DIGITIZING TRIBAL LAW: HOW CODIFICATION PROJECTS SUCH AS *TRIBAL LAW ONLINE* COULD GIVE NEW RISE TO AMERICAN INDIAN SOVEREIGNTY

"Well, neither could . . . anybody, right? I mean if anybody could find it, you could. It's because it's not published anywhere, right?"

—Chief Justice John Roberts, in response to being told by an attorney arguing for the Cheyenne River Sioux Tribe that his office had been unable to discover applicable Cheyenne River Sioux precedent.[1]

INTRODUCTION

"Today, in the United States, we have three types of sovereign entities–the Federal government, the States, and the Indian tribes."[2] The oft-forgotten American Indian nations have inherent sovereignty to govern themselves, by virtue of their existing as cultural and political entities prior to the founding of the United States.[3] Federally recognized American Indian nations thus have intrinsic authority and jurisdiction over their internal

1. Transcript of Oral Argument at 3–32, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008), http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-411.pdf.

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

3. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding that American Indian Nations are not subject to the Constitution of the United States because they are a "separate people . . . thus far not brought under the laws of the Union, or of the State within whose limits they resided") (quoting United States v. Kagama, 118 U.S. 375, 381 (1886)); Worcester v. Georgia, 31 U.S. (1 Pet.) 515, 557 (1832) (classifying American Indian Nations as explicit sovereigns, and holding that the "treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states").

affairs; tribal[4] governments perform executive, judicial, and legislative functions.[5]

Despite this fact, most of the federally recognized tribes in the United States have not formally published or codified their laws.[6] What *is* codified is usually out of date and almost never digitized or published in an online forum.[7] The online databases that *do* contain tribal laws are "incomplete and are often plagued by broken links, outdated laws, unsearchable documents, and unreadable images."[8] Accessing these laws and applying them in tribal courts is often very difficult, even for attorneys working for American Indian nations with access to whatever databases exist.[9]

The Pine Ridge Reservation, located in South Dakota, provides an all-too-typical example. The Reservation, which is home to the Oglala Sioux Tribe, last formally codified its laws in 1996.[10] Thus, hundreds of enacted ordinances and resolutions that have been passed by the Oglala Sioux Tribal Council have not been included in this codification, which is thus decades out of date.[11] While there is an online database that has collected the ordinances and resolutions passed by the Oglala Sioux Tribal Council since

4. Throughout this Note, I have chosen to use the term "tribal law" to refer generally to the laws created by American Indian Nations. This is for two reasons. First, the Center for Empirical Research in the Law has chosen the moniker "Tribal Law Online" to refer to its codification and publication project. *See* Interview with Steve Gunn, Attorney for the Oglala Sioux Tribe and Associate Professor at the Washington University School of Law, in Saint Louis, Mo. (Jan. 18, 2016); discussion *infra* Introduction. Second, the people of the Oglala Sioux Tribe have chosen to use the term "tribe" to refer to themselves. *See* CONSTITUTION AND BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION Jan. 15, 1936. I personally prefer using the term "nation" instead, because I believe it better encapsulates the sovereign status of American Indian nations. I also think that the word "tribe" can have some pejorative connotations. *See also* AKIM D. REINHARDT, RULING PINE RIDGE: OGLALA LAKOTA POLITICS FROM THE IRA TO WOUNDED KNEE (PLAINS HISTORIES) xxv–xxvi (2009) (arguing that the history of the term "tribe" makes its application to American Indian Nations problematic, but respecting the choices of the American Indian nations that have decided to use the term).

5. U.S. Dep't of the Interior, *Frequently Asked Questions*, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/FAQs/index.htm (last visited Oct. 28, 2016).

6. *See* Bonnie Shucha, *"Whatever Tribal Precedent There May Be": The (Un)availability of Tribal Law*, 106 LAW LIBR. J. 199 (2014) (describing the inaccessibility of the law of American Indian nations, due in part to the lack of formal publishing or codification); The Oglala Sioux Tribe, Application of the Oglala Sioux Tribe for the Bush Foundation Nation Building Grant at 3–4 (July 1, 2015) (on file with author) (stating that "[l]ocating authoritative sources of tribal constitutions, codes, and court decisions is extremely difficult," due in part to the lack of formal publishing).

7. *See* Shucha, *supra* note 6 (describing the lack of online databases systematically publishing the laws of American Indian nations); Application of the Oglala Sioux Tribe for the Bush Foundation Nation Building Grant, *supra* note 6, at 3–4 ("Most tribes have not digitized their laws . . . . they have not integrated the laws, ordinances, and resolutions subsequently adopted into an updated code.").

8. *See* Application of the Oglala Sioux Tribe, *supra* note 6, at 3.

9. *See* Interview with Steve Gunn, *supra* note 4.

10. *Id.*; *see also* Application of the Oglala Sioux Tribe, *supra* note 6, at 4.

11. *See* Interview with Steve Gunn, *supra* note 4; Application of the Oglala Sioux Tribe, *supra* note 6, at 4.

then, this database is organized solely by date and ordinance number and consists wholly of PDF images that cannot be word-searched.[12] Only individuals with permission from the Oglala Sioux Tribe have access to this database,[13] and there is no reporter systematically publishing the decisions made by Oglala courts online.[14]

Any lawyer wishing to practice law in Pine Ridge has an immensely difficult time tracking down the law. Imagine that a client has a civil dispute with either the Oglala Sioux Tribe itself or one of its members. To discover applicable law, the lawyer will need to chase down a copy of the Law and Order Code of the Oglala Sioux Tribe. However, that law is nearly two decades out of date. To adequately search for applicable ordinances and resolutions, the lawyer will have to search through the Tribe's online database to see if there is any applicable law that has modified the Law and Order Code. Keep in mind that taking this step is predicated on the lawyer having access to the database, which can only be obtained with the Tribe's permission. There is no way to chase down case law short of visiting the Oglala courts and leafing through their slip opinions one by one.[15]

Also understand that it is entirely possible (even likely) that the lawyer will find two separate laws that overlap or conflict with one another.[16] This is because the Tribal Council and its attorneys have the same difficulties as the lawyer in discovering existing tribal law, and may pass a new law without being able to reasonably locate laws that may already apply.[17]

The extreme unavailability of tribal law on the Pine Ridge Reservation

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12. *See* Interview with Steve Gunn, *supra* note 4 (discussing an online database maintained by the Oglala Sioux Tribe that cannot be accessed without the Oglala Sioux Tribe's permission). The PDFs on the Oglala Sioux Tribe's database are images that have not been converted into text using optical character recognition technology. *Id.* A version of the Law and Order Code is also available with some amendments at the National Indian Law Library ("NILL") website. *See* The Oglala Sioux Tribe, *Oglala Sioux Tribe: Law and Order Code*, NATIONAL INDIAN LAW LIBRARY, http://www.narf.org/nill/codes/oglala_sioux/index.html (Nov. 2010). However, this code is also very out of date, and the NILL recommends that readers "contact the tribe" for the "official" version of the code. *Id.*

13. *See* Interview with Steve Gunn, *supra* note 4.

14. *Id.* The Oglala Sioux Tribe has a two-tiered court system consisting of trial courts and a Supreme Court that present written opinions, which remain unpublished in a systematic way. *Id.* While the *Indian Law Reporter* does publish a few Oglala court decisions, its coverage is not comprehensive, and the reporter is only available in print form. *Id; see also* The Indian Law Reporter, AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., www.indianlawreporter.org (last visited Oct. 28, 2016).

15. Excepting the occasional appellate opinion that may be published in the *Indian Law Reporter*. *See* The Indian Law Reporter, *supra* note 14.

16. While the general rule is that newer laws supersede older laws, there have been instances in which Oglala Courts, similarly finding trouble with discovering available precedent, have cited superseded Oglala law to support their opinions. *See* Interview with Steve Gunn, *supra* note 4.

17. *Id.*

and the many reservations like it has made it prohibitively expensive and time-intensive to practice law and represent parties in Oglala courts. It has also made it difficult to attract business to the Reservation, since businesses worry that discovering applicable law that could apply to future disputes may be very difficult and costly.[18] Perhaps worst of all, the state of the law in Indian nations has made it more difficult for these nations to resolve the issues that they face.[19]

Luckily, the digital age may provide ways that could help American Indian nations overcome these problems. The Center for Empirical Research in the Law (CERL), an institution operating at the Washington University School of Law, partnered with the Oglala Sioux Tribe in the summer of 2015 to "bring together all the laws and court decisions of the Oglala Sioux Tribe and make them easily accessible and highly visible to all Tribal members and to the public on a searchable online database," which they have called Tribal Law Online.[20] CERL aims to bring this database up to date and make it available in 2017.[21] The Oglala Sioux Tribe will formally adopt the codification when it has been completed, and will be able to supplement and add to it as new laws are passed.[22]

Tribal Law Online could help promote the self-governance of the Oglala Sioux Tribe in many obvious ways. For one, it will increase the ability of Oglala citizens to see and evaluate their current laws, and make it easier for them to communicate their concerns and needs to the Oglala Sioux Tribal Council.[23] It will also make it much easier to practice law on the Reservation, and help the Oglala Sioux Courts when issuing new precedent.[24] It will also likely make doing business on the Reservation a far more attractive prospect.[25]

However, there are even *greater* possible benefits to the sovereignty of American Indian nations that this project could serve, and some potential pitfalls that need to be avoided. This Note focuses on less-visible but potentially critical ways that Tribal Law Online and undertakings like it could advance American Indian sovereignty in the United States. It also

18. *Id.*
19. *See* discussion *infra* Part I.
20. *See* Application of the Oglala Sioux Tribe, *supra* note 6, at 3. This project is being funded by a grant from the Bush Foundation and is currently under way. *See* Interview with Steve Gunn, *supra* note 4.
21. *See* Application of the Oglala Sioux Tribe, *supra* note 6, at 12.
22. *See id.* at 12.
23. *See id.* at 4.
24. *See id.* at 5.
25. *Id.* at 4.

addresses potential criticisms.

