American Indian Law Journal

Volume 5
Issue 1 *Volume V, Issue I*

Article 6

1-24-2017

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Cover Page Footnote
*University of Denver Sturm College of Law, J.D. expected May, 2016. The author wishes to thank Troy Eid and Jan G. Laitos for their assistance in reviewing this article.

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CONTENTS

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Juliana E. Okulski[1]

INTRODUCTION

Many contemporary tribal communities have two distinct justice systems capable of resolving interpersonal civil disputes among tribal members.[2] The systems are grounded in different justice paradigms, and as a result utilize very different procedures for dispute resolution. One system is based on the Western, or Anglo-American, paradigm of justice and resolves conflict through litigation or other adversarial dispute resolution methods.[3] For example, Indian tribal courts, which were modeled largely on American courts, historically have resolved disputes by employing some degree of the Western adversarial ideals of justice.[4] The Western paradigm of justice prioritizes and seeks to protect individual rights above all else. More recently, however, many tribes have rediscovered or formally instituted traditional tribal methods of dispute resolution, generally referred to as "peacemaking,"[5] and are now also resolving interpersonal civil disputes pursuant to traditional tribal justice principles as well.[6] The "tribal peacemaking" concept has been defined as "any system of dispute resolution used within a Native American community which utilizes non-adversarial strategies . . . [and] incorporates some traditional or customary approaches . . . the aim of which is

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[1] University of Denver Sturm College of Law, J.D. expected May, 2016. The author wishes to thank Troy Eid and Jan G. Laitos for their assistance in reviewing this article.

[2] Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473, 502 (2002).

[3] *Id*.

[4] Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 237 (1997).

[5] William C. Bradford, *Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution*, 76 N.D. L. REV. 551, 578-79 (2000); Porter, *supra* note 4, at 250-51.

[6] Bradford, *supra* note 4, at 577-78.

conciliation and restoration of peace and harmony."[7] Unlike the Western system of justice, in which individual rights are paramount, peacemaking primarily aims to repair relationships among individuals and to restore community harmony. Unlike the Anglo-American paradigm, traditional tribal dispute resolution procedures are fairly informal and typically proceed outside of tribal court.[8]

While from the outside, this dual system seems to do no more than provide tribal members with options regarding where they want to settle their civil disputes, a number of scholars find the dual system more problematic. Some scholars argue that because the adversary system promotes values—such as individualism—that are antithetical to tribal values, employment of Western justice systems tears at the fabric of tribal communities and undermines tribal sovereignty.[9] These scholars argue that tribes should rely less on the Western-influenced tribal court system, and instead rely more on traditional, informal dispute resolution techniques, such as peacemaking, which reflect and promote tribal values.[10] However, other scholars believe just the opposite. This latter group of scholars strongly believes that strengthening the current model of tribal courts, and tribal courts' use of Western legal traditions, will help guarantee tribal sovereignty.[11] These scholars argue that tribal independence and self-government necessitate state and federal recognition of tribal court judgments.[12] This recognition requires that tribal courts have legitimacy, which can only come from adhering to certain Western legal traditions.[13]

These scholars' opposing positions frame a policy debate, at the root of which is a question regarding how tribes can resolve disputes among members in a manner that best benefits tribal

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[7] Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821, 835 (1996).
[8] Porter, *supra* note 3, at 257.
[9] *Id*. at 237-38.
[10] *See* Justice Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351 (2011).
[11] Clarkson, *supra* note 1, at 509.
[12] Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law* 24 N.M. L. REV. 225225, 242 (1994).
[13] *Id*. at 262-63.

communities and members. This article considers this question and takes the position that tribal communities can best be served by relying primarily on peacemaking techniques, rather than the Western-style adversarial litigation, for resolving interpersonal civil disputes. Unlike the perspectives considered above, however, this article does not use policy to support its conclusion that tribes should actively seek to emphasize peacemaking as the preferred dispute resolution technique. Instead, this conclusion is based on mainly functional grounds, that is, how the Western adversarial tradition compares in efficacy to the peacemaking system for resolving interpersonal civil disputes. Because the peacemaking system is far more adapted to the dynamics of human social systems, such as tribes, this article concludes that peacemaking is a more effective civil dispute resolution tool for tribes.

