Tribal Justice:
25 Years as a Tribal Appellate Justice

Frank Pommersheim

Introduction

It is almost impossible for me to imagine that when I was named to the Rosebud Sioux Supreme Court in 1987 that I would still be serving on it 27 years later and that I also would serve on six additional tribal appellate courts – namely the Cheyenne River Sioux Tribal Court of Appeals and the Flandreau Santee Sioux Tribal Court of Appeals in South Dakota, the Saginaw Chippewa Tribal Court of Appeals in Michigan, the Mississippi Band of Choctaw Supreme Court, the Grand Portage Chippewa Tribal Court of Appeals and Lower Sioux Tribal Court of Appeals in Minnesota. In this quarter century of judicial service, I have also authored over 115 judicial opinions.

Given the depth and breadth of my tribal appellate court service and related scholarship, a number of people suggested that a lib guide or book length treatment of this experience might help to illuminate a particularly fertile and significant period of tribal court doctrinal and institutional development. It is the spirit of a case study detailing the journey of a single tribal appellate justice’s mind through time and place that animates this endeavor. A journey, measured in the DNA of actual tribal court opinions, which constitutes the heart of this text.

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1 See Guide Index for dates and length of service on each tribal appellate court. I have also just recently been named Chief Justice to the newly formed Crow Creek Sioux Supreme Court. In addition to the Rosebud Sioux Supreme Court, I continue to serve on both the Cheyenne River Sioux Tribal Court of Appeals and the Flandreau Santee Sioux Tribal Court of Appeals.

2 See Guide Index for a complete list of opinions by court and subject matter.

3 See Selected Works of Frank Pommersheim for a bibliography of relevant scholarship (http://works.bepress.com/frank_pommersheim/).

4 To be clear, the opinions that appear in this lib guide are the ones that I wrote. These courts, of course, issued many, many other decisions that I did not write, but did participate in.
This introduction provides a basic primer on tribal courts, including matters of institutional development and legitimacy. In addition, there is a discussion of a model of tribal court jurisprudence, which also includes a thicker and more detailed description of the process of tribal appellate decisionmaking and the development of a tribal judicial philosophy. In essence, I have attempted to provide a rich and complete picture of the institutional and human factors that define modern tribal appellate courts.

A. From New York City to the Rosebud Sioux Reservation

The deepest journeys are seldom direct. When I finished law school in the late 1960s at Columbia in New York City, I had no interest in the practice or study of law. Three years of avid formalism without any encounter with justice left me high and dry. I was young enough to take affront. At the very last, I took my only ‘job’ interview and was selected for a new VISTA (Volunteers in Service to America) program to recruit 8-10 young law school graduates to work in the very rural ‘bush’ area of Alaska. The basic goal was to place young law graduates in Native Yupik, Inuit, and Athabaskan communities to provide basic (civil) legal services to native people under the sponsorship of Alaska Legal Services, the statewide OEO (Office of Economic Opportunity) funded legal services program.

The experience was eye-opening; not so much from a legal point of view but more from a cultural encounter point of view. The legal work was mostly routine, helping Native people obtain state (legal) recognition of indigenous ‘adoption’ practices, as well as navigating the ins and outs of many state and federal social services programs.

The cultural encounter was much more profound, especially to a young (non-Native) law school graduate; quintessentially urban who had never travelled west of the Mississippi River. Yupik culture was strongly communal, subsistence driven, spiritual (a hybrid Russian Orthodox
indigenous blend), and welcoming. It was also riven by problems of alcohol, economic deprivation, and discrimination. I will always remember a local (state) magistrate, who was also a minister in the Moravian Church, informing me that the problems of local ‘Eskimos’ were a product of their ‘inherent evil’ as non-Christians.

As I was nearing the end of my two year service, statewide discussion about the proposed Alaska Native Claims Settlement Act of 1979 (ANCSA)\(^5\) was expanding into rural Native communities. Part of our job as VISTA volunteers was to ‘explain’ the particulars of this (proposed) complex statute. It was not easy to bridge the gulf between modern law and policy and rural, indigenous culture. The disconnect was profound. Most people in the native communities along the Nushagak and Kuskokwim Rivers where I served had difficulty understanding corporate governance, land selection issues, and the potential loss of subsistence rights that surrounded the discussion of the proposed Act. These discussions made a lasting impression on me about the unique challenge of contemporary law and policy to assist and to advance the well-being of Native communities.

I ultimately returned to New York City and worked at a store front law office in East Harlem that was funded by the City of New York and a federal Model Cities Grant to provide consumer protection advice and representation to the poor. This was another valuable and instructive experience about the misuse of law to take advantage of the most vulnerable members of the community. I was also engaged in serious non-violent resistance to the war in Vietnam.