Part I of this Note will focus on the ways that Tribal Law Online could be beneficial to American Indian sovereignty. It discusses how codification and digitization will improve Supreme Court recognition of American Indian sovereignty, benefit American Indian nations economically, help them obtain more favorable legislation from Congress, and aid American Indians in shaping their governments to more accurately reflect their cultures. Part II will address potential criticisms of codification and digitization, including fears that allowing nonmembers to codify Oglala law could cause the laws to less accurately reflect Oglala interests, that codification itself could involve the imposition of Anglo-American jurisprudential norms, and that codification could harm existing Oglala customary law. This Note will ultimately conclude that Tribal Law Online and projects like it could potentially advance American Indian sovereignty to a degree heretofore unseen since the founding of the United States.

I. HOW TRIBAL LAW ONLINE COULD AID THE CAUSE OF AMERICAN INDIAN SOVEREIGNTY

There are numerous ways that Tribal Law Online could aid the cause of American Indian sovereignty in the United States should other nations join in on it or other similar projects. This Part will focus on just a few of those potential benefits, including how it could (A) increase Supreme Court respect for American Indian sovereignty, (B) benefit the economies of American Indian nations, (C) gain increased trust from Congress and obtain increasingly favorable applications of legislative power, and (D) help the culture of individual Nations play a larger role in shaping tribal laws and government.

A. Improving Supreme Court Recognition of American Indian Sovereignty

It is no secret that American Indian interests have been disfavored by the U.S. Supreme Court in recent years.[26] Congress's respect for American Indian sovereignty during the "Self Determination Era"[27] has been

26. American Indian interests lost in 77% of the cases heard before the Supreme Court between 1986 and 2000. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280–81 (2001).

27. The period of Congressional policy towards American Indian Nations following 1968 has been generally termed the "Self-Determination Era," reflecting Congress's decision to promote tribal self-government in contrast to previous policies. ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY & SARAH KRAKOFF, AMERICAN INDIAN LAW: CASES AND COMMENTARY 152 (2d ed. 2010).

frequently frustrated by the Supreme Court, which has evinced a willingness to abrogate American Indian sovereignty since 1986.[28] One line of cases clearly displays the Supreme Court's inclination towards abrogating protections that previous courts extended to American Indian nations: the *Montana* cases.[29] In this subpart, this Note will examine modern Supreme Court *Montana* decisions and discuss how they show serious distrust for American Indian legal institutions. It will then explain how the Tribal Law Online project could help to increase the respect of the Supreme Court for these institutions.

The *Montana* line of cases concern the civil jurisdiction American Indian nations have over non-members for actions occurring within reservation borders.[30] *Montana* held that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[31] The Court also held that a tribe could extend civil jurisdiction over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements" and over "non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[32] The Supreme Court thus determined that "absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a

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It has been characterized by legislation generally promoting tribal self-government, such as the Indian Child Welfare Act and the Indian Self-Determination and Education Assistance Act. *Id.* at 156–57.

28. American Indian interests won 58% of the cases heard by the Supreme Court between 1969 and 1986. *See* Getches, *supra* note 26, at 280–81.

29. Named for *Montana v. United States*, 450 U.S. 544 (1981), which determined that the Crow did not have authority to regulate fishing and hunting by nonmembers of the Nation on trust land held by nonmembers within the Reservation.

30. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (applying the *Montana* test and determining that the Navajo did not have the authority to collect a hotel occupancy tax on a hotel run by a nonmember on nonmember owned fee land on the Reservation); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (applying the *Montana* test and determining that American Indian courts on the Ft. Berthold reservation had no civil authority over a tort that occurred on a North Dakota owned right-of-way running through the Reservation).

31. *Montana*, 450 U.S. at 565. "Fee land" refers to land acquired by non-Indian settlers because of the General Allotment Act and the Burke Act. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10–11 (1995). Between the passage of these Acts and the Indian Reorganization Act, which formally ended the allotment practice, approximately 27 million acres of Reservation land had been given to non-Indians. *Id.* at 12. A large majority of this land remains possessed by non-Indians, meaning that much of the land formally within the borders of American Indian reservations are not held by American Indian parties. *Id.* at 17–18. *Montana* established that fee land so held is treated differently for the purposes of civil jurisdiction. *See Montana*, 450 U.S. at 565.

32. *Montana*, 450 U.S. at 565–66.

reservation," subject to the two above exceptions.[33]

Nevada v. Hicks drastically departed from previous *Montana* cases by using the *Montana* test to invalidate the jurisdiction of the Fallon Paiute-Shoshone Nation to adjudicate a tort that originated on land owned by a member.[34] In that case, a member of the Fallon Paiute-Shoshone Nation claimed that two Nevada state officials, while executing a search warrant, had damaged a mounted sheep head that he kept within his home.[35] He sued the two state officials in the Paiute-Shoshone Court for "trespass to land and chattels, abuse of process, and violation of civil rights . . . each remediable under . . . 42 U.S.C. § 1983."[36] The defendants sought a declaratory judgment in a Federal District Court that the tribal court lacked the jurisdiction necessary to hear the tort claims.[37] The Supreme Court unanimously agreed that the tribal court lacked jurisdiction to adjudicate the claim.[38]

Justice Scalia, writing for the majority, held that the fact that Floyd Hicks' home was "on tribe-owned land within the reservation" did "[n]ot necessarily" provide the Tribe with the right to adjudicate the dispute.[39] He determined that the possessory status of the land was "only one factor to consider" when determining whether an American Indian Nation had civil jurisdiction over an issue involving non-members.[40] Instead, Scalia wrote that American Indian nations retained civil jurisdiction over non-members only "to the extent 'necessary to protect tribal self-government or to control internal relations.'"[41] He then ultimately decided that the "authority to regulate state officers in executing process relating to the violation, off reservation, of state laws" was not essential to those interests, and so denied jurisdiction.[42]

Justice Scalia's opinion in this case has boggled numerous legal scholars because it diverges so strongly from other *Montana* cases holding that the status of the land was dispositive[43] over whether an American Indian Nation had civil jurisdiction over non-members.[44] Multiple precedents stood

33. *Strate*, 520 U.S. at 446.
34. *See* Nevada v. Hicks, 533 U.S. 353 (2001).
35. *Id.* at 356–57.
36. *Id.*
37. *Id.* at 357.
38. *Id.* at 369.
39. *Id.* at 359.
40. *Id.* at 360.
41. *Id.* at 359 (quoting Montana v. United States, 450 U.S.544, 564–65 (1981)).
42. *Id.* at 364.
43. Subject to the above-mentioned *Montana* exceptions. *See Montana*, 450 U.S. at 565–66.
44. *See* Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 94 (2003)

against this argument. *Strate v. A-1 Contractors*, decided four years prior, framed the *Montana* test as determining whether American Indian nations have civil authority to regulate "the conduct of nonmembers on non-Indian land within a reservation."[45] It tacitly accepted the idea that the *Montana* test applied only to non-Indian land within a Reservation. In *Atkinson Trading Co. v. Shirley*, which was decided less than a month before *Hicks*, the Court also emphasized the character of the land, holding that "[a]n Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land."[46]

Perhaps most condemning to Justice Scalia's interpretation of the case law is *Merrion v. Jicarilla Apache Tribe*. That case concerned a severance tax that the Jicarilla Apache Tribe levied on oil and gas extracted from Jicarilla lands.[47] A group of oil companies that had been leasing Jicarilla lands to extract oil and gas sued to enjoin the tax as exceeding the civil authority of the Jicarilla Apache Tribe over nonmembers.[48] The Supreme Court ruled that the imposition of the tax was within the power of the Tribe, holding that its right to tax did not derive "from its power to exclude . . . persons from tribal lands" because that proposition contradicted "the conception that Indian tribes are domestic, dependent nations, as well as the common understanding that sovereign taxing power is a tool for raising revenue necessary to cover the costs of the government."[49] What makes this

(characterizing Justice Scalia's opinion as abandoning *Montana* doctrine regarding the status of land); Melanie Reed, Note, *Native American Sovereignty Meets a Bend in the Road: Difficulties in* Nevada v. Hicks, 2002 BYU L. REV. 137, 162 (pointing out that "case law suggests that the majority in *Hicks* mischaracterized *Montana* when it dismissed land ownership as only one factor in the analysis of a tribe's jurisdiction"); Alex Tallchief Skibine, *Making Sense out of* Nevada v. Hicks*: A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 356 (2001) (stating that "the *Montana* Court was very explicit" in treating "Indian land differently from non-Indian lands for the purpose of tribal jurisdiction over nonmembers"); *cf.* Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 407 (2003) (castigating *Hicks* and its "sub-rosa abandonment of longstanding presumptions in law that sustained tribal jurisdiction" as an "intentional . . . judicial microbe that endangers the cultural and political life of American Indians"). It is worth noting, however, that the Supreme Court's view of tribal jurisdiction over nonmembers may be changing. A recent Fifth Circuit case that accepted tribal jurisdiction over a tort claim against a nonmember was affirmed by the Supreme Court. *See* Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014), *affirmed by an equally divided court*, 136 S. Ct. 2159 (2016). That said, *Dolgencorp* was not officially decided under *Hicks*. *Id.* at 173–74. Instead of determining that the Mississippi Band of Choctaw Indians had jurisdiction based on some fact distinguishing it from *Hicks*, the Fifth Circuit found jurisdiction on the basis of the *Montana* "commercial relationship" exception. *Id*. he Supreme Court has not touched on the *Hicks* ruling since making its decision.