This article is premised on two assumptions. First, it is assumed that, while the policy behind choosing a dispute resolution system is important, what is equally important is that the dispute resolution procedure employed by tribes be effective at resolving interpersonal civil disputes. Dispute resolution procedures that are effective at resolving interpersonal civil disputes are particularly crucial for tribes, whose long-term endurance depends on the maintenance of community cohesion.[14] Second, it is assumed that the most effective dispute resolution system will be the system that is best adapted to the dynamics governing human social systems. Based upon these two premises, this article uses complex adaptive systems theory to assess the relative effectiveness of the two dispute resolution procedures in terms of their adaptability to the dynamics governing the behaviors of complex human social systems. Ultimately, this article concludes that because traditional, tribal dispute resolution procedures are better adapted to human social systems, they are more effective at actually resolving interpersonal civil disputes. Therefore, traditional, tribal dispute resolution procedures

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[14] Gretchen Ulrich, *Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 Hamline J. PUB. L. & POL'Y 419, 441 (1999).

strengthen tribal communities in ways that Western adversarial dispute resolution procedures cannot.

This article proceeds in four parts. Part I examines how tribes came to employ dual justice systems with such widely diverging concepts of justice. Part II analyzes various aspects of the Western adversarial system that are employed in many tribal courts. Part II also examines the unique procedures used in adversarial litigation and the values and assumptions underlying this Anglo-American approach to resolving interpersonal civil disputes. Part III engages in a similar examination of the Peacemaking system. While peacemaking techniques vary significantly from tribe to tribe, Part III specifically focuses on the peacemaking procedures employed by the Navajo Nation as a model example of how peacemaking proceeds. Part IV outlines and explains systems theory principles that are relevant to human social system dynamics and explains how human social systems, such as Indian tribes, operate as complex adaptive systems. Part IV then analyzes both the Western adversarial and peacemaking systems, in light of the insights provided from complex adaptive systems theory, to determine which system best comports with the dynamics governing human social systems. Ultimately, the article concludes that because peacemaking employs methods that are far more adapted to the principle dynamics governing human social systems, peacemaking is a more effective dispute resolution system. From a systems theory perspective, this article concludes that because it is likely more effective at resolving disputes, a greater use of peacemaking could better strengthen tribal communities than primarily relying on the adversarial system to resolve interpersonal civil disputes.

DISCUSSION

I. DUAL SYSTEMS OF JUSTICE IN INDIAN COUNTRY

The dual justice system present in many tribes today is a Post-Columbian phenomena directly resulting from American colonization.[15] Prior to colonization, most Indian tribes relied on a

[15] *See* Porter, *supra* note 3, at 237.

single traditional or customary system of law that was "derived from rules of conduct and attitudes of the mind concerning their kinship system."[16] Because Indian law was a function of oral tradition, colonists encountering the Indians erroneously concluded that tribes had no law or justice. Consequently, a significant part of the American assimilation program was to impose Western justice traditions, such as the adversarial system, on Indian tribes.[17] The following part provides a chronology of the major federal actions that led to the utilization of Western justice practices by Indian tribes.

A. Origins of the Western Legal Tradition in Tribal Justice Systems

The incorporation of the Anglo-American adversarial justice paradigm into tribal justice systems can be traced to the political backlash that followed the 1881 Supreme Court case *Ex parte Kan-gi-shun-ca* (otherwise known as Crow Dog).[18] Prior to *Crow Dog*, tribes' justice systems remained fairly intact, except that that tribes had virtually no jurisdiction over non-Indians.[19] In particular, tribes retained exclusive jurisdiction over crimes committed by one Indian against another Indian.[20] However, in *Crow Dog*, the federal government decided to test these jurisdictional limits by asserting jurisdiction over an Indian who was accused of murdering another Indian.[21]

Crow Dog was a member of the Brule tribe who was accused of shooting and killing a political rival and fellow Brule tribal member named Spotted Tail.[22] A day after the shooting, the tribal council ordered an end to the fighting that had followed the killing, and initiated dispute resolution procedures designed to reconcile the families involved.[23] After a traditional peacemaking ceremony,

