

**A FRAMEWORK FOR UNDERSTANDING TRIBAL COURTS
AND THE APPLICATION OF FUNDAMENTAL LAW:
THROUGH THE VOICES OF SCHOLARS IN THE FIELD OF
TRIBAL JUSTICE**

April L. Wilkinson¹

*“Different thinking, planning, life ways, languages, beliefs, and laws
appear among us, But the fundamental laws placed by the Holy People
remain unchanged.”*

The Foundation of Diné Law and Diné Government
Navajo Nation Code

Introduction

Article 40 of the United Nations Declaration on the Rights of Indigenous Peoples articulates that “Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes . . . [with] due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned.”² Since time immemorial, indigenous communities have employed customary norms as a source of just procedures to guide and inform the behavior of their community members. The concept of justice is shaped by those customary norms. In modern terms, customary norms have served either as frameworks for tribal justice systems in the United States or have been set aside in a tribe’s pursuit to develop Western style courts. In either case, the

¹ Third year student at the University of New Mexico School of Law. Law Clerk, firm of Van Amberg, Rogers, Yepa, Abeita & Gomez, LLP. Enrolled member, Kiowa Tribe of Oklahoma. *Ah-ho* to the people of the Pueblo of Jemez for the opportunity to serve your community for over a decade; to Professors Scott Taylor and Jeanette Wolfley for the opportunity to work with and learn from you; to the staff of the Tribal Law Journal for the opportunity to publish this paper. To my family- *Ah-ho Dawkee; aum taine tso dah aum may.*

² Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. GAOR, 61st Sess., Supp. No. 53 (Vol. 1), U.N. Doc. A/61/53 (Vol. 1), at 13 (Sept. 13, 2007).

administration of justice is understood as part of a tribe's exercise of self-government.³

The focus on tribal justice systems has increased as a result of changing social dynamics. First, the crime rate on reservations and the case load for tribal courts has risen significantly.⁴ The increased crime rate has increased pressure on tribal courts to improve functionality through written codes and procedures, and hiring law-trained judges and attorneys.⁵ Secondly, there is an increase in the use of restorative justice methods in Western courts and urban community settings—a method that was once considered the hallmark of tribal justice resolution models.⁶

Through an examination of scholarly articles, this paper discusses traditional tribal justice systems set in tribal communities. This effort establishes a framework for understanding tribal courts and the unique challenges they face. The examination is dependent on the significant scholarship and knowledge of both academics and practitioners in the field of tribal justice. Scholars detail tribal court models and tribal justice perspectives that define challenges and identify human, cultural, and written resources. Tribal justice practitioners work to implement and document tribally-designed justice systems through code drafting, court procedure, and jurisprudence, including tribal member utilization of tribal court systems. The result is a significant body of literature devoted to the subject of tribal justice systems. Search terms, such as “traditional justice,” “tribal justice,” and “indigenous justice models” produced a balance of scholarly articles that either describe the cultural adaptation

³ FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 145 (1971 ed.).

⁴ Timothy Williams, *High Crime but Fewer Prosecutions on Indian Land*, N.Y. TIMES, Feb. 21, 2012, at A14.

⁵ CAL. CENTER FOR FAMILIES, CHILDREN & THE COURTS, RESEARCH UPDATE: NATIVE AMERICAN STATISTICAL ABSTRACT: VIOLENCE AND VICTIMIZATION (Sept. 2011), available at <http://www.courts.ca.gov/documents/NatAmStatsAbUpdate.pdf>.

⁶ See generally Sadhbh Walshe, *NY Court Applies Native American Traditions to Modern Justice*, ALJAZEERA AMERICA, available at <http://america.aljazeera.com/articles/2014/10/18/peacemakers-brooklynjustice.html> (discussing application of peacemaking in a New York state court); see also Lauren Villagran, *Restorative Justice May Be a Good Fit for NM*, Attorney General Says, ALBUQUERQUE JOURNAL, available at <http://www.abqjournal.com/295936/news/nm-news/ag-restorative-justice-may-be-good-fit-for-nm.html> (discussing application of Mexican and tribal restorative justice systems to alleviate case-loads in the New Mexico justice system).

by tribes of Western style courts to fit a tribal community, or traditional justice theories and systems in their original forms.

The paper is set forth in six parts. Part I discusses the intent and the working definition for the research. Part II discusses the importance of tribal courts and the high stakes associated with undeveloped tribal justice systems. Part III offers perspectives on traditional justice from U.S. Supreme Court and Navajo Nation justices. Part IV describes the spectrum of traditional tribal courts and provides examples of working models. Part V deals with generalized descriptions of traditional tribal courts. Finally, Part VI describes challenges tribal courts face and suggests solutions and opportunities.

I. Intent of the Research and Definition of Traditional Tribal Courts

In his article “*The Supreme Court’s Legal Culture War Against Tribal Law*,” Mathew L.M. Fletcher writes “[t]he Court and Indian law scholarship appears to have forgotten [the] linkage . . . between tribal law and tribal culture.”⁷ Fletcher’s research investigates the link between law and culture. Such investigation not only uncovers “tangible evidence”⁸ that the linkage exists, but also reveals that tribal justice systems cannot be divorced from the culture of a tribal community. Traditional tribal courts are the creative expression of an individual sovereign tribal nation, crafted to reflect the values of that sovereign through the authority conferred upon it to make law.

To begin defining tribal courts, the following working definition of traditional tribal courts was developed: A traditional tribal court is one the tribal sovereign has crafted that implicitly or explicitly incorporates traditional tribal law (tradition, customs, tribal values). However, as the research effort progressed, the voices of the scholars and the evidence of the practical application of customary law in tribal courts altered that definition.

In tribal justice systems, traditional law is an integral part of tribal self-government. In these systems, tribal laws are not detached from the traditional ways of knowing or the customary norms of society.⁹ Repeatedly, scholars described traditional law as something

⁷ Mathew L.M. Fletcher, *The Supreme Court’s Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 109 (2007).

⁸ *Id.*

⁹ See Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 AZ. L. REV. 225, 234 (1989).

that existed before Western style courts and as something that still exists beyond the court setting. Traditional law gives and preserves life. It is the law that guides an individual's existence,¹⁰ moderates relationships and gives a tribe distinction and a legacy. Traditional law is fundamental to a tribal member's way of living and engaging the world.¹¹

Later, the working definition was narrowed to be: A traditional tribal court is one the tribal sovereign crafts to incorporate the tribe's fundamental law (i.e. tradition, customs, tribal values). This definition reflects the fact that fundamental law pervades every aspect of a tribal community, and traditional tribal courts incorporate fundamental law into their systems of justice. The review and analysis of the scholarly literature was conducted through the lens of this working definition.

