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The Individual, the Collective, and Tribal Code

BRUCE G. MILLER

Over the last few decades more than 100 US Indian tribes have established their own tribal courts and, consequently, have produced (and continue to revise) their own law codes.¹ This paper examines the place of the individual, and individual rights, within several of these communities and, ultimately, within their codes and constitutions. In creating their own legal systems, small scale Indian societies face a different set of problems than those faced by the vastly larger, and differently organized mainstream society. Foremost among these problems is the threat of domination of tribal life by large, powerful, extended families which can potentially erode the circumstances of individuals, other families, and ultimately, the tribe. Extended families, however, remain core cultural and social institutions. As a consequence the problems encountered in creating tribal code are not simply those of balancing two domains (the individual and the collective), but, rather, three: the individual, the kin group, and the tribe. The debate about rights can best focus on the legal relations between both individuals and the larger tribal community and extended families and the tribal community.²

In considering this topic the relevant issue is not whether western notions of individualism and Indian communalism are compatible when considering tribal code, but rather, how Indian

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conceptions of individualism and collectivism are related. The argument here is that they are compatible, and, ultimately, inseparable. Scholars have pointed to the significance of the individual within contemporary Indian societies in various ways, but I wish to relate the concept to current issues of community legal development by exploring epistemological issues.³ This paper points to the importance of accounting for the differences between Indian communities in cosmology, epistemology, and traditions of justice in understanding the individual and the collective.

Simply put, contemporary codes by their very nature embed ideas of the individual and need not necessarily be regarded as violating traditional culture in doing so. Members of Indian societies, in fact, continue to hold clear notions of the individual operating outside of the immediate constraints of the collective, however the collective might be defined. Pocklington and Pocklington have rightly observed that “[i]t would be a serious mistake to underestimate the strength of individualist moral conceptions in Native groups.”⁴ At present there are important debates about the nature of legal rights within North American Indian communities engaged in the continuing process of developing tribal code.⁵ Outcomes of these debates are manifested in the production of code and a variety of legal decisions. For example, Chief Justice Irvin, of The Nisqually Tribal Court of Appeals, explained her position regarding the issue of individual rights in relation to tribal customary law, writing “Tribal jurisprudence does not spring from European roots, but stems from tribal traditions. . . the role of which is in many ways analogous to that of common law crimes in the Anglo-American tradition.” As a consequence, “**due process rights derive from tribal customs and traditions** and Title I of the Indian Civil Rights Act.”⁶ In other instances the tribal courts have upheld the rights of individuals; in one case, for example, the court granted the defendant’s right against double jeopardy (appeal by the prosecution) under the tribal constitution.⁷

There are a variety of reasons why academics have not embraced individual rights within tribal law.⁸ However, the questions remain: how do Indian people address the topics of diversity and individual rights within their own legal settings? And, is it proper to speak of rights within systems of mutual obligation, reciprocity, and moral entanglements, that is, what Indian people across North America refer to as “respect” relations? LaPrairie

noted the significance of the rights debate for Canadian First Nations, observing that

Mediation forums, which stress the collective good, dominate the aboriginal justice discourse but some groups within communities are becoming increasingly conscious of their individual rights and needs. . . . One of the greatest challenges for communities in the coming years will be to design systems which are capable of accommodating both collective and individual values.⁹

In making these claims the significance of the long-term struggles over collective rights need not be diminished. Indian communities have primarily found success in their efforts to cope with encroachment by the dominant society through legal efforts to protect treaties, themselves documents in which the collective is preeminent. The defense of collective rights can be regarded as a necessary tactic, even if it has distorted somewhat the nature of indigenous cultural reality. In addition, this paper is not intended as an argument for or against the authenticity of tribal legal institutions. Indeed, authenticity is hardly a useful criteria to employ in thinking about the current systems. Tribal courts clearly do not simply replicate practices of the past in that laws are codified and litigation conducted in tribal centers. But the tribal courts are of the community, they are part of the current reality, and they constitute a site for the neotraditional application of indigenous values to contemporary problems.¹⁰

The data with which these ideas are explored come primarily from the tribal codes of eight western Washington Coast Salish tribes, interviews with tribal code writers, tribal court judges, and tribal councilors, and secondarily from the analysis of case law, and ethnographic study of political processes among these tribes and Coast Salish bands of British Columbia.¹¹ I incorporate both US and Canadian materials inasmuch as indigenous polities within both countries address the issues of political and legal reorganization and because, in the Coast Salish case as with many others, the membership of a single culture group is divided by the international border and familial, community, and ceremonial affairs are conducted in common with members from both sides.

CODES AND THE PROCESSES OF CODE CREATION

Each tribe has created its own processes to compose code, but there are a number of common ways. Many tribes select law committees which employ paid code writers in making recommendations to the tribal council. Code writers have sometimes imported language from other jurisdictions, including tribal code and state law. The council can then refine the language and vote to accept, reject, or alter the recommendations. Law committees sometimes propose the incorporation of folk law (or, as it is sometimes called, tribal common law).¹² The tribal council can pass legislation on its own initiative or vote on suggestions coming directly from the membership or from other sources. Finally, the general membership of the tribe can instruct the council to prepare legislation by vote or consensus at the General Membership Meetings.