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[16] Bradford, *supra* note 4, at 565.
[17] *See* Jessica Metoui, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 2007 J. DISP. RESOL. 517, 518 (2007).
[18] *Ex parte Kan-gi-shun-ca*, 109 U.S. 556, 3 S. Ct. 396, 109 U.S. 556 (1883).
[19] Bradford, *supra* note 4, at 568.
[20] *Id*.
[21] *See Kan-gi-shun-ca*, 109 U.S. 556.
[22] Bradford, *supra* note 4, at 568.
[23] *Id*.

the family of Spotted Tail agreed to accept payment from Crow Dog of $600, eight horses, and one blanket to resolve the dispute.[24]

Despite the resolution reached by the tribal council, unsatisfied federal officials arrested Crow Dog and tried him under federal law for murder in the federal Territorial Court of South Dakota.[25] The federal court subsequently found Crow Dog guilty of murder and sentenced him to death.[26] However, Crow Dog appealed his conviction on the grounds that the federal court ruling was invalid for lack of jurisdiction.[27] The Supreme Court agreed and reversed the conviction.[28] The court supported its decision by noting that the treaties between the tribe and the federal government in effect at that time gave the tribe a preeminent right to exercise their own methods, and resolve disputes internally within the tribe, without United States interference.[29]

Reeling from the result in *Crow Dog*, Congress undertook the goal of eliminating the "savage quality" of tribal law in order to impose "white man's morality."[30] To achieve these ends, Congress passed the Major Crimes Act,[31] which extended federal criminal jurisdiction over major felonies committed by Indians on reservations regardless of the status of their victims.[32] In addition, the United States Department of the Interior, the federal agency responsible for Indian affairs, began to develop court systems on Indian reservations, referred to as the Courts of Indian Offenses or "C.F.R. Courts."[33] Ultimately, these courts enforced federal regulations designed to extinguish tribal culture and tribal legal systems, and were part of Congress's overarching Indian policy of assimilation.[34]

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[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *See Kan-gi-shun-ca*, 109 U.S. 556.
[28] *Id*.
[29] *Id*.
[30] Bradford, *supra* note 4, at 570.
[31] Major Crimes Act, Act of March 3, 1885, § 9, 23 Stat. 362, 385.
[32] Bradford, *supra* note 4, at 570-71.
[33] Justice Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 356-57 (2011).
[34] *Id*.

C.F.R. Courts operated under the Anglo-American justice paradigm and handled less serious criminal actions as well as disputes among tribal members.[35] Many of the judges of C.F.R. Courts were the local Federal Bureau of Indian Affairs superintendents whose primary objective was to further assimilationist ideals and to suppress any activities that interfered with the integration goal.[36] The courts largely failed to reflect Indian values and customs. Instead, the courts utilized the adversarial model, and were designed to change tribal values into those of American civilized society.[37]

Traditional tribal justice systems were again subjected to Western influence in 1934 with the passage of the Federal Indian Reorganization Act (IRA).[38] The IRA, or "Indian New Deal," was a reflection of a remarkable sea change by Congress in regards to its Indian policy. Rather than attempting to assimilate and integrate Indians into American society, the IRA aimed to strengthen and encourage tribal sovereignty and self-government.[39] While the act aimed to revitalize tribes, such that they would reassume responsibility for their own affairs, ultimately the act's passage resulted in the tribes further incorporating Western ideas of justice into their legal systems.[40]

The IRA provided that any tribe that adopted its provisions could establish a constitutional form of government that would be recognized by the United States.[41] The IRA gave tribes the option of adopting constitutions based on boilerplate provisions included in the IRA.[42] In response, nearly 200 tribes adopted IRA constitutions.[43] The IRA "form" constitutions deviated from the

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[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] Indian Reorganization Act, 25 U.S.C. § 461-70; Bradford, *supra* note 4, at 572-73.
[39] Mathew L. M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 141 (2006).
[40] Bradford, *supra* note 4, at 573.
[41] L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96, COLUM. L. REV. 809, 832 (1996).
[42] *Id*.
[43] Jason P. Hipp, *Rethinking Rewriting: Tribal Constitutional Amendment and Reform*, 4 COLUM. J. RACE & L. 73, 74 (2013).