II. Why are tribal courts important?

A general response to the question about why tribal courts are important is that the United States Supreme Court has made decisions that bring tribal courts into play. In 1978, the court decided in *U.S. v. Wheeler*¹² that Congress has plenary power to limit or abolish tribal power, but tribal power does not derive from Congress. Tribal power derives from the tribes' sovereignty, and tribes exercise this power in the courts. The Supreme Court also decided that tribal courts are the proper forum for civil disputes arising on tribal land;¹³ that internal affairs, including internal disputes, are exclusively within jurisdiction of tribal government¹⁴; and that tribal remedies must be exhausted before a federal review can occur in cases regarding federal and diversity questions.¹⁵ These decisions are examples of how the Court affirms tribes' sovereign power. From that power flows an individual tribe's right to exercise sovereign authority, to assume jurisdiction, to provide a proper forum for disputes arising on tribal land, and to construct remedies that resolve disputes.

¹⁰ See Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 3, 127 (Nov.-Dec. 1995).

¹¹ See Robert Yazzie, "Life Comes From it": *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).

¹² *U.S. v. Wheeler*, 435 U.S. 313, 323-326 (1978).

¹³ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978).

¹⁴ See *Williams v. Lee*, 358 U.S. 217, 223 (1958).

¹⁵ See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987).

Tribal courts are the “manifestation of greater sovereign power.”¹⁶ They assume responsibility for administering justice for the community. In doing so, tribal courts maintain characteristics that make each tribal court unique in comparison to other tribes, the state, and or the federal government.¹⁷ Tribal administration of justice comes naturally to tribes because custom already carries the force of law in the community.¹⁸ A tribe’s justice system must reflect the fundamental law of the tribe to whom it is responsible for, or it will work against the relationships and cultural life ways of the tribal members.¹⁹

It is important for tribes to incorporate fundamental law into the design of their courts so that they will be in the position to not only reflect an “indigenous version of . . . self-rule,”²⁰ but also to craft “a unique jurisprudence.”²¹ This serves two purposes: sustaining the existing traditional law; and advancing the community through “organic notions of tribal justice and methods of dispute resolution,”²² which maintains the integrity of the tribe’s identity. For these reasons, a tribal justice system is the best forum to resolve the disputes of the community.

The benefit of aligning fundamental law with a tribal legal system is most evident when considering the impact to individual tribal or community members. The insular nature of a reservation emphasizes the role of the community in the life of the individual; the community represents one’s home, one’s tradition, and one’s place in society. The role of the community continues to play out even in the life of an “offender,” a tribal person who violates the fundamental law of the community or an incarcerated tribal member. For such an individual, the community still represents home, tradition, and a place in society.

Because of its adherence to tradition, a tribal court provides the only appropriate forum for resolving the community conflict caused by

¹⁶ Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo- American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 297 (1997).

¹⁷ See Judith Resnik, *Dependent Sovereigns: Indian Tribes, State and the Federal Courts*, 56 U. CHI. L. REV. 671, 751 (1989).

¹⁸ See Melton, *supra* note 10, at 130.

¹⁹ See Tso, *supra* note 9, at 234.

²⁰ Frank Pommersheim, *Liberation, Dreams and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411 (1992).

²¹ Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110, 112 (Nov.- Dec. 1995).

²² Porter, *supra* note 16, at 239.

an offender, and for crafting unique jurisprudence. The tribal court can act in a way that anticipates the return of the offender to the community in a restorative manner. The incorporation of fundamental law into a tribal court is critical to the wellbeing of a community as “it is in the tribal court that the competing concepts regarding social order and the place of the individual with the family, clan, the band and the tribe will be decided.”²³

If tribes do not develop a viable court structure that aligns with the fundamental law of their communities, status as distinct tribal nations is at stake. Tribes already face the immediate threat of losing native language speakers. Language loss means that the sources of the laws’ interpretation and application may also be lost. Loss of status as distinct tribal nations threatens tribes’ exercise of sovereignty. If law is a significant part of any culture, then a tribal court’s use and acknowledgement of fundamental law extends the reach of a tribal sovereign to ensure that “a certain custom or tradition remains viable within the community.”²⁴ Conversely, when tribes “surrender their own concepts of native law” they “participate in their own ethnocide.”²⁵ Loss of the unique characteristics of the traditional dispute resolution processes will leave many tribes operating under pan-Indian, adopted, or misplaced traditions and customs that do not belong in a particular tribal community the court serves. The destruction of this self- government tenet weakens a sovereign as a whole. Each tribe has a distinct view of justice that is unlike any other tribe. A tribe’s systematization of fundamental law in its court system ensures its fundamental law remains a “living concept”²⁶ and operates as shield against the loss of a tribe’s distinction.

III. Tribal Justice: Comparative Analysis of Perspectives from the Bench

Tribal justice systems are crafted to address the interests of tribal sovereigns, and to establish some identity in relationship to the other sovereigns, specifically the federal and state courts.²⁷ These

²³ Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 137 (Nov.-Dec. 1995).

²⁴ Mathew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 93 (2006).

²⁵ Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL’Y 17, 24 (Winter, 1997).

²⁶ Melton, *supra* note 10, at 128.

²⁷ See Resnik, *supra* note 17, at 750.

relationships provide two benefits. First, a tribal justice system is acknowledged to have “power sufficient” to check and diffuse the authority of the other sovereigns.²⁸ Second, by acknowledging the decisions of the other sovereigns, each one is able “to make plain what its own values are.”²⁹ To better understand the unique role tribal justice systems play in American jurisprudence, Part III offers a comparative analysis of the writings of Honorable Robert Yazzie, former Chief Justice of the Navajo Nation; Honorable Raymond D. Austin, former Navajo Nation Supreme Court Justice; and Sandra Day O’Connor, former Associate Justice of the United States Supreme Court. Justice O’Connor was chosen based on her experience working with tribal communities in her home state of Arizona, including the Navajo Nation. Both Justice Yazzie and Justice Austin have written and are published extensively on the Navajo Nation court system and the application of fundamental law. The following perspectives from the bench describe distinctive elements of traditional court systems. These perspectives also reveal a marked difference among the justices in the way each defines traditional justice, how it operates and how it should progress.

In her article, *Lessons from the Third Sovereign: Indian Tribal Courts*, Justice O’Connor writes that “most modern reservation judicial systems” were fashioned after the Bureau of Indian Affairs (BIA) Code of Federal Regulations Court (CFR Court) because it was most familiar to the tribes.³⁰ Traditional justice systems emerged when tribes attempted “to incorporate their traditional tribal values and customs into their courtrooms, decisions and laws,” and tried to “infuse proceedings with values of consensus and community.”³¹ Justice Austin describes the method of “integrating indigenous [traditional] law and methods into modern tribal court litigation and decision making” as a challenge because the method had to be both reflective of the tribal culture and fall within the procedure of Western style courts. This method sometimes required that the tradition be fitted to the modern circumstance.³²

²⁸ *Id.* at 753.

²⁹ *Id.* at 757.

³⁰ Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. J. 1, 2 (1997).