Despite this course of satisfying work and activism, fortuity intervened one more time. A friend of a friend contacted me about a job opening at a new college that was starting on the Rosebud Sioux Reservation in south central South Dakota. Sinte Gleska College (now Sinte

\(^5\) 43 U.S.C. § 1601 et. seq.
Gleska University) was looking for someone with a law degree to teach and to develop some materials on treaties and tribal government.

I was offered the job. My wife Anne and I bought our first car (1973 Chevy Nova!) and drove from the New York City to Rosebud, arriving on Labor Day in 1973. Our plans consisted of no more than thinking that it would be an interesting experience for a year or two. It turned out to be ten. I learned how to teach. I wrote two books, *Broken Ground and Flowing Waters: An Introductory Text with Materials on Rosebud Sioux Tribal Government*[^6] and *Reservation Street Law: A Handbook of Individual Rights and Responsibilities*.[^7] I made good friends. I found a place that helped me to grow, to mature, and to serve.

Sinte Gleska’s philosophy emphasized the importance of faculty involvement in the community. As a result, I went to many community meetings, which were dispersed all over the three million acre Reservation. I usually travelled with Stanley Red Bird, Chairman of the Board of Directors. I went to powwows big and small. I went to the traditional ceremonies of Robert Stead, Frank Picket Pin, Art Running Horse, and Joey Eagle Elk. I stumbled and prayed in my own halting way. People prayed for me. The spirits (I was told) said I was doing good work. Stanley was always with me. Most of this just seemed ordinary to me. This is stuff you do on the Reservation, but part of it also went straight to my soul.

I also played hoops all over the Reservation. I was good. I had a wonderful jumpshot, was a terrific passer. I had played college ball. I was still an athlete of quality. Softball, too. I played in Indian-only fast pitch tournaments all summer long. I qualified through the unwritten – tribal common law – exception for non-Indian Reservation residents who were teachers. I

played a mean first base and could hit well with two strikes. Sports provided solid, common
ground; friendship across the racial divide; all the way from the Big Apple to the wide open
prairie. We had a garden too. Things grew. A thousand flowers bloomed!

There was darkness as well. Too many people died too often and too soon. Illness,
violence, alcohol, and car wrecks took their toll. I attended too many wakes and funerals.
Despite the intense sorrow, everyone was welcome, drunk or sober, friend or stranger. No one
was rejected, no one turned away. I was often asked to speak without prior notice or invitation.
I learned that I could do it.

Poverty was extreme, but not dehumanizing. Things were shared especially food and
material goods. A certain hope and endurance held sway. The traditional giveaways at
graduations and funerals profoundly affected me. I saw the generosity of star quilts, honor
songs, the extended hand. It is better to give than to receive, a cultural practice not a quote from
the Bible.

I learned about the importance of treaties and their centrality to sovereignty and dignity
from traditional elders like Stanley Red Bird, Bill Menard, Ben Black Bear Sr., Christine
Dunham, Isadore White Hate, and Dorothy Crane. They took me under their wing. I observed
tribal government on a daily basis; struggling, often inept, even corrupt. Local Tribal people also
saw this and began to demand more. My students at Sinte Gleska were hungry to learn how to
become more engaged Tribal citizens and how to lead better, more productive lives. They drew
me out of myself. They inspired me. One such student, Sherman Marshall, was in the very first
class – Introduction to Sociology – that I taught at Sinte Gleska. He ultimately went on to
graduate from law school and has served as the Chief Tribal Judge at Rosebud for the past 30
years. A dear friend and colleague to this very day.
In return, I gave my best; the bond and dynamic of reciprocity. Day in, day out, just that
life. I was quiet too. I could fit in without saying too much. I was just there. I didn’t have any
answers. That was good. Lakota people at Rosebud wanted information, feedback, connections.
Corroboration, even collaboration, but not answers. That worked for me.

After seven years as a teacher at Sinte Gleska College, I became the Director of Dakota
Plains Legal Services, the statewide Indian legal services program funded by the federal
government. In that capacity, I got a close look at the many difficulties that poor Native (and
non-Native) people faced in tribal, state, and federal court. Poverty and race certainly skewed
essential fairness and respect, even in tribal courts. It made me see that the beginning of justice
was respect. Justice is not really possible unless judges and lawyers show respect to Indian
litigants in both civil and criminal proceedings; not only respect for individuals, but institutional
and cultural respect as well.