Particular difficulties arise in this process in that the code writers are ordinarily neither enrolled tribal members nor community members and find it a difficult task to fit the ideas emerging from the community and the Law Committee into the legal structure already in place. Code writers, as lawyers, are immersed in the legal traditions of western society, and as a consequence, struggle to understand the perspectives of tribal members and to deal with the diversity of viewpoints within single communities. Over time, tribal members themselves have come to have greater influence over the production of code, frequently thinking through the issues concretely in reference to their own family. Much of the code introduced by code writers and adopted by tribes has gradually been tailored to fit local needs and perspectives.

In one of the communities in question, several individual rights are contained in the tribal constitution (as provided under the federal Indian Civil Rights Act of 1978); including freedom of speech, press, religion, assembly, and equal protection under tribal law. Adult tribal members in common can fish, vote, hunt, apply for housing and tribal jobs, and so on. However, restrictions are imposed in the interests of other individuals, families, and the tribe; for example, nepotism laws prohibit an adult from holding a council seat if a family member already holds one (family is defined here to include immediate family, plus spouse); minors (except those emancipated and heads of household) may not fish in order to protect them from exploitation by family, but non-

member spouses may accompany an adult member and assist in fishing. Individual tribal members are provided the right to fish for subsistence purposes, yet extended families maintain rights to fishing locations. Extended families also maintain rights to oversight of children in the event of the unsuitability or incapacity of the parents (the legal definition of family includes any one considered to be a family member).

In a second tribe, the Bill of Rights provides all adult members, as individuals, equal opportunities to participate in the economic resources and activities of the tribe. In addition, freedom of worship, conscience, speech, press, assembly, and association are provided as rights assigned to individuals (tribes have not all incorporated the same features within the Bill of Rights). However, an adult tribal member may lose parental rights to the interests of the tribe, may be restricted from running for tribal office or holding a fireworks sales permit if an immediate family member is so engaged, and stands in violation of the law (and the interests of the tribe) if, for instance, children are allowed to run free or for leaving dangerous materials unsecured. Individuals are protected from harassment by members of large families at work, or while conducting duties as a council member, and are guaranteed access to tribal jobs and houses in common with those from dominant families. Individuals hold rights to obtain fishing and hunting licenses, but fishing locations remain a heritable right of extended families as long as the right is exercised. The tribe retains taxing authority over the production of fishers, who generally are organized into extended family collectives. These issues are addressed more fully below.

THE INDIVIDUAL AND COAST SALISH CULTURE

The issues surrounding understanding the individual within legal codes can be addressed in part by examining Coast Salish epistemology and social practice (an activity Messer¹³ suggests will produce better cross-cultural understandings of local concepts of human right). One can build a case for the idea of individual rights of a sort which embed ideas of responsibility to the larger community rather than primarily serving as a tool for the defense of the individual against the power of the collective.

Cross-cultural Variance in the Idea of the Individual

A recent article by Long and Chiste, which argues against the extension of the Canadian Charter of Rights and Freedoms to Indian communities, contrasts Western "homocentric" liberalism, which rests on a philosophic individualism wherein the individual is the primary unit, and which balances the interests of individuals within the social order, with their reading of traditional Plains "cosmocentric" philosophy.¹⁴ The logic of homocentric society leads, they claim, to the institutionalization of a set of guarantees to protect the individual from the state, while cosmocentric society disallows individual claims to inherent, inalienable rights in privileging reciprocal relations. Although Long and Chiste acknowledge the existence of personal autonomy in Plains Indian thought, they consider it irrelevant to a consideration of individual rights because it is based on a concept of human dignity stemming from the equality of status and interdependence of individuals within the cosmic order, rather than on an atomistic view of human nature. In this analysis, "restoration of community harmony was primary, and adversarial technologies of justice would have been antithetical to this goal."

Long and Chiste's position, however, does not account for hierarchical societies such as those of the Northwest Coast, including the Coast Salish. Their reading fails to adequately consider problems of long-term disharmony faced within and between communities and related processes of disaffiliation and social contradiction. Within Coast Salish communities there are, and have long been, "adversarial technologies of justice," and ongoing problems of resolving the contemporary equivalent of inter-family blood feuding.¹⁵ Present-day tribal code writers and tribal communities must face the problems of developing appropriate rules in a vastly transformed setting.¹⁶

Shweder and Bourne employ a scheme similar to that used by Long and Chiste in positing that cross-culturally societies hold either holistic and sociocentric or egocentric conceptions of the self and individual.¹⁷ Sociocentric societies, in their treatment, develop context-dependent, occasion-bound concepts of the person, and Schweder and Bourne hold that in many non-western systems the individual is not abstracted independent of social role. There is, therefore, no context-independent recognition of the individual, and, consequently, no inviolate self with intrinsic moral worth and no inherent rights to the protection of the

individual. If one accepts this line of argument, the problem is to determine an appropriate social context within which the individual can be recognized in non-western societies.

Context: the Individual in Coast Salish Culture

Although there are today a variety of religious practices and although some Coast Salish people participate in no religious or ritual practices, virtually all community members regularly encounter the expression of aboriginal concepts in tribal political meetings, funerals, hunting, sporting and otherwise secular events. Consequently, Coast Salish society is still fundamentally built around the idea of personal connections with spiritual entities or guardian spirits, which, once encountered, impart gifts or skills to humans. For this reason, Coast Salish people have been characterized as individualists par excellence.¹⁸ In Coast Salish cosmology humans are subordinate to the nonhuman world and are relatively dependent and weak.¹⁹ Various rituals of supplication mark these facts, including First Salmon ceremonies, and other, more private rituals.²⁰ It is from these core relationships between humans and non-human beings that human society has been constructed; a division of labor is produced (spirit helpers may be needed, for example, in order to become an adept carver, political leader, shaman, and so forth); and a network of social obligations is constructed between people from a wide area who collectively share ceremonial and religious obligations which are discharged in winter time spirit dancing, in potlatching, in the giving of Indian names which link people to spirits and to geography, and in other activities.