45. *See* Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997).
46. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 (2001).
47. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 135–36 (1982).
48. *Id.* at 136.
49. *Id.* at 137, 141. Another aspect of Justice Scalia's opinion that has been significantly criticized

case so damaging to Justice Scalia's interpretation of case law in *Hicks* is that the majority opinion in *Merrion*, despite being decided after *Montana*,[50] makes no mention of the *Montana* test at all. This omission is telling, because both cases concern the civil authority of American Indian nations over non-members. The Supreme Court has since read the *Merrion* decision as applying only when American Indian nations exercise civil authority over non-members for actions occurring on Indian-owned land within a reservation.[51] *Hicks* has been interpreted by many scholars as a significant departure from previous case law on this subject.[52]

Something must have motivated the Supreme Court to deviate from precedent in *Hicks*. Legal scholars have offered multiple explanations.[53] Justice Souter articulated at least one motivation that influenced a portion of the court in his concurring opinion. Towards the end of his opinion (in which he is joined by Justices Thomas and Kennedy), Souter states:

> "Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts 'mirror American courts' and 'are guided by written codes, rules, procedures, and guidelines,' tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to

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is his rejection of "tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude.'" Nevada v. Hicks, 533 U.S. 353, 359 (2001) (quoting *Strate*, 520 U.S. at 456). This has been interpreted by many scholars as contradicting Justice Marshall's opinion in *Merrion*. *See* Skibine, *supra* note 44, at 355–56 ("The Court's biggest oversight is that it misconceived the right to exclude, treating it as an ordinary landowner's right to exclude instead of a sovereign right reserved in treaties."). In many ways, this narrowed view of tribal sovereignty is more worrying than the Court's broadening of *Montana*. However, this Note is only concerned with the latter issue, as it more explicitly exposes the Court's divergence from previous case law.

50. *Montana* was decided in 1981. Montana v. United States, 450 U.S. 544 (1981). *Merrion* was decided in 1982. *Merrion*, 455 U.S. 130.

51. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 (2001) (distinguishing *Merrion* from the case heard before the Court because *Merrion* concerned taxation over trust land rather than fee land). Again, *Atkinson* was decided less than one month before *Hicks*. *Id.*

52. *See* Braveman, *supra* note 44; Reed, *supra* note 44; Skibine, *supra* note 44.

53. *See* Carole Goldberg, *In Theory, In Practice: Judging State Jurisdiction in Indian Country*, 81 U. COLO. L. REV. 1027, 1027 (2010) (arguing that *Hicks* was decided because the Supreme Court believed that "federal courts and other decision-makers seem to favor state over tribal jurisdiction because state jurisdiction is perceived to be more likely to deliver fair and effective justice"); Skibine, *supra* note 44 (arguing that the Court was primarily concerned with the fact that the Tribal Court was going to adjudicate a dispute over state officials, and that *Hicks* ought to be seen as being applicable only to its facts); *c.f.* Braveman, *supra* note 44, at 95 (pointing out that *Hicks* created a "presumption...against tribal sovereignty over nonmembers, regardless of the status of the land").

> another'. The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law," which would be unusually difficult for an outsider to sort out."[54]

Several themes permeate this excerpt. First, Justice Souter is clearly concerned that nonmembers of the Tribe will be unable to access relevant information about the different customs and norms that drive the tribe's legal system. He is similarly concerned that nonmembers may tacitly assume that the same protections and processes that apply outside of the Reservation apply when they are on American Indian land.[55] The last sentence also expresses a fear that outsiders will not be able to "sort out" the relevant law necessary to adjudicating a dispute.[56]

Justices Thomas and Kennedy joined both the majority Opinion and Justice Souter's concurring Opinion.[57] That means that two Justices currently seated on the Supreme Court have at least partially agreed that lack of transparency in tribal law is a valid reason to deny American Indian courts adjudicatory authority. Several legal scholars have also read Justice Ginsburg's opinion in *Strate* as illustrating the same principles.[58] This may also be a motivating factor behind some of the other more recent Supreme Court decisions abrogating the sovereignty of Indian nations.[59]

Tribal Law Online could help to increase the success of American Indian sovereignty interests before the Supreme Court. Collecting and codifying the laws of the Oglala Sioux Tribe and its court decisions could increase the accessibility of tribal law and invalidate Souter's criticisms. Indeed, should the Tribal Law Online project succeed, the participants' laws will be easier to access than the laws of the separate States via Westlaw, Lexis, or Bloomberg, since access to the Tribal Law Online site will be free. Abrogating this concern altogether could thus be a significant factor in

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54. *See* Nevada v. Hicks, 533 U.S. 353, 384–85 (Souter, J., concurring) (citations omitted) (quoting Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130–31 (1995)); then quoting NAT'L AM. INDIAN COURT JUDGES ASS'N., INDIAN COURTS AND THE FUTURE 43 (1978)).

55. *See id.* at 384 (expressing concern that American Indian Courts do not apply "due process" for the purposes of the Indian Civil Rights Act in the same way that federal courts do for the purposes of the 5th and 14th Amendments).

56. *Id.* at 385.

57. *Id.* at 355 (majority opinion); *id.* at 375 (Souter, J., concurring).

58. *See* Goldberg, *supra* note 53, at 1038 (arguing that "Justice Ginsburg went out of her way to praise the alternative state court forum and to stress the unfairness and unfamiliarity of the tribal court").

59. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208, 211 (1978) (invalidating Indian criminal jurisdiction over nonmembers, even though Congressional precedent "would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction" and regardless of the fact that the Court recognized "that some Indian tribal court systems have become increasingly sophisticated").

obtaining Supreme Court decisions that are friendlier to American Indian sovereignty.

B. Increasing the Economic Prosperity of Indian Nations

It is no secret that American Indian nations comprise some of the most impoverished areas in the United States.[60] The poor economic status of Indian Nations has traditionally been ascribed to "poor land quality, geographic isolation, and inadequate human capital to manage what few assets Indians have."[61] However, recent economic scholarship has shifted focus from these characteristics and begun to attribute poor economic performance to institutions and their not "credibly committing to a consistent rule of law."[62] This is what makes Anderson and Parker argue that Public Law 83-280 ("Public Law 280") ought to be seen as benefiting the Indian Nations it has affected, because it has brought the stability and rule of law of the States into Indian country and has thus increased their economic prosperity.[63]

Sociologist Stephen Cornell looked at the institutions and relative unemployment levels of sixty-seven American Indian nations and concluded that the solution to American Indian poverty involves building "a nation in which businesses can flourish . . . creating an environment in which the governing infrastructure and the legal infrastructure . . . support

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60. *See* Terry L. Anderson & Dominic P. Parker, *Sovereignty, Credible Commitments, and Economic Prosperity on American Indian Reservations*, 51 J.L. & ECON. 641, 641 (2008) (calling Indian Nations "islands of poverty in a sea of wealth").

61. *Id.*

62. *Id.*; *see* Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369, 1395 (2001) (studying countries with histories of colonization, and discovering a correlation between economic success and "institutions that enforced the rule of law and encouraged investment"); Robert J. Barro, *Institutions and Growth, an Introductory Essay*, 1 J. ECON. GROWTH 145, 147 (1996) (pointing out that "[s]everal empirical studies have verified the positive effects on growth and investment from institutions that provide secure property rights"); Robert E. Hall & Charles I. Jones, *Why Do Some Countries Produce So Much More Output per Worker than Others?*, 114 Q.J. ECON. 83, 113–14 (1999) (studying the output of multiple countries and discovering that "[c]ountries produce high levels of output per worker in the long run because they achieve high rates of investment in physical and human capital and because they use these inputs with a high level of productivity"); Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q.J. ECON. 1251, 1252 (1997) (concluding that institutions that encourage "trust and civic cooperation are associated with stronger economic performance").

63. *See* Anderson & Parker, *supra* note 60, at 657–59. Many scholars have wholly disagreed with their endorsement of Public Law 280. *See* Goldberg, *supra* note 53, at 1044 (advocating that Anderson and Parker's endorsement of Public Law 280 be read with a large degree of skepticism). For more discussion of Public Law 280 and the harm it has done to American Indian sovereignty, *see* discussion *infra* Part I(C)(2).

prosperity."[64] Cornell argues that having complete authority over economic affairs is a prerequisite to economic prosperity, and further points out that "[i]n virtually every case that we have seen of sustained economic development on American Indian reservations, the primary economic decisions are being made by the tribe, not by outsiders."[65] Cornell further argues that Indian institutions, in order to cultivate economic success, must cultivate "the separation of politics and business,"[66] the "separation of government powers,"[67] and "effective bureaucracy."[68]

Lastly, and most importantly for Tribal Law Online, Cornell concludes that the laws and institutions set in place must culturally match with the Indian Nations they serve.[69] To make this point, he looks at the boilerplate tribal constitutions created in response to the Indian Reorganization Act (IRA) for the White Mountain Apache and Oglala Sioux Tribes, then analyzes the economic differences between the two tribes.[70] He argues that the relative economic success of the White Mountain Apache can be attributed to the fact that the Apache system of governance that existed prior to U.S. control more closely resembled the boilerplate constitution adopted by the tribe following the IRA.[71] This similarity results in the people tending "to believe in and support the government," because it "fits with their concept of how authority ought to be organized and exercised."[72] This is contrary to the experience of the Oglala Sioux, whose more decentralized government[73] does not match the strong-centralized government mandated by the 1934 Oglala Constitution.[74] Because of this, "few people really believe in [the Constitution], and where people don't think the institutions are much good, they're unlikely to invest."[75]

Cornell's analysis displays another way in which a project such as Tribal

64. Stephen Cornell, *Sovereignty, Policy and Prosperity in Indian Country Today*, COMMUNITY REINVESTMENT (FED. RES. BK. KS. CITY) 5 (1997), *reprinted in* ANDERSON, BERGER, FINCKEY & KRAKOFF, *supra* note 27, at 361, 362.