³¹ *Id.*

³² See RAYMOND D. AUSTIN, *Navajo and Navajo Common Law, A Tradition of Tribal Self- Governance* 201 (2009).

Conversely, Justice Yazzie does not describe traditional justice in terms of how a tribal court system is fashioned or how traditional law is used. Instead, Justice Yazzie discusses what justice is- a “product of the experience” of tribal people that expresses “something fundamental” about the lessons the Navajo have learned from historical experiences and contemporary challenges they have faced.³³ That “something fundamental” is the law given to the Navajo from their deities, or “Holy People,” to survive this life. It is not dependent on the man-made court system to be executed.³⁴

While Justice O’Connor and Justice Austin may agree that fundamental law is incorporated into tribal court settings, Justice Austin offers the perspective that this is challenging because the Western court setting potentially alters the application of the fundamental law. In contrast, Justice Yazzie offers the perspective that Navajo fundamental law defines justice; it is pervasive and is applicable to conflicts regardless of the style of the court system. As is shown by these differing opinions, there are significant variations in how traditional justice is defined, even among justices with intimate perspectives of both tribal and Western justice schemes.

Operationally, Justice O’Connor finds the application of traditional values in a tribal court appropriate because those values are closely held by the people that a court serves. Traditional values provide “critical guidance” for their behavior.³⁵ By employing dispute resolution that incorporates traditional values, “to achieve restorative justice,” tribal courts can operate efficiently, and even “more informally.”³⁶ Both Yazzie and Austin share the perspective that fundamental law operating within a traditional justice system is something more than just guidance for the people. Austin explains that the use of the Navajo common law (i.e. fundamental law), acknowledges the covenant made with the Holy People who gave the law to the Navajo people. It works to ensure the “ancient way of life” is preserved into the future.³⁷ Yazzie explains that fundamental law is evident in Navajo concepts of justice because it is a way of life that has the intended outcome of harmony and solidarity. Navajo justice concepts seek to restore the individual internally and in his

³³ Yazzie, *supra* note 11, at 175.

³⁴ *See id.*

³⁵ O’Connor, *supra* note 30, at 4.

³⁶ *Id.* at 3.

³⁷ Austin, *supra* note 32, at 200.

relationships, regardless of the forum or the circumstance.³⁸ This comparison reveals a critical difference between Justice O'Connor and both Yazzie's and Austin's understandings of the way traditional justice operate within a tribal community.

The perspectives of all three justices are more closely aligned regarding the beneficial impact traditional justice can make on the courts of other sovereigns. Justice O'Connor points out the role tribal courts play "in administration of the laws of our nation, [the United States]" will continue to expand as Western style courts seek to develop alternative dispute resolution models. She deems it is essential that the tribal sovereign formally separate powers in order to gain legitimacy in the estimation of other sovereigns.³⁹

Justice Austin finds the future role of tribal courts "in the overall scheme of justice" is clouded by the suggestion that tribal justice systems are too different to be used with any other populations. He suggests that the indigenous jurisprudence used by Navajo judges could serve as a model because "every dispute resolution system contains beneficial elements that other systems can use to improve dispute resolution for everyone."⁴⁰

Justice Yazzie suggests internal and external benefits from the continued use of fundamental law in Navajo courts. Internally, the use of the fundamental law ensures the sustainability of Navajo justice "as a form of distributive justice" so that disputants can learn it and use the law to self-correct and reconcile.⁴¹ The external benefit is the sharing of traditional justice models and theory as a way to address the "shortcomings of modern American adjudication." Changing times require the courts of every sovereign to revisit how justice is defined.⁴² The three justices agree traditional tribal justice systems offer an alternative dispute resolution model from which all three sovereigns (federal, state, and tribal) can learn.

Tribal sovereigns craft traditional justice systems that influence the justice systems of the other sovereigns. Despite the interplay of federal, state, and tribal courts, these perspectives from the bench reveal marked differences in the way traditional justice is defined and understood to operate.

³⁸ See Yazzie, *supra* note 11, at 180-181.

³⁹ See O'Connor, *supra* note 30, at 6.

⁴⁰ Austin, *supra* note 32, at 202.

⁴¹ See Yazzie, *supra* note 11, at 187.

⁴² See *id.* at 190.

IV. Spectrum of Tribal Courts

The traditional courts described in this section provide a framework for viewing contemporary iterations of traditional tribal courts in the United States. The purpose of this section is to provide a brief overview of how tribes are contextualizing fundamental law into their courts. The tribal courts described here either incorporate traditional values into their Western style court systems, or offer an alternative “to adversarial litigation . . . based on traditional concepts of justice”⁴³ and customary practices. However, each tribe’s rationale for the development of a particular court system is not the purpose of this paper. This part concludes that traditional tribal courts exist on a spectrum, with fundamental law in a traditional forum at one end and fundamental law integrated into Western-style courts on the other. Because the tribal justice system is an expression of a tribe’s inherent sovereignty, each tribal justice system is unique. A tribal sovereign crafts its court system to align its court’s procedure and/or jurisprudence with a tribe’s community, fundamental law, and history.

A. Traditional Tribal Courts Spectrum: Western-Style Courts with Fundamental Law Incorporated into Written Codes

At one end of the spectrum are tribes that have established Western style courts and procedure with fundamental law incorporated in their written codes. For example, the Passamaquoddy Tribe has mandated in its tribal constitution that fundamental law should be interpreted in the same way tribal statutes and applicable federal and state law are interpreted. The constitutional provision in effect “declares the existence and applicability of customary law as the law of the tribe.”⁴⁴

The White Earth Band of Chippewa Indians have the option in the judicial code to “announce customary law” as part of decision making.⁴⁵ Like the Passamaquoddy Tribe, the White Earth Band Judicial Code recognizes customary law as “on par” with other law provisions, but requires that if the judge announces the use of

⁴³ Russell Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J. L. PUB. POL’Y 74, 74 (1999).

⁴⁴ Fletcher, *supra* note 24, at 66.

⁴⁵ *Id.*

customary law, customary law must be interpreted.⁴⁶ The judge is also required to write about the history, use, and specific application of customary law to the case at issue in order for the decision to serve as legal precedent.

Similarly, the Stockbridge-Munsee Community of Mohican Indians has as part of its tribal court code of civil procedures that fundamental law may be used in the judge's jurisprudence, but only on an interpretive basis, not as substantive law.⁴⁷ The Bay Mills Indian Community has a tribal court code that places customary law on par with other laws, such as tribal statutes and federal laws "so long as the custom does not conflict with federal law."⁴⁸

Finally, the Hoopa Valley Tribe requires the tribal court to use fundamental law where the "tribal statute is silent."⁴⁹ This tribe has a written procedure for determining what the fundamental law is and how it is applied. The procedure requires the judge to first find out if the fundamental law is written. Proof of the writing can be tribal resolutions, ordinances, or even historical documents that reference the tradition or custom. If the fundamental law is supported by a writing, the law is deemed ratified. The judge can then formally announce its use and apply it to the issue.