A related notable feature of contemporary Salish society is an emphasis on secrecy.²¹ While many adults obtain spirit helpers to function meaningfully, one does not ordinarily communicate directly the content of the spiritual relationship to other people. Consequently, no one knows precisely who the other really is and what spiritual capacity someone has is ordinarily never known. All of this reinforces the cultural emphasis on the individual (even for those who are not engaged directly in the spirit helper complex) which serves to balance obligations to the collectivity. Within present-day Salish society there is a cosmological underpinning for the idea of individuality and for the idea of the individual as intimately connected to the spirit realm and with obligations to spirituality which can be properly viewed as inte-

grated with but unrestricted by other social obligations. It is an error to interpret Coast Salish society as solely organized around collective human obligations, although these are unmistakably present and very powerful. An internal study based on elder testimony carried out in 1991 by the Northwest Intertribal Court System, a legal consortium of fifteen Coast Salish tribes of Puget Sound, notes that "Traditional spiritual beliefs and practices allowed the individual great freedom and privacy which helped ease the tensions created by group living. These beliefs may be associated with a non-interference or privacy ethic"22

Secondly, ideas of personal autonomy mitigate rank and class differences. Although Coast Salish society entrenches class, there is a countervailing egalitarian ethos which entails autonomy and which provides room for individual maneuver independent of one's status.²³In settings of all sorts, including daily and ceremonial life, people ordinarily only very cautiously and indirectly express disapproval for the actions of individuals, despite any status differences. High ranked leaders continue to be constrained by obligations to kinfolk, rather than the other way around, and leaders exert influence cautiously and at the risk of alienating followers.²⁴Fissioning strategies continue to be employed by alienated individuals or small groups within the community who are disaffected by their circumstances, especially by what they perceive as unfair or high-handed treatment which fails to recognize individual achievement, status, or distinctiveness.²⁵These disaffected individuals may leave the community, enroll in another tribe/ band, or affiliate with another extended family.²⁶One Coast Salish chief described this as a "pulling out" strategy which applies even at the band level, and Canadian Coast Salish bands join and withdraw from tribal councils with some regularity. Similarly, component groups within US Coast Salish tribes have withdrawn and reaffiliated with the federally recognized tribal units. The Marietta Band of Nooksack Indians and the Aboriginal Swinomish, for example, are among those groups which have attempted to establish themselves as political units independent of recognized tribes.²⁷Coast Salish society, in effect, can be characterized as continuing to be organized around regular processes of affiliation, disaffiliation, and reaffiliation at several levels of social organization.²⁸The individual, even the low-status individual, emerges clearly within this system.

On the other hand, leaders may act autonomously in ways that affect the collectivity within constrained circumstances, and, in-

deed, society depends on this. In 1994 one Canadian Coast Salish band, *Ohamil, located along the lower Fraser River and a member band of the Sto:lo Nation, changed their own legal procedures for the selection of band councilors to more closely approximate earlier practice.²⁹ Elections were ended and a process created whereby band members indicate individually the names of their family leaders. The family leaders (Siy:am) are appointed to the council, which then assigns governmental portfolios to the councilors.

These changes were motivated in part by the desire to release councilors from the obligation to seek validation from other councilors or the community at large prior to making political decisions affecting the community. Community leaders, it was felt, to be effective, must be free to make decisions on the spot in meetings with governmental officials from the mainstream society or with other First Nations. This liberty is regarded as appropriate for leaders given their achievement of a position of respect within the community. The spiritual underpinnings of such respect relations are thought to justify community reliance. Ultimately, however, leaders who act outside of the interests of the community may be recalled by their own family members or by the community. Political decision-making, then, requires a notion of the spiritually capable, autonomous individual who is responsible to society, but not directly. In this logic, recalled leaders stand revealed as bereft, at least for the moment, of the spiritual capacity which provided their political standing to begin with; they may have offended their guardian spirit by their actions, and, in effect, the autonomy of the true siy:em stands unimpeached.

This picture of Salish society appears somewhat atomistic; however, deeply felt moral obligations continue to bind people together. The argument so far is that current notions of the individual, personal secrecy, and obligations owed first and foremost to non-human beings create culturally sanctioned autonomy and, by extension, something like legal rights for the high and low status individual.³⁰

The Individual Contextualized in Code

The individual is contextualized culturally, and also within current Coast Salish codes, not merely as a holder of inalienable rights and worth, but within one or more social roles, and within a legal system which allows for aboriginal conceptions of the

collective to be considered. Provisions for the application of current understandings of the spirit of tribal law, which pertain in one form or another in the eight codes under consideration, allow for contextualizing of the individual litigant at either the point of sentencing or during the trial itself. One tribal youth code provides that “[t]ribal law or custom shall be controlling, and where appropriate, may be based on the written or oral testimony of a qualified elder, historian, or other tribal representative.”³¹ Another allows that “[i]f the course of the preceding be not specifically pointed out by this code, any suitable process or mode of proceeding may be adapted which may appear most comfortable to the spirit of Tribal Law.”³²

The following examples illustrate the direct application of the “spirit of tribal law”: in one case, the tribal appeals court ruled that tribal custom creates a fundamental right of individuals to speak on any matter of concern, including issues being litigated, a ruling which recognizes the individual within the cultural setting and which recognizes a localized notion of rules of evidence.³³ In a second case, rights of individuals are restricted: the tribal court held that although the US imposed a Bill of Rights because of a history of abuse of minorities, the tribe had no such history nor cultural practice, and therefore the Tribal Bill of Rights need have no provision analogous to the Sixth Amendment.³⁴ In a third case, the tribal court rejected an appeal lodged on the grounds of the failure to employ the exclusionary rule regarding pre-trial testimony (which was formulated to proscribe police conduct) because it does not take into account Indian cultural background and community common knowledge.³⁵ Here, in effect, rights of the individual are limited in favor of the community through the expectation that individuals share cultural understandings.