65. *Id.* at 362.

66. *Id.* at 364.

67. *Id.*

68. *Id.* at 365.

69. *Id.*

70. *Id.* at 366.

71. *Id.*

72. *Id.*

73. *See* discussion, *infra* Part II.

74. *See* Cornell, *supra* note 64, at 367; CONSTITUTION AND BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION, Jan. 15, 1936.

75. Cornell, *supra* note 64, at 367; *see also* Knack & Keefer, *supra* note 62, at 1252 (concluding that institutions that encourage "trust and civic cooperation are associated with stronger economic performance").

Law Online could cultivate economic prosperity for American Indian nations. Many of the codes that American Indian nations have adopted to help curb poverty are model codes made by legal institutions.[76] While model legal codes have the advantage of being specifically tailored towards creating economic prosperity, Cornell's article makes it clear that the general populace needs to believe in the created institutions for them to be effective. As such, creating an online publication system such as Tribal Law Online would provide affected populations with a greater ability to evaluate and vocalize disdain and approval for their respective nations' codes. The legislative process would be much more transparent, which would give American Indian voices greater weight in creating the institutions required for economic successes. It is hard to imagine that the people would have less faith in institutions that were created with greater transparency than in model codes simply adopted as-is by American Indian legislatures and promptly hidden in inaccessible ordinances and codes. American Indian voices, in having a stronger role in creating codes designed to cultivate economic prosperity, would create institutions that better reflected their respective cultures.

C. Increasing Congressional Respect for the Sovereignty of American Indian Nations

Even though the current era of Congressional legislation has been loosely termed the "self-determination era,"[77] federal legislation has not been entirely friendly to American Indian sovereignty. This subsection will look at three current statutes—Public Law 280,[78] the Indian Civil Rights Act,[79] and the Tribal Law and Order Act[80]—that have been generally

76. For an example of this, look at the Model Tribal Secured Transactions Act Project. *See* William H. Henning, A History and Description of the Model Tribal Secured Transactions Act Project (2005) (unpublished manuscript) (on file with author). This was a model legal code created by the National Conference of Commissioners on Uniform State Laws (NCCUSL) intended to be adopted by Indian Nations to encourage economic growth. *Id.* (manuscript at 2). While a serious effort was made to "adapt the MTSTA to the specific circumstances of the tribes" that adopted it, this effort does not seem to have been made with the understanding that American Indian Nations often have significantly different cultures and values from one another. *Id.* (manuscript at 6); *see also* Cornell, *supra* note 64, at 365 (describing the significant differences in the governmental cultures of the Oglala Sioux and White Mountain Apache Tribes).

77. *See* ANDERSON, BERGER, FRICKEY & KRAKOFF, *supra* note 27, at 152.

78. Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (2012)).

79. The Indian Civil Rights Act, 25 U.S.C. § 1301–1341.

80. The Tribal Law and Order Act, Pub. L. No. 111-211, 124 Stat. 2261 (2010) (codified as amended in scattered sections of 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.).

harmful to American Indian sovereignty. It will also evaluate how Tribal Law Online could motivate Congress to abrogate or repeal these laws.

1. The Indian Civil Rights Act and the Tribal Law and Order Act

The Indian Civil Rights Act (ICRA) was passed in 1968 in response to Congressional concerns that American Indian courts, not constrained by the Bill of Rights,[81] were abusing the civil liberties of tribal residents and failing to provide procedural and substantive fairness guarantees.[82] In addition to imposing certain civil rights guarantees onto American Indian courts,[83] ICRA currently forbids American Indian nations from subjecting criminal defendants to a term of imprisonment greater than one year or imposing a fine greater than $5,000, except under certain circumstances.[84]

For obvious reasons, ICRA has been seen by many legal scholars as offensive to the cause of American Indian sovereignty. For one, it imposes American jurisprudential norms onto American Indian nations that may or may not share them.[85] It also critically limits the ability of American Indian nations to adjudicate crimes on the reservation. This has caused one legal scholar to state that "the message and implication [of the ICRA] is that tribal governments do not have jurisdiction over felony crimes."[86] The ICRA and *Oliphant* decision have had the combined effect of nearly eliminating the criminal jurisdiction of American Indian nations: *Oliphant* prevents Indian courts from exerting criminal jurisdiction over non-Indians,[87] and ICRA prevents Indian courts from proportionally sentencing major crimes.[88]

The complicated jurisdictional status of American Indian nations in non-Public Law 280 states has made the adjudication of major crimes extraordinarily difficult. When a major crime has been committed, the

81. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding that American Indian Nations are not subject to the Bill of Rights, because the power they exert is not a delegated form of federal power).

82. *ee* Robert Berry, *Civil Liberties Constraints on Tribal Sovereignty After the Indian Civil Rights Act of 1968*, 1 J.L. & POL'Y 1, 1–2 (1993). This was in spite of the fact that the "more pervasive" abuses of Indian rights came at the hands of the "federal government, the states, [and] their political subdivisions," which ICRA did not attempt to remedy. *Id.* at 21.

83. Amongst other guarantees, ICRA prevents American Indian nations from prohibiting free speech, participating in unwarranted searches and seizures, making uncompensated takings, and denying accused persons the right to a "speedy and public trial." 28 U.S.C. § 1302(a).

84. *Id.* § 1302(a)(7)(B).

85. *See* Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 461 (2005) (castigating ICRA as "yet another imperial effort to assimilate tribal governments, by imposing the United States Bill of Rights onto tribal governments").

86. *Id.*

87. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

88. 28 U.S.C. § 1302(a)(7).

perpetrator's status has to be determined so the authorities can determine who has jurisdiction–the Tribe or the federal government.[89] Even if the Tribe has concurrent criminal jurisdiction over the perpetrator, the Indian Civil Rights Act hobbles its sentencing power, meaning that the federal government is the only entity with the power to adequately sentence the perpetrator of a felony.[90] However, federal investigative and prosecutorial resources are spread so thin that "federal agents are forced to focus only on the highest-profile felonies while letting the investigation of some serious crime languish for years."[91] As a result, many of the major criminal offenses that occur in Indian country are inadequately adjudicated.

In response to these troubles, Congress passed the Tribal Law and Order Act ("TLOA") in 2010.[92] TLOA made multiple changes to American Indian jurisdiction, with the goals of clarifying the jurisdiction of state, federal, and tribal bodies; providing tribal bodies with more authority and resources; reducing the number of violent crimes committed in Indian country; preventing drug trafficking; and streamlining the sharing of information between federal, state, and tribal officials.[93] Amongst other things,[94] TLOA amended ICRA by allowing American Indian nations to imprison a defendant for up to three years and fine him or her up to $15,000, provided that the tribes provide certain procedural guarantees.[95] In order to exercise the extended sentencing allotments, American Indian nations must "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution," "provide an indigent defendant the assistance of a defense attorney," have a licensed and trained

89. *See* Jasmine Owens, Comment, "*Historic" in a Bad Way: How the Tribal Law and Order Act Continues the American Tradition of Providing Inadequate Protection to American Indian and Alaska Native Rape Victims*, 102 J. CRIM. L. & CRIMINOLOGY 497, 510 (2012). Federal jurisdiction over crimes committed by American Indians on reservations is granted through the Major Crimes Act, 18 U.S.C. § 1153 (2012), and the Indian Country Crimes Act, 18 U.S.C. § 1152 (2012).

90. *See* Owens, *supra* note 89, at 511.

91. *Id.* at 510 (quoting Michael Riley, *Promises, Justice Broken: A Dysfunctional System Lets Serious Reservation Crimes Go Unpunished and Puts Indians at Risk*, DENVER POST (Nov. 11, 2007, 12:48 PM), http://www.denverpost.com/ci_7429560). Several U.S. attorneys have admitted that federal prosecutors tend to shirk and avoid prosecuting crimes that occur on reservations. *Id.* at 511. Federal judges have had similar reactions. *Id.*

92. *See* The Tribal Law and Order Act, Pub. L. No. 111-211, 124 Stat. 2261 (2010) (codified in scattered sections of 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.).

93. *Id.* § 202(b).

94. TLOA required the appointment of special prosecutors to assist the federal government in adjudicating major crimes in Indian country (*Id.* at § 213(a)), allowed tribes to request concurrent jurisdiction over major crimes with federal and state courts (*Id.* at § 221(a)), offered federal assistance to state and tribal governments that cooperate with one another (*Id.* at § 222), and extended the federal budget to provide for programs and legal representation in American Indian Nations (*Id.* at § 242(b)).