When I joined the faculty at the University of South Dakota School of Law in 1984, my
contact with tribal people and institutions continued to grow. I brought my Indian law students
(now more than 25 years) to visit tribal court and spend an evening at the Tribal motel and
casino. I know from both student evaluations and conversations with students that the Indian law
field trip is a powerful experience for many of them. Students are well-received and treated with
respect. They have the opportunity to see a tribal court in session and share a meal in the
courtroom. They experience Lakota generosity and the quest for fairness and justice. They see a
beautiful landscape as the Little White River dips around the Grass Mountain Community down
below Crazy Horse Canyon. They gamble at the Tribal Casino. These manifold interactions
often break down the artificial barrier between different peoples and their institutions.
Other unexpected things happened when my friend and mentor Stanley Red Bird died. Tillie Black Bear, Stanley’s granddaughter, told me that I was now an ‘orphan’ and that I needed family and relatives on the Reservation. In the Lakota way, Tillie arranged a hunka ceremony to make me (and another friend, Jerry Mohatt) a member of her extended family and tiyospaye; to make me a ‘relative.’

I hesitate to mention this for fear of being misunderstood. It did not make me ‘Indian’ in any way, legal or otherwise, but did make me a ‘relative’ with duties and responsibilities to my ‘family.’ While Tillie occasionally addresses me as her ‘brother’ in public settings, my status as a hunka relative remains little known. That seems best, though it has profoundly affected my understanding of who I am.

This autobiographical snippet is an inescapable part of what I bring to the bench, but it is no more than a very small part of the whole. Yet it remains true that any reliable and informative description of contemporary tribal courts and their jurisprudence must necessarily include an adequate understanding of the tribal peoples and of the judges who sit on the bench.

Tribal court jurisprudence is inevitably made and developed by real flesh and blood tribal judges at both the trial and appellate level. It is therefore worth remembering that the competence and engagement of these judges is key to the realization of justice and fair play. My experience with tribal judiciaries throughout Indian country reveals a group of individuals with high levels of talent, commitment, and courage. This is of no small consequence, for there is an important nexus between the character of the judge and the quality of the judicial decision. As noted by Judge Noonan of the United States Court of Appeals for the Ninth Circuit:

The connection is not mechanical. It is that you understand the judge much better if you understand the man. . . . [A]n American appreciation of the truth that the law a judge makes is a projection of values that are inescapably personal—even while the Judge labors
to be impartial between the litigants and objective in his framing of the dispositive legal rule. . . .

To see with the judge’s eyes one should know where he comes from, what his experience has been, what his ideals and limits are.  

There must also be a complementary understanding of the institutional issues and forces that shape concerns for justice and the actual disposition of cases. Tribal appellate courts not only decide cases, but also help to forge a unique tribal institution that reflects normative and cultural values. They hold justice in the balance.

The product of all these experiences was to give me a rich and informed understanding of local tribal people including their aspirations and their institutions. It was excellent ‘training’ for tribal appellate work. It gave me a personal and cultural context that enhanced my ability to help decide difficult cases with more than raw doctrine and law. Empathy is a dangerous but important word. It is often mistaken or confused with sympathy or condescension. It is neither, but rather the ability to see how things look from another person or culture’s point of view. It permits and encourages a larger framework of understanding within which to fit law, precedent, and doctrine. It does not mean favoritism or a predisposition that Indians and tribes always win.

B. A Model of Tribal Court Jurisprudence

Given the varied challenges that the two “faces” of Indian law as ‘offensive’ nation building and ‘defensive’ resistance to state and federal threats to tribal institutions, especially tribal courts, it is worthwhile to consider the contours of a workable model of tribal court jurisprudence with which to respond. Such a model suggests idealized aspiration, not an absolute necessity attainable in every case. It also provides a practical checklist of possibilities for tribal court judges who face the exigency of real, often staggering, caseloads, limited legal resources,  

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and usually no law clerks at all. For these reasons tribal court jurisprudence constitutes a pragmatic yet complex art. This model or paradigm⁹ (there may well be others) contains the following parts:

1. Tribal court jurisprudence as craft;
2. Tribal court jurisprudence as culture;
3. Tribal court jurisprudence as narrative;
4. Tribal court jurisprudence as literacy primer;
5. Tribal court jurisprudence as “the extended hand”;
6. Tribal court jurisprudence as guide to the standards of review.

Ultimately, these pieces will be stitched together in their unique (tribal) patterns by the hearts and minds of real tribal judges doing their jobs day in and day out with their characteristic hard work and enviable commitment to render justice and fair play to the litigants that come before them.