Tribal code both places community members within a legal context (situating people as members of the community, as adults, as members of extended families, and so forth in relation to others) and serves as a text by which social discord is mediated. Most significantly, the everyday social context, even in the present, incorporates social beings other than human beings and, therefore, consideration of the set of human-human relations must be supplemented with human-non-human relations as well.

There is another sense in which the individual, kin group and tribe conceptually merge. Pocklington and Pocklington, in considering the issue of nepotism in Indian politics, note that universalistic precepts of the polity stem from a political ideal that

stresses personal autonomy.³⁶ The familial/parochial precepts which are said to generate nepotism, on the other hand, emerge from a conception of polity which stresses community and the collective. Paradoxically, then, individual rights are connected to the universal and communal rights to the particular. This is one sense in which drawing a distinction between collective rights and individual rights fails³⁷; both individual and collective are connected to some conception of the greater good, but defined in differing ways. In the case of contemporary Coast Salish societies, a set of corporate extended families make up the tribal community, but do not of themselves constitute the collective.³⁸ In fact, the extended families are widely regarded by Coast Salish people as particularistic in nature and as acting to defend their own interests at the expense of the large collectivity.³⁹ Some Coast Salish people argue the other side, holding that the creation of legal rights of individuals and of the tribe violates the rights of the corporate extended family, which itself ought to be regarded as the primary social body, the collective. The differing emphases heighten the difficulties facing those creating codes in balancing interests within the tribe.

TRIBAL CODES

Legal Statuses

One way to think of the tribal codes is to follow a structural approach and identify the social actors (individuals or groups) specified within the codes and to regard these as occupying social statuses.⁴⁰ The codes as wholes can be said to create sets of legal statuses in relation to other statuses (and which are limited by or restrict those occupying other statuses). Table 1 provides a means of displaying quickly some features of the complex relationships between the legal standing of individuals, members of extended family, and tribal interests. This table shows, for example, rights to fishing locations as variously vested with the tribe, extended families, or individuals within separate codes; in addition, rights to oversee children are variously divided among parents (as individuals), extended families, or the tribe.

Table 1⁴¹
Key Legal Statuses
Legal Status Key Legal Entitlements and Restrictions

1. minor (under-aged individual)
rights to participate in ceremonial life,
eg. attend funerals even if incarcerated
restricted from fishing, hunting, voting
2. adult (adult individual; age of adulthood defined by
activity); includes emancipated minors.
fishing, hunting, voting (if tribal member)
3. kinfolk (as defined independently of membership in
corporate family networks) some restrictions on tribal
office holding by nepotism rules in some codes
4. parent
some limited rights to control of offspring,
mitigated by rights of extended family members in some
codes
5. household head
rights to tribal resources (if tribal member)
emancipated youth may be household head
6. community member
rights to residence, some tribal services
no rights to vote or hold tribal jobs
7. family network member
some rights regarding access to children
some customary resource use-rights such as fish
camp sites in some codes
restriction on tribal office or permit holding by
nepotism rules in some codes
8. tribal member (or, adult individual)
rights to vote, office-holding, collective resources, to
compete for tribal jobs

Discourse About Code

A second way to consider the codes is to examine the ways codes, and community debates about codes, address the conflicting claims of individuals and families in several domains. Some tribal councilors, in arguing for the establishment of legal rights of individuals, have described the extended family system itself as the source of oppression of individual family members who are unable to escape the tenacious grasp of family violence and who are coerced into silence. This argument recognizes the continuing impact of the family, but also reinforces the worth of the individual, who may properly look to the tribe as a supporting collective.

CHILD CUSTODY AND PARENTAL OBLIGATIONS

Some contemporary councilors and community members speak of parental rights concerning children or the work place as deriving from traditional, localized notions of the proper regulation of community life. The object of leadership and the object of regulation, in this discourse, is to preserve the community as healthy and prosperous. Debate has occurred over the regulation of children on the reservation in this light. One position has been that children ought not be regulated (for example, curfews ought not be established) since the free movement of children conforms with traditional patterns of the care of children by extended families. Others, seeking relief from noise or vandalism and hoping to protect children from harm, have argued that parents, as individuals, rather than the extended families, can be held responsible for children and that community members have a right to an orderly, regulated community. Tribal codes reflect both viewpoints. Similar debates have concerned the regulation of dogs, which are seen variously as community property and free to roam, or alternately as the property of individuals which may cause harm to property (in which case other individuals might seek civil damages). In this latter view, individual and tribal interests, as opposed to family interests, predominate and dogs should be regulated and licensed.

