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OVEREXTENDED BORROWING: TRIBAL PEACEMAKING APPLIED IN NON-INDIAN DISPUTES

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Respected figures within the U.S. legal system are saying that the system could be improved by borrowing elements from Native American dispute resolution. To longtime students of Indian Law, this is a striking shift of rhetoric. Historically, non-Indian America has either ignored or dismissed tribal law, often characterizing tribes as lawless.[1] But has the rhetoric merely shifted from condescension to impractical romanticizing? This article examines and analyzes the position taken by non-Indian advocates of borrowing from tribal justice systems and considers whether such borrowing can really work.

Non-Indian acknowledgment of tribal law first sprouted in the 1940s, as legal historians and anthropologists of law began documenting the distinctive features of individual tribal legal systems. Some of the studies in this tradition, such as Llewellyn and Hoebel's classic study of the Cheyenne[2] and Reid's volume on the Cherokee,[3] attempted to reconstruct legal regimes that existed before European contact. Others, such as Strickland's study of Cherokee law,[4] devoted more attention to the development of tribal systems in the post-contact period.

Moreover, with the institution and vitalization of tribal judicial systems since the 1960s, tribes themselves have been generating legal material that is more familiar to non-Indians, such as court opinions and legal codes.[5] Thus, outside observers have more readily identified tribal law as a distinct legal system. These contemporary tribal systems began

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1. Since the early years of European contact with indigenous North American peoples, statements by non-Indian observers, traders, American courts, and scholars have echoed the view that tribal members live(d) in a state of near-anarchy. See sources cited in Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. Rev. 1405, 1411 nn.28–29 (1997).

2. K. N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (1941).

3. John Philip Reid, *A Law of Blood: The Primitive Law of the Cherokee Nation* (1970).

4. Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (1975).

5. *See generally* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225 (1994) (presenting sources and substance of tribal law).

as imitations of non-Indian justice.[6] But many have transformed into hybrids of indigenous and non-Indian dispute resolution practices. Tribal leaders produced this transformation through self-conscious efforts to incorporate tribal traditions, such as invoking tribal common law in court proceedings,[7] referring disputes to councils of elders,[8] and instituting tribal peacemaker courts as nonadversarial alternatives to more conventional non-Indian style courts.[9]

Unlike their predecessors, many of today's non-Indian lawyers and judges seem fully prepared to credit these more traditional tribal systems as "law." What is considerably more remarkable, however, is the fact that leaders of the legal profession and judiciary, as well as some legal scholars, are touting these indigenous North American systems as worthy of emulation in the American judicial process.[10] They are urging American lawyers to study and consider incorporating features of tribal justice into both the adversarial and alternative forms of non-Indian dispute resolution. Typically, these exhortations focus on one particular form of tribal justice, usually called tribal peacemaking, which will be described in further detail below.

I have some sympathy for the impulses behind this turn to tribal dispute resolution. Most non-Indian exponents of tribal peacemaking speak from a profound dissatisfaction with the excesses and unproductiveness of adversarial justice.[11] In this article I suggest, however, that the non-Indian legal establishment is mistaken in thinking that tribal dispute resolution processes can be readily imported into non-Indian legal culture.

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6. Peter Iverson, *The Navajo Nation* 74–75 (1981).

7. *See, e.g.*, Frederic Brandfon, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. Rev. 991 (1991); Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo National Code of Judicial Conduct*, 76 Judicature 15 (1992); Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 Ariz. L. Rev. 226 (1989); Valencia-Weber, *supra* note 5; James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 Mont. L. Rev. 265 (1984).

8. *See* Hepler v. Perkins, 13 Indian L. Rep. 6011, 6016 (Sitka Community Ass'n Tribal Ct. 1986).

9. *See* Raymond Austin, *ADR and the Navajo Peacemaker Court: Freedom, Responsibility, and Duty*, Judges' J., Spring 1993, at 9; Philmer Bluehouse & James W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 10 Mediation Q. 327 (1993); Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. Rev. 175 (1994); James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 Am. Indian L. Rev. 89 (1983).

10. *See infra* Part I.A.

11. *See infra* notes 36–37 and accompanying text. For a critical discussion of the rhetoric advocating alternatives to the adversarial system, see Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 Ohio St. J. on Disp. Resol. 1 (1993).

