved. Peacemaking is based upon the antithesis of the adversarial model that the parties work together and "talk through" their problem to find compromise and restore relationship.

Continuing the fight in order to find resolution is, at best, counterintuitive, and at worst, ridiculous. Admittedly, litigation is designed to force the "truth" to rise forth and build pressure on the parties to settle. But the reality is that this process requires continued acrimony between the parties. Making things worse before they get better may actually work in some cases—as with large extended republics like the United States—but the likelihood is that at the end of the process the parties will hate each other and simply have no desire ever to want to do business with each other again.[224] Problems never get truly resolved, and the matter lingers in the heart and mind of the losing party for years.

In the highly diverse United States, such an effect on individual life may be unimportant beyond the concern of the legal system. But in an Indian community, particularly a small one, acrimony of this sort can be disastrous. Tribes, even the largest ones, are highly interconnected and dependent upon strong interpersonal relationships.[225] Even for Americans, there is usually not enough time in a person's life to outlive the bitterness and hostility that litigation can produce. Compound this effect by reducing the size of the

224. *See* Roger Fisher & William Ury, Getting to Yes: Negotiation Agreements Without Giving In (1991).

225. *See* Yazzie, *supra* note 82.

community and increasing the number of people related to one another, and there exists the possibility of never-ending conflict that can destroy the community.

3. Reliance Upon Lawyers

It cannot be underestimated how much the presence of lawyers makes the adversarial system even more effective at causing acrimony between disputing parties. Indians, like most humans, are no different than other people when it comes to avoiding discomfort. In litigation, hiding behind one's lawyer is the best way to say and do the nastiest things to the "other side," all within the professed spirit of trying to resolve the dispute. It is easy for litigants to learn to hide behind their lawyers because it is easier to engage in outrageous conduct if you never have to face the other side and live with repercussions of your actions. Engaging in this kind of behavior only strains already weakened tribal relationships.

4. Decision by Neutral Fact Finder

The concept of involving uninterested third parties to impose a solution on the parties if they fail to reach a settlement is another aspect of the American legal system that tears at the fabric of tribal societies. Given the size and degree of interconnectedness of Indian communities, it is hard to believe that a person appointed or elected a tribal judge from that community does not bring to the bench a lifetime of personal experiences that will influence his or her decision making process.[226] No doubt there are some tribal communities large enough to avoid this problem. Too frequently, however, the judge will be known to at least one of the parties and maybe even to both of them. Having such a person in a decision-making position will more than likely result in at least one of the litigants believing that some factor not germane to the litigation had something to do with the outcome. Suspecting that the system is "fixed" is the surest way to destroy the dispute resolution process and cause disaffection with the legal system.[227] Indian nations that perpetuate the illusion of neutral justice through Anglo-American style courts fuel the erosion of community relationships.

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226. *See* Barsh, *supra* note 147, at 297-98.
227. *See id.* at 305.

5. Reliance Upon Fixed Legal Principles

The failure of decision making for native people is heightened by the reliance upon fixed procedural and substantive law. The existence of such rules perpetuates a destructive belief in the mind of the parties (and maybe even the judge) that technical correctness is more important than justice. Focus on the law, and not resolution of the problem, erodes the ability of the parties to be creative and "invent" equitable solutions that suit their particular needs and circumstances. In peacemaking, the peacemaker and the parties carry the responsibility of insuring that tribal norms are properly respected. Leaving this responsibility to dusty law books interferes with the relationship building necessary for the resolution of the underlying dispute and the preservation of community.

6. Enforcement by the State

Government enforcement of judicial decisions can be considerably destructive in Indian nations that have adopted the American dispute resolution system. Because of the aforementioned factors, there may be a high degree of distrust of the Americanized tribal judicial system and its ability to render fair decisions. Throwing whatever coercive power of the tribal government behind judgments that do not carry sufficient integrity creates an intolerable situation in which enforcement agents must either work injustice by enforcing illegitimate judgments, or undermine the tribal government by refusing to follow and acknowledge them. In both circumstances, obviously, the legal system fails to meet its fundamental goal of promoting justice.[228]

7. Conclusory Conceptual Analysis

Thus, in every significant aspect, the American legal system is in conflict with the manner in which native people have traditionally resolved disputes. As a result, tribes that have embraced litigation

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228. Surely, peacemaking is not without some coercive effect. For example, in the case of a young man accused of beating his wife, there is certainly some fear when your grandfather, whom you respect dearly, berates you for this misconduct. But the notion of exerting "maximum persuasion" instead of coercion is a subtle yet important distinction. Respecting the need for tribal members to save face in the context of resolving disputes goes a long way toward the operation of an effective system of resolving disputes.

subject their citizens to a dispute resolution process that precipitates and requires a radical change in their behavior in order to obtain justice from the system. While behaving like an American may not seem problematic (especially for Americans), the resulting effect is that native people end up relinquishing traditional cultural values, particularly those relating to community and relationship. As native people lose their connectedness to one another, the fragmentation of their societies soon follows.

How is it, exactly, that the demise of tribalism precipitates the weakening of tribal sovereignty? Tribalism is relevant to tribal sovereignty in the sense that individual Indians must be members of an Indian community in order to be an Indian. This is true in two important respects.

First, self-identification as an Indian is strongly associated with membership in one's tribe. That is, individual identity is shaped by the identity of those similarly situated, such as other reservation Indians. Even Indians no longer living within a reservation community invariably make a decision about whether to identify as a native or not. For many years, the dominant society encouraged a belief that identifying as an Indian was stigmatizing, and so many did not do so. When an Indian makes the conscious choice not to identify himself or herself as an Indian, then, as a practical matter, he or she no longer exists as an Indian from the tribe's perspective. To the extent that they do so self-identify, their identity is invariably in relation to their tribe. Thus, in the absence of the tribe, it is impossible to self-identify as an Indian.

Second, to the extent that the outside world, particularly the United States, makes decisions about who it will or will not recognize as an Indian, the issue of tribal existence takes on special importance. Federal law governing the recognition of Indian people is complicated and confusing.[229] Nonetheless, it is in the recent memory of many tribal elders that the United States at one time engaged in a formal Termination Policy of denying recognition as citizens of sovereign Indian nations. Of course, simply the fact that the United States does not recognize that a tribe is a tribe does not mean that the tribe no longer exists. However, all federal law dealing with the Indians is

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229. *See* 25 C.F.R. § 83 (1994). *See generally* Jackie J. Kim, *The Indian Recognition Administrative Procedures Act of 1995: A Congressional Solution to an Administrative Morass*, 9 Admin. L.J. Am. U. 899 (1995).

predicated upon the recognition of separate political status of Indian nations. When that recognition is gone and Indians have no common land base and must start paying property taxes, for example, then the issue of tribal existence as determined by the outside world becomes terribly important for Indian identity and survival.