Each of these tribal courts has adopted constitutions, codes, and procedures that indicate customary law is a valid source of law. However, these courts have also designed justice systems to incorporate use of customary law, but limit its application.

B. Traditional Tribal Courts Spectrum: Incorporation of Fundamental Law and Mix of Forums

A second type of court system found on the spectrum is one that incorporates fundamental law in written code and jurisprudence, offers a mix of judges, and a choice of traditional forums to reflect the unique traditional values of the tribe. For example, the Pokagon Band of Potawatomi Indians requires licensed attorneys at the trial level, but allows one of the three judges at the appellate level to be a non-legal

⁴⁶ *See id.* at 67.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Matthew L.M. Fletcher, *Tribal Justice Systems*, Legal Studies Research Paper Series, Research Paper No. 11-23, above n. 62 (2014), available at <http://ssrn.com/abstract=2378526>.

trained tribal member.⁵⁰ Similarly, the Little Traverse Bay Band of Odawa Indians requires that one of the three tribal appellate court judges be an elder.⁵¹

Alternative forums are offered in the Navajo Nation, Laguna Pueblo, and Hopi court systems. The Navajo Peacemaking courts are established in each judicial district and use mediation processes based on fundamental law.⁵² Pursuant to the tribe's rules of civil procedure, Navajo courts are required to offer parties the choice of alternative Peacemaking courts early in litigation. District courts provide support by supervising the completion of the process and enforcing the negotiated resolution (i.e. agreements).⁵³

The Laguna Pueblo has an established Western style court system, but also maintains a traditional forum, ratified by the tribe's constitution. The traditional method of dispute resolution requires that tribal members address their disputes to the Village Officers who give "their advice" to resolve the matter.⁵⁴ The Hopi Tribe's constitution also authorizes villages to settle matters "according to the procedures that the traditional village determines under the leadership of the village chief."⁵⁵

On the traditional tribal court spectrum, the type of court system discussed in this section reflects the value tribes place on the incorporation of fundamental law into the tribal justice system through the use of alternative forums and traditional dispute resolution methods.

C. Traditional Tribal Courts Spectrum: Fundamental Law Reflected in Traditional Procedures and Jurisprudence

The third type of traditional court is one in which fundamental law is incorporated into jurisprudence. The procedure is entirely traditional, and a written code may not exist. These types of courts are generally found in insular, homogenous communities where both the language of the people and the application of fundamental law as a

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Tso, *supra* note 9, at 228.

⁵³ *Id.*

⁵⁴ Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]incorporating Customs and Traditions in Tribal Law*, 1 N.M. TRIBAL L. J., unnumbered paragraph 22, available at http://lawschool.unm.edu/tlj/tribal-law-journal/articles/volume_1/zuni_cruz/index.php.

⁵⁵ *Id.*

lifeway are reflected in their daily lives.⁵⁶ Researching this type of court is challenging, as few decisions are published. Investigation is further hindered by the restrictions placed on the transmission of traditional knowledge.

a. Restrictions on Transmission of Fundamental Law

The sources of the fundamental law in traditional tribal courts “are members of tribal society who were raised traditionally,”⁵⁷ not a written body of law. The knowledge of the fundamental law is associated with the “authority of the possessor” due to his or her position in the community.⁵⁸ As a result, it is impossible to detach the knowledge and understanding of fundamental law from “its source and [transfer it] to new carriers and new contexts.”⁵⁹

Specialized knowledge is not equally distributed among all tribal members. A community comes to depend on certain individuals to better explain the source and application of the fundamental law. As a result, there can be no “real division between the representations of traditional practices and belief and the articulations of power and authority and legitimacy that go along with them.”⁶⁰

For a traditional court where jurisprudence is based entirely on fundamental law, there is fear surrounding the sharing of a tribe’s sacred knowledge through open forums or published opinions. One fear is that the sacred knowledge will be taken, and “when cultural appropriation occurs, the meaning and the value is no longer that of the donor culture.”⁶¹ Another fear is that the knowledge will be used incorrectly, or taken out of context.

For example, one scholar describes a situation in which a tribal member judge, fluent in the language, tried to ascertain the appropriate traditional law to apply to a case and sought advice from a group of elders.⁶² In doing so, he made two critical mistakes. First, the judge asked the elders to consider a hypothetical situation, which frustrated

⁵⁶ See Fletcher, *supra* note 24, at 85.

⁵⁷ Zuni, *supra* note 25, at 26.

⁵⁸ See Justin B. Richland, “What Are You Going To Do With The Village’s Knowledge?” *Talking Tradition, Talking Law in Hopi Tribal Court*, 39 LAW & SOC’Y REV. 235, 263 (2005).

⁵⁹ *Id.*

⁶⁰ *Id.* at 267.

⁶¹ Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 258 (2005).

⁶² See Richland, *supra* note 58, at 264.

the process because “it did not allow the elders to conduct explicit discussion of the actual world or the taking of action in it.”⁶³ Next, the “judge was compelling them to talk too freely about tradition,” even though “Hopi ideologies” do not permit all people to “legitimately [know] or even [hear] the information sought.”⁶⁴ The judge’s method of inquiry was effectively asking the elders to “tell the tradition in improper ways.”⁶⁵

Critics find that these types of traditional tribal courts are too difficult to understand or that traditional law is too subjective and “too controversial to apply.”⁶⁶ Yet, the argument for legitimization of the courts through publication or sharing of the fundamental law jurisprudence is outweighed by the potential of losing the character of the law itself.

b. Models of Traditional Courts

The Navajo Peacemaking court is one example of the type of traditional tribal court that uses fundamental law in its jurisprudence with an entirely traditional procedure. Though the Peacemaking court can be used by the Navajo Western style court as an alternative, it can also be independently requested by tribal members. In general, the peacemaking session is conducted in the Navajo language, uses prayer, and permits participation by all those affected by the conflict.

Peacemaker sessions are intended to help build consensus around an argument, and to help participants reach an agreement that restores harmony among the individuals in conflict. To achieve this, the sessions are moderated by a *naat’aanii* who is selected to a position of leadership by the community based on demonstrated knowledge, wisdom and high character.⁶⁷ The *naat’aanii* reiterates Navajo ways of thinking to promote free and open communication about the issue, and to remind the participants to “watch your words” and to not harm each other.⁶⁸ This is the treatment prescribed by the Holy People.

The Peacemaking court uses ceremony as a justice process. This is indicated by the use of prayer, a *naat’aanii*, Navajo language,

⁶³ *Id.*

⁶⁴ *Id.* at 265.

⁶⁵ *Id.*

⁶⁶ Zuni, *supra* note 25, at 24.

⁶⁷ See Yazzie, *supra* note 11, at 186-187.

⁶⁸ *Id.* at 188.