Cultural differences between Native and non-Indian cultures make the process of cross-cultural importation treacherous at best, and altogether futile at worst. This is true even if, as most borrowing proponents assume, alternatives to the prevailing U.S. legal system are desirable,[12] and tribal peacemaking is working well within Indian Country.[13] The operation of tribal peacemaking presupposes certain socio-cultural conditions, such as religious homogeneity and strong kinship networks, that cannot be replicated in most of contemporary non-Indian America. If the non-Indian legal system is to become less adversarial and more effective in resolving conflict, it will have to get that way because of features of non-Indian culture that lend themselves to such transformation, not because of romantic yearnings for a different way of life.[14] Part I of this article demonstrates that the non-Indian legal establishment is indeed recommending tribal peacemaking as a model for American justice. It also seeks to explain what these speakers mean when they refer to tribal peacemaking. Part II dissects and critiques these statements, suggesting that tribal peacemaking emerges from a specific set of cultural characteristics that find no parallel in contemporary non-Indian American life.

I. WHAT NON-INDIANS "SEEK" IN TRIBAL PEACEMAKING

A. Leaders of the American Legal System Urge Use of Tribal Peacemaking

Effusive praise for tribal peacemaking comes from the very pinnacle of the American legal hierarchy. Usually these accolades come with suggestions that the American judicial process learn or borrow from peacemaking systems. In a March 1997 newspaper article, Justice Sandra Day O'Connor wrote:

> In place of the Anglo-American system's emphasis on punishment and deterrence, with a "win-lose" approach that often drives parties to adopt extreme adversarial positions, some tribal judicial systems

12. *Compare* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 Wm. & Mary L. Rev. 5 (1996) (criticizing adversarial proceedings), *with* Nader, *supra* note 11 (defending adversarial proceedings).

13. Given the long history of non-Indians romanticizing and essentializing indigenous North American peoples, there is some reason to doubt the accuracy of non-Indian perceptions of tribal justice. Tribal peacemaking has received little systematic empirical study to date. Any such research should be conducted only with the permission of the relevant tribe.

14. *See* Menkel-Meadow, *supra* note 12, at 42 (acknowledging that reform of adversary system requires "[a] cultural change").

> seek to achieve a restorative justice, with emphasis on restitution rather than retribution and on keeping harmonious relations among the members of their community. Tribal courts may employ inclusive discussion and creative problem-solving as alternatives to conventional adversarial processes. These new methods have much to teach the other court systems operating in the United States.[15]

America's top government lawyer, Attorney General Janet Reno, said in a recent speech that crime victims would be better served if state and federal justice systems emulated the Indian approach to conflict resolution. According to Reno, "[t]he victim does not feel whole until there is some resolution to the bitterness . . . inflicted by the crime. The tribal system heals rather than determining guilt. Community-based peacemaking, according to tribal tradition, seeks to resolve problems instead of processing cases in lengthy adversarial proceedings."[16]

Roberta Cooper Ramo espoused similar sentiments during her term as President of the American Bar Association. In 1995, she wrote in her editorial for the ABA Journal:

> [T]he Navajo goal of preserving the community and seeking peace is one our own system of justice must embrace.
>
> . . . .
>
> The medicine man exhorts us to remember that we are all part of the same Mother Earth, that we must live with each other in peace and in harmony. His blessing bears an important message for lawyers and for our legal system.
>
> Lawyers must embrace the role of peacemaker and work toward creating harmony . . . .[17]

Scholarly writing echoes this enthusiasm for remaking American legal processes in the image of tribal peacemaking. Particularly receptive to this notion are proponents of alternative dispute resolution. For example,

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15. Sandra Day O'Connor, *Tribal Courts Are Vital Part of U.S. Justice System*, Anchorage Daily News, Mar. 20, 1997, at C8 [hereinafter O'Connor, *Tribal Courts*]; *see also* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 9 Tribal Ct. Rec. 12, 14 (1996) [hereinafter O'Connor, *Lessons from the Third Sovereign*]. Justice O'Connor wrote: "The Indian tribal courts' development of further methods of dispute resolution will provide a model from which the Federal and State courts can benefit as they seek to encompass alternatives to the Anglo-American adversarial model." *Id.*

16. *Reno Speaks at Indian Crime Forum*, San Diego Union-Tribune, Jan. 25, 1997, at B2 [hereinafter *Reno Speaks*].

17. Roberta Cooper Ramo, *Lawyers as Peacemakers: Our Navajo Peers Could Teach Us a Thing or Two About Conflict Resolution*, 81 A.B.A. J., Dec. 1995, at 6, 6.