federal constitution in a number of respects. Notably, they did not provide for an independent judiciary or for separation of powers.[44] In response to this omission, tribes took legislative action and established their own tribal judiciaries. These tribal judiciaries were modeled after the form and structure of the Anglo-American court system, and instituted the adversarial system for resolving disputes.[45] Because of their foreign model and structure, tribal judges were forced to borrow extensively from both American substantive and procedural law.[46]

Tribal justice systems were further subjected to Western influence when, in 1954, Congress passed another law that resulted in the Westernization of tribal justice systems. Public Law 280 was an outgrowth of yet another development in congressional Indian policy, aptly referred to as the "termination era."[47] During the termination era, Congress was primarily concerned with terminating federal responsibility for Indian tribes' welfare.[48] Public Law 280 sought to further this goal by establishing a system of concurrent jurisdiction between the state and tribal court systems.[49] The law vested state courts with civil adjudicatory jurisdiction over causes of action involving Indians, arising on Indian lands, and extending to state criminal jurisdiction over Indian lands located within state lines.[50] While the law was mandatory in only a handful of states, it provided that any other state could unilaterally accept jurisdiction over Indian lands located within its borders.[51]

One effect of the concurrent jurisdiction established by Public Law 280 was that jurisdiction over a case was determined by

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[44] *Id.* at 80-82; Valencia Weber, *supra* note 8, at 236.
[45] See Margery H. Brown, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 219-20 (1991).
[46] Fletcher, *supra* note 37, at 739.
[47] Robert T. Anderson, *Criminal Jurisdiction, Tribal Courts and Public Defenders*, 13 FALL- KAN. J. L. & PUB. POL'Y, 141 (2003).
[48] Vanessa J. Jiménez, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1661 (1998).
[49] *Id*.
[50] *Id*.
[51] Julie A. Pace, *Enforcement of Tribal Law in Federal Court: Affirmation of Indian Sovereignty or a Step Back Towards Assimilation*, 24 ARIZ. ST. L. J.435, 450 (1992).

where the action was first filed – tribal or state court. Access to the state courts had the effect of putting competitive pressure on tribal courts to keep up with state laws and procedures.[52] Consequently, in order to not be rendered obsolete by the state courts, tribal courts abandoned a number of their traditional procedures and processes in favor of adopting those analogous to state systems.[53] In their attempts to keep up, tribes further adopted adversarial methods of dispute resolution.[54]

By the 1960's Congress had changed directions again regarding its Indian policy. Fueled by the civil rights movement, Congress began to focus on the civil rights of Indians.[55] Addressing the reality that the Indian nations were not subject to the federal constitution or the Bill of Rights, Congress passed the Indian Civil Rights Act (ICRA).[56] The ICRA introduced a jurisprudence of individual rights within tribal courts, which caused tribes to abandon traditional value systems, based on collective wellbeing and community harmony, in exchange for value systems reflective of individualism.[57] From the Indian perspective, a number of the fundamental rights guarantees were foreign to traditional methods of Indian dispute resolution. Tribal traditions of fairness and community justice were soon replaced by concerns with the values embraced by the adversary system, such as due process, equal protection, the right to a speedy trial, etc.[58] Ultimately, the ICRA, like the Major Crimes Act, the IRA, and Public Law 280, required tribes to adopt a number of Anglo-American justice procedures and resulted in instilling adversarial litigation methods into tribal justice systems.

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[52] Porter, *supra* note 3, at 270.
[53] *Id*.
[54] Bradford, *supra* note 4, at 573.
[55] *Id*. at 573-74.
[56] Indian Civil Rights Act of 1968 (ICRA), Pub. L. No. 90-284, Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-1303 (1994); Bradford, *supra* note 3, at 574.
[57] Bradford, *supra* note 4, at 574-75.
[58] Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 123-24 (1993).