If assimilation continues, and in our case, Indians continue to adopt American cultural values transmuted to them by their Americanized tribal judicial systems, what will be the reaction of the federal government when a tribal society is indistinct from American society as a whole? In other words, what happens when native institutions and behavior are no different in form and substance than the American government and the American people? My concern is that the United States will no longer believe it can justify the legal barrier that exists between the two sovereignties and will move, once again, to terminate its recognition of tribal sovereignty. Unfortunately, the first time it did so was when it sought to hasten assimilation; the last time it happens will likely be when assimilation has actually occurred.

It is with this in mind that Indian nations should be concerned about assimilation in general and the manner in which they require their citizens to resolve disputes. The dispute resolution process, as the colonizer has long known, is a terribly important assimilating tool. Eventually, unless action is taken to change this reality, the loss of tribal identity will lead to the loss of tribal uniqueness, and the destruction of tribal sovereignty.

C. Empirical Analysis

In recent years, considerable efforts have been given by natives and non-natives to the strengthening tribal courts. The fundamental premise of this development has been that tribal sovereignty can be strengthened if tribes exercise their civil adjudicatory jurisdiction, that is, their ability to exercise authority over the disputes that arise within their territory. This movement to strengthen tribal courts has coincided with the increase in the number of lawyers practicing "Indian law" and the recognition by the Supreme Court of certain tribal judicial authority.

It would be of little surprise to me that many of the tribal judges and lawyers involved in tribal court practice would disagree with my conclusion that developing tribal court in the current manner actually erodes tribal sovereignty. At the very least, my conclusion suggests the precise opposite of what many of these lawyers and judges believe they

are doing—enhancing tribal sovereignty. My response is that these well-meaning practitioners may not be giving adequate consideration to the influence of their Anglo-American legal education on their "sovereignty philosophy" and may unwittingly be transmitting to their native clients the theories and justifications of the Anglo-American legal system learned in law school.

Despite the natural skepticism that might follow from the conceptual analysis set forth above, there nonetheless exists some empirical evidence to support my conclusion that litigation erodes tribal sovereignty.

In 1978, Linda Medcalf published a study of the impact on Indian tribes of the first generation of tribal lawyers.[230] Medcalf concluded that, despite their best intentions, lawyers working on behalf of Indian people failed in their stated mission of strengthening native communities and had contributed to the breakdown of native culture by imposing upon the Indians the full panoply of Anglo-American values, particularly the emphasis on individual rights.

Medcalf's analysis starts by identifying the foundation principle of American political philosophy—the Lockeian social compact theory that (1) government is necessary for social order, because social order cannot exist in man's natural state and (2) because individual freedom is desired, law is needed as a restraint on government.[231] She suggests that American legal education reaffirms this fundamental belief and that *all* American-trained lawyers, by definition, see problems only within the context of this Lockeian model.[232]

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230. *See* Linda Medcalf, Law and Identity: Lawyers, Native Americans and Legal Practice (1978). Medcalf's work revolved around interviews with a number of Indian and non-Indian attorneys in the Seattle area that practiced "Indian law," both in the legal services and tribal counsel contexts.

231. *See id.* at 17-20.

232. *See id.* at 27-32. Medcalf describes a particular lawyer's adherence to this belief as a kind of "order versus freedom" continuum in which "Establishment" lawyers place more emphasis on order; "Radical" lawyers more emphasis on freedom. But of the legal training which all receive, she writes that:

> Such training—a sense of social responsibility, a commitment to making the system work, and the tools and conceptual capability to perform these obligations—is obviously never complete. However, this is the professional ethic and conceptual capability that law schools attempt mightily to impart. Though it may not be entirely accepted, it is strongly encouraged in a variety of ways. Its impact cannot be denied, whether promulgated by the Establishment or railed against by the radicals.

Flowing from this orientation, she argues, American-trained tribal lawyers can see only one fundamental problem facing Indians—"a general condition of powerlessness, a condition that must be overcome in order to break the [political, economic, social, and cultural] poverty cycle."[233] Accordingly, only through the law and its emphasis on rights can progress in addressing this problem be made.[234]

What follows—development of tribal sovereignty and the pursuit of self-determination through strong tribal governments—however, creates a problem for American-trained tribal lawyers. Strong tribal governments—like all governments—will abuse their authority, victimize their citizens, exploit tribal resources for personal ends, and in the last analysis, "be destroyed from within."[235] To address this problem, tribal lawyers conclude that a legal infrastructure must be developed to protect individual rights.[236] Medcalf suggests that it was this thinking that led many tribal lawyers to support the enactment of the Indian Civil Rights Act.[237]

Medcalf acknowledges that the tribal lawyers she studied were, in one sense, successful because they were able to assert tribal rights to obtain political and economic power for their native clients.[238] She concludes, however, that American-trained tribal lawyers ultimately fail because they do not provide their native clients with a meaningful

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Id. at 29-30.

233. *Id.* at 38.

234. "[T]here are three main areas where legal help is necessary: (1) the education about and assertion of rights, both personally and tribally; (2) the maintenance and enhancement of tribal sovereignty; and (3) the utilization and development of economic resources." *Id.* at 42.

235. *Id.* at 85.

236. [K]nowledge, assertion and utilization of rights is capable of replacing what the [tribal] attorneys defined as individual powerlessness. But it is first necessary to educate Native Americans as to their rights. Secondly, it is necessary that rights be asserted. It is the willingness to assert, as well as the knowledge of rights that creates self-confidence and thus a strong and aggressive person. If the tribe is to be strong, internally and externally, its individual members must be strong. To the attorneys, to know and utilize one's rights replaces individual "anomie . . . with an attitude of self-determination." *Such individual self-determination is the best route, and a necessary building block, for tribal self-determination.*

Id. at 100 (emphasis added).

237. *See id.* at 85-102.