Professor Phyllis Bernard, Professor of Law and Founding Director of the Oklahoma City University Center on Alternative Dispute Resolution, wrote:

> With careful development, tribal peacemaking can become a proving ground for the philosophical and ethical principles which undergird mediation as practiced generally in the United States. . . . Peacemaking holds special promise for those still searching for ADR models that might not only resolve immediate legal disputes, but aid in healing human relationships.[18]

Some tribal judges also think that American justice would be better served by incorporating elements of tribal peacemaking. For example, a newspaper recently paraphrased Chief Justice Robert Yazzie of the Navajo Supreme Court as having said that "[i]n some respects, . . . the practice of law in the United States might benefit from adopting some of the tenets of Navajo law, which include a tradition called 'peacemaking,' a way to settle disputes without the need for going to court."[19] However, most tribal commentators on Indian peacemaking write to increase understanding of their distinctive systems and not to proselytize for non-Indian followers.[20]

B. The Appeal of Tribal Peacemaking to Non-Indian Justice

What qualities do non-Indian legal commentators admire in tribal peacemaking and urge upon the U.S. legal system? Answering this question requires identifying and analyzing what proponents of cross-cultural borrowing mean when they speak of tribal peacemaking.[21]

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18. Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. Tol. L. Rev. 821, 821–22 (1996); *see also* Valencia-Weber, *supra* note 5, at 261– 62 (suggesting that Indian courts are "the laboratories for new concepts that can benefit the majority judicial system").

19. Bill Workman, *Navajos High Court Convenes at Stanford, Panel Offers Lessons in Indian Justice*, S.F. Chron., Apr. 26, 1995, at A15; *see also* Louis Sahagun, *Banishment Tests Not Only Criminals But Their Tribe as Well*, L.A. Times, June 21, 1995, at A5 (quoting Navajo spokesperson Philmer Bluehouse, who pointed out that "[t]he Anglo adversarial system often only results in trial and tribulation").

20. *See, e.g.*, Bluehouse & Zion, *supra* note 9, at 328, 335.

21. Some non-Indian proponents of experimentation with tribal peacemaking seem to assume that peacemaking is a universal feature of tribal justice systems. See, for example, *Reno Speaks*, *supra* note 16, at B2, in which Attorney General Janet Reno speaks of "*the* tribal system" of justice (emphasis added). In fact, a wide variety of dispute resolution mechanisms can be found among tribal traditions, including use of witchcraft accusations, clan councils, and councils of chiefs. *See, e.g.*, Llewellyn & Hoebel, *supra* note 2, at 68–98 (council of chiefs); Strickland, *supra* note 4, at

For the proponents of cross-cultural borrowing, peacemaking is defined by what it is not as much as by what it is. It is definitely *not* adversarial or bipolar in its framing of issues.[22] It does *not* empower a disinterested third-party to impose a solution on the disputants.[23] It does *not* entail the application of general principles establishing a hierarchy of rights.[24] Its procedures are *not* formal.[25] It is *not* limited to rational argument.[26] And it is *not* concerned primarily with deterrence, retribution, or fully compensating victims for their losses.[27] In other words, tribal peacemaking lacks many essential characteristics of non-Indian adjudication.

So what *are* the appealing qualities of tribal peacemaking, according to the borrowing proponents? Most commentators have in mind some image of the Navajo Peacemaker Court, even though several other tribes have established peacemaking systems as adjuncts to their tribal courts.[28] The Navajo system has achieved this prominence because of its large caseload[29] and because eloquent spokespersons for the Navajo Nation have written about the system for non-Navajo readers.[30] I will explain how non-Indian fans of Navajo peacemaking describe and compare it (usually favorably) with both non-Indian adjudication and alternative dispute resolution.

The outward form of the Navajo Peacemaker Court is relatively accessible to outsiders.[31] The Peacemaker Court operates only when parties invoke it, either as an initial matter or as a diversion from a tribal court proceeding. It is staffed by respected members of the community (medicine men and women, tribal leaders) who usually know the disputants. This peacemaker convenes the parties, concerned extended

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56–62 (clan councils); Watson Smith & John M. Roberts, *Zuni Law: A Field of Values*, 43 Papers of Peabody Museum of Am. Archaeology & Ethnology 38–49 (1954) (witchcraft accusations).

22. *See* O'Connor, *Tribal Courts*, *supra* note 15, at C8; *Reno Speaks*, *supra* note 16, at B2.

23. Bluehouse & Zion, *supra* note 9, at 334.

24. Bernard, *supra* note 18, at 831–32.

25. *See* O'Connor, *Tribal Courts*, *supra* note 15, at C8; O'Connor, *Lessons from the Third Sovereign*, *supra* note 15, at 13.