Navajo ways of thinking, and the Navajo fundamental law. From the Navajo worldview, teachings of the Holy People are the fundamental laws for the people. By using Peacemaking courts to reach harmony, the Peacemaking court is simply “a means of invoking supernatural assistance” to resolve problems “in the larger community of reality.”⁶⁹

Among many Pueblo communities, the sole tribal court is administered by tribal members who are appointed to positions of authority by the religious leaders. Fiscales and governors are two positions of leadership authority active in the traditional Pueblo tribal court. These individuals usually are appointed to one-year terms, serve specific roles within the community and employ customary disciplinary methods.

For example, pursuant to fundamental law, the fiscale is tasked with the responsibility to maintain “peace and [oversee] the welfare of the children and youth.”⁷⁰ As a result, the fiscales are arms of justice that reach beyond the court setting and into the larger community. Fiscales address youth where they are offending—in the home, at the school, at community events, and in tribal court.

Governors preside over cases involving adults in the tribal court setting. Depending on the tribal court design, the governors may hear both civil and criminal cases. Attorneys and advocates are generally not permitted, and standing is often extended to family and/or community members. The session is opened with prayer and is conducted in the tribal language.⁷¹

Adults and youth appearing in tribal courts speak to the dispute and respond to questions. The judges (governors or fiscales) then employ the customary discipline method of lecturing offenders, or talking to them about their offense. Lectures may include assessing blame for the conflict, but primarily focus on the impact to the family and the community, the individual’s role in and responsibility to the community, and the need for the ways of the community to be maintained.⁷² The determination by the governor or the fiscale is often recorded in some way, but is not put into a written opinion. As a result, both governors and fiscales serve as judges for their target population, employing the use of fundamental law in their jurisprudence and in their discipline method to resolve disputes.

⁶⁹ *Id.* at 184.

⁷⁰ Melton, *supra* note 10, at 131.

⁷¹ *Id.*

⁷² *Id.*

In these traditional tribal courts, the procedure is based on customary practice. Individuals are appointed by a formal customary process and preside over the courts, where jurisprudence is based on fundamental law. Offenders are disciplined according to custom in an effort “to restore personal and communal harmony.”⁷³ These courts may not have written codes or issue written opinions, but the systems are nonetheless formal in their design and functionality. Moreover, they represent tribes’ traditional notions of due process.

V. Generalizations Based on Review of Scholarly Literature

As yet, no consensus exists among scholars, tribal judges, lay practitioners, or tribes regarding a definition of tribal justice or best practices for designing, sustaining and enhancing the traditional justice model. This is because the jurisprudence and judgments conducted within traditionally designed justice systems reflect the unique cultural values and customary practice relative to each tribe. In general, traditional courts are designed to allow tribal community values and traditional ways of living to inform the law and not the reverse. The assumption is that justice is promoted when the cultural background of the individual and the value judgments of a tribal culture are taken into consideration.

Although the diversity of tribes makes generalizations about traditional tribal courts difficult to draw, three primary areas of commonality exist across the spectrum.

A. To Whom the Law Applies

The first area of commonality among traditional tribal courts is the courts’ context. Traditional tribal courts apply fundamental law to insular communities of individuals who speak the same language and share religious, social, and cultural homogeneity.⁷⁴ Individuals have similar upbringings, acknowledge and effect cultural norms in their daily lives, and operate within the cultural context of the community. As a result, customary law is “. . . easily discovered, understood and applied.”⁷⁵ This is critical for the individual to fully participate in the community and to access its system of justice.

⁷³ *Id.* at 126.

⁷⁴ See Wenona T Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL’Y 357, 367 (2005-2006).

⁷⁵ Fletcher, *supra* note 24, at 59.

For example, in the tribal court of the Grand Traverse Band of Ottawa and Chippewa Indians, traditional customs are incorporated into civil procedure. Tribal judges often require that the case narrative go beyond the submitted pleadings, briefs, or oral arguments, and “. . . ask the parties to go all the way back to the beginning, maybe as far back as generations, to ascertain and understand the origins of the dispute.”⁷⁶ Tribal communities are comprised of people “that have interacted with each other consistently for centuries.”⁷⁷ The justice process therefore requires that parties know their relations and family history of conflicts and misunderstandings that may have contributed to the dispute in court. The traditional courts’ concern with relationships among tribal or community members means that the cases are often specific to the community, and involve tribal lands, family disputes, political matters, or claims by tribal members against the tribal government.⁷⁸

Tribal language is an important part of traditional court proceedings. Both the command of the native language and language interactions between parties play a role in successful dispute resolution. Many court proceedings are conducted in the native language of the people, so parties in a dispute must be able to speak or at least understand the tribal language and the language references used. Traditional tribal courts draw “upon understanding of the language to derive” an interpretation of fundamental law and its application to the facts.⁷⁹ In other words, the language is used “. . .not only for reference to, but fundamentally for construction of, social realities and orders,” within the context of fundamental law.⁸⁰

Frank Pommersheim provides an example of an elderly grandmother who brought a claim against her daughter for long-term child care services rendered after the daughter removed the children from the grandmother’s home.⁸¹ The judge heard testimony in both English and Lakota and recognized that the root cause of the action was more of a cultural offense. The daughter had not asked the grandmother’s permission before taking the children. The pretext of

⁷⁶ See Fletcher, *supra* note 49, above n. 55.

⁷⁷ Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 831 (2007).

⁷⁸ See Fletcher, *supra* note 7, at 119.

⁷⁹ See Fletcher, *supra* note 24, at 75.

⁸⁰ Richland, *supra* note 58, at 236.

⁸¹ Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts*, 18 N.M. L. REV. 51, 62 (1988).

the small claims proceeding within the tribal courts permitted the grandmother to tell the whole story in her own language “without interruption (a cultural prerogative of elders) and in [her] first language.”⁸²

Most traditional tribal courts employ some method of “talking things out” to reach agreement.⁸³ Prayer is often used at the beginning of the court proceeding to establish intent and to invoke the supernatural to provide guidance to both the judges and the parties. The invocation pulls spirituality into the dispute resolution to remind the parties to be truthful and respectful in their interaction.⁸⁴ In this way, “. . . customary law permits no excuse.”⁸⁵ Parties must resolve the dispute to sustain the community. The invocation moves the discussion beyond the dispute at hand to “deal with psychological injuries” that may not be obvious.⁸⁶

Chief Justice Emeritus Robert Yazzie depicts prayer as important in the Navajo peacemaking process because it emphasizes the Navajo way of thinking and compels the truth.⁸⁷ He illustrates this by describing a peacemaking session during which divorced parents in a child visitation dispute went “back and forth” discussing the history of their marriage that led to the issue in court.⁸⁸ Through peacemaking, the ex-wife was permitted to express emotions that were not allowed during the Western style court proceedings. In the end, the issue was resolved.