238. *See id.* at 103-08.

choice between retaining a distinct tribal existence and adopting a lifestyle indistinguishable from American society.[239]

This "meaningless" choice, she argues, occurs because Anglo-American lawyers are not trained to think and act in terms consistent with traditional tribal life:

> There are many ways to relate to the world and to others. However, when emphasis is placed on the ability to separate, to fragment, and to work with the world as a series of component parts, it is difficult to perceive the wholeness and relatedness of thought and practice. Each problem is defined and worked on in isolation; the fundamental nature of the solutions *as a whole* goes unnoticed. The more the thought and practice of [Anglo-American trained] attorneys is accepted and acted upon, the less the possibility of a meaningful choice for Native Americans, due precisely to the fundamental nature of what the attorneys perceive to be neutral and superficial.[240]

Medcalf suggests that reliance upon Anglo-American trained lawyers affects all aspects of tribal governance. With the introduction of the lawyer to the tribe, a never-ending spiral begins in which power is conceived of merely in terms of "control" and "rationalization." Alternatives, to the extent more consistent with traditional values, are disfavored because all new efforts must be evaluated against what has been done before—that which is "more powerful, more efficient, and more rational."[241]

As a result, collective action is displaced with a series of narrow technocratic proposals subject to mere political choices. Rights, then, are critical because of their relationship to political choices.[242] But ultimately, reliance upon rights leads to the domination of individualism and with it, the destruction of "collective forms of action and human interrelationships."[243] Eventually, the options for future

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239. *See id.* at 108 ("Despite the best of intentions and the desire to maintain an adapted Native American culture, the more successful the lawyers' activities, the more they create a situation where the choice proffered is meaningless.").

240. *Id.* at 112 (emphasis in original).

241. *Id.*

242. *See id.* at 113.

243. *Id.* at 114.

choices involving traditional tribal values not only become limited, they become totally displaced by American values.[244]

Medcalf's findings, analysis, and conclusions regarding the effect of Anglo-American trained lawyers on indigenous people strongly suggests that the Anglo-American dispute resolution process—litigation—has a similar effect in eliminating the meaningful choice of maintaining traditional native values. Thus, in the case of Anglo-American rules governing dispute resolution, if "Law [is regarded] as an activity, a way of relating to the world and others, one still finds it consistent with the basic assumptions and definitions of society as a whole: in this case, Law as an activity repeats the fundamental core of American liberalism."[245]

Medcalf's analysis confirms that Anglo-American legal values contribute to the displacement of traditional native values. The loss of relationship, or as Medcalf describes it, "humanness,"[246] hastens the process of assimilation and the breakdown of distinct native identity. Despite the gloominess of this conclusion, it seems clear to me that the role of American-trained lawyers in this process can be beneficial by ensuring that such lawyers are trained with sensitivity towards the preservation of cultural choice. Given the emerging prominence of the tribal bar and judiciary within Indian country, lawyers (and non-lawyers) serving in such capacities have important obligations to ensure cultural, as well as political, sovereignty. While the general obligations to the profession must be satisfied, they must be satisfied in a manner that preserves cultural choices and does not unthinkingly apply the lessons of law school to the problems facing native people.

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244. In their effort to help, [Anglo-American trained] attorneys utilize what they think of as mere aspects of their society to ensure the survival and progress of Native Americans. But these "mere aspects" are informed by underlying concepts of power, rights, and human relationships which reproduce, reinforce, and institutionalize the core of American society. Although successful in solving "the Indian problem" according to their own perceptions, the attorneys' "progressive reservation communities" only mean new versions of the United States, not adapted "Indianness."

Id. at 115.

245. *Id.* at 123.

246. *Id.* at 114.

D. Case Analysis

The thesis of this article—that the Anglo-American legal tradition undermines indigenous societies—is dramatically demonstrated by the recent events that have befallen the Seneca Nation of Indians. In Part I, the origins and operation of the Seneca peacemaking tradition was chronicled. This section highlights the circumstances that led to the complete abandonment of that formal process and the self-inflicted loss of Seneca sovereignty. Given the underlying causes of the Seneca dispute, it seems reasonable that other Indian nations should be concerned about the possibility of similar threats of self-destruction.[247]

A brief overview of recent Seneca history is necessary in order to understand the events precipitating the Seneca Civil War. In the 1950, the United States initiated efforts to condemn approximately one-third (10,000 acres) of the Seneca Nation's Allegany Reservation for the construction of the Kinzua dam.[248] Unsuccessful in their efforts to prevent the construction of the dam, almost 135 Seneca families were removed from their homes along the Allegany River and moved to higher ground, triggering a radical transformation of Seneca society.

In addition to causing the untimely demise of many elders, the Removal (as it has now come to be known) signaled the rapid entry of the Senecas into the material culture of twentieth century America. This was not to say that Seneca society prior to that time had not embraced aspects of American capitalism and the market economy.[249] Rather, it was such things as new homes, with indoor electricity and plumbing, and the influx of millions of dollars of federal compensation and grants through the 1970s that precipitated significant changes in

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247. In a scenario hauntingly similar to that of the Senecas, the Turtle Mountain Band of Chippewa Indians recently rejected an attack on their sovereign immunity initiated by five former members of their tribal council. The plaintiffs sought to have overruled the case of Santa Clara Pueblo v. Martinez, 439 U.S. 49 (1978), which held that Indian nations could not be sued in federal court for alleged Indian Civil Rights Act violations, so that their ICRA claim against the current tribal chair and council members could proceed. *See* David Melmer, *Sovereignty Set Back?*, Indian Country Today, Feb. 26, 1996, at A1. The suit was later dismissed. *See* David Melmer, *Federal Court Dismisses Action*, Indian Country Today, Mar. 7, 1996, at A3; *see also* discussion *supra* notes 7-9.

248. *See* Seneca Nation v. United States, 338 F.2d 55 (2d Cir. 1964); Seneca Nation v. Brucker, 262 F.2d 27 (D.C. Cir. 1958).

249. *See* Seneca Nation Settlement Act of 1990, Pub. L. 101-503 (1990) (codified at 25 U.S.C. 1774); H.R. 5367 (S. 2895) (legislative history).

Seneca lifestyle. Federal monies subsidized Seneca governmental activity and between 1967 and 1980, tribal employment rose from three to almost 400.

By the 1980s, the entrepreneurial spirit had infected many Senecas. The Nation government established two high-stakes bingo operations, generating millions of dollars a year in revenue. Moreover, individual Senecas established gas station/smokeshops in which they took advantage of the prohibition against State taxation of Indians to resell gas and cigarettes to their non-Indian customers at great discount. The Nation government also moved to establish its own gas station/smokeshops to take advantage of this lucrative trade. Millions of dollars were made by the tribe and a few individuals; both public and private employment increased dramatically.

By the end of the 1980s, considerable tension had developed between Seneca government officials and the Seneca business community (the "Entrepreneurs"). New York State, which claimed to be losing millions in revenue from the tax-free reservation sales and bootlegging, induced the Seneca Council to agree to impose its own sales tax to resolve the intergovernmental dispute. The Nation President at the time originally agreed to support the agreement, but he later acceded to the Entrepreneurs' position and vetoed it. The Seneca Council overrode the veto, but the President, urged on by the Entrepreneurs, declared at New York State hearings on the matter that he would not be party to its enforcement.