26. Robert Yazzie, *Traditional Indian Law*, 9 Tribal Ct. Rec. 8, 10–11 (1996).

27. *See* O'Connor, *Tribal Courts*, *supra* note 15, at C8.

28. *See* Bernard, *supra* note 18, at 821.

29. The four-year old court's annual caseload grew from 42 cases in 1991 to more than 1000 in 1994. Sahagun, *supra* note 19, at A5.

30. *See supra* note 9.

31. For a description of the process, see Bluehouse & Zion, *supra* note 9, at 333–34; Yazzie, *supra* note 9, at 180–87.

family members, and other interested individuals for an open discussion of the dispute or disruption that has occurred. Each person is given an opportunity to speak as long as necessary to air her concerns, and the speaker is allowed to define her own sense of relevance. Emotional expressions as well as factual presentations and rational arguments are in order. In addition, Navajo peacemaking almost always includes traditional prayers or sacred rituals. Proponents of tribal peacemaking usually praise the greater informality, flexibility, and openness of the process employed in Navajo peacemaking cases as compared with adjudication.[32]

Non-Indian fans of tribal peacemaking also emphasize its distinctive vision and objectives. But these features of the system are more difficult to grasp. To describe the guiding mission of Navajo peacemaking, most outsiders have to resort to metaphor. The choices available in English translation lead both Navajos and outsiders to resort to imagery that is either aesthetic or medical. Many refer to the objective of a peacemaking discussion as returning the community to a state of balance or harmony. Navajo spokesperson Philmer Bluehouse has characterized the peacemaking system as "a consensus-building process that uses our creation narratives, ideas of law and life protocols to regain balance within families."[33] Navajo Nation Chief Justice Robert Yazzie has said:

> Navajo concepts of justice are related to healing because many of the principles are the same. . . .
>
> The term "solidarity" is essential to an understanding of both Navajo healing and justice. . . . Navajo justice . . . favors methods which use solidarity to restore good relations among people. Most importantly, it restores good relations with self.[34]

Similarly, Justice O'Connor refers to the goal of "harmonious relations"; Attorney General Reno calls the tribal peacemaking system one that "heals"; and former ABA President Ramo speaks of a system that "creates harmony."[35]

Leaders of the non-Indian legal system seem to be attracted to this set of metaphors out of frustration with the U.S. system of adversarial litigation. They have seen too many cases, both civil and criminal, that take too long, consume too many resources, and leave litigants and the

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32. *See generally* O'Connor, *Lessons from the Third Sovereign*, *supra* note 15.

33. Sahagun, *supra* note 19, at A5 (quoting Philmer Bluehouse).

34. Yazzie, *supra* note 9, at 180–81.

35. *See supra* notes 15–17 and accompanying text.

community little better off than when the litigation started.[36] These failings are usually traced to excessive concern with reconstructing past events, elaborate procedures designed to maximize individual control over the litigation process, identification of winners and losers based on a hierarchy of rights, and remedies that ignore the full range of individual and communal interests in resolving disputes.[37]

Non-Indian proponents of Navajo peacemaking view the objectives of harmony and healing as a salutary alternative to the objectives of winning and procedural fairness focused solely on the individual that characterize American justice. Usually the objectives of peacemaking are equated with "problem-solving" rather than articulation of rights and obligations.[38] The emphasis is on future relations, not on legal consequences of past events, and in considering future relations, "the good of the community" matters, as well as the concerns of the individuals most directly involved.[39] Peacemaking procedure centers on the objective of improving future interpersonal and communal relations. The participants in the peacemaking proceeding, as well as the peacemaker, are expected to take responsibility for formulating a solution acceptable to all.[40]

Although tribal peacemaking clearly departs from conventional Anglo-American adversarial justice, differentiating it from non-Indian alternative dispute resolution (ADR) is more subtle; non-Indian proponents of tribal peacemaking have only begun to explore such differences. Certainly informality, party control, and problem-solving orientations characterize not only tribal peacemaking but also negotiation and mediation, key forms of ADR.[41] As Professor Bernard has pointed out, however, tribal peacemaking differs from mediation in two important and related ways.[42] First, the tribal peacemaker usually knows the parties involved and is expected to employ that knowledge during the

36. *See, e.g., Reno Speaks*, *supra* note 16, at B2.

37. *See* Menkel-Meadow, *supra* note 12, at 24–31.

38. *See* O'Connor, *Lessons from the Third Sovereign*, *supra* note 15, at 12.

39. Bernard, *supra* note 18, at 825 (quoting Native Am. Legal Resource Ctr., Oklahoma City Univ. Sch. of Law, Tribal Peace Making Conference 1 (1993)).