Parental rights is another issue which revolves around the roles extended families are permitted to play. One tribal code allows for the termination of parental rights to children in the event of abandonment, or willful, repeated physical abuse that creates a

substantial risk of death; or in the case of sexual abuse; or with consent of both parents. In this tribe's code tribal members are appointed guardians for minor children and no rights of oversight are given to members of the child's extended family. The tribe itself retains oversight for children. Furthermore, in a clause which underscores the restrictions on the extended family in favor of the rights of individuals, legal sanctions are provided against people who interfere with another's exercise of custody of children.

Another of the eight tribes approaches child custody quite differently and specifically rejects termination of parental rights to children and provides for the provision of care by the extended family network in all cases. The family network itself is defined broadly, including anyone who would be considered a member of the child's extended family under tribal custom. In this code, raising the child of another within the family is specifically sanctioned as a customary alternative to parental care, and the extended family maintains oversight. Of the eight codes, extended family rights to and responsibilities for children is acknowledged in three, restrained in four, and unspecified in one.

ACCESS TO RESOURCES: FISH, JOBS, HOUSING

Access to tribal resources, including housing, the fishery, jobs, and social service programs is a second critical area in which the rights of individuals, extended families, and the interests of the tribe are brought into question. Rights to the salmon and shellfish harvests are provided within the mid-nineteenth century treaties signed by ancestors of the present-day Coast Salish of Washington state, and these rights have been upheld in US federal court. It is the assignment of the fisheries right to the tribal entity, rather than to the extended families, which causes communities to search for ways to assign interests in the resource. For the most part, the balance seems to be struck around efforts to guarantee access to all individual tribal members in theory through limits on usufruct rights, even though the harvest continues to be primarily carried on along family lines. No tribally owned, collectively controlled fleets have emerged in these tribes. Family networks commonly act as fishing cooperatives and previously worked within a usufructory system in which senior members of a family maintained heritable rights to manage and use a resource procurement station. Within this system, family members work

together to carry out all of the components of fishing, including harvesting, maintaining the fish camps, boats, and nets.⁴² Today, use rights to resource sites are fully embedded in the law of only two tribes and rejected by four others; extended families are limited as institutions with rights of ownership by seven of the tribes.

The issue of where the right to fisheries is legally vested arises again in the controversial issue of whether non-Indian or non-member spouses of fishers may fish. In some codes the spouse may assist and in others this is prohibited. The debate on this issue, in part, has reflected the larger debate over whether fisheries properly belong to families (in which case spouses would be permitted to fish as family members); to the tribe (in which case non-tribal members could properly be excluded); or to individuals, as members of the tribe (in which case others may appropriately help a member carry out the tasks of fishing).

Another critical resource is the employment opportunities the tribe can offer. Four of the eight tribal codes contain specific provisions under the Bill of Rights for equal access to jobs by tribal members. In addition, one tribe created code which provides economic rights to individuals which are not accorded to members of extended families. This code protects individuals from criticism by community members in the conduct of their work and forbids threatening behavior. The code reads "Any person, who shall . . . threaten such person with an act of violence or otherwise [trying] to influence an official act by means of verbal threat shall be guilty of an offense."⁴³ The regulatory provision was created with the expressed purpose of providing a work place free of disruption by factionalized conflict and to ensure a productive community. The effect is to provide for safety in a work place occupied largely by women and to ensure women's capacity to provide for dependents. The intent of tribal councilors in this case was to create code which protected the tribal community itself through regulating the competition between corporate family groups as they may play out at the work place. In one case, an effort was made to create code which protected the access of individual tribal members (and not simply those from dominant families) to tribal jobs. This was attempted by excluding tribal councilors from simultaneously holding the post of tribal general manager; in addition an independent hiring committee was established which was intended to operate beyond the control of large families.

Tribal codes also provide for the equal access of tribal members to community housing and services, an accommodation, in part, to the fact that dominant extended families could potentially (and are frequently said to) exert political pressure to attempt to control these resources.

RITUAL PRACTICE AND RELIGIOUS DIVERSITY

Some tribal councilors have argued that legal protection of diversity in religious views and lifestyle conforms to Coast Salish notions of eclecticism and acceptance of innovation (itself an idea tied to cosmology, in that the domain of spiritual helpers is not fully known and is open to change). Over the last century and a half, various Christian denominations have been introduced to Coast Salish communities, and others, such as the Shaker Church, incorporate Christian and Salish elements. In addition, some religious and ceremonial practices of other Indian cultures have gained ground among Coast Salish. Consequently, some codes reflect efforts to provide the legal protection of religious diversity and to ensure that members of smaller, less powerful families who hold minority religious affiliations can remain peacefully within the tribal collective. Both arguments for the protection of religious diversity emphasize rights of the individual in order to preserve the well-being of the community as a whole. For some tribes, zoning ordinances have been created to restrict the locations of religious and ritual activity and as a means of protecting diversity through avoiding influence over residential areas by the practitioners of dominant religions.

Although diversity in religious practice is protected in this case, it is limited in the interest of protecting individuals regarding the former and occasional practice of forcing people into initiation into the winter ceremonial spirit dancing. While the preceding examples concern the rights of individuals in relation to other families, here rights of the individual in relation to one's own family come into play. Current provisions in several tribes' codes make illegal "grabbing," or forcing anyone into winter ceremonial life without their consent. In some cases, people regarded as drug or alcohol dependent or in need of spiritual guidance had been made initiates. Episodes of grabbing which resulted in death (due to the rigorous conditions required to become acceptable to spirits) resulted in litigation in non-Indian courts and was an impetus to protecting the individual within tribal code.