95. *Id.* § 234(b)-(c).

judge, maintain a complete record of criminal proceedings, and, "prior to charging the defendant, make publicly available the criminal laws . . . , rules of evidence, and rules of criminal procedure . . . of the tribal government."[96]

TLOA presents an immediate way that American Indian nations that ascribe to Tribal Law Online could aid their sovereignty. Tribal Law Online aims to publish the entire codes of its participants (including those laws required by TLOA) and would thus fulfill TLOA's publishing requirement. Tribal Law Online could therefore, at the very least, help participants access the higher sentencing provisions allotted by TLOA's amendments to ICRA. Tribal Law Online could also provide a starting place for gaining American Indian nations greater freedoms from ICRA. If we accept that ICRA was explicitly meant to divest American Indians from having criminal jurisdiction over major crimes that occur on their reservations,[97] then TLOA reveals at least some of the concerns that have prevented Congress from simply eliminating ICRA's sentencing restrictions. Some of the provisions provided in TLOA seem to more directly reflect American jurisprudential norms, such as providing law-trained judges and giving the defendant a right to legal counsel.[98] However, the publication requirement seems more technically oriented, and may not come at the expense of many American Indian nations' own judicial norms.

What the TLOA publication requirement shows is that Congress's concerns about the state of tribal law prevent it from simply removing the restrictions that the ICRA has placed on American Indian sentencing. Should Tribal Law Online prove successful, it may be possible to assuage this fear of Congress and cause it to gain respect for American Indian sovereignty. It may even help Congress gain critical respect for the jurisprudential norms of American Indian nations that guide their criminal adjudicative processes.

2. Public Law 280

Public Law 280 was passed in 1953, amidst Congressional concerns about the adjudication of crimes under federal and American Indian

96. *Id.* § 234(c).

97. *See* Deer, *supra* note 85, at 461.

98. Many American Indian Nations take alternative approaches to dispute resolution and even criminal adjudication. For more on this, see discussion, *infra* Part II.

concurrent jurisdiction.[99] Public Law 280 gave six states[100] jurisdiction (concurrent with the resident tribes) "over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory" and gave the state criminal laws "the same force and effect within such Indian country as they have elsewhere within the State or Territory."[101] This amounted to an enormous divesture of the criminal adjudicative powers of the American Indian nations caught within Public Law 280's jurisdiction scope. American Indian nations previously shared jurisdiction only with the federal government, and then only through the provisions given in the Major Crimes Act and the Indian Country Crimes Act.[102] Now, state law enforcement and criminal adjudication has replaced federal law enforcement and criminal adjudication in tribes within Public Law 280's scope.[103]

The legislative history of Public Law 280 reveals that one of Congress's primary motivations in passing it was to combat "'lawlessness' on reservations and the 'absence of adequate tribal institutions for law enforcement.'"[104] Congress was concerned that "the enforcement of law and order among the Indians in the Indian country ha[d] been left largely to the Indian groups themselves" and that "tribes are not adequately organized to perform that function."[105] Immediately, this concern presents a way in which Tribal Law Online could help to remedy Congressional fears about the state of criminal adjudication on American Indian reservations. Publishing the legal decisions made by tribal judges and providing free access to tribes' codified criminal codes will show that the political institutions of American Indian nations are sophisticated and fully capable of adjudicating crimes. This could present Congress with the proof it needs

99. *See* Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162. 25 U.S.C. §§ 1321–1326, 28 U.S.C. § 1360 (2012)); Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1632–34 (1998) (giving an overview of Public Law 280).

100. 18 U.S.C. § 1162(a) (2012). These states include Alaska (added after it achieved statehood in 1958), California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.*

101. *Id.* Several American Indian Nations within Minnesota, Alaska, and Oregon are explicitly exempted from State criminal jurisdiction in § 1162(a). *Id.*

102. *See* 18 U.S.C. §§ 1152–1153 (2012).

103. *See* Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 701 (2006).

104. *See* Jiménez & Song, *supra* note 99, at 1659. This is in spite of the fact that federal adjudication of crimes that occurred on American Indian reservations was "typically neither well financed, nor vigorous," likely dramatically exacerbating the problem of "lawlessness." Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA. L. REV. 535, 541 (1975).

105. S. Rep. No. 83-699, at 5 (1953).

to either abrogate Public Law 280 or eliminate it altogether.

While many legal scholars have criticized Public Law 280 for being ineffective and wholly offensive to the cause of American Indian sovereignty,[106] outcry against Public Law 280 has not been unanimous. Some economic scholars have noted that Public Law 280 has been effective at increasing the economic prosperity of the American Indian nations it affects, because it has allowed outside businesses that are interested in doing business on and with American Indian nations to rely upon state rule-of-law and on institutions that are perceived as being more stable and reliable.[107] Tribal Law Online may help to achieve those laudable goals in ways that are less offensive to American Indian sovereignty. Because businesses potentially interested in working on and with American Indian reservations will share free access to Tribal Law Online, their legal teams will be able to more accurately gauge their respective codes and case law. Tribal Law Online will also aid these businesses in communicating with American Indian authorities, as it will be far easier to discuss which specific provisions and decisions are potentially dissuading businesses from engaging with their Nations. Furthermore, it may provide concrete and easily accessible evidence showing that American Indian courts are fair and do not show favoritism in their decision-making.[108]

D. Helping American Indian Voices More Directly Shape Laws and Government

106. *See* Goldberg & Champagne, *supra* note 103 (providing statistical evidence indicating that the residents of American Indian reservations affected by Public Law 280 are considerably less likely to have faith in the criminal adjudicative process); Jiménez & Song, *supra* note 99, at 1705 (castigating Public Law 280 because it "impedes the full realization of tribal self-government, not only because it intrudes upon tribal authority, but because it creates uncertainty regarding the scope of tribal authority"); Goldberg, *supra* note 53, at 1064 (noting that many American Indian Nations affected by Public Law 280 have called for retrocession because "they wanted to make their justice systems more consistent with tribal priorities and values, and because they were receiving inadequate services from state criminal justice systems").

107. *See* Anderson & Parker, *supra* note 60, at 647; *but see* Goldberg *supra* note 53, at 1045–47 (advocating that Anderson and Parker's endorsement of Public Law 280 be read "with skepticism" because it contradicts other scholarly research indicating that providing American Indian Nations with more control over their own laws increases their economic success, because it contradicts "the federal Indian policy that has prevailed for the past forty years" and because their "notion that state justice is better for Indians than tribal justice goes against the expressed preferences of tribal communities").

108. Evidence of this already exists, though discovering it currently requires searching through legal databases that require more expertise than directly evaluating decisions made by tribal courts. *See* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 352 (1997) (noting that "non-Indian parties were treated fairly" in all twenty American Indian courts studied by the author).

Many American Indian constitutions and laws are modeled directly after U.S. judicial systems.[109] Initially, this occurred because the first constitutions that were drafted for American Indian nations following the passage of the Indian Reorganization Act of 1934 were written not by American Indians, but by people working for the Department of the Interior or the Bureau of Indian Affairs.[110] Many procedural laws, such as the rules of evidence and court procedure, also mirror federal or state laws.[111] This presents a problem, as oftentimes, these laws and structures run counter to individualized American Indian nations' norms governing dispute adjudication and justice.[112] Where these laws fail to represent the tribe's norms, the people lose faith in their governmental institutions and the laws fail to adequately represent their interests and beliefs.[113]

Members of the Blackfoot Nation in the early 21st century attempted to re-draft the Blackfoot Constitution to more accurately represent the norms and values of its people.[114] Proponents attempting to create the new Constitution went "door-to-door to share the draft with citizens," and even read the document as it currently existed aloud to "illiterate members of the tribe in order to ensure that educational privilege [did] not exclude anyone."[115] The resulting constitution in some ways mirrored U.S. jurisprudential values, as it included individual rights of religion, speech, due process, and to keep and bear arms.[116] However, in many ways, it diverged dramatically from traditional U.S. norms. The drafted Constitution provided individual rights to "Education, Housing, Medicine, and

109. *See* Cornell, *supra* note 64, at 366; Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29, 49 (2008) (pointing out that "[m]any tribes quickly adapted the American government template for their own use" after the Indian Reorganization Act of 1934).

110. *See* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 927 (1990); Newton, *supra* note 108, at 334. It is worth noting, however, that not all American Indian nations have jurisprudential norms and values that are all that dissimilar from the U.S. *See infra* note 148.

111. *See* Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 582 (2012) ("[a]lthough exact numbers are not available, a large number of tribal courts also apply rules of procedure and evidence that resemble procedural and evidentiary rules used in non-Indian jurisdictions in the United States"); *c.f.* Cooter & Fikentscher, *supra* note 109, at 49.

112. *See* Cornell, *supra* note 64, at 365–66.

113. *Id.* at 367.

114. Taiawagi Helton, *Nation Building in Indian Country: The Blackfoot Constitutional Review*, 13 KAN. J.L. & PUB. POL'Y 1, 23–24 (2003).

115. *Id.* While this proposed Constitution was designed to manifestly represent the will of Blackfoot members, the Constitution did draw on "the values articulated" by several foreign nations, such as South Africa and the Netherlands. *Id.* at 24.

116. *Id.* at 25–26.