40. Judge Elbridge Coochise, Northwest Intertribal Court System Traditional Dispute Resolution (paper), *presented at* National Conference on Traditional Peacemaking and Modern Tribal Justice Systems (Oct. 29–30, 1992) (copy on file with author).

41. *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. Rev. 754 (1984).

42. Bernard, *supra* note 18, at 821–23.

proceeding.[43] The non-Indian mediator, in contrast, should be neutral and impartial. Second, the peacemaker can and should invoke community values as a guide to establishing a proper outcome. As Navajo spokesperson Bluehouse indicated above, tribal peacemakers invoke creation narratives as well as cultural ideals of proper conduct.[44] In this respect, Bernard claims, tribal peacemaking more closely resembles arbitration than mediation.[45] Yet arbitration still differs from peacemaking in other important ways; the arbitrator normally engages in principled decision-making and articulates legal rights relating to the individuals directly involved in the proceeding,[46] while the tribal peacemaker focuses on states of mind and patterns of conduct for the future well-being of the extended family and sometimes the community as a whole.[47]

Tribal peacemaking differs both from the adversarial system and from conventional non-Indian mediation. Scholars and leaders of the legal profession thus are counseling real change when they advocate borrowing from the peacemaking model. Part II of this paper assumes arguendo that such a transformation of the American legal system is desirable and considers whether such change can actually be effectuated given differences between non-Indian and tribal cultures.

II. OBSTACLES TO CROSS-CULTURAL BORROWING

A. The Cultural Context for Tribal Peacemaking: A Navajo Illustration

Tribal peacemaking operates within a distinctive cultural framework or "world-view" that gives particular meaning to its practices and ideals. The terms that non-Indians use to describe the objectives of Navajo peacemaking, such as balance, harmony, and healing, carry different meanings for tribal members than for outsiders who do not share this world-view. In particular, these terms have spiritual and social dimensions for the Navajo that differ from the aesthetic or medical

43. *See supra* notes 31–32 and accompanying text.

44. *See supra* note 33 and accompanying text.

45. Bernard, *supra* note 18, at 822.

46. Stephen Yeazell, *Civil Procedure* 599 (1996). The arbitrator's sources for the articulation and enforcement of such rights are either contractual arrangements (e.g., collective bargaining agreements) or court-applied law incorporated in agreements.

47. For a discussion distinguishing tribal peacemaking from both mediation and arbitration, see Bluehouse & Zion, *supra* note 9, at 334–35.

connotations that arise in English. Thus, to understand what Navajo peacemaking is about—and to appreciate whether peacemaking can be deployed successfully within the non-Indian justice system—outsiders need to comprehend the Navajo world-view, and how the peacemaker operates within it.

The world-view that informs Navajo peacemaking is based on the concept that all things in the universe are interconnected. One comprehensive account of indigenous North American sacred ways explains how balance, harmony, and healing take their meanings within such a world-view:

> One of the important concepts Native American tribal people share with respect to the sacred is that all things in the universe are dependent on each other. This concept is first introduced to a child through the stories and songs of the origin histories. Behind the ceremonials and rituals each tribe carries out throughout the year is the notion of balance and imbalance. Among most North American tribal people the aboriginal theories of disease include this *concept of balance and imbalance.* Disease is seen as a part of the total environment which includes the individual, the community, the natural world, and the world of ancestors and spirits.[48]

In this account, the term "balance" has two essential attributes: first, it is a sacred order attributable to a Great Spirit or other supernatural force and associated with sacred ritual; second, it is broad and comprehensive with distinct social dimensions, encompassing proper relations with one's kinship, clan, and other social networks, as well as with the natural world and spirits.

The sacred nature of this order reflects the belief that cosmic balances were established at the time of creation. The creating deities, holy people, or animals established guidelines or rules for sustaining those balances and gave the guidelines to human beings as part of creation. Creation stories that are sacred to the tribe recount this process and set forth the rules in a broad way. Often shamans or medicine men are available as specialists who can interpret the creation stories and discern how people "must live in order to keep the balance of relationships that order the world."[49]

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48. Peggy V. Beck et al., *The Sacred: Ways of Knowledge, Sources of Life* 102 (1990).

49. *Id.*

The creation stories often include commands to carry out sacred rituals, such as Navajo "chantways," to help maintain and restore that order. Indeed, as one commentator writes:

> "[T]he central Navajo's (Diné) religious ideas are concerned with health and order; very likely to the Navajo (Diné) mind, these two concepts are in fact inseparable. Moreover, the kind of order conceived of is primarily of ritual order, that is, order imposed by human religious action, and, for the Navajo (Diné) this is largely a matter of creating and maintaining health."[50]

Thus, ritual or "human religious action" is another reflection of the sacred nature of balance or order within the traditional Navajo world-view.