1. Craft

The field of law invokes certain sets of practices and ways of thinking and speaking that make it a craft. It also constitutes a unique way of identifying and resolving legal disputes. The end product of such dialogue and “translation” is usually a judicial decision that summarizes, weighs, and resolves the competing arguments or claims.¹⁰ The expectation is that the judicial decision will speak at least in part through the language or craft of law. In order to be credible to the law community both on and off the reservation and the larger society in general, tribal court decision making must be convincingly rendered in the craft and analytical practices of legal

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⁹ A fledgling discussion of this model appears in Frank Pommersheim, *What Must Be Done to Achieve the Vision of the Twenty-First Century Tribal Judiciary*, KAN. J. L. & PUB. POL’Y 8 (Winter 1997).

¹⁰ See id. at 12-13. See also FRANK POMMERSHEIM, BRAID OF FEATHERS 74-79 (University of California Press, 1995).
reasoning. This does not mean that this requirement is preemptive or exclusive of other concerns but only that it is necessary in a fundamental way. It is the yeast for the bread of legal conversation and discourse.

2. Culture

The risk of craft standing alone in tribal court jurisprudence is that it will be seen to represent a kind of (dominant) mimicry and it will be perceived as inauthentic and merely imitative. The counterweight to an unhinged craft is the door of culture. Tribal culture provides a context for legal craft to be persuasive because it takes into account tribal history and tradition in the process of legal decision making. Too often legal decision making and the legal system as a whole are seen as a purely formal system of rules and procedures that bear little relationship to the day to day life of people living on the reservation (or elsewhere for that matter). Sensitivity and awareness of (tribal) culture helps to insure that tribal court decision making will not only be analytically sound, but also culturally informed. In many ways, craft and culture are the cornerstones for building a sturdy and enduring tribal court jurisprudence.

3. Narrative

Tribal court decisions both individually and collectively tell a story about law, values, and culture. It is therefore critical for tribal court judges to be aware of the developing narrative or story their jurisprudence tells. How does it, for example, relate to the ongoing struggle to realize sovereignty and to vindicate particular values in unique human circumstances? Attention to narrative allows one to perceive more fully the meaning of tribal court jurisprudence not simply

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11 See id. at 107, 112-20. Note also the role of language in achieving change: “The importance of these poems of competing discourses lies in the poet's conviction that the person who owns the language owns the story, and that he who wishes to change the story must first change the language.” HELEN VENDLER, SEAMUS HEANEY 126 (1998).

12 As noted by Professor Frickey, “This tension between uniformity and formalism versus uniqueness and contextualism (is) at the heart of federal Indian law theory.” Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Non-members, 109 YALE L. J. 1, 70 (1999). This tension also presents itself as a challenge in tribal court jurisprudence.
as the interplay of craft and culture but as something that reveals and explains a people to themselves and others. If law is a field of endeavor primarily for the mind and intellect, narrative is a way to the heart. Narrative is critical to tribal self-understanding not only in a cultural but in a legal sense as well. This element of narrative in tribal court jurisprudence also connects pointedly with the “story telling” tradition that is central to many tribal traditions.

4. Literacy Primer

Tribal court jurisprudence needs also to function, where it can, as a basic Indian law literacy primer in several different ways. First, since tribal court decisions often generate significant local tribal interest and discourse, it is helpful if such opinions contain background discussion about the nature of basic principles of Indian law and tribal sovereignty. Such descriptions at their best aid local understanding of important legal and cultural matters in the many cases that generate local interest. Because law—for better or worse—plays such an outsized role in reservation life, any background understanding is particularly advantageous to developing an informed and literate citizenry.

13 See id. See also POMMERSHEIM, BRAID OF FEATHERS, supra note 10, at 108-12; Frank Pommersheim, Tribal Court Jurisprudence: A Snapshot from the Field, 21 VT. L. REV. 7, 37-45 (1996). Note also these unique observations concerning narrative and language in the context of many indigenous cultures:

The practical knowledge, the moral patterns and social taboos, and indeed the very language or manner of speech of any nonwriting culture maintain themselves primarily through narrative chants, myths, legends, and trickster tales—that is, through the telling of stories.


The sense of being immersed in a sentient world is preserved in the oral stories and songs of indigenous peoples—in the belief that sensible phenomena are all alive and aware, in the assumption that all things have the capacity of speech. Language, for oral peoples, is not a human invention but a gift of the land itself.

Id. at 263.

It is a style of thinking then, that associates truth not with static fact, but with a quality of relationship.

Id. at 264.

In contrast to the apparently unlimited, global character of the technologically mediated world, the sensuous world—the world of our direct unmediated interactions—is always local. The sensuous world is the particular ground on which we walk, the air we breathe.

Id. at 266.