B. How Justice is Distributed

Traditional courts along the spectrum are concerned with relationships between tribal members and the impact that disputes have on the broader community. Courts often exercise flexibility, and

⁸² *Id.*

⁸³ O James W. Zion, *Punishment vs Healing: How Does Traditional Indian Law Work*, in JUSTICE AS HEALING: INDIGENOUS WAYS 69 (Wanda D. McCaslin ed., 2005).

⁸⁴ *See id.* at 70.

⁸⁵ Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231, 240 (1987).

⁸⁶ Zion, *supra* note 83.

⁸⁷ Laura Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One*, RESTORATIVE PRACTICES E-FORUM 1, 2 (2004), available at http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/natjust1.pdf.

⁸⁸ *Id.* at 3.

adapt fundamental law to cases in a way that is responsive to the specific relationships between the parties. This is done to hold the individual offender accountable and enable him to adjust his behavior so he may be restored to the community.

An example of this flexibility is that tribal courts may view standing differently. In each of the traditional court models, opportunities exist for individuals to speak who may be associated with, but are not directly injured by the incident presented in the case. This authority to speak is derived from fundamental law which places high value on human life, especially the lives of elders.⁸⁹ Navajo fundamental law, for example, “. . . require[s] the participation of the community elders and all those who either knew the parties or were familiar with the history of the problem” for proper dispute settlement.⁹⁰

While a traditional tribal court judge may extend standing to all parties affected by the dispute, the judge may also require that the parties share responsibility in the blame. The impact of the dispute is inherently broader than the involved parties, so fundamental law distributes justice to a broader community, “. . . to the offender’s wider kin group [so that] there is a wider sharing of the blame.”⁹¹

Traditional laws reflect the norms of the community. When an individual commits an offense and is confronted with the truth in tribally-designed justice systems, he or she feels the weight of the “community’s moral judgment” in a way that “bring[s] about regret for the . . . offense.”⁹² One scholar describes the community’s judgment as “coercive pressure” and includes “response mechanisms such as ridicule, ostracism, and banishment.”⁹³ The offender’s family also feels this shame and ridicule.

The community’s redress of the offense provides a mechanism for the individual to rejoin the community, as well. If the offender feels the weight of the community’s judgment and properly responds with remorse and improved behavior, the individual can begin reintegrating into the community. The justice system has worked, “. . .

⁸⁹ B.J. Jones, *Role of Indian Tribal Courts in the Justice System*, in NATIVE AMERICAN TOPIC-SPECIFIC MONOGRAPH SERIES, at 1, 12 (Nat’l Center on Child Abuse and Neglect, Native American Topic-Specific Monograph Series Ser. No. 45566425, 2000), available at <http://www.icctc.org/Tribal%20Courts.pdf>.

⁹⁰ Tso, *supra* note 9, at 229.

⁹¹ Melton, *supra* note 10, at 128.

⁹² Kevin K. Washburn, *The Federal Criminal Justice System in Indian Country and the Legacy of Colonialism*, 52 FED LAW. 40, 46 (Mar.-Apr. 2005).

⁹³ Porter, *supra* note 16, at 254.

as the good is accomplished, so too is the full restoration of the individual.”⁹⁴ The court procedure, judgments, and remedies reflect traditional values and energize the community to take responsibility for the discipline of the individual to restore him to the community.

C. The Application of Fundamental Law to the Community

Traditional tribal courts share access to and use of the fundamental law with tribal communities. Fundamental law pervades every aspect of tribal life. In general, tribal communities may be described as “network[s] of complexly- interrelated groups.”⁹⁵ Fundamental law is “interwoven [into the] political, social and economic spheres of . . . [the] communities.”⁹⁶ The American legal system requires that an injury be sustained to trigger the adversarial process. Conversely, traditional tribal courts address the injury by examining the past relationships of the parties.⁹⁷ Fundamental law is used in jurisprudence as a way to both resolve the dispute and inform the community to prevent future injury.

Indigenous jurisprudence and traditional dispute resolution methods ensure that the fundamental law is perpetuated to sustain the community. If the fundamental law and traditional methods were to “disintegrate, indigenous values lose their persuasive force, and tribal courts are left with the same relatively ineffective, deterrent weapons as state courts, economic penalties and incarceration.”⁹⁸ The traditional tribal court dispute resolution process frequently happens more efficiently and economically than in Western style court systems.⁹⁹ This is despite the fact that tribal courts are often underfunded and “lack up to date and efficient legal resources.”¹⁰⁰ The broad application of fundamental law to the entire community, the tribal court included, supports a standard of success in traditional tribal courts for transmission of fundamental law.

⁹⁴ Vicenti, *supra* note 23, at 134.

⁹⁵ Barsh, *supra* note 43, at 76.

⁹⁶ Elizabeth Ann Kronk, *American Indian Tribal Courts as Models for Incorporating Customary Law*, 3 J. OF COURT INNOVATION 231, 234 (Winter 2010).

⁹⁷ Mirsky, *supra* note 87, at 4.

⁹⁸ Barsh, *supra* note 43, at 85.

⁹⁹ Kronk, *supra* note 96, at 235.

¹⁰⁰ Pommersheim, *supra* note 20, at 454.

VI. Challenges, Solutions and Opportunities

A traditional tribal court represents the effort of the tribal sovereign nation to link its right to self-government to the fundamental law that carries force within the community. Setting aside the history lesson that would be useful in explaining why some tribes elect to conduct Western style courts, this part focuses on the challenges tribes face in crafting a traditional justice system.

The work required to craft traditional justice systems that apply fundamental law is significant. It must be done with the input of the community because “indigenous groups must define for themselves what traditional law is.”¹⁰¹ Three significant challenges arise related to: the tribal people themselves; the lack of judge training; and the use of native language.

A. Challenges

a. Pushback from the Tribal Community Members

Western style courts focus on the rights of the individual. As already discussed, traditional tribal courts focus on the individual as part of the community. It follows that tribal legal analysis likely begins with an acknowledgement of the relationships between the disputing parties. Within the context of the tribal community, there are expectations associated with those relationships, such as marriage, clan or society membership, and age differences (i.e. elderly, juvenile). This tribal interrelationship factor is what “can conflict with the canon of individual equality before the law.”¹⁰²

As the value placed on “vindication of individual rights” grows among tribal people, tribal people themselves may resist the use of fundamental law in traditional tribal courts.¹⁰³ A tribal court might be seen as an ineffective and illegitimate component of a tribe’s self-government because “the people [no longer] recognize it as emanating from their own value system and resist it.”¹⁰⁴ They begin to view the courts as “far below recognized state and federal standards.”¹⁰⁵

¹⁰¹ Zuni Cruz, *supra* note 54, at unnumbered paragraph 19.

¹⁰² Barsh, *supra* note 43, at 76.

¹⁰³ Porter, *supra* note 16, 274.

¹⁰⁴ Zuni Cruz, *supra* note 54, at unnumbered paragraph 4.