In addition to being sacred, the notions of order, balance, health, and harmony within Navajo culture are very expansive, encompassing certain states of being as well as certain conduct in relation to other humans and the rest of the natural world. The ultimate objective of harmony is captured in the Navajo word "*hozho*." Navajo Supreme Court Justice Raymond Austin points out that this term is broader than the translated term "harmony," and means something like "a reality with a place for everything, and everything in its place, functioning well with everything else."[51] Another commentator on Navajo culture expands on the meaning of *hozho* as health in the following terms: "Health, on its part, is seen as stretching far beyond the individual: it concerns his whole people as well as himself, and it is based in large part on a reciprocal relationship with the world of nature, mediated through ritual."[52] *Hozho* is difficult to translate into English because English has so few words that capture both the sacred/moral dimension and the aesthetic dimension in a single concept.

Proper social relations are essential to achieving *hozho*. Navajos have an elaborate system of extended kinship and clans, and obligations of kinship solidarity, or "*k'e*," are part of the sacred order that requires Navajos to live in harmony with their clan members and extended family. A Navajo practicing *k'e* expresses love, compassion, kindness, friendliness, generosity, and peacefulness.[53] This social dimension of

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50. *Id.* at 270 (quoting Barre Tolkein, *The Pretty Languages of Yellowman*, 2 Genre 211, 229 (1969)).

51. Austin, *supra* note 9, at 10.

52. *See* Beck et al., *supra* note 48, at 270 (quoting Tolkein, *supra* note 50, at 229).

53. Bluehouse & Zion, *supra* note 9, at 329.

Navajo sacred order is noteworthy for its emphasis on the equal worth of individuals despite their differences.[54] Thus, *k'e* does not mean fulfilling one's role in a hierarchical order; rather, it means taking individual responsibility for achieving solidarity with equally worthy members of one's family and clan, with whom one is inextricably linked. Distinct patterns of interpersonal behavior flow from the obligation of *k'e* in particular circumstances, making it more than an abstract or general injunction.

Within the Navajo world-view, humans are capable of undoing as well as sustaining sacred order. An absence of proper ritual practice, appropriate states of being, and prescribed conduct jeopardizes cosmic order and communal well-being. The sacred rituals that inhere in the cosmic balance function to reinstate order when an individual suffers from disease or disharmony. Sacred ceremonies are prescribed, for example, when a person experiences excesses of behavior or exaggerated states of mind.[55] Thus, healers who conduct such ceremonies are necessarily religious and ritual experts. This conception of healing naturally informs the tribal peacemaker's role.

B. The Tribal Peacemaker's Role in the Context of Navajo Culture

Navajo peacemaking operates within this sacred system of rituals and social responsibilities. At the very outset, the peacemaker invokes the aid of the supernatural with a prayer, and uses the prayer to prepare the participants for greater receptivity to the peacemaking process.[56] Such opening prayers are common in other tribal peacemaking processes as well.[57] Following the prayer, the Navajo peacemaker invokes the sacred order to determine whether the participants are in an inner state or have behaved in a way that indicates a condition of disharmony.[58] The process

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54. This notion of mutually dependent equals finds expression in the Navajo creation story, which includes an account of negotiations between the female deity, Changing Woman, and the male deity, the Sun. *See* Paul G. Zolbrod, *Diné bahane: The Navajo Creation Story* 274–75 (1984); *see also* Austin, *supra* note 9, at 10.

55. Beck et al., *supra* note 48, at 14; Bluehouse & Zion, *supra* note 9, at 332.

56. *See* Bluehouse & Zion, *supra* note 9, at 333.

57. For example, the peacemaking system operated by the Northwest Inter-tribal Court System may take place in a smokehouse, which is a site of spiritual practice, and begin with a prayer. *See* Bernard, *supra* note 18, at 834–35; *see also* Manu Meyer, *To Set Right—Ho'oponopono: A Native Hawaiian Way of Peacemaking*, Compleat Law., Fall 1995, at 30, 30–31, 35 (describing traditional Native Hawaiian peacemaking process as "sacred justice," and indicating that process begins and ends with prayer).

58. *See* Bluehouse & Zion, *supra* note 9, at 333.

continues with the peacemaker offering sacred narratives to instruct the participants in Navajo values, including the value of *k'e*, or social solidarity.