CONCLUSION

The Coast Salish communities of Puget Sound have produced tribal codes which organize a series of social relationships and which entail rights and responsibilities. In doing so, these communities are addressing their own current circumstances, and, to a degree, their own historic and cultural experiences. Those rights assigned to individuals do not simply emanate from the western legal imagination or from existing arrangements within state and federal law. Rather, they also reflect underlying Salish world views as interpreted for the present-day, and, as such, are not repudiations of traditional culture. Academics have not readily focused on this development, thereby missing much of what is significant about these new legal systems. Individual rights need not be thought solely linked to an "atomistic," or homocentric society. Rather, the idea of individual rights derives in part from new interpretations of traditional culture.⁴⁴ The interrelatedness of these units within the whole is not simply reducible to a legal construction privileging rights of the collective.

At present, tribal code writers, tribal law committees, tribal councilors, and judges understand clearly the difficult task of creating code which skillfully addresses the complexity of social relations in order to protect community diversity, to engage both corporate groups and individuals, and to protect the collective interests of the tribe itself. Because both the cohesion of the unit and the well-being of the individual within it depend on the continued and vital participation of a full spectrum of tribal citizens, the dangers of alienating members by overlooking the importance of the individual are great, especially for small and fragile polities surrounded by a sometimes openly hostile (and always intrusive) state and its non-Indian citizenries.

NOTES

1. Sharon O'Brien, *American Indian Tribal Governments*. (Norman: University of Oklahoma Press, 1989).

2. Among those scholars writing about the individual and the tribal courts are Carla Christofferson, "Tribal Court's Failure to Protect Native Women: A Reevaluation of the Indian Civil Rights Act," *Yale Law Journal* 101 (1991):169-85; Russel Lawrence Barsh and J. Henderson Youngblood, "Tribal Courts, the

Model Code, and the Police Idea in American Indian Policy," *Law and Contemporary Society* 40 (1976): 25-60; Frances Svensson, "Liberal Democracy and Group Rights: The Impact of Individualism and its Impact on American Indian Tribes," *Political Studies* 27 (1979):421-39; Bruce G. Miller, "Folk Law and Contemporary Coast Salish Tribal Code," *American Indian Culture and Research Journal* 19:3 (1995):141-164.

3. There are prior traditions of writing about the individual, especially in the Plains, going back at least to Lowie's individualism-authority continuum, which describes certain Plains Indians as practicing democratic individualism. (Robert H. Lowie, *Primitive Society* (New York: Boni and Liveright, 1920)). Studies in culture and personality have taken up the problem of the individual. A related argument is that individualism arose as a consequence of the fur trade, or, more broadly, as a consequence of contact. More recently scholars of Indian literature, especially autobiography, have debated the nature of the individual and the self in Indian societies. See, for example, David Brumble III, *American Indian Autobiography* (Berkeley, University of California Press, 1988). Recent interpretations of gender have reopened considerations of the autonomous individual. See Laura F. Klein and Lillian A. Ackerman, eds., *Women and Power in Native North America* (Norman: University of Oklahoma Press, 1995). In addition, Canadian First Nations and American Indian legal scholars have addressed the idea of individual rights. See, for example, Patricia Monture-Angus, *Thunder in My Soul* (Halifax: Fernwood Publishing, 1995), and *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Royal Commission on Aboriginal Peoples, 1996), a document produced in part by First Nations scholars.

4. Pocklington and Pocklington, "Aboriginal Political Ethics," in *Corruption, Character and Conduct: Essays on Canadian Government Ethics*, ed. John W. Langford and Allan Tupper (Oxford: Oxford University Press, 1995), 63.

5. See Northwest Intertribal Court System (NICS), "Traditional and Informal Dispute Resolution Processes in Tribes of the Puget Sound and Olympic Peninsula Region" (unpublished manuscript, 1991); and also Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Life* (Berkeley: University of California Press, 1995).

6. See *Michael Stepetin, III. v Nisqually Indian Community* (No. NIS-Cr/91-060), Nisqually Tribal Court of Appeals.

7. *Lummi Indian Nation v Rick Kinley and Carl Lane* (Nos 89-CRF-0 2385, 2386), Lummi Tribal Court of Appeals.

8. Perhaps most significantly, US and Canadian public policies have been perceived to and, for the most part, have historically encouraged individualism (as opposed to collectivism) among Indians as a vehicle of assimilation, a circumstance which makes the repudiation of individualism, and, logically, the promotion of communalism, an important part of the politics of difference employed by tribal officials. Communalism and the restoration of the harmony of the community are widely held to be diacritical features of folk law of non-western societies influenced by the west and the idea of communalism continues to work in the present political climate because it contrasts easily with

Western conceptions of the rights of individuals, of individuals as the primary holders of property rights, and the recipients of rights to assembly, free speech, and so on. A case in point is the highly publicized circumstance of two Tlingit juveniles, convicted of assault, who were diverted in 1994 from Snohomish County Superior Court, Everett, Washington, to "banishment" in Tlingit territory in Alaska. Presiding Judge Robert Allendoerfer, who released the boys on bail pending the rehabilitative outcome of the boys' time spent alone, believed that Tlingit law, unlike western law, emphasized spiritual restoration through the desire to purge shame from the community (personal communication, Judge Allendoerfer, November 2, 1994). Media representations, playing to preconceptions of the mainstream audience, easily and frequently focused on the communal, restorative features of Tlingit notions of justice, setting these in contrast with Washington state law.