II. THE WESTERN ADVERSARIAL JUSTICE SYSTEM

Today, the majority of disputes in Indian country are still resolved in tribal courts employing some degree of the Western adversarial principles of adjudication.[59] Even though tribal courts have begun reincorporating customary substantive law and made various procedural adjustments in adjudicatory dispute resolution,[60] the majority of tribal courts employing the adversary system remain faithful to the general rules governing the process.[61] Adversarial justice systems inside and outside tribal courts have a common method of operations that reflects a specific narrative about how justice is achieved. Additionally, Western adversarial tradition reflects specific values as a result of certain fundamental assumptions regarding the nature of humans and human societies. The following section provides an overview of the major features of adversarial justice that trial courts still utilize today.

A. *Distinct Methods of Operation*

The adversary system operates differently than other civil dispute resolution processes in three main respects.[62] First, the adversary system requires party presentation of the evidence in a competitive rather than cooperative setting.[63] Competition is key to the effectiveness of the adversary system, and numerous procedural rules are designed to ensure both that the requisite threshold level of competition has been met and that the process is as competitive as possible.[64] For example, constitutional and prudential standing rules are designed to serve these ends. The assumption that only the person directly affected by the dispute

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[59] Metoui, *supra* note 15, 518.
[60] Austin, *supra* note 8, at 362.
[61] Metoui, *supra* note 15, at 519-20.
[62] Paul T. Wangerin, *The Political and Economic Roots of the "Adversary System" of Justice and "Alternative Dispute Resolution*," 9 OHIO ST. J. ON DISP. RESOL. 203, 203-05 (1994).
[63] *Id*. at 205.
[64] Michael Dominic Meuti, *Legalistic Individualism: An Alternative Analysis of Kagan's Adversarial Legalism*, 27 HASTINGS INT'L & COMP. L. REV. 319, 336-337 (2004).

will be sufficiently interested in the dispute to provide the sharpness of conflict required for a judicial decision, excludes family members or friends of a litigant from participating in the dispute resolution process, even if they experience substantial secondary effects as a result of the dispute.

Second, in an adversarial system, the responsibility for investigating, authenticating, and presenting evidence falls solely on the individual disputants, while a neutral fact finder is tasked with issuing a final decision regarding the dispute.[65] In many respects, the adversary system affords disputing parties enormous amounts of power. Litigants alone, decide the evidence and arguments the court will hear. Judges or fact-finders do not participate in investigation of the evidence or the formulation of accurate legal arguments. Consequently, judges do not probe beyond a witness's veneer in order to assess credibility beyond spoken assertions, nor will a judge offer up a different perspective on the governing law not raised by the parties. Instead, the judge or fact-finder's role is limited to objectively evaluating the evidence presented, and applying established legal principles to the facts in order to reach a decision that will govern the outcome of the dispute.[66]

While the judge or fact-finder's role may be limited, it is nevertheless exclusive. Individual disputants play no role in determining the outcome of the dispute, beyond presenting their version of events during the trial.[67] Once all the evidence has been presented, the neutral decision-maker determines how the dispute will be resolved without input from the parties.[68] Because the parties cannot participate in crafting a solution, the adversary system in some respects circumscribes disputants' control over the conflict. The requirement that a judge or jury be impartial is critical given the disputants' exclusion from the decision-making process. Neutrality of the judge or jury is essential to ensure both

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[65] Wangerin, *supra* note 60, at 204.
[66] *Id*.
[67] *Id*. at 204-05.
[68] *Id*.

the evenhanded consideration of each case and the appearance of fairness.[69]

The third distinguishing feature of the adversary system is that it employs a highly structured forensic procedure.[70] Elaborate sets of rules govern the pretrial and post-trial periods, the trial itself, and the behavior of both those representing the disputants and the judges.[71] The rules of procedure produce a climactic confrontation between the parties in a trial that the neutral decision-maker observes and from which it makes its decision resolving the dispute. [72] The procedural rules also function to distill the amorphous cloud of conflict into discrete, workable legal components, or issues. The evidence rules are designed to keep the trial fair and to narrowly focus the legal issues in dispute.[73] These rules prohibit unfairly prejudicial evidence and exclude evidence that is irrelevant to the legal aspects of the conflict.[74] Because the highly competitive nature of a trial promotes a win-at-all-cost attitude, the adversary system employs a set of ethical rules to control the behavior of the disputants and their representatives.[75] Operating together, these rules create a framework providing for a narrow focus and rigid order in the dispute resolution process.[76]