Second, most recent United States Supreme Court jurisprudence in Indian law relative to tribal courts reaches back no further than *Montana v. United States*. As a result, current Supreme Court decisions in Indian law are remarkably truncated with little sense of the roots of tribal sovereignty and the sweep of Indian Law history from the colonial era onward. Again, tribal court jurisprudence can provide a valuable corrective to this pernicious historical and doctrinal amnesia. While there is no guarantee that reviewing federal courts-including the United States Supreme Court-will pay attention or even notice, any opportunity to educate and create dialogue needs to be seized.

Third, tribal courts do not have the luxury of assuming that other judges who read and review their decisions are adequately informed about tribal judicial descriptions of tribal law itself. Tribal courts, wherever possible, have to go that extra mile to explain basic tribal law and values. Without such efforts, it becomes all too easy for federal courts to avoid a genuine engagement with tribal court decisions.

Fourth, in a related but somewhat different vein, tribal court jurisprudence provides the opportunity for tribal courts to explain why some decisions of the Supreme Court and Circuit Courts are wrongly decided from the perspective of the federal courts' own precedents and/or from the tribal court's understanding of its own law. None of this is meant to sound arrogant or presumptuous, yet the Supreme Court does seem to be further and further out of touch with its own historical precedents and its understanding of the law and capabilities of tribal courts. Tribal courts, where they can, need to assist the educable within the federal judiciary.

5. “The Extended Hand”

While the Supreme Court appears to be retreating from its deference and solicitude

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toward tribal courts, tribal courts ought not reciprocate this indifference or hostility, but remain
poised with the “extended hand” of respect and willingness to engage in judicial dialogue.
Failure to do so will just instill more, rather than less, federal jurisprudential chill and
willingness to ignore rather than engage tribal court decision making.

While such a proposal clearly requires a certain kind of judicial diplomacy that should be
mutually shouldered by tribal and federal courts, the Supreme Court, whether inadvertently or
not, has clearly stepped back from its own authoritative initiatives in this regard that were at the
heart of the *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*\(^\text{16}\) and *Iowa Mutual
Insurance Co. v. LaPlante*\(^\text{17}\) cases. Tribal courts ought not to follow suit, and where possible,
they should remind federal courts of the Supreme Court's own extended hand in *National
Farmers Union* and *Iowa Mutual*.

6. The Standards of Review

In the immediate aftermath of *National Farmers Union and Iowa Mutual*, one of the
primary questions addressed by federal courts was what were the appropriate standards of review
for the various kinds of findings a tribal court might make in the course of its own jurisdictional
determination. The potential determinations were of three kinds: findings of fact, findings of
tribal law and findings of federal law. The consensus about the appropriate standard of review
was as follows: tribal findings of fact were entitled to complete deference unless clearly
erroneous; findings of tribal law were entitled to complete deference; and findings of federal law
were reviewed de novo.\(^\text{18}\) This is all well and good, but there are instances, perhaps increasingly

\(^{16}\) 471 U.S. 845, 857 (1985) (holding that parties must exhaust their tribal court remedies before challenging tribal
court jurisdiction in federal court).

\(^{17}\) 480 U.S. 9, 16 (1987) (holding that exhaustion is required even in a diversity context: “[F]ederal policy supporting
tribal self-government directs a federal court to stay its hand in order to give the tribal court a ‘full opportunity to
determine its own jurisdiction.’”).

\(^{18}\) See, e.g., Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN.
so in a post-Strate\textsuperscript{19} world, where lower federal courts may simply leapfrog the particulars of any review to the broad federal question about whether a tribal court has jurisdiction. This potentiality has been astutely pointed out by Professor Royster. As she notes:

Tribal court adjudications involving non-member parties are thus messy affairs. Any given case may raise the issue of whether tribal court jurisdiction is proper as a matter of federal law. It may also raise the issue of whether tribal court jurisdiction over the nonmember is proper as a matter of tribal law, depending upon the wording and reach of tribal constitutional provisions and statutes. In addition, the case may raise the issue of whether tribal legislative or executive power over the non-member party is proper as a matter of federal law.\textsuperscript{20}

When a federal court on post-exhaustion review fails to conscientiously distinguish between those issues of federal law and tribal law, the result is not only doctrinal confusion but serious encroachment upon the proper role of the tribal courts.\textsuperscript{20}

Tribal courts may seek to reduce the likelihood of such problems in the post-exhaustion review situation by doing two specific things in their opinions. First, tribal court opinions should accurately label their various determinations as such: findings of fact, findings of tribal law and findings of federal law. Second, the opinions can explicitly make reference to Professor Royster's insight that findings of tribal law cannot willy nilly be transmogrified into questions of federal law to permit de novo review that completely ignores a tribal court's interpretation of tribal law. This is a critical point. Failure to hue to this distinction means “tribal court jurisprudence cannot prosper.”\textsuperscript{21}