The idea that differing conceptions of the law serves colonized peoples as a defense against invasion by the intrusive western society is widely noted (see for example, Roger M. Keesing, *Custom and Confrontation: The Kawaio Struggle for Culture Autonomy*, Chicago: University of Chicago Press, 1992, p. 124) and current Indian nationalist aspirations are well served by publically promoting the idea of communalism. Inasmuch as communalism is thought to be linked to a notion of group identity which is itself grounded in notions of spirituality, Indian religious practices, and cosmology, one can see why the analytic focus has not been placed on Indian concepts of individuality.

9. Carol La Prairie, "Aboriginal Crime and Justice: Explaining the Present, Exploring the Future," *Canadian Journal of Criminology* (July-October 1992). (add page numbers)

10. Issues of the relationship between the individual and the collective do not permeate all domains of the codes which include enrollment, gaming, housing, labor, probate, tax, traffic, utilities, zoning, criminal, juvenile, family, and other areas of law (all tribes do not have code in all areas and tribal courts may seek guidance from precedents established first in other Indian courts, then in federal and state courts). The issues in question here figure most prominently regarding intratribal affairs, and this paper specifically concerns such portions of the codes.

11. The tribes whose codes are considered here are the Lummi, Muckleshoot, Nisqually, Nooksack, Sauk-Suiattle, Skokomish, Tulalip, and Upper Skagit. Case law from the appeals courts of these and neighboring tribes is also reviewed. Among those I have consulted are non-Indian attorneys who have served as code writers, including Ted Maloney, Martin Boll, Talus Woodward, Emily Mansfield, Russel Barsh, and Harry Chesnin. I thank Elbridge Coochise and Emma Dulik, Judges of the NICS, and Doreen Maloney, appeals Judge, for their help. I leave the many tribal councilors, tribal court clerks, tribal attorneys, tribal prosecutors, Law Committee members and community members I have consulted unidentified here to maintain their privacy. Any errors in fact or interpretation are my own.

12. Some code writers and community members have observed that there is limited knowledge of aboriginal justice practices, a circumstance which

prompted a study by the NICS, and on-going studies by the Sto:lo Nation. While self-governance was lost in the nineteenth century and some justice procedures fell into disuse, communities did not lose track of the cultural values and practices which generated justice procedures, a circumstance pointed out by Chief Frank Malloway of the Yakweawwoose Band (personal communication, June, 1996).

13. Ellen Messer, "Anthropology and Human Rights," in *Annual Review of Anthropology*, (Annual Reviews Inc., 1993):221-49, p. 241.

14. J. Anthony Long and Katherine Beaty Chiste, "Indian Governments and the Canadian Charter of Rights and Freedoms," *American Indian Culture and Research Journal* (1994):91-120.

15. Northwest Intertribal Court System, "Traditional and Informal Dispute Resolution."

16. There are other relevant approaches to law and society which emphasize the competition for the loyalties of the group between bodies of law co-existing in a single location, particularly where state governments intrude on indigenous societies. Such approaches, while more compatible with the argument here, are not, at present, dominant in the discussion of North American tribal communities and codes.

See, for example, Melanie G. Wiber, *Politics, Property and Law in the Philippine Uplands* (Waterloo, Ontario: Wilfred Laurier Press, 1993); Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge and Keegan Paul, 1978); Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford: Stanford University Press, 1990).

17. Richard A. Shweder and Edmund J. Bourne, "Does the Concept of the Person Vary Cross-Culturally?" in *Cultural Concepts of Mental Health and Therapy*, eds. A.J. Marsella and G.M. White (Dordrecht, Holland: D. Reidel, 1982).

18. Personal communication, Michael Kew, Department of Anthropology and Sociology, University of British Columbia, December 5, 1994.

19. See June Collins, *Valley of the Spirits* (Seattle: University of Washington Press, 1974), for an account of the spirit world in relation to the human world.

20. J.E. Michael Kew, "Central and Southern Coast Salish Ceremonies Since 1900," in *Handbook of North American Indians*, Vol. 7, Northwest Coast, ed. Wayne Suttles (Washington D.C., Smithsonian Institution, 1990), 476-480.

21. Pamela T. Amoss, "The Power of Secrecy Among the Coast Salish," in *The Anthropology of Power*, ed. Raymond D. Fogelson and Richard N. Adams (New York: Academic Press, 1977).

22. NICS, "Traditional and Informal Dispute Resolution," 9.

23. Kathleen A. Mooney, "Social Distance and Exchange: The Coast Salish Case," *Ethnology* 15:4 (1976): 323-346.

24. *Swinomish Tribal Mental Health Project, A Gathering of Wisdoms* (La Conner, WA.: Swinomish Tribal Community, 1991).

25. Bruce G. Miller, "Women and Politics: Comparative Evidence from the Northwest Coast," *Ethnology* 32:4 (1992):367-383.

26. Bruce G. Miller, "Folk Law and Contemporary Coast Salish Tribal Code," *American Indian Culture and Research Journal* 19:3 (1995):141-164.

27. See Frank W. Porter, III *The Coast Salish Peoples* (New York: Chelsea House Publishers, 1989); Robin K. Wright, ed. *A Time of Gathering: Native Heritage in Washington State* (Seattle: Burke Museum, 1991).

28. J.E. Michael Kew and Bruce G. Miller, "Locating Aboriginal Governments in the Political Landscape," in *Sustainability and Human Choice in the Lower Fraser Basin: Resolving the Dissonance*, ed. Michael Healey (Vancouver: University of British Columbia Press, in press).