The State legislature refused to ratify the agreement, giving the Entrepreneurs a hard won victory in the State forum, a victory that they could not obtain from their own Council. This infuriated many within the Seneca community, not only because of the president's disregard of the Council's override, but because the Entrepreneurs had engaged in the treasonous action of lobbying a foreign government against their own. While the battle with the Entrepreneurs had been brewing for years, this event triggered the beginning of open, high-stakes conflict over the future of the Nation.

In the Seneca general election in 1990, the Entrepreneur-supported candidates captured all eight of the open seats on the Council and the Presidency. Nonetheless, the Council was deadlocked between the Entrepreneurs and their holdover political enemies on the Council. Moreover, the new President turned out to be an unreliable ally of the Entrepreneurs and soon found himself politically isolated. Governmental paralysis and weakness set in.

Thus, by mid-1992, when the State courts enjoined the sale of gasoline and cigarettes to the Nation and the Entrepreneurs, the Nation government was ill-equipped to deal with the hardship that destruction of the tribal economy might precipitate. In an unprecedented act of unity, hundreds of Senecas successfully blocked major interstate highways running through Seneca territory, stood down the State police, and forced the State to reverse its position. The event symbolized the confusion over economic development; Senecas risked their lives for two things that can both co-exist and be in conflict—sovereignty and greed.

By 1992, when the Entrepreneurs completed their sweep of the Nation political offices (except for one Council seat), the underlying disputes over economic development and wealth distribution were serious open wounds. Unfortunately at this time, a new and even more caustic issue emerged—casino gambling. The new administration moved quickly to initiate the required negotiations with the State and to build a casino. In a move that came to symbolize the distrust of the government, at midnight during a week night special session at which only three people (all government employees) were in attendance, the Council authorized gaming compact negotiations with the State.

The fallout was immediate and dramatic. The opposition Council member resigned and gambling opponents shut down the personal businesses of the President, threatening to do the same to the tribal businesses. Within days, the Council hastily convened to rescind its earlier action. By June 1993, the battle lines for the 1994 election had already been drawn.

The 1994 election found an unprecedented ninety-nine candidates running for seventeen Nation political offices, including eight running for President. The successful presidential candidate, Dennis J. Bowen, Sr., had moved back to the Seneca Nation six months prior to the election after having lived in the Navajo Nation for over twenty years. Unfortunately, while he had been an activist with the American Indian Movement and later a guidance counselor, he had never worked in government or served in public office. He defeated the Entrepreneur's candidate with only 30% of the total vote and by a total margin of only three votes. Half of the eight open council seats were won

by his supporters, and half were retained by the Entrepreneurs, leaving them with a twelve to four majority.[250]

Shortly after the general election, President Bowen took a series of provocative and allegedly unconstitutional measures against his Entrepreneur-supported political opponents, including the "removal" of two Councillors appointed by his predecessor.[251] He later petitioned the Nation Peacemakers Court to address the constitutional and other legal issues underlying his actions.[252] As requested, the Peacemakers issued temporary orders granting the President his desired relief.[253]

President Bowen's Council opponents, who constituted a majority of the Council, for a number of stated reasons did not accept the Peacemakers Court decision.[254] In response, these Councillors took their case to the New York State courts[255] where they were able to convince the State court judge to issue an *ex parte* order[256] granting temporary relief over the same subject matter pending in the Peacemakers Court and in direct contravention of that court's orders.[257]

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250. One of the seats, held by Ross John, Sr., was originally held by the Opposition Council member who resigned the previous year. John had just been elected in 1990 and was to serve in his appointed seat until 1996. One of the other seats, was filled by the out going president's brother who was appointed during the days following the election to fill the vacancy created by the elevation of Councillor Adrian Stevens to the Treasurer's position. Both appointments were to be of considerable controversy.

251. These measures included the "removal" of two Councillors who had been appointed by his predecessor and conducting a Council meeting following the general election with Councillors appointed "for the day" in order to make quorum. *See* Bowen v. Doyle, 880 F. Supp. 99, 107 (W.D.N.Y. 1995).

252. *See* Bowen v. John, CA No. 1111-94 (S.N.I. Peacemakers Ct. 1994); *see also* Scanlan v. Printup, CA No. 0127-95 (S.N.I. Peacemakers Ct. 1995) (invalidating impeachment of Bowen).

253. *See* Bowen v. Doyle, 880 F. Supp. 99, 106-07 (W.D.N.Y. 1995).

254. Bowen's opponents claimed that the Peacemakers Court was "corrupt and biased," *id.* at 111, because Bowen and his lawyer "sat down with some of the peacemakers and talked about this case that is pending before their court." Agnes Palazzetti, *Jurisdiction At Issue In Seneca Case; President's Authority Focus of Power Dispute*, Buff. News, Dec. 1, 1994, at B5.

255. The New York State courts have "jurisdiction in civil actions and proceedings between Indians . . . to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings." 25 U.S.C. § 233 (1996); *see also supra* text accompanying note 188.

256. *See* John v. Bowen, Index No. 1994/12582 (N.Y.S. Sup. Ct.).

257. *See* Bowen v. Doyle, 880 F. Supp. at 107-08 ("Justice Doyle's November 18 Order does not mention the pending Peacemakers Court action or the Peacemakers Court's orders of November 11 and November 18.").

The State court conducted hearings on the matter of its jurisdiction, issued additional temporary relief, and ultimately decided that it had jurisdiction over the subject matter in late December 1994.[258]

In response, President Bowen proceeded to ignore the State court orders. His opponents moved the State Court to jail him for contempt. Bowen moved successfully in federal district court for a temporary restraining order against the exercise of State court jurisdiction over the internal Seneca dispute.[259]

The State court plaintiffs then sought to moot the federal and state court actions by impeaching him.[260] Violence broke out at the impeachment proceeding and three people were injured.[261] Each faction then secured a Seneca Nation office building by force of arms.[262]

Bowen followed with a lawsuit in the Peacemakers Court in which the impeachment was declared invalid.[263] Despite this declaration, however, the State court plaintiffs ignored the Peacemakers Court decision and filled the presidential "vacancy" with one of their own members, Karen Bucktooth.[264] Bucktooth then took her case to the Bureau of Indian Affairs to seek recognition by the United States as the Seneca President.[265]

In late February, 1995, the federal district court issued a preliminary injunction restraining the state court from exercising subject matter jurisdiction over Seneca Nation internal affairs.[266] On the day of the decision, violence broke out and one person was wounded by gunfire.[267]

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258. *See id.* at 108–109.

259. *See id.* at 109–10.

260. *See id.* at 110.

261. *See* Agnes Palazzetti, *Senecas Impeach President; Bowen Rejects Council Action*, Buff. News, Jan. 29, 1995, at 1.

262. *See* Farah Safiuddin, *Seneca Council Calls on County, State Police; Deputies, Troopers Resist Taking Sides In Dispute*, Buff. News, Feb. 5, 1995, at B1.