Subsistence,"[117] included a clause binding the Blackfoot Nation to "devote itself to just, equitable and sustainable" environmental policies,[118] and created a "'holistic' judiciary . . . which recognize[d] no distinction between criminal offenses and civil wrongs," focusing instead on "healing and social prosperity."[119] In short, it was a Constitution designed to represent the "Blackfoot People, guided by their own traditions of justice."[120]

Tribal Law Online provides an opportunity for the members of the Oglala Sioux Tribe to make their laws and procedures decidedly more Oglala. By providing free access to a clear, codified database of current Oglala laws, citizens will be able to more clearly determine what the law in Pine Ridge is, and consequently discover more easily which laws do not conform to their own values. It will be easier for Oglala citizens to point out these laws to the Oglala Sioux Tribal Council and help their representatives amend and alter them to more accurately serve their needs. It will provide more accountability as well, as laws passed by the Tribal Council will be readily available to the public shortly after they are drafted. Publication of judicial decisions will ensure that Oglala citizens can easily discover how judges are interpreting Oglala laws and determine if these interpretations are adequately serving their values. Lastly, as these benefits take effect, other American Indian nations and outsiders will be able to access the database and see what Oglala norms of law and justice look like. This could help these Nations create laws and dispel the myth of "lawlessness" in Indian country.

All in all, Tribal Law Online could very likely eliminate many of the erroneous perceptions and stereotypes outsiders have of American Indian codes and American Indian courts. It has the potential to unseat the assumptions that have undergirded legislation and Supreme Court opinions, and it has the potential to increase nationwide trust in the procedures and functions of American Indian law. Perhaps most importantly, it has the potential to help participants create and draft codes that more accurately represent their own values.

II. ADDRESSING POTENTIAL PITFALLS OF TRIBAL LAW ONLINE

Despite all of these potential advantages, support for the broad codification and publication of tribal law is not unanimous. Several

117. *Id.* at 26 (footnotes omitted).
118. *Id.*
119. *Id.* at 27.
120. *Id.* at 28.

respected legal scholars and American Indian jurists have argued that broad publication of tribal law could in fact impede the sovereignty of American Indian nations and limit the ability of their citizens to access courts and mold the government. This Part will address (A) criticism that having nonmembers codify Oglala law could result in those nonmembers having an undue influence on the final result, (B) criticism that the very act of codifying American Indian laws necessarily imposes Anglo-American jurisprudential norms, and (C) concerns that codification could have a negative effect on customary law.

A. Issues with Nonmembers Codifying the Tribe's Laws

One concern is that giving the project of codifying and publishing existing laws to parties other than members of the Nation could reduce the Nation's control over the final product.[121] For the Oglala Sioux Tribe, the very act of codifying the Tribe's resolutions and ordinances necessarily involves making editorial choices about what pieces of resolutions and ordinances to include in the final product of a section. Oglala Sioux resolutions and ordinances include multiple "whereas" clauses explaining the authority of the Tribal Council to pass specific pieces of legislation and providing reasons why the resolutions and ordinances are necessary.[122] Similarly, since the Oglala Sioux Code has not been codified since 1996, there are conflicts and overlap between ordinances.[123] Choosing which language to include and picking which overlapping or conflicting resolutions represent the most accurate expressions of the law involves making interpretive decisions about what the law is. Indeed, the very act of putting together the code into a subject arrangement requires answering questions about where laws belong in the grand scheme of the Code. Putting these interpretive tasks in the hands of non-Oglala parties could result in changes to the code that run counter to the intent of the Tribal Council and the Oglala people.

CERL has recognized that this could be a possible issue, and it has thus instituted certain procedural safeguards to prevent this kind of harm from occurring.[124] First, the Project requires that the Oglala Sioux Tribe formally

121. *See* Shucha, *supra* note 6, at 205 (expressing concern that allowing a third party to codify and publish tribal laws could reduce the influence of the Tribe's constituents on them).

122. *See generally* Oglala Sioux Tribe, Resolution 15-88 (Apr. 28, 2015) (on file with the author) (authorizing the Tribal Law Online project by resolution of the Oglala Sioux Tribe).

123. *See* Interview with Steve Gunn, *supra* note 4.

124. *See* Shucha, *supra* note 6, at 205 (pointing out that it is likely that any codification efforts made by third parties would work in close concert with tribal clients in order to prevent these issues from

adopt the final codified product.[125] Second, one of the main participants in this project, Professor Steve Gunn, is one of the Oglala Sioux Tribe's attorneys.[126] The final codification will be formally presented to and discussed with the Tribal Council by Professor Gunn,[127] to help limit the likelihood of accidental alterations to the laws.

None of these procedural safeguards can strictly ensure that issues of interpretation will be resolved by Oglala parties. However, they do show that CERL has taken the potential issue seriously. The Tribal Council is free to reject any sections of code that do not accurately represent its legislation, and CERL has expressed a willingness to present issues involving interpretation to the Tribal Council to limit any potential corrupting influence.

B. Concerns that Codification Imposes Anglo-American Legal Norms on American Indian Nations

A greater concern is that the very act of codifying and widely disseminating the law could harm sovereignty by imposing a culture onto American Indian nations that runs counter to their norms. Robert B. Porter, a former Attorney General for the Seneca Nation of Indians, argues that the imposition of Anglo-American legal norms could ultimately have the effect of eliminating the sovereignty of American Indian nations altogether.[128] The American system of adversarial justice, Porter argues, runs counter to the "[p]eacemaking" tradition that is the "primary method of dispute resolution traditionally found in indigenous communities."[129] The main difference between the peacemaking method of adjudication and the more adversarial American model is that "peacemaking is concerned with justice as it relates to the benefit of the community, and not just for the benefit of individual members."[130] It is essentially a mediating process[131] that does not involve representation by lawyers[132] and is held before an interested, rather than a disinterested, mediator.[133]

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coming to fruition).

125. *See* Interview with Steve Gunn, *supra* note 4.

126. *Id.*

127. *Id.*

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

129. *Id.* at 251.

130. *Id.* at 252.

131. *Id.*

132. *Id.* at 253.

133. *Id.*

Most problematically for Tribal Law Online, Porter argues that the peacemaking tradition of justice relies upon a lack of formally written laws.[134] He alleges that the advantage of norms and policies being translated "orally rather than through written edicts" is that it allows "the 'law' [to] 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."[135] He is also concerned that a "reliance [on] fixed procedural and substantive law" can perpetuate "a destructive belief in the mind of the parties (and maybe even the judge) that technical correctness is more important than justice."[136] This could thus prevent the parties from seeking out inventive and creative solutions that are made with a mind towards benefitting the community as a whole rather than simply adjudicating guilt.[137]

There are two overarching concerns with imposing Anglo-American norms of adversarial justice on the Oglala Sioux Tribe. On the one hand, it could amount to lawyers working for CERL unwittingly imposing outside influences onto an Oglala culture that may or may not be suited to it. Porter argues that "[l]aw school training . . . 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"[138] and is worried that the outside influence imposed on lawyers by law school could cause them to steer and guide American Indian nations into adopting legal systems that have more in common with the American system than their own culture.[139] This could be an "accidental" way of enforcing the federal policies of the "Assimilation era"[140] towards American Indians.[141] Porter argues that this could even lead to the Federal Government feeling that it can no longer "justify the legal barrier that exists between the two sovereignties" which could cause it to "move, once again, to terminate its recognition of tribal sovereignty."[142]

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134. *Id.*
135. *Id.*
136. *Id.* at 281.
137. *Id.*
138. *Id.* at 303.
139. *Id.* at 303–04.
140. The "Assimilation era" is a loose term describing Congress's policy towards American Indian interests from 1871 to 1928. *See* David M. Blurton, *ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country*, 13 ALASKA L. REV. 211, 227 n.120 (1996). This "era" was characterized by an attempt to force American Indians to assimilate into white U.S. culture. *Id.* at 227.
141. Porter, *supra* note 128, at 281–83.
142. *Id.* at 283.

Similarly, adopting a formal Code may in and of itself be an imposition onto individual Nations' cultures. Several American Indian nations have implemented some form of peacemaking courts in their judicial systems.[143] In fact, in recent years, there has been a resurgence of American Indian nations utilizing more traditional forms of dispute resolution.[144] A former Chief Judge of the Jicarilla Apache Supreme Court has noted that "Mainstream Americans . . . . do not seem to understand that . . . the institution of the courts and the workings of an adversarial system of justice . . . amount to a large portion of American culture."[145] He further notes that many attempts to impose American judicial norms have weakened the cultures of American Indian nations.[146] Indeed, surveys of American Indian courts have noted that judges in American Indian nations prefer not to be as strictly bound by *stare decisis* as state and federal courts are.[147] Porter's concerns, therefore, about imposing outside norms of American justice onto American Indian nations such as the Oglala Sioux Tribe may be well-founded. It certainly presents a concern that the very act of codifying the laws of the Oglala Sioux Tribe and providing free access to a Westlaw-like system could have the unfortunate accidental result of limiting the influence Oglala culture has on the law in Pine Ridge.

Of course, it is important to note that many American Indian nations have had an adversarial system of justice for almost two hundred years.[148] Not all Nations utilized a method of dispute adjudication similar to the "peacemaking" method described by Porter. The Oglala Sioux Tribe, however, did utilize a system that was certainly somewhat comparable. Sioux justice was traditionally dispensed through the *tiospaye*, or extended family.[149] Like the peacemaking courts, these units focused on restoring

143. The Navajo are well known for implementing a two-tier court system, in which some disputes are adjudicated by the Peacemakers Court, and others by a more traditional legal body. *Id.* at 302. The Jicarilla Apache make use of a similar system. *See* Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 137–39, 140 (1995) (describing the traditional Apache methods of adjudication, then explaining how the traditional norms are applied by the Jicarilla Apache).

144. *See* Vicenti, *supra* note 143 at 139.

145. *Id.* at 135.

146. Former Chief Judge Vicenti notes that the impositions placed on the courts by the Indian Civil Rights Act have represented "the demise of traditional values and practice." *Id.* at 137.

147. *See* Cooter & Fikentscher *supra* note 109, at 66–67 (pointing out that most judges of American Indian Nations do not rely upon past precedents, limiting their value in developing the common law).