29. *Personal communication*, Sonny McHalsie, Yewal Siy:am, Ohamil Chief, June, 1994.

30. Alison Dundes Renteln in *International Human Rights: Universalism versus Relativism* (Newberry Park: Sage Publishing, 1990) refers to the doctrine of moral correlativity in arguing for a similar idea, that moral obligations create a category of rights.

31. This text is from the published code of a Puget Sound tribe, which I leave unidentified. Chief Judge Coochise observed (personal communication, April, 1995) that the instances in which specific appeal to tribal common law not contained directly within code are unusual, but do arise. In addition, in some cases, Elders panels have been convened to consider issues concerning children. The Canadian Royal Commission on Aboriginal Peoples observed the NICS tribal courts are understanding of circumstances and cultural practices of the litigants (*Bridging the Cultural Divide*, 195).

32. This text is from the published code of a Puget Sound tribe, which I leave unidentified.

33. *John C. Bowen v Upper Skagit Indian Tribe* (No. Upp-Cr-2/89-009), Upper Skagit Tribal Court of Appeals.

34. *Hoh Indian Tribe v Glenn Penn* (No. Hoh-CrF-10/87-085), Hoh Tribal Court of Appeals.

35. *Southern Puget Sound Intertribal Housing Authority v Carl Johnson, Jr.* (No Sho-Civ 6/80-434), Shoalwater Bay Appellate Court; and see *Michael Stepetin, III, v Nisqually Indian Community* (No 1 NIS-Cr-1/91-060), Nisqually Tribal Court of Appeals.

36. Pocklington and Pocklington, "Corruption, Character, and Conduct," 52.

37. Falk Moore wrote "To speak of . . . collectivity and individuality does not make sense. The generalizations couched in these terms use one aspect of a system to characterize the whole. . . ." Sally Falk Moore, "Legal Liability and Evolutionary Interpretation: Some Aspects of Strict Liability, Self-help, and Collective Responsibility," in *The Allocation of Responsibility*, ed. Max Gluckman (Manchester: Manchester University Press, 1972), 101.

38. The tribe (or band, in Canada), although a creation of contact, is today a core social and political institution because it is the unit which holds recognition by the state See Bruce G. Miller, and Daniel L. Boxberger, "Creating Chiefdoms: The Puget Sound Case," *Ethnohistory* 41 (1994): 267-93.

39. For a recent Coast Salish autoethnographic treatment of these issues see Swinomish, "A Gathering of Wisdoms"; see Miller, "Women and Politics," for a discussion of competition for tribal jobs and tribal politics.

40. Arthur R. Radcliffe Brown, *Structure and Function in Primitive Society* (Glencoe, Ill.: Free Press, 1952).

41. Adapted from Bruce G. Miller, "Contemporary Tribal Codes and Gender Issues," *American Indian Culture and Research Journal* 18:2 (1994):43-74. This article discusses the content of the codes of particular tribes more systematically than is possible here. See also Miller, "Folk Law and Contemporary Code."

42. See Daniel L. Boxberger, *To Fish in Common* (Lincoln: University of Nebraska Press, 1989).

43. This text is from a Puget Sound tribal code.

44. Case law also plays an important role in clarifying the legal relationships of individuals and the collective, but is not the focus of this article. However, the courts have ruled on the rights of individuals in a variety of areas, including the rules of evidence, rights to sue the tribe, due process considerations, speedy trial issues, appeals rights, double jeopardy, and applications of the Indian Civil Rights Act. The trend has been towards the elaboration of individual rights in code and in court rulings, although this area of law is still relatively undeveloped. A counter development has been rulings which indicate individuals should know their own folk law, regarding it as a manifestation of cultural knowledge, and therefore some features of the US Bill of Rights do not apply and are not needed. The Indian Civil Rights Act, 25 U.S.C.A. 1301-1303, imposed requirements on tribes in section 1302 (8) such that "No Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." However, the reading of non-Indian rights into Indian country is not straightforward, and the intention of Congress was not to disrupt tribal practice. Federal court review is confined to *habeas corpus* cases and federal and state court interpretations are not binding. Tribes have not uniformly incorporated the provisions of the US Bill of Rights into their constitutions and codes.

The following are illustrations of the several recent cases in western Washington state upholding individual rights: in one, the appeals court ruled that under tribal code, the defendants rights in procedural issues were violated, including her right to make recommendations for sentencing and adequate representation (*Lummi Indian Nation v Linda Ward* (nos. 92.2 CRP 2288, 92.4 CRP 2525 and 92.4 CRP 2526), Lummi Tribal Court of Appeals). In another case the defendant was granted immunity from double jeopardy as a right under the Lummi constitution and therefore the tribe itself was given no rights of appeal (*Lummi Indian Nation v Rick Kinley and Carl Lane*). In a third case, the tribal government's obligation to a high standard of protection of individual rights was upheld, including the right of appeal (*Suquamish Indian Tribe v. Randi Purser* (No. SUQ-FCR-2/90-3, Suquamish Tribal Court of Appeals). But in a fourth case, an argument to dismiss a case due to the failure of tribal police to inform a defendant of his legal rights (i.e. Miranda rights) was rejected because the defendant was not harmed and because the fundamental fairness inherent in tribal law was not breached (*Lower Elwha Klallam Tribe v James L. Bolstrom and Russell N. Hepfer* (Nos. LOW-CRP-1/91053,054), Lower Elwha Klallam Tribal

Appeals Court).