263. *See* Scanlan v. Printup, CA No. 0127-95 (S.N.I. Peacemakers Ct. 1995).

264. *See generally* Letter from Franklin Keel, Acting Area Director, Bureau of Indian Affairs, to Dennis J. Bowen, Sr. (Mar. 31, 1995) [hereinafter Letter of March 31, 1995] (advising Bowen that the United States would recognize him as Seneca Nation President despite effort of Council members to impeach him).

265. *See id.*

266. *See* Bowen v. Doyle, 880 F. Supp. 99, 138 (W.D.N.Y. 1995).

267. *See* Anthony Cardinale & Agnes Palazzetti, *Gunfire Erupts on Reservation; One Man Shot, Two Beaten Outside Seneca Offices*, Buff. Times, Feb. 28, 1995, at 1.

After almost five months of legal and political wrangling without any meaningful effect, the low point came in late March 1995, when three men were shot to death during a drunken attempt to retake an office building held by their political opponents. One of those doing the shooting was the son of one of the victims.[268]

Following the shooting, there was a marked increase in weapons being carried openly.[269] Political gridlock continued as the BIA rejected Bucktooth as President and affirmed its recognition of Bowen.[270] Eventually, federal mediators and law enforcement were able to de-escalate the crisis and reduce the risk of further shootings. However, while the fear of violence subsided, governmental gridlock continued for months thereafter.

The purpose of highlighting the origins and escalation of the Seneca Civil War is to demonstrate three important points: one, how complicated the types of disputes that face indigenous people can be; two, how native people and tribal sovereignty can be the casualties of these conflicts; and three, how ineffective the Anglo-American dispute resolution process is at dealing with these conflicts.

It is without question that the Senecas are caught in the middle of a violent clash of values. The issue of future development—cultural, legal, and social, as well as economic—has been and will continue to be the focal point of the Seneca political process until consensus is somehow achieved.[271] Especially with the recent influx of Senecas who were not raised within Seneca territory, and the assimilated value systems they bring with them, the likelihood of similar conflict within the Seneca Nation in the future remains strong.

Given that reality, it is especially troubling that the official dispute resolution mechanism within the Seneca Nation—the Seneca Court system—was a contributing factor to the conflict. The Peacemakers Court was trying to act in accordance with the Peacemakers Court Civil Procedure Rules. It conducted its proceedings on the basis of the parties' written submissions and oral arguments and then rendered a decision. The real issue here, however, is why did the

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268. *See* Palazzetti, *Three Killed by Gunbattle, supra* note 1.

269. *See id.* (quoting Erie County Sheriff Thomas Higgins as saying, "Everybody is armed. Every pickup truck going down the road has a rifle in the front seat.").

270. *See* Letter of March 31, 1995, *supra* note 264.

271. *See* Robert B. Porter, *In Troubled Times a Vision of Nation Building*, 13(4) Native Americas 52 (1996).

Seneca People design their judicial system to handle problems in that manner?

The traditional peacemaking process was wholly abandoned. The Peacemakers Court made no effort to try to bring the parties together and "make peace." As a legal matter, the Peacemakers Court had little choice because its procedural rules required it to proceed with the litigation. Nonetheless, it seems obvious that peacemaking would have been perfectly appropriate here, not only with the spirit of the Seneca peacemaking tradition, but in the context of how a dispute of this magnitude might have been resolved.

The Seneca peacemaking tradition transcends the constitutional and legal provisions governing the Peacemakers Court.[272] It is clear, from their actions, however, that the parties and the Court focused exclusively on the vindication of rights and pushed the Peacemakers Court to operate far beyond its historical foundations and acceptance within Seneca society.[273] It can scarcely be imagined a more inappropriate type of case to be resolved by litigation—a divisive, high stakes political conflict involving the very question of the tribal presidency.[274] The passions that this case invoked were apparently so great that a majority of the Seneca Nation's elected leaders thought that justice could be obtained only by subjecting Seneca governmental affairs to review by the State courts.[275] At the very least, the fact that they even contemplated such a course of action is evidence that they had little faith in the ability of the Peacemakers Court to give them a

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272. *See* Agnes Palazzetti, *Seneca Scholar Calls Court Decision An Intrusion Into Indian Sovereignty*, Buff. News, Jan 23, 1995, at B4. Professor John Mohawk stated that the constitution is not the whole body of Seneca law: "We also have customs and traditions that play an important role in what we do and how we act." *Id.*

273. *See Senecas, Struck by Violence, Must Work For Compromise; Big Money Lies Behind Big Trouble For Nation*, Buff. News, Mar. 28, 1995 at B2 ("Ideally, [the Senecas] will have to agree according to traditional Iroquois customs of shaping solutions by consensus.").

274. "In short, though these can be disguised as legal problems, they are by any reasonable definition political questions and cannot readily be addressed by the state or federal courts." *See* John Mohawk, *Let Senecas Decide*, Buff. News, Mar. 2, 1995, at B2.

275. *See* Bowen v. Doyle, 880 F. Supp. 99, 129 (W.D.N.Y. 1995) ("'[I]t is difficult to think of a greater intrusion' on tribal sovereignty than when a state court instructs Nation officials 'on how to conform their conduct' to Nation law.") (citing Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984)).

satisfactory redress.[276] The reality, however, was that their action subjected the internal workings of the Seneca governmental and political process to review and direction by a foreign court judge. The result was a complete sacrifice of Seneca sovereignty.

Given the nature of the dispute, it may very well have been appropriate for the Peacemakers Court to abstain from deciding the case on the grounds of a judicially crafted "political question doctrine."[277] This could very well have served to retain the dignity of the Court and may have built pressure on the disputing parties to resolve their difference politically.[278] But the Court did not abstain, and in its efforts to decide the dispute it simply escalated the conflict. Instead of using what little moral and political power it had to urge the parties to find their own resolution of the dispute, it plunged fully into the mire of what was arguably the worst internal political dispute that has faced the Seneca People since 1838, when the Seneca chiefs sold all of the remaining Seneca territory.

The illusion that the Court could somehow decide this case and direct aggressive political actors to simply stand by and abide by its decision was no doubt influenced by the false promise that litigation is somehow superior, or at least, more powerful than peacemaking. This critical belief is the basis for development of tribal legal systems in the Anglo-American model. Looked at in isolation, however, it seems ridiculous to suggest that a system designed by and for non-Indians can be easily transferred and made to function in a society which has far different cultural and political roots. Nonetheless, litigation continues to be relied upon as the primary judicial development tool.