148. For example, the Creek, Cherokee, and Choctaw all very readily adopted American governmental and adjudicatory norms. *See* Porter, *supra* note 128, at 265. The Cherokee at the time of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) had codified their laws and adjudicated disputes through an adversarial system similar to that of the United States. ANDERSON, BERGER, FRICKEY & KRAKOFF, *supra* note 27, at 76.

149. *See* REINHARDT, *supra* note 4, at 80; ROBERT M. UTLEY, THE LANCE AND THE SHIELD: THE

community harmony rather than adjudicating guilt and punishing parties.[150] While this method of adjudication is not identical to that of the Peacemakers Court of the Navajo, it certainly seems to reflect some similar interests. It also seems somewhat antithetical to the American adversarial system of justice.

However, it is important to note that the Oglala Sioux Tribe currently uses a two-tiered legal system with trial courts and a Supreme Court.[151] The Tribe has also not been opposed to formally codifying its laws in the past; it put all of its laws together into a single code in 1996.[152] Similarly, the resolution passed by the Oglala Sioux Tribe formally adopting this project states that "codification . . . will strengthen our Tribal government, promote economic development, and help us educate our youth in the laws, customs, and traditions of our people."[153] This particular "whereas" clause of the Resolution clearly shows that the Oglala Sioux Tribe believes that codification is in the best interest of the Tribe's sovereignty.

Now, the Oglala Sioux Tribe may decide to readopt some form of *tiospaye* justice in the future,[154] but it is difficult to see how formally codifying the current laws and tribal court decisions could interfere with that. One of Porter's issues with adopting a formally codified system of laws is that it decreases the access of ordinary people to justice.[155] However, the Oglala Sioux Tribe already has a system of codified laws that is essentially unavailable to ordinary people without access to the government directory or the resources to spend sorting through it. Publishing all the laws in a subject arrangement on a website with free access will greatly increase the availability and usability of the law not just to outside businesses, but also for tribal residents who currently have almost no access to the 1996 codification, much less the legislation that has been passed since then.

It is also possible that formally digesting the court decisions of the Oglala could begin imposing American *stare decisis* norms and common

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LIFE AND TIMES OF SITTING BULL 8–9 (1993).

150. UTLEY *supra* note 149, at 9. In fact, the landmark case of *Ex parte Crow Dog*, 109 U.S. 556 (1883), was originally litigated because a federal Indian agent did not believe that the Brule Sioux's system of justice had adequately punished a murderer. No attempt was made by the tribe to determine whether the killing was just; instead, the accused was required to compensate the victim's family with $600, eight horses, and one blanket. ANDERSON, BERGER, FRICKEY & KRAKOFF, *supra* note 27, at 93.

151. *See* Interview with Steve Gunn, *supra* note 4.

152. *See* Application of the Oglala Sioux Tribe, *supra* note 6, at 4.

153. *See* Oglala Sioux Tribe Resolution 15-88 (Apr. 28, 2015) (on file with the author).

154. There may be some push to reinstitute some more traditional methods of dispute resolution in Pine Ridge. For example, the newly constructed Pine Ridge Courthouse contains a room devoted to "alternative dispute resolution." *See* Interview with Steve Gunn, *supra* note 4.

155. *See* Porter, *supra* note 128, at 260.

law traditions onto the Oglala. Right now, due to the state of the law, it is difficult to state with certainty what emphasis the Oglala courts place on precedent. However, publishing and digesting court decisions could provide a venue for courts to explain, in a formal and public way, their understanding of Tribal precedents. Instead of imposing American judicial norms, digesting Oglala court decisions could provide the Oglala courts with a public voice that they have not had before. It could allow Oglala judicial norms to be publicly broadcast. It may also prevent outside lawyers, arguing in Tribal Court, from assuming that the American common law tradition applies. Furthermore, it could allow the Oglala to communicate their judicial norms to outside American Indian audiences, who may be interested in using them to strengthen their own tribal sovereignty through their own judicial systems.[156]

It is also worth noting that, simply as a practical matter, tribal sovereignty will likely be better served in the immediate by codifying and disseminating Oglala laws and court decisions. For one, it is no secret that many of the decisions that have had the greatest effect on American Indian nations have been decided without American Indian involvement.[157] Increasing the accessibility and prevalence of Oglala law could thus increase the ability of the Oglala to assert it before tribunals and for it to be used and considered by other Indian courts and legislative bodies. It is also generally believed that "the U.S. Supreme Court has taken up the standard as the enemy of tribal rights."[158] Given the immediate threats that decisions such as *Oliphant* and *Hicks* present to American Indian sovereignty,[159] the Oglala and other American Indian nations' causes may be best served by

156. Some legal scholars have alleged that there is nothing "cultural" about the Peacemaking traditions of American Indian Nations. *See* Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 130–31 (2001). Joh argues specifically that the Navajo Peacemakers Court ought not to be considered a cultural institution. *Id* at 124–25. This is because its use of custom does not "extend[] far beyond European contact," since it was derived from multiple (including non-Indian) sources. *Id.* at 125. Also, it "has more symbolic than practical value as an adjudicatory forum." *Id.* Joh argues that what is traditionally considered American Indian customary law is, in fact, an outlet for "popular justice" concepts, which are Western in origin. *Id.* at 125–28. However, it is unclear why American Indian methods of judicial adjudication need to be hundreds of years old for them to be valid expressions of the modern culture of an American Indian Nation. It is also unclear why borrowing and adopting concepts from non-Indian sources prevents the Peacemakers Court from being a valid expression of Navajo culture. The article's persuasiveness suffers from assuming that culture is a fixed, rather than evolving concept and that cultures cannot be influenced by one another and remain distinct.

157. *See* Bethany R. Berger, United States v. Lara *as a Story of Native Agency*, 40 TULSA L. REV. 5, 7 (2004) (pointing out that "[t]o a striking degree, federal Indian law has been made in the absence of the voices of the people it most intimately affects.").

158. *Id.* at 19.

159. *See* discussion *supra* Part I(A).

disseminating laws and court opinions that draw respect from outside sources and help the American Indian community to speak with unified voices.[160]

It is hard to say with certainty whether codification in and of itself is an Anglo-American judicial method that could hinder the ability of Oglala culture to drive Oglala courts. However, the procedural safeguards and the mere fact that the Oglala have codified their laws in the past shows that, at the very least, the Oglala Sioux Tribe believes that partnering with CERL will have a positive rather than negative effect on their Nation's sovereignty.

C. Concerns that Codification Could Harm Customary Law

CERL may also need to be concerned with the effect codification could have on the customary law of American Indian nations.[161] Many American Indian nations continue to make use of customary law in their adjudicative processes.[162] Customary law differs from more formal law in that it is more dependent upon the dispositions of the cultural community than on the more rigid processes that govern Anglo-American traditional jurisprudence.[163] For that reason, codification may have unfortunate effects upon customary law that are more difficult to foresee than the effects upon more formalized laws and court decisions.

A good example of the effect that codification can have upon customary law comes from the unique case of Lesotho and the Laws of Lerotholi. It is helpful to point out that Lesotho shares a lot of characteristics with

160. Indeed, tribal law systems that emphasize traditional American Indian systems of justice have been considered by the Supreme Court as reasons to deny tribal courts jurisdiction in certain cases. For example, a member of the Pueblo of Jemez tribe wrote an article describing the more holistic form of justice employed by many American Indian Nations. *See* Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126 (1995); *see also* discussion *supra* Part II. Justice Souter cited this article in his concurring opinion in *Nevada v. Hicks* as evidence that tribal law "would be unusually difficult for an outsider to sort out," and to justify denying an American Indian court jurisdiction over a civil dispute. Nevada v. Hicks, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring).

161. Customary law is formally defined in the context of indigenous peoples of Africa as "rules of custom, morality, and religion that the indigenous people of a given locality view as enforceable either by the central political system or authority . . . or by various social units such as the family." Modibo Ocran, *The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa*, 39 AKRON L. REV. 465, 467 (2006). This Note uses the term simply to mean laws based on the traditional cultures and norms of American Indian nations that may or may not be similar to U.S. legal norms.

162. *See* Porter, *supra* note 128 at 301 (discussing the customary law practices of the Navajo Peacemaker courts); Vicenti, *supra* note 143 at 140–41 (categorizing how customary law is applied by American Indian Nations).

163. *See* Porter, *supra* note 128 at 257–58 (discussing the customary law practices of traditional Navajo peacemaking); Vicenti, *supra* note 143 at 137–38 (discussing traditional Apache norms of justice and adjudication).

American Indian nations in the United States. Like American Indian nations, Lesotho was the subject of colonization by a foreign, European power.[164] Like American Indian nations, Lesotho lies entirely within another country[165] that has inherited the British common law tradition.[166] Like American Indian nations, Lesotho's traditional methods of adjudication vary widely from the British common law tradition.[167] Lastly, Lesotho is recognized as a sovereign nation.[168]

In 1903, the Basutoland[169] National Council convened to "compile the Basotho traditional laws and reconcile them with the 'laws of Moshoeshoe.'"[170] This process resulted in the creation of the Laws of Lerotholi, a codification of customary Lesotho laws concerning topics ranging from Khotla procedure to marriage law to theft.[171] The Laws of Lerotholi have since been updated; "the current version of them is substantially a merger of the original version from 1903 with the subsequent amendments, rules, and orders made by the Paramount Chief in pursuance

164. *See* Laurence Juma, *The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho*, 23 PACE INT'L L. REV. 92, 101 (2011).