The peacemaker uses a combination of sacred instruction, persuasion, and shaming to lead the participants to a plan for restoring *hozho*. Although coercion is contrary to Navajo values,[59] traditional Navajos experience considerable cultural and social pressure by virtue of the burden each individual bears to sustain communal well-being by adhering to the sacred order. Within tightly-knit traditional Navajo communities, shaming produces conformity much as coercion does in heterogeneous non-Indian communities.[60] Thus, for example, when a Navajo peacemaker hears a domestic violence case, proper resolution is shaped by the understanding of what it means, in Navajo sacred terms, for a married couple to "stay together nicely," or "*hozho sokee*." The peacemaker seeks to guide the participants in the proceeding to understand this aspect of sacred order and identify practical means to conform their future conduct to it.[61] Although participants will not be "forced" to conform to this standard of conduct, they will experience sacred injunctions to bring themselves into a state of *hozho*. If they wish to remain accepted within the community, they will endeavor to change their lives.

C. *Implications for Non-Indian Borrowing*

The distinctive spiritual and social dimensions of Navajo peacemaking ought to counsel caution in viewing tribal peacemaking as a model for non-Indian justice. Non-Indian justice is rigorously segregated from religion; and the non-Indian social system does not establish a comprehensive, well-specified regime of individuals' social responsibility to extended kinship or other groups. Replicating any successes of tribal peacemaking will be difficult without the cultural conditions that form the foundation for peacemaking processes within the tribes.

I am hardly the first scholar to note that traditional tribal law and tribal sacred life are thoroughly intertwined.[62] But the implications of that fact for cultural borrowing seem to be largely overlooked. Unlike a dispute

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59. *See* Austin, *supra* note 9, at 9–10.

60. *Id.* at 10.

61. James W. Zion & Elsie B. Zion, *Hozho' Sokee'—Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 Ariz. St. L.J. 407, 424 (1993).

62. *See, e.g.*, Strickland, *supra* note 4, at 10–12.

resolution system based on sacred injunctions, a secular democratic system has few sources that command positive behavior. As Professor Stephen Carter has bemoaned, U.S. legal and political culture formally and practically disavows any penetration of religion into law.[63] The First Amendment's prohibition on the establishment of religion, with its associated insistence on the separation of church and state, provides the official statement of this position. Furthermore, as a practical matter, the myriad religious traditions found within the American population make it unfeasible for government to promote any one sacred vision. Not only is non-Indian religion disassociated from official dispute resolution, but the non-Indian social system denies any well-delineated extended obligations, sacred or otherwise, to kinship group members or other broad social groupings. The prevailing Anglo-American ideology of individualism and the nuclear family contrasts sharply with Navajo notions of extended family and clan responsibilities associated with a sacred order. The absence of such responsibilities within non-Indian America is lamented and challenged by non-Indian communitarian thinkers, who advocate greater recognition of interdependence and mutual obligations.[64] But the population size, heterogeneity, dispersion, and mobility of non-Indian America are real obstacles to achieving the kind of social accountability that Navajo communities experience.[65]

Without sacred prescription of states of being, ritual practice, and specific intra-group obligations, it is difficult to make a peacemaking process work, at least a peacemaking process like that of the Navajo. Certainly the kind of balance, harmony, and healing that Navajo peacemakers strive to achieve has no ready equivalent in non-Indian American culture. The most sophisticated participant in the discourse of cultural borrowing, Professor Bernard, recognizes that unless members of a community share a vision of proper conduct and social well-being, peacemaking cannot serve as a viable model within the non-Indian justice system. She suggests that neighborhoods may be able to conduct peacemaking if they are "able to reach agreement on a core set of values for harmonious living."[66] This claim, however, equates a humanly

63. *See* Stephen Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993).

64. *See, e.g.*, Michael J. Sandel, *Liberalism and the Limits of Justice* (1982); Amy Gutmann, *Communitarian Critics of Liberalism*, 14 Phil. & Pub. Aff. 308 (1985).

65. For another critique of attempts to transpose dispute resolution systems from more traditional societies to the American justice system, see William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 Law & Soc'y Rev. 63, 86–87 (1974).