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276. The role of the attorney in the conflict cannot be understated. Lead legal counsel for these Councillors were non-Indians with little experience with federal Indian law, much less Seneca law. Of counsel was a prominent national Indian law firm, Hobbs, Straus, Dean & Walker. At least in part, they acted under an assessment that vindication of their clients' "rights" could only occur by subordinating tribal jurisdiction and sovereignty in favor of review by the New York State courts. *See generally* Memorandum In Opposition To Injunctive Relief Against State Court, Brief of Defendants-Intervenors, 95-CV-43A (W.D.N.Y. Feb. 10, 1995); *see also* Part IV.B.

277. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903); *see also* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597 (1976).

278. *See* John Mohawk, *Let Senecas Decide*, Buff. News, Mar. 2, 1995 at B2 ("President Bowen has recommended a referendum to address the key issues. It may not be a perfect solution, but it is a workable one that deserves support inside the Seneca Nation and with the public.").

Unfortunately, this recent episode in Seneca history suggests a degree of assimilation and/or cultural decay that places a serious threat on the future of Seneca sovereignty. There is no doubt that the Senecas themselves took the actions that placed their governmental affairs under the dominion of the State of New York. In doing so, it certainly appears that the State court plaintiffs valued something far more important than Seneca sovereignty. Perhaps they valued their own political power, the possibility of a gambling casino or, as they stated, simply the integrity of the constitution which they thought had been violated by the President. In any event, the possibility exists that these leaders are so ill-educated about Seneca sovereignty that they never even perceived going to the State courts as an important issue. Given these conditions, how can the Senecas continue to think of themselves as a sovereign nation when so many of its members, especially its leadership, have more faith in foreign governmental institutions than their own?

V. RESETTING THE PEACEMAKING FOUNDATION

A. The Pursuit of a Distinct Indigenous Existence

Given the nature and magnitude of the problems facing the Senecas and other indigenous people within the United States, it is difficult to conceive that there could be any one comprehensive solution that might reverse the trend toward greater assimilation. Certainly I am not suggesting that such a solution exists. What I am suggesting is that the problems native people face are identifiable, and that therefore, appropriate remedial action should exist.

Preserving a distinct native identity should not be construed as a recommendation that native people should return to some romantic, pre-colonial lifestyle. I well acknowledge that the forces of change are to a great extent, irreversible, and that the winds of cultural transformation can never be put back in some kind of cultural Pandora's box. As time goes on, however, the specific efforts that have been taken over the last 200 years to destroy indigenous existence will continue to have their assimilative effect. Rejecting that this future is inevitable is the necessary first step towards changing it.

Given that the romantic past and the gloomy future are unacceptable options for native societies, there surely must be some "third path" that defines the future of indigenous existence. While this path certainly is influenced by the traditional past and the colonized

past, it is nonetheless distinct and revolves around the paradigm tribal value—the respect for and perpetuation of kinship and relationship.[279] Ultimately, the degree to which tribal institutions are redesigned based upon the kinship model depends upon the particular native community involved, its commitment to self-preservation, and its ability to self-identify problems and formulate strategic solutions to those problems. Failure to identify and pursue the Third Path is to accept that the colonization of native people is inevitable.

This is a vision of the future that I fail to accept. While there is much of the dominant society's political and cultural intrusions into native life that I doubt can ever be rejected, there is no requirement that native political and cultural traditions must be supplanted in the process. Identifying and reiterating these traditional native values, perhaps through Anglo-American institutions, is a method of hybrid development that can serve to achieve progress towards the Third Path. It is in this vein that I suggest that the adaptation of indigenous dispute resolution processes within the Anglo-American legal tradition presents a discrete problem of cultural and political assimilation that can and must be redressed.

Nonetheless, indigenous people who have wholly adopted the Anglo-American method of dispute resolution and take no action to change it or have been forced to adapt are jeopardizing their identity and their sovereignty.[280] There is no question that stronger tribal judiciaries are a manifestation of greater sovereign power and the capacity to self-govern. In contrast to the reality that existed not long ago—when there were no functioning courts or traditional dispute resolution mechanisms—recent developments are obvious improvements in the capacity to self-govern. But what does it mean if tribal judiciaries develop as mirror images of Anglo-American courts?

As Linda Medcalf argues so powerfully, the elimination of meaningful choices in one's legal system also eliminates the choices regarding one's way of life. As tribal courts have developed to date, they have undermined their efforts to strengthen the tribe by limiting the lifestyle choices of tribal members. In so doing, Professor Pommersheim's "golden rule" of tribal court development has been

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279. *See* Barsh, *supra* note 147, at 297.

280. *See* John Mohawk, *On Sovereignty,* 1(3/4) Akwesasne Notes 9 (1995) ("Indians owe allegiance to their own nations before they owe allegiance to the United States. What do those concepts mean when the Indian nation is all but indistinguishable from the non-Indian nations? Has not the term 'Indian' in Indian sovereignty been extinguished.").

violated: "Tribal courts do not exist solely to reproduce or replicate the dominant cannon appearing in state and federal courts. If they did, the process of colonization would be complete and the unique legal cultures of the tribes fully extirpated."[281] Accordingly, it is both unproductive and destructive for indigenous societies simply to recreate their legal systems in the image of the dominant society. How, then, can this difficult and threatening problem be addressed?

B. The Process of Revitalizing Peacemaking

In order for indigenous people to maintain and redevelop meaningful choices for their future, they must dedicate themselves to conducting their affairs in reliance upon their own traditions.[282] The process through which this occurs must be deliberate and calculating in determining the extent to which traditional and acculturated values intertwine. The forces of political and cultural change are too great to simply leave to random efforts to identify and manage them.

As this process relates to dispute resolution, there is little to suggest that litigation is inherently valuable in dealing with problems where an underlying relationship exists (unless the particular tribe involved at some level values conflict for its own sake). Thus, rededication to a traditional approach suggests that peacemaking, not litigation, be utilized where it is both historically founded and capable of implementation. Practically speaking, this means the development of a dual approach to justice reliant upon peacemaking and litigation.

1. Step One: Commitment

The first step toward resetting the peacemaking foundation is for tribal leadership to make a philosophical commitment to reinstating this tradition. Unless political effort is given to the task of pursuing justice methods consistent with the traditional values and norms of the native people and rejecting the whole-cloth implementation of tribal justice systems designed by and for Anglo-Americans, distinct tribal

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281. Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay On Tribal Court Jurisprudence*, 1992 Wis. L. Rev. 411, 420 (1992).

282. "Yoked to the notion of difference [from the dominant society], however, is the pride rooted in pre-Columbian sources from which Indian tribes and tribal communities find cultural continuity and spiritual richness. It is this pride of difference that is at the heart of claims of tribal sovereignty." *Id.* at 424.

identity and the tribe's sovereignty will be eroded over time. It is clearly the case that this message has been adopted by and reiterated frequently by tribal leadership. Unfortunately, far too often the stated commitment to preserving traditional ways is only rhetoric and is not followed by specific action.[283] This dissonance is especially harmful, not only because it frustrates real progress, but because it erodes public confidence, making change difficult. As Chief Justice Yazzie has suggested, peacemaking is healing, and tribal leaders have a special responsibility to facilitate the healing of their communities with real political effort.