In the confusing, if not chaotic, post-Montana world, tribal courts face even greater responsibilities than ever in seeking to hold federal courts to their proper range of review rather than permitting them to exercise a free ranging de novo approach. If reviewing federal courts encounter tribal court decisions with clear findings and precise indications of the standards of

\textsuperscript{20} Royster, \textit{supra} note 18, at 250-51 (citations omitted).
\textsuperscript{21} \textit{Id.} at 254.
review along with the admonition to “resist the temptation to turn tribal law issues into federal questions,” it will provide a helpful guide to federal review and a salutary reminder to federal courts to respect tribal courts and not overstep their boundaries.

To be sure, this model of tribal court jurisprudence is comprehensive and broadly idealistic. Yet in the real world where the stakes are high and tribal resources may be quite limited, it is important to have something to look to for guidance and direction; something that is both functional and aspirational. The fateful consequences that increasingly characterize federal Indian law as the result of an increasingly illegitimate jurisprudential model ought not be reproduced in tribal court decision making.

Any model of tribal court jurisprudence is inevitably carried out by real flesh and blood tribal judges at both the trial and appellate level. It is therefore worth remembering, as noted previously, that the competence and engagement of these judges is key to the realization of any of the qualities set out in the model. In this light, the personal qualities of intellect, character, and commitment found in tribal judges are central components of tribal court jurisprudence. Without such individuals, no model of tribal court jurisprudence is sufficient to insure justice and fair play in Indian country.

C. The Process of Collaboration and Collegiality in Tribal Judicial Decisionmaking

It has been my uniform experience in serving on several different tribal appellate courts during the past quarter century that there is a consistent and ongoing commitment to collegiality and lively deliberation and collaboration. Deliberations take as much time as necessary to give each justice the opportunity to identify and to speak to the issues. The deliberations are led and mediated by the Chief Justice. The discussions usually continue until the Chief Justice senses a consensus. Then he or she will articulate the consensus orally as to each issue and the resolution
he or she discerns. If the other judges agree, the Chief Justice will usually summarize the issue, its resolution, and the underlying rationale.

There is a strong – though seldom directly articulated – commitment to achieve unanimity in order to speak forcefully with a single, unified (judicial) voice. Over ninety-five percent of the cases in which I have participated have resulted in unanimous opinions. The actual writing of the opinion is usually assigned by the Chief Justice based on collegial commitment and the necessity to share the workload. With rare exceptions, the appellate courts on which I serve issue *per curiam* as opposed to signed opinions by particular justices.\(^23\) This common practice has never involved much discussion. I understand this practice to be connected with collective modesty and a disinclination toward too much individualism.

The lead writer will always circulate the proposed opinion to the other justices for their comments and proposed revisions. My experience is that there is seldom, if ever, significant revision. Tribal appellate court opinions are not changed or modified to hold on to or to obtain a colleague’s vote to join the opinion. This is just not the mindset of tribal appellate courts. Occasionally, different justices will write different parts of a particularly long and intricate opinion; however, in my judicial experience, this practice is quite rare.

**D. Evolution of a Tribal Judging Philosophy**

While little has been written to date about theories or approaches to tribal court judging – at either the trial or appellate level – I want to make an initial foray in this direction that focuses on my own judicial evolution and development. At some point, it is essentially disingenuous to say that you merely ‘umpire’ and neutrally apply the facts to the law as precedent requires.

\(^{23}\) As a result of this practice, all the opinions presented in this Lib Guide as authored by myself must be taken on good faith that this is so.
The ‘umpire’ view is the stuff of mainstream legal education, but like much else in mainstream legal education, it bears little relationship to reality. This judging axiom has particular force in the tribal court context, where many tribal court judges, especially at the trial level, are recent law school graduates who are relatively young and likely still under the sway of the conventions of their law school education. Such youth often needs experience and reflection in order to connect more fully and adroitly with tribal legal and cultural reality.

This ‘neutral’ judicial model is also often advocated to ward off charges of partiality or favouritism of Indians over non-Indians or the tribe over its members. And while such concerns are legitimate and quite real, the ‘neutral’ approach has its own problems in that it often defaults to a vague and messy status quo and otherwise grants too much deference to narrow construction and interpretation with insufficient attention to history and context. This approach is further complicated by the fact there are many, many cases of first impression in tribal appellate courts with little or no local tribal court precedent on point to guide or to frame the analysis. There is no guiding rule or precedent. Neither logic nor legal convention compels a particular result. Choices must be made.