¹⁰⁵ Pommersheim, *supra* note 81, at 60.

As reservation crime rates have risen, so have the criminal case loads in tribal courts. Tribal governments nationally have acquired new powers and exercised inherent sovereign powers at a rate that has far outpaced tribally designed systems of “appropriate checks and balances.”¹⁰⁶ These modern issues reinforce the ideas that traditional tribal court models are overburdened and ineffective and that the use of fundamental law hinders appropriate “separation of powers . . . due process . . . [and] enforcement of judgments.”¹⁰⁷ As a result, Tribal governments are forced to balance fundamental law and foreign legal ideals in order “to resolve the tension between conservation and innovation” and to create a justice system responsive to a community’s changing needs.¹⁰⁸

Many tribal governments have already incorporated their fundamental law into their written codes, jurisprudence and procedures of their traditional tribal courts. They have done so because they see the “traditional values and principles” contained in the fundamental law as a “life way” that protects the tribal people today and guarantees perpetuation of the traditions.¹⁰⁹

Tribal codes may follow fundamental law, which is not always defined. A traditional justice system requires that the judges and the parties have “some knowledge of the practices and customs of the tribe to understand” the law and order of the tribal court.¹¹⁰ Similarly to the modernist tribal community members, traditionalists in the community also push back against incorporating fundamental law into the court system because they find this invasive of the traditional hierarchy. There are aspects of the fundamental law that people outside the community simply cannot know. This concern arises when traditional dispute resolution judgments and jurisprudence are based entirely on fundamental law.

Facing this tension, some tribes have adopted a Western style justice system. This may strengthen “their ability to redress disputes that arise within their territories”¹¹¹ and to appear more legitimate and

¹⁰⁶ Barsh, *supra* note 41, at 86.

¹⁰⁷ Pommersheim, *supra* note 81, at 60.

¹⁰⁸ Valencia-Weber, *supra* note 61, at 257.

¹⁰⁹ Kenneth Bobroff, *Din Bi Beenahaz’ anii: Codifying Indigenous Consuetudinary Law in the 21st Century*, 5 N.M. TRIBAL L.J. 4, available at http://lawschool.unm.edu/tlj/tribal-law-journal/articles/volume_5/_dine_bi_beenahazaanii_codifying_indigenous_consuetudinary_law_in_the_21st_century/index.php.

¹¹⁰ Jones, *supra* note 89, at 12.

¹¹¹ Porter, *supra* note 16, at 238.

“become more sovereign,”¹¹² but at what cost? Tribal adoption of foreign laws often constricts fundamental law and threatens tribal distinctiveness. For example, the Crow Tribe adopted a rule of criminal procedure that is like the Miranda warnings. This authorized offenders to keep silent about a criminal issue, clearly undermining the traditional value of talking things out. Similarly, the Seneca Nation adopted a Western style dispute resolution system “despite almost 500 years of tradition by which disputes were resolved informally and through peacemaking.”¹¹³ The Seneca Nation self-imposed this system without pressure or coercion from state or federal entities to satisfy “their desire to have a form of government in which they could hold their leaders accountable.”¹¹⁴ The Crow Tribe and the Seneca Nation have internally adopted Western style justice models that satisfy the changing community needs, but constrict the tribe’s fundamental law.

In order to conform to external law, such as the Tribal Law and Order Act of 2010 (TLOA), tribes have been forced by necessity to address criminal cases in ways that constrict traditional justice systems.¹¹⁵ Under TLOA, tribal courts may not increase their sentencing time and fine amounts without adopting some federal provisions that protect the individual rights of the offenders.¹¹⁶ These include incorporating the right to licensed counsel and judges and written criminal codes and procedures made available to the public.¹¹⁷ On the one hand, TLOA can be viewed as the federal government’s confidence in tribal courts to assume greater responsibility over criminal cases and expand “their punishment authority.”¹¹⁸ On the other hand, TLOA serves as an example of the challenges tribes face to grow and evolve as sovereigns while balancing modern issues and foreign law.

Codification of fundamental law, publication of the codes and procedure, and even written opinions may provide some benefit of precedent and predictability. However, these are not customary practices of all traditional tribal courts. Even if they were, there are parts of customary law that people outside of the community cannot know pursuant to tribal hierarchies. The tension tribal courts encounter

¹¹² *Id.*

¹¹³ *Id.* at 251.

¹¹⁴ *Id.*

¹¹⁵ 25 U.S.C. § 1302 et seq. (2010).

¹¹⁶ *Id.* at § 1302 (c)(1)-(5).

¹¹⁷ *See id.*

¹¹⁸ Kronk, *supra* note 96, at 241-242.

today is how to “remain relevant.”¹¹⁹ In the face of changing social and political norms of a tribal community, tribes strive to maintain the fundamental law and the “traditional aspects of their systems,”¹²⁰ in order to guarantee the future of tribal people.

b. Judges and Indigenous Jurisprudence

Strong tribal judiciaries represent the strength and the capacity of the tribal sovereign to self-govern.¹²¹ Traditional tribal courts along the spectrum are inconsistent in their methods of fulfilling a tribe’s goal of applying fundamental law to cases and “the ways tribal judges explain what they are doing in a specific case.”¹²²

Tribal court judges struggle to imitate traditional jurisprudence styles for two reasons. First, all things are not equal in the transmission of traditional or cultural values. Different aspects of the fundamental law, especially the aspects tied to spirituality, are communicated only to certain individuals and may not include tribal judges. Yet, the community depends on the proper interpretation of the tradition in the tribal court. Secondly, judges may be “reluctant to assume the competence to declare indigenous jurisprudence” because they have not been fully educated or do not fully understand the fundamental law itself, let alone its proper application.

Traditional tribal members have a way of knowing fundamental law and a way of using that law to engage the world. They also use that law to define justice for themselves and the community. Judges rely on precedent and general rules in deciding cases. A tribal judge is handicapped in declaring indigenous jurisprudence when he is not from that community, when the law is not written, decisions are not published, and teaching is limited. In that case, tribal judges must seek out knowledge, but must also “be prepared to re-learn legal reasoning from a local indigenous perspective.”¹²³ Judges must do this to meet the needs of the community they serve, even if there is no clear path to do so.

¹¹⁹ Zuni, *supra* note 25, at 19.

¹²⁰ *Id.* at 20.

¹²¹ *See* Porter, *supra* note 16, at 297.

¹²² Barsh, *supra* note 43, at 84.