It is a fair criticism to suggest that tribal political leaders may, in fact, already be serving the desires of their constituents by paying lip service to the resurrection of traditional dispute resolution. While much of the traditional aspects of native societies have been forcefully taken from native people, there is no doubt that many native people today have little problem with that. To the extent that peacemaking might require traditional spiritual involvement different from one's colonized religious beliefs, or demand a degree of personal involvement that a person is unwilling to make, the failure to implement aspects of time-honored methods of dispute resolution is a realistic lifestyle choice.

Nonetheless, raising the issue is important if it is assumed that Indians today do not fully desire the perpetuation of the status quo, that is, assimilation. Surely it is a difficult case of the tribe that seeks to exercise its sovereignty towards the objective of recreating the dominant society for themselves. While I am hesitant to say that the legitimacy of native self-government should be subject to an ends-oriented analysis, in that case, it is obvious that the forces of assimilation have achieved the ultimate success—self-termination. Tribal leadership—both the formal and informal—carries the burden of leading on this issue.

2. Step Two: Assessment

The second step in the process of resetting the peacemaking foundation is to examine the extent to which peacemaking may already serve a role within the tribal community. In many cases, informal methods of dispute resolution such as ridicule and ostracism may be strong and only require acknowledgment and formal utilization in order to strengthen the tribal justice system as a whole. In other cases, the

283. *See* Barsh, *supra* note 147, at 292-97.

peacemaking tradition may be non-existent and greater efforts must be taken to discern how peacemaking may, if at all, serve a role.

3. Step Three: Recognizing the Limitations of Peacemaking

Peacemaking is not a panacea. As has been discussed, there is much to suggest that Indian nations of the future will be considerably different than those of today and the past. Pursing a distinct Third Path requires an acknowledgment of the limitations to which traditional methods can be valued and revitalized.

Perhaps the most important factor in a functional peacemaking system is the extent to which there is willing participation in the system. With tribal members, the degree of participation depends upon the value that tribal members place on tribal membership and how they are perceived by others around them. Even to the extent that tribal membership is not valued greatly, unless there is some person in the community who, by force of relationship, respect or even will, can influence the conduct of a party in dispute, it is impossible for peace to be achieved willingly. This is especially true of non-members (particularly non-Indian non-residents and corporations) for whom relationships outside of a commercial context have little or no meaning.

The devaluation or nonvaluation of relationship is a reality that any effort to revitalize peacemaking must accommodate. As indigenous people have evolved and been shaped by the dominant society, there has been considerable change in the dynamic that exists between a tribe, its members, and non-members. In many tribes, the community may be noticeably similar to non-Indian communities or, as with gaming tribes, heavy with non-Indian commercial visitation.

With respect to tribal members, as individuals have become less dependent on the tribe for their personal economic viability, they perceive that they are less dependent upon the tribe for their political, social, or spiritual viability as well. To the extent that an individual can now physically leave the tribe and still, at least nominally, provide for basic human needs, individuals have become less subject to tribal norms.[284] While I do not believe that this is correct,[285] in these instances,

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284. The reason for this situation, which the United States is singularly responsible for, is the belief that Indians can exist as Indians divorced from the tribe. While this notion is false, it has been the predominant message that the legal, political, and educational institutions of American society have been sending to indigenous people. The acceptance of this message, as intended, has greatly affected how tribal members view

it is difficult to see how unwritten or uncodified tribal norms can have any effect of their own volition.

While I have little hope that commercial actors can ever be drawn into a peacemaking process, there is some reason to believe that disaffected tribal members, particularly those still living within the community, might be brought into compliance with tribal norms through a peacemaking process. To the extent that such people can perceive that their misconduct will not be tolerated, they will either (1) change their behavior to accommodate the norm, (2) leave the tribal community, or (3) do nothing. The first option certainly and the second, arguably, serve to strengthen the tribe. The latter option will eventually result in one of the first two options occurring depending upon how strong the tribe cares about enforcing its norms. The key is the identification and reiteration of the tribal norm, a task especially well-suited to tribal courts.[286]

4. Step Four: Build New Institutions In A Pragmatic Way

The fourth step toward revitalizing peacemaking is to address the problems of its implementation in a pragmatic way. Aggressive and strident notions of "returning to tradition" will have far more effect in frustrating meaningful political initiatives than furthering them. Developing rational proposals that clearly identify problems and put forth pragmatic recommendations for rebuilding the tribal institutions dedicated to dispute resolution is critical for meaningful change.[287]

In revitalizing peacemaking (and other traditional values for that matter), there is nothing wrong with developing hybrid systems for accomplishing the desired objective. For example, some Canadian courts have started using "sentencing circles"—traditional, multi-party events

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themselves and how viable tribes are today.

285. In some cases, it is still true that tribal members cannot survive without tribal benefits, such as housing, water, and food, whether they are provided by the tribal government or generous community members. But it is at the most fundamental level where this issue is most true because an Indian cannot exist unless there is a tribe of which he or she is a member. Political rights, economic opportunity, and even social and spiritual existence are intimately related to tribal life. The difference today is that tribal life for too many has become merely a lifestyle choice, not a requirement for survival.

286. *See* Pommersheim, *supra* note 11.

287. *See* Pommersheim, *supra* note 92, at 406–07 ("Theory and practice in Indian law are too often unhinged from the political commitment to institution building which is necessary to make the possibilities of the law meaningful.").

in which the victim, the family, and the community are involved in the process of deciding what to do with one who has transgressed community norms.[288] Indian nations with westernized tribal courts might do very well in adapting their procedures to accommodate a desire to revitalize tradition to the desired extent.

Perhaps the foremost example of native people resetting the peacemaking foundation is the Navajo Nation.[289] Originally possessing a rich peacemaking tradition, the Navajos were later victimized by federal government efforts to impose the Anglo-American legal system on them through the CFR courts. The Navajos discovered that, despite the formality of the colonial court system, the practice of peacemaking continued to take place.