If this is the Scylla of tribal court jurisprudence, there is also the Charybdis of making tribal court decisions with little or no reference to what tribal (or federal) law actually is. This approach ‘creates’ rather than analyzes or interprets law.24 Knowingly or not, it claims too much and becomes excessive. It overreaches and is potentially destabilizing. There ought to be a responsive third way and I believe there is. It involves a synthesis of craft, context, reason, and sensitivity to consequences.

This innovative approach may be highlighted and better understood by comparison to the contending views that exist within the federal court judging community. Recent work by Judge

Richard Posner of the Seventh Judicial Circuit Court of Appeals is most helpful and illuminating. He fruitfully describes the two maincontending judicial philosophies as the ‘formalist’ and ‘realist’ approaches.\textsuperscript{25}

The character of legal formalism, for example, is captured in the slogan “the law is its own thing”\textsuperscript{26}and more academically:

The law as seen from the formalist perspective is a compendium of texts, like the Bible, and the task of the judge or other legal analyst is to discern and apply the internal logic of the compendium. He is an interpreter, indifferent or nearly so to the consequences of his interpretations in the real world. He is not responsible for those consequences; if they are untoward, the responsibility for altering them through a change in law falls to the “political branches” (as judges like to call the legislative and executive branches of government, thus distancing themselves from the taint of politics). On this view, judges who take into account the consequences of alternative interpretations are stepping outside law. Only the orthodox materials of legal analysis – statutes, constitutions, regulations, precedents, other legal documents – are law; all the rest is policy, or politics (or economics!). As one notable formalist has put it, impressively but opaquely, “formalism treats the law’s concepts as pathways into an internal intelligibility.” (footnotes omitted)\textsuperscript{27}

Legal realism is:

[H]arder to describe than legal formalism, because it is everything in legal thought and practice that is not formalism, . . . The realist places emphasis on the consequences of judicial rulings, and in that regard is pragmatic but only if the realist considers systemic as well as case-specific consequences and thus avoids shortsighted justice – justice responsive only to the “equities” of the particular case – and is analytical and empirical rather than merely intuitive and political. Systemic consequences include the effect of a doctrine or decision on the predictability of law, on caseloads, on administrability, on the work of other branches of government (such as the legislative branch, which would be thrown into disarray if judges paid no heed to statutory language), and on reasonable expectations both private and public.

. . . The core of a defensible legal realism is the idea that in many cases, and those the most important, the judge will have to settle for a reasonable, a sensible, result, rather than being able to come up with a result that is demonstrably, irrefutably, “logically” correct. Law is not logic but experience, as Holmes

\textsuperscript{25} Id. at 4.
\textsuperscript{26} Id. at 4-5.
\textsuperscript{27} Id. at 4-5.
famously put it. And experience is the domain of fact, and so the realist has a much greater interest in fact than the formalist. . . . 28

Put more simply, ‘formalism’ is primarily committed to the narrow abstraction of ‘textual originalism’:

[W]hose votaries purport to “look for meaning in the governing text, ascribe to that text the meaning that it has born from its inception, and reject judicial speculation about both the drafters’ extratextually derived purposes and the desirability of the fair reading’s anticipated consequences.” So all that judges have to do and all they should do when faced with an issue of statutory or constitutional interpretation is apply the relevant statutory or constitutional text to the facts of the particular case. The escape from empirical reality is then complete.

In form, textual originalism is a celebration of judicial passivity; in practice, it is a rhetorical mask of political conservatism. At the other end of the political spectrum we encounter a freewheeling imaginative approach – one of rampant activism, so obviously unanchored as to be shunned even by liberal judges. 29

‘Realism’ is more ‘concrete’ with its focus on facts and consequences, rather than the blind abstractions of ‘formalism.’

All of this is necessarily mediated through ‘interpretation.’ No text or case is self-disclosing, and interpretation is necessary in order to arrive at a legal ‘meaning’ to apply to the facts and to decide a case. Cases in tribal court are often rife with unique issues of interpretation.

To mention just a few, there are issues involving treaties entered into more than 150 years ago, tribal constitutions that were adopted more than 75 years ago with no reliable input from the tribal citizenry of the day, applying U.S. Supreme Court precedent that is no more than made up federal common law, 30 and discerning long ago tribal tradition and custom. 31 In this framework, I believe, ‘original textualism’ has almost nothing to offer, but pragmatic realism does, particularly with its concern for facts, context, and consequences in the real world.