165. *Id.* at 97.

166. *See* Amanda Barratt & Pamela Snyman, *Researching South African Law*, LLRX (Oct. 1, 2002), http://www.llrx.com/2002/10/features-researching-south-african-law/ [https://perma.cc/YC2H-WSEP].

167. Juma, *supra* note 164, at 100–01. Now, it is true that Lesotho's method of traditional adjudication did not necessarily line up with the Oglala Sioux Tribe or with other American Indian Nations. Lesotho (then called Basotho) was created in the first half of the 19th century by King Moshoeshoe out of refugees fleeing social upheavals and drought. *Id.* at 98–99. The traditional chiefdom system was organized into a kind of oligarchy, with Moshoeshoe and his ruling class presiding over the smaller, traditional Basotho chiefs. *Id.* at 99. The court system, called the Khotla, was presided over by chiefs, and while the goal of the Khotla was to restore community harmony, it seems to have been somewhat adversarial. *Id.* at 105 & n.71. This, of course, is much different than the Sioux, who historically were very decentralized, *see* UTLEY, *supra* note 149, at 9, and whose *tiospaye* method of adjudication was non-adversarial. *See* discussion *supra* Part II. However, the purpose of this section has less to do with any specific version of customary law than it does with the effect of codification upon customary law in general. As such, these differences do not prevent this comparison from being illustrative.

168. Lesotho gained its independence from Great Britain in 1966. SCOTT ROSENBERG, RICHARD F. WEISFELDER & MICHELLE FRISBIE-FULTON, HISTORICAL DICTIONARY OF LESOTHO xxxviii (2004). Of course, American Indian Nations are not sovereigns in the same sense as Lesotho, as they are not wholly separate nations. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (1831) (holding that American Indian Nations are to be considered "domestic dependent nations" in American law). However, American jurisprudence has routinely affirmed the sovereign status of American Indian Nations within the United States. *See* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030–31 (2014) (calling the sovereign status of American Indian Nations "settled law" and characterizing them as "separate sovereigns pre-existing the Constitution" (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978))). The comparison with Lesotho in this regard, while not perfect, is still apt for the purpose of evaluating codification's effect on customary law.

169. Another term for Lesotho. *See* Juma, *supra* note 164, at 102.

170. *Id.* at 116.

171. *Id.*

to Native Administration Proclamation No. 61 of 1938."[172] In 1965, the Central and Local Courts Proclamation effectively rendered customary law "inferior" to all other written law, subordinating the Laws of Lerotholi via a "repugnancy clause" which asserted the primacy of British principles of law whenever they came in conflict with a different native law.[173] While this principle remained with Lesotho after its independence in 1966,[174] "the [Lesotho] courts have resorted to the Laws of Lerotholi" to determine the content of custom in a myriad of cases where customary law has been found to be the applicable law.[175]

One of the unfortunate results of codification in the case of the Laws of Lerotholi is that the code has "been outpaced by the changes in Basuto social life" and applied seemingly arbitrarily by the Lesotho courts.[176] The Laws of Lerotholi are "regarded only as one of the sources of customary rules."[177] Courts have declined to apply the Laws of Lerotholi if there is any other legislation on the issue it is hearing.[178] Perhaps most perplexingly, judges have refused to apply the Laws of Lerotholi in any situations in which they seem as though they have been "outpaced by the changes in the Basuto social life," which means that many of its laws are not applied in a consistent fashion.[179] This has raised concerns that the Courts will begin to follow South African jurisprudence ahead of Lesotho customs and culture in matters that concern human rights norms.[180]

The problems that codification has caused in Lesotho raise significant concern for Tribal Law Online and the codification of Oglala laws that invoke customary or traditional law. One of the goals of CERL in engaging in this process is to make Oglala law accessible and predictable.[181] The hope is that doing so will make it easier for parties to litigate cases and use Oglala courts, as well as entice outsiders to do business with and in Pine Ridge.[182]

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172. *Id.* at 116–17.
173. *Id.* at 118–19.
174. "[C]ustomary law has remained subordinate to 'western law'" in Lesotho. *Id.* at 119.
175. *Id.* at 119.
176. *Id.* at 121.
177. *Id.*
178. *Id* at 122.
179. *Id.* Taufik Cotran, Chief Justice of Lesotho from 1976 to 1990, stated:

> I think a large part of the difficulties encountered in these cases has arisen because attempts have been made to reduce customs, but not all others, and in haphazard fashion . . . into ink and paper with the result that the written words have assumed a quality of rigidity out of all proportion to their true meaning or significance.

Id. at 123 (quoting *Ramaisa v. Mpholenyane*, 1977 LLR 149).
180. *Id.* at 121–22.
181. *See* Application of the Oglala Sioux Tribe, *supra* note 6, at 4.
182. *See* discussion, *supra* Part I(D).

The mere existence of a code will not help to stimulate these situations if the code is haphazardly followed and inconsistently applied. Indeed, this application evokes the current state of the laws in Pine Ridge, where the only available codification has been out of date for twenty years.[183] It may also cause the Oglala courts to rely upon federal and South Dakota law to help adjudicate disputes, removing distinct Oglala voices from the application of the law.

One possible distinction that could be made between the Laws of Lerotholi and Tribal Law Online is the existence of the "repugnancy" doctrine in Lesotho law that has influenced the application of the Laws of Lerotholi by the Lesotho courts. However, while the Oglala are not bound by an identical repugnancy doctrine, they are still bound to federal law via the plenary power doctrine.[184] This doctrine means that tribal law is required to defer to federal law in certain contexts, regardless of the applicability of customary or traditional law to that situation.[185] It is important to note, however, that this binds tribal law to a significantly smaller extent than does repugnancy doctrine; American Indian nations have enjoyed significant leeway in interpreting federal law, often declining to adhere to Supreme Court interpretations of terms such as "due process."[186]

Perhaps a more important distinction lies in the fact that Lesotho is a common law country plagued by inadequate case reporting,[187] while CERL seeks to report and codify Oglala court cases as a part of Tribal Law Online.[188] This has had the effect of making "Basotho courts less attuned to developing their own jurisprudence, let alone that of customary law."[189] It has also increased Lesotho reliance on South African jurisprudence, because the poor reporting means that the "Court of Appeal is seldom in a position to discuss legal principles in a wholesome manner."[190] This means that "South African text books written by people who did not have Lesotho in mind and were not aware of difference between the law of Lesotho and that

183. *See* Application of the Oglala Sioux Tribe, *supra* note 6, at 4.

184. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903) (establishing that the Congress has plenary authority to unilaterally alter any agreements it has made with Indian Nations); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (affirming that American Indian Nations are bound by ICRA and that people who are improperly detained may seek relief through a federal habeas proceeding).

185. *See Santa Clara Pueblo*, 436 U.S. at 56.

186. *See* Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (pointing out that "there is a 'definite trend by tribal courts' toward the view that they 'ha[ve] leeway in interpreting' the ICRA's due process and equal protection clauses and 'need not follow the U.S. Supreme Court precedents 'jot-for-jot'" (quoting Newton, *supra* note 108, at 344 n.238)).

187. *See* Juma, *supra* note 164, at 126.

188. *See* Application of the Oglala Sioux Tribe, *supra* note 6, at 4.

189. *See* Juma, *supra* note 164, at 126.

190. *Id.*

of the Republic of South Africa are commonly used," which results in the non-application of Lesotho cultural norms and legal principles to Lesotho cases.[191]

This is strikingly similar to the current state of case reporting in Indian country. *The Indian Law Reporter*, one of the only reporters available for tribal court decisions, only reports on a select number of cases from "a few dozen tribes."[192] Several American Indian nations, such as the Navajo, report their own decisions, but most do not.[193] Westlaw offers incomplete reporting of the court decisions of twenty-four tribes, but they charge a fee on top of their ordinary charges for access.[194] This has made it extremely hard to identify legal precedent in most tribal courts.

However, Tribal Law Online, should it be successful in its attempt to report and codify Oglala court decisions, would not be susceptible to these issues. Accessing Oglala precedent would be as easy as logging on to Tribal Law Online and conducting subject matter searches. The Oglala courts would be able to access previous opinions and apply Oglala precedent, and there would be much less need to rely on outside precedents from places like South Dakota in adjudicating decisions. This may also have a big effect on the effectiveness and fluidity of customary law. While the codification of Oglala law would still be "rigid" in the sense that Oglala courts would be forced to apply the laws, decisions of the Oglala courts that applied laws in ways that offended the customary values of Oglala culture would be widely published and easily discovered. People will find it much easier to discover acts of the judiciary that contradict current Oglala cultural norms, and would similarly be able to suggest specific changes to the Oglala code to the Oglala Sioux Tribal Council. A vital element of communication between the courts and the cultural communities they serve, currently absent in Lesotho, would be filled, which would help the system to function. Nevertheless, CERL would be well-advised to keep in mind how necessary fluidity is to customary law and reflect that in the Tribal Law Online Project.

CONCLUSION

While there are potential pitfalls, Tribal Law Online and projects like it could redefine the way tribal law is perceived in the U.S. legal system. The

191. *Id.*
192. *See* David E. Selden, *Researching American Indian Tribal Law*, COLO. LAW., Feb. 2014, at 51, 53.
193. *Id.*
194. *Id.*

potential advances it could bring to the cause of American Indian sovereignty and to the lives of American Indians are immeasurable in their value. While care needs to be taken to prevent these new publications from minimizing the voices of American Indian peoples in how they wish to be governed, it is difficult to overstate how important Tribal Law Online and projects like it could be to American Indian nations.

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