In the early 1980s, the Navajos reformed their judicial system by establishing a Peacemakers Court.[290] Because the Navajo Nation is divided into a number of judicial districts, each district now has a Peacemaker court associated with it. All complaints are received by the district court and determined whether the nature of the dispute makes it appropriate for peacemaking. If so, the matter is assigned to the Peacemakers Court for resolution. If the peacemaking is successful, the results are recorded and entered as a judgment. If not, the case goes to trial at the district court.[291] Evidence to date suggests that the Navajo Peacemakers Court has been a tremendous success.[292]

Having a bifurcated tribal judicial system is a pragmatic way to acknowledge these informal practices and address the difficult problem of weaning off the Anglo-American legal tradition. While accommodating the revitalization of tradition, the Navajo judicial system accommodates the non-homogenous nature of modern Navajo society. Cases in which relationship may matter can be handled by peacemaking; cases in which the parties are strangers can be handled by litigation. Ultimately, justice can be most effectively obtained because the option of a Third Path has been created.

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288. *See* David Arnot, Remarks Delivered at the United States Department of Justice, Harvard Law School, & Harvard Native American Program Tribal Courts Symposium (Dec. 2, 1995).

289. *See generally* James Zion, *The Navajo Peacemakers Court: Deference to the Old and Accommodation of the New*, 11 Am. Ind. L. Rev. 89 (1983).

290. Interestingly enough, the Navajos apparently were influenced by the Seneca Peacemakers Court in deciding upon the name of their new court.

291. *See* Yazzie, *supra* note 82.

292. *Id.*

5. Step Five: Prepare For A Struggle

The obstacles facing any effort to revitalizing peacemaking are considerable. In addition to those parties which actively seek to maintain the status quo, simple inertia will make it a difficult process. In large part, because of acculturation to date, many tribal members simply will not perceive litigation as having a caustic effect, and thus will take no effort to minimize its impact. Proposals to reintroduce tradition-based justice methods will be perceived as foreign and thus be feared and resisted.

It is likely that Anglo-American trained tribal lawyers and judges might also be resistant to peacemaking methods. It is extremely easy for an Anglo-American trained lawyer to believe that he or she knows how to deal with any particular legal problem. Law school training, among other things, is a type of boot camp that tears down the non-lawyer civilian and rebuilds him or her in the image of the dominant society's lawyer-soldier. The lawyer culture is powerful and narrow as it relates to practicing within the United States. Depending, of course, on the person involved, this narrowness may have a limiting effect on the ability to appreciate the value of traditional justice methods and move to implement them.

It is certainly the case that lawyers can be trained to identify and address this potential pitfall in judgement and channel their considerable talents towards establishing the Third Path that their clients seek.[293] Successful American international lawyers are able to identify and accommodate cultural, as well as political, chasms that exist between themselves and the societies in which they work. Certainly having a personal connection with the society in which one works is important—and may give a slight edge to Indian lawyers practicing within Indian country—but the bigger issue is commitment to bridging the cultural chasm and serving the needs of the client.

Indian nations themselves can help in this process. Non-lawyer tribal officials and community members must take a stronger hand in either minimizing the involvement of their lawyers in policy matters, better educating these lawyers in traditional ways, or simply reasserting that their proper role is as the "dog" and not the "tail" by making their lawyers respond to tribal needs.

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293. It is with this purpose in mind that the Tribal Lawyer Certificate Program at the University of Kansas School of Law was developed.

Unfortunately, the most difficult challenge of all may be the quest for legitimacy. In seeking acceptance from the dominant society, there is a natural tendency for tribal leaders and tribal lawyers to replicate that from which respect is sought. As Russel Barsh has described it, tribal leadership tends to seek "external rather than internal legitimacy" in that they believe "tribal councils, courts, and laws must be recognizable to outsiders and compatible with white Americans' conceptions of good government."[294] As a result, unfortunately, "tribal governments are growing indistinguishable from white governments."[295]

Reversing this trend is a formidable challenge, but not one that cannot be overcome. There seems little choice for indigenous people that wish to retain their distinct identity but to change, among other aspects of their self-governing institutions, their dispute resolution mechanisms. The reintegration of peacemaking offers the possibility that tribal members in conflict can resolve their disputes, not only successfully, but in a manner more consistent with tribal traditions. As such a process reestablishes itself and gains a foothold within the community, instinct and familiarity should perpetuate success. If it is clear that the risk of failure may mean the possibility of extinction, hopefully, the very best efforts will be given to achieve the objective of a distinct Third Path.

CONCLUSION

I well acknowledge that the world that native people now live in is considerably more complex than the model paradigms that have been discussed in this article. Forced and natural changes have occurred that have effectively assimilated all of us to some degree. These changes, while implemented in the past, nonetheless continue to have their assimilating effect and will continue to do so unless remedial action is taken.

In some circles, I know that this argument may not be popular, but it is necessary in my view if sovereignty is to become stronger in quality as well as magnitude.[296] Because there have been affirmative

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294. Barsh, *supra* note 147, at 303.

295. *Id.*

296. "American Indian tribal leaders and their academic supporters are locked in a conspiracy of denial. They fear that should white Americans discover that there is nothing qualitatively different, or substantially better, about Indian self-government, they will

attempts to assimilate us, I suggest that we must put forth affirmative effort in order to maintain a distinct existence, and thus safeguard our sovereignty and a meaningful choice for the future generations.[297] Despite the best efforts of many well-intentioned native and non-native people now working on our behalf, it is a simple fact that only we can legitimately define our own existence and take action to bring it about.

Failing to take immediate action to reverse the forces of colonization means that tribal sovereignty will continue to weaken.[298] The legal system of any society is a powerful force in the lives of the people who are subject to it. In recent years, our nations have started to appreciate the utility of strengthening tribal courts in order to strengthen our sovereignty. In part due to the greater recognition by the federal courts and Congress, this recognition has fueled an unprecedented effort to give real meaning to our struggle for self-determination. Unfortunately, unless equal effort is given to the direction in which this development is occurring, I fear that some time in the future—when tribal judiciaries look and act just like their federal and state counterparts—all of us in the field will ask ourselves why we spent all those years trying to perpetuate tribal sovereignty through tribal court development.

I would like to leave you with a final thought. I have come to believe that how we resolve, or rather do not resolve, our disputes has everything to do with how strong we are as individuals and how strong we are as nations. Unfortunately, it is easy to forget that the downside of a dysfunctional dispute resolution system can be a loss of life or a loss of sovereignty. We now know that the reason for a lot of the dysfunction in our communities is due to the influence of American law and culture. Having identified the problem, however, means little if nothing is done to resolve it. Non-Indians can and should do much to lift the unfair burden of colonization from our shoulders. But foremost, we must assume the responsibility for addressing this problem ourselves. After all, that is what sovereignty is all about.

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abolish it. There is plentiful historical evidence to support this proposition." Barsh, *supra* note 147, at 296 (footnote omitted).

297. "In the long run, tribal governments will survive only by becoming culturally and spiritually superior governments." *Id.* at 297.

298. "If the contradiction between cultural ideals, rhetoric, and practice persists for another generation, however, American Indian governments may self-destruct without any help from outsiders." *Id.*