¹²³ *Id.* at 89.

c. Use of Native Language

Finally, fundamental law “is oral and primarily preserved in the native language.”¹²⁴ Language is the primary vehicle by which fundamental law is traditionally transmitted in a tribal community.¹²⁵ The loss of tribal language poses the greatest challenge to traditional tribal courts. The threat is that the understanding of the law and its application will be lost, or worse, that it will mislead.¹²⁶ English can be useful in general interaction between the parties and with the judge, however, when used in the discourse of the fundamental law, for example in an elder’s explanation of how something should be, English is an “inadequate vessel to express certain traditional values and concepts embedded in tribal culture.”¹²⁷

A tribe’s language accurately transmits the intent of the fundamental law to legal discourse within the respective language. The translation of the fundamental law into English “involves taking the law . . . removing it from the associations of its origin” and applying it to a modern circumstance.¹²⁸ In doing so, the fundamental law is contextualized in modernity, given new associations that potentially change the application of the law in a way that diminishes tribal distinctiveness, misleads, or is inappropriate. The loss of native languages poses a significant challenge to tribal courts’ usage and maintenance of fundamental law.

Along the spectrum, sovereigns are trying to balance fundamental law and Western, foreign law. Their efforts are critical to developing tribally distinctive judicial systems that are both responsive to the communities’ needs and encourage usage and development of fundamental law.

B. Solutions

Some innovative solutions to overcoming the challenges facing traditional tribal courts include the construction of indigenous justice systems, codification of fundamental law, and judge training.

¹²⁴ Zuni, *supra* note 25, at 25.

¹²⁵ *See id.*

¹²⁶ *See* Pommersheim, *supra* note 20, at 426.

¹²⁷ *Id.* at 425.

¹²⁸ *Id.* at 436.

a. Indigenous Justice Design

A tribal legal construct requires the inclusion of tribal members in the development process. The benefit of this is two-fold. First, the fundamental law originates from the community itself. Inclusion of tribal membership into a court's design lends "contextual legitimacy" to the effort. It is the only way the "social, historical and cultural setting of the court" will be fully examined.¹²⁹ Second, involvement of the tribal members also ensures that a court is evaluated by the tribal community. Evaluation conducted at the tribal level is the only "fruitful framework" because a tribal court is crafted by the sovereign. It is part of a community and plays a significant role in sustaining the culture of a community. If tribal members do not use a court, the application and transmission of fundamental law will end. A tribal court is part of a broader system of justice that includes tribal law enforcement and traditional security forces.¹³⁰ Inclusion of tribal members in the development and evaluation of a traditional tribal court ensures the court reflects traditional language and teachings and serves as a conduit for gaining "their greatest trust in their own governments."¹³¹

b. Codification of Fundamental Law

Another solution is for a tribe to authorize codification of high level values, principles, or elements of their fundamental law. Tribal judges and other court practitioners could then use the codified fundamental law to guide jurisprudence, judgments, and aftercare plans.

For example, if an offender's reintegration to the community is a value in fundamental law, a judge who knows this will be more deliberate in deciding sentences and aftercare plans. Similarly, a court clerk or tribal staff who places an offender in jail will consider this value and incarcerate an offender closer to home to facilitate family visitation. In this way, the fundamental law becomes part of the legal system and alleviates the threat of exposing sacred knowledge.

¹²⁹ Pommersheim, *supra* note 81, at 59.

¹³⁰ In many Pueblo communities, war captains, tribal sheriff, sheriff aides or similar traditional security forces are appointed annually through traditional systems to serve and protect the tribal community.

¹³¹ Barsh, *supra* note 43, at 88.

In addition, courts can develop unique rules of procedure.¹³² These may include rules of standing, rules for testimony in the native language, or rules for testimony by elders and family members. High level values can also be incorporated into law through tribally adopted statutes or ordinances. This is accomplished by a tribe “affirmatively deciding that incorporation of customary law is desirable and encourage its use,”¹³³ in order to lay a foundation of fundamental law tenets that define justice for the tribal community.

c. Judge Training

The judiciary is critical to the fundamental law becoming part of the legal system. Many traditional tribal courts do not publish opinions. If a judge is authorized to know elements of the fundamental law, values, or rules, she may openly use them in decision making and even publish opinions that include the fundamental law.¹³⁴ However, this requires “strengthening of the [entire] tribal court legal community.”¹³⁵ This includes training to develop understanding of the legal reasoning that is appropriate for the community.¹³⁶ Training must include lay advocates, attorneys, and judges. Discussions of the power of language must explore how the fundamental law is transmitted in the jurisprudence of a court,¹³⁷ what is permissible to say and “what ought to be encouraged in court arguments.”¹³⁸ This effort develops an “interpretive community” that will be sensitive to the use of fundamental law and refine its application over time.¹³⁹

Innovative solutions to the challenges faced by tribal courts include the construction of indigenous jurisprudence through the identification of high level values from the fundamental law that can be codified and used as training tools for the legal community.

¹³² Zuni, *supra* note 25, at 26.

¹³³ *Id.* at 27.

¹³⁴ Valencia-Weber, *supra* note 61, at 249.

¹³⁵ Pommersheim, *supra* note 81, at 63.

¹³⁶ *Id.* at 67.

¹³⁷ Pommersheim, *supra* note 20, at 429.

¹³⁸ Pommersheim, *supra* note 81, at 67.

¹³⁹ *Id.*

C. Opportunities

The design of a justice system and the use of fundamental law create unique opportunities for traditional tribal courts to influence other court systems. Tribal courts serve as both justice laboratories and learning labs for the development of justice models. Carey Vicenti, Chief Justice Emeritus of the Jicarilla Apache Nation, characterized tribal courts as “small laboratories that can test new directions for American jurisprudence.”¹⁴⁰ Tribal courts have been credited as having the “creative capacity [to be] the laboratories for new concepts that can benefit the majority judicial system.”¹⁴¹ Tribal courts test dispute resolution concepts, legal system designs, and the use of practitioner mixes (i.e. lay advocates, non-law trained judges, elder boards).

Tribal courts are also learning labs that establish fundamental law tenets in a court and transfer that knowledge to a community through judge made law, alternative forums, tribal legislation, and tribal ordinances, which reenergizes tribal members’ use of the fundamental law in a community.

Ultimately, the words and actions of a tribe and its institutions will determine the survival and continuity of fundamental law in a community. Despite the significant challenges tribal courts face, innovative solutions could mean that traditional tribal courts now have the opportunity to expand their influence to the justice models of other sovereigns, including other tribes, and federal and state courts.

Conclusion

Indigenous communities have been sustained through the application of fundamental law. Traditional tribal courts express the sovereign tribal nations’ definitions of justice, and are crafted to reflect the values of the tribal nations in a way that protects and sustains tribal communities and their customary life ways. The research presented here provides a framework for understanding traditional tribal justice systems through an examination of literature from scholars in the field. The research presented describes a spectrum of traditional aspects within tribal courts, and analyzes the impact that changing social dynamics have had on the tribal court construct. Traditional tribal

¹⁴⁰ Vicenti, *supra* note 23, at 141.

¹⁴¹ Valencia-Weber, *supra* note 61, at 261.

courts have the opportunity to craft indigenous jurisprudence that serves as a model for the justice systems of other sovereigns.