28 Id. at 5-6.
29 Id. at 178-79 (internal footnotes omitted).
Some obvious caveats also pertain. Such a view does not license or encourage disregard for the text of tribal constitutions and statutes or the holdings of relevant Supreme Court cases. For original textualists, the text is the beginning and the end of the analysis. For pragmatic realists, the text is also the beginning but it is not the end of analysis. There is additional concern for the ‘quality’ of the ‘fit’ of law with tribal history, culture, and practical consequences. In other words, pragmatic realism in tribal court jurisprudence often looks further back and further forward than the boundaries of original textualism.

There is also the ‘reality’ of the residue of colonialist jurisprudence that feels no compunction in adjusting or setting aside what tribes and tribal courts do, especially in regards to non-Indians. This is particularly glaring – even galling – when the most textual-originalist Supreme Court in the modern era routinely erodes tribal sovereignty without reference to any constitutional or statutory text. The Court just makes it up as it goes along and casts an ominous shadow over much tribal court decisionmaking.32

As noted elsewhere,33 tribal courts must be able not only to earn federal court respect with craft and analytical rigor, but also communicate successfully with the tribal public at large. This is another hallmark of pragmatic realism. Tribal court opinions should not add needless ‘complexification’ that further obscures the reality they are describing.34 The law – lest we forget – is a human endeavor that ought not get stuck in its own jargon and bloated obfuscations.

Perhaps, active restraint is a key term or ingredient. Sometimes, tribal appellate courts are seen as sources of clarity and reason; forums for the resolution of important legal questions.

33 See supra notes 9-22 and accompanying text.
34 POSNER, supra note 24, at 351-52.
As a potential authority for both law and policy, there must be a willingness to go far, but not too far. Restraint with a true center of gravity; an anchor in what is necessary and what is possible.

Tribal courts must necessarily take all this into account as best they can. And while it certainly is no easy task, a pragmatic tribal realism offers the most thoughtful and reliable approach and reflects a truer sense of gravity. Perhaps the character Bazil Coutts in Louise Erdrich’s novel *The Round House* says it best:

> These are the decisions that I and many other tribal judges try to make. Solid decisions with no scattershot opinions attached. Everything we do, no matter how trivial, must be crafted keenly. We are trying to build a solid base here for our sovereignty. We try to press against the boundaries of what we are allowed, walk a step past the edge. Our records will be scrutinized by Congress one day and decisions on whether to enlarge our jurisdiction will be made. Some day. *We want the right to prosecute criminals of all races on all lands within our original boundaries.* Which is why I try to run a tight courtroom, Joe. What I am doing now is for the future, though it may seem small, or trivial, or boring, to you.35

I would lastly invoke Albert Camus, the French writer and activist. He makes for me a powerful point; all the more powerful for its counterintuitiveness. Camus notes that his own commitment to pursue justice in the face of so much injustice is nourished and buoyed by the beauty of his home ground. “In a word, the world’s beauty, and not only its injustices, also demands our attention.”36 In Camus’s case, his native Algeria, ravaged by poverty and colonialism, was the place of both sunlight and resolve. For me, the Rosebud Sioux Reservation is that ‘home’ place, that place of endless prairie beauty and wise struggle. That is why I can go on with resolve to render justice in each and every case I participate in. No matter the odds, engaged attention is the predicate of fairness and respect.

Reservation life (at Rosebud) is often besotted by tragedy but saved by (its) beauty and the dream of justice. Both the earth and the stars set deep in the night sky keep the darkness at

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36 ROBERT ZARETZKY, A LIFE WORTH LIVING 188 (Harvard University Press 2013).
bay. Yes, “to serve justice so as not to add to the injustice of the human condition, to insist on plain language so as not to increase universal falsehood, and to wager, in spite of human misery, for happiness.” Such is the call way out there at the outer edges of Indian law and history.

This Lib Guide and the forthcoming book will provide an innovative blend of old fashioned text in the printing press tradition pioneered by Johannes Gutenberg (1395-1468) and the new wave advance of Internet website technology of cyberspace. Those of you who know me will surely chuckle at the irony of a confirmed neo-Luddite at the cutting edge of anything more technologically advanced than pen and paper. Nevertheless, if you go to the University of South Dakota School of Law – Law Library Guides website (http://libguides.law.usd.edu) and click the link for Tribal Justice: 25 Years as a Tribal Appellate Justice, you will find a personal and jurisprudential introduction to this project, the complete texts of the 115 appellate opinions that I have written, a link to my SelectedWorks site containing a bibliography of my Indian law scholarship, and even an embedded YouTube video of the reading of a few Buddha poems. As Buddha (probably) said,

Give more
eat less

It fills
you up

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37 *Id.* at 178.
38 Due out Spring 2015.