66. Bernard, *supra* note 18, at 826–27.

constructed set of values with a tribe's sacred order. Indeed, at one point Bernard indicates that she views the tribal system more as an intentional human construct than a sacred order at all. She seems to suppose that the sacred world-view of tribal communities no longer holds sway. She writes:

> Tribal peacemaking has in many ways been recreated in the United States to meet the needs of persons far more dispersed, far more secularized than a hundred years ago.... The process of developing a tribal peacemaking program inherently acknowledges ... [that] shared blood, ancestry, or history ... do not, in and of themselves, create a true community. That body of people must make an intentional decision to identify who they are, what they value, and how they wish to live in relation to each other.[67]

But far more than shared "blood, ancestry, or history" forms the foundation for tribal peacemaking. Tribal peacemaking rests on a shared world-view and sacred order. Without these, a justice system has neither the force of individuals' compulsion to restore balance, harmony, and good health, the network of powerful communal bonds that makes values truly social, nor the sources of authority giving particular content to general moral prescriptions that drive tribal peacemaking.

A return to the domestic violence example will illustrate the difficulties of importing tribal peacemaking into a non-Indian setting. In a tribal peacemaking proceeding, the peacemaker seeks to guide the participants to understand and accept sacred rules regarding proper conduct of a marriage.[68] Those rules include interpersonal as well as broader social obligations. When one or both spouses have departed from that vision, the peacemaking proceeding can guide them toward restoration of that ideal. Optimally, each spouse was raised to accept sacred obligations[69] and understands that proper conduct is necessary for the well-being of the community as a whole in relation to supernatural forces. In a secular non-Indian setting, the justice system may be able to articulate what spouses should *not* do to one another; but it is quite unimaginable that a neighborhood peacemaker would promote one particular vision of a proper marriage (encompassing gender relations, extended versus nuclear family arrangements, regimes of sharing, etc.). Yet at the heart of tribal peacemaking, as the proponents of cultural

67. *Id.* at 842.

68. *See* Zion & Zion, *supra* note 61, at 413–16, 423–24.

69. *See* Beck et al., *supra* note 48, at 189–97.

borrowing seem to accept, is a concrete and specific focus on future relations and future conduct.

Professor Bernard attempts to minimize concern about cross-cultural importation by pointing out that tribal communities are becoming more like non-Indian communities. She may be correct in claiming that tribal communities are becoming more secularized and heterogeneous. The most notable and widely-touted success with tribal peacemaking, however, has come from the Navajo, whose traditionalists have been known for their antagonism to other religious practices such as Christianity or the Native American Church.[70] Even those Navajo who choose to practice these other religions seem to retain some adherence to traditional Navajo religion as well.[71] The extent to which Navajos become more like non-Indian communities, however, is cause for skepticism about the effectiveness of *tribal* peacemaking, not an argument for importing tribal peacemaking into non-Indian systems. Research is already underway to determine how well peacemaking is working in tribal settings.[72]

III. CONCLUSION

Scholars of comparative law have long warned about the futility of transporting legal regimes from one cultural context into another, especially from religious to secular cultures.[73] Enthusiasm within the non-Indian legal establishment for tribal peacemaking seems to reflect dissatisfaction with the financial, social, and emotional costs of adversarial litigation. This newfound praise for tribal justice may also bespeak some wish to show diplomatic or genuine respect for another governmental system. But those who urge us to experiment with tribal peacemaking will fall into the trap of so much romanticizing about indigenous societies if they continue to ignore the real differences

70. David F. Aberle, *The Peyote Religion Among the Navajo* 207 (2d ed. 1982).

71. *See* Derek B. Milne, Proposal for Institute of American Cultures Research Grant (copy on file with author).

72. Telephone Interview with Donna Coker, Professor of Law, University of Miami Law School (May 10, 1997). Professor Coker is conducting research on tribal peacemaking in domestic violence cases. To be effective, such research must attract the cooperation of the Navajo people and their leaders.

73. *See, e.g.*, Suzanne Last Stone, *In Pursuit of the Countertext: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 Harv. L. Rev. 813 (1993).

between most tribal and non-Indian cultures in contemporary North America.[74]

The very concepts that non-Indians use to describe tribal peacemaking have meanings with no ready equivalence in non-Indian social life. Without a sacred order that penetrates every aspect of life and creates broad social obligations, the kind of consensus and personal acceptance that tribal peacemaking presupposes will be very difficult to achieve. Tribal peacemaking seeks to reestablish a particular way of living in relation to sacred commands. There is no simple way to graft such a vision onto the secular, heterogeneous, individualistic non-Indian justice system. In order to effectuate change, opponents of the adversarial system will have to identify and cultivate strands of non-Indian culture that lend themselves to alternative ways of resolving disputes.

74. It is worth noting, for example, that Justice O'Connor, an enthusiast of cross-cultural borrowing, has joined in many U.S. Supreme Court decisions rejecting claims of tribal sovereignty, thereby making it more difficult for tribes to sustain functioning legal systems. *See* David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573 (1996).