B. Underlying Narrative

The system's design reflects a narrative about how justice is best achieved. The narrative behind the adversary system is summarized as follows: Justice is achieved when an impartial decision-maker decides the outcome of a dispute based upon the application of discrete and established legal principles to the

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[69] Stephen A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 737-738 (1983).
[70] Wangerin, *supra* note 60, at 204-05.
[71] Landsman, *supra* note 67, 716-17.
[72] *Id*. at 716.
[73] *Id*.
[74] *Id*.
[75] *Id*. at 717.
[76] Gerold W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. DAVIS J. JUV. L. & POL'Y 57, 68 (2005).

factual truths of a disputed situation.[77] The truth of a disputed situation is reached not through cooperation between the parties, but by orchestrating a clash between the parties' respective interests and arguments.[78] Because only individuals who are personally involved in a particular dispute will have the incentive to proffer the best arguments in resolving the dispute, the disputants themselves must be responsible for gathering all of the available evidence and formulating the arguments thereon.[79] Consequently, the judge, other agents of government, or those not directly involved in the dispute must stay out of the process of investigation and argument formulation.[80] The judge or fact-finder is concerned only with making an objective and enforceable decision based upon applying established legal principles to the truth of the case.[81] In order to keep the game fair at all times and to protect the truth from being distorted by overzealous self-advocacy, extensive procedural and evidentiary rules must govern all stages of the process.[82]

C. Principal Values

The adversary system reflects and seeks to further a distinct set of values. Because the system is designed to maintain a free society in which individual rights are central,[83] the system places a high, if not the highest, value on protecting individual rights.[84] Within the system, individual rights are given priority over both governmental interests and community rights.[85] Various aspects of the system reflect a preference for individual over governmental interests. The process confers broad authority on the disputing parties while strictly limiting the role of the judge or the fact-

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[77] Meuti, *supra* note 62, at 337.
[78] *Id*.
[79] *Id*.
[80] Wangerin, *supra* note 60, at 203-04.
[81] *Id*.
[82] Meuti, *supra* note 62 at 337-38.
[83] Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57 (1998).
[84] Meuti, *supra* note 62, at 339.
[85] *Id*.

finder.[86] The breadth of party control over the process and the limited authority and role of judges reflects a general mistrust of government, and a need to safeguard the rights and freedom of individuals against the perceived risks of abuse of governmental power. Additionally, the system prioritizes individual rights over communal rights.[87] The heart of adversary adjudication is the vindication of the individual rights of the litigants via a court battle.[88] In this battle, the focus is on individual conflict rather than fostering community harmony.[89] Consequently, while it may be in the best interest of the community to resolve a dispute peacefully and quickly, the adversary system prioritizes individual interests by ensuring that disputes are resolved based on the most reliable evidence, even if this comes with an apparent cost of protracted, and at times, irreparable conflict.

The second set of principal values of the adversary system includes those of truth and fairness.[90] The system's defining features, in fact, are designed to promote the discovery of the truth regarding a dispute and to enable the impartial decision-maker to fairly determine the outcome of the dispute based solely on applying established legal principles to the truth surrounding the conflict.[91] Proponents of the system eschew cooperative dispute resolution processes on the grounds that only adverse self-interested parties will expose and bring to light the truth of a dispute.[92] Concern for the truth and fairness also mandates that the ultimate decision-maker be an impartial party who has no relationship with the parties or familiarity with the dispute.[93] Only disinterested decision-makers are able to come to an honest decision by employing a fair and accurate assessment of the evidence presented and the law to be applied.[94]

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[86] *Id*.
[87] *Id*.
[88] Metoui, *supra* note 15, at 338.
[89] Hardcastle, *supra* note 74, at 60.
[90] *Id*. at 60-61.
[91] *Id*. at 60-61, 66.
[92] *Id*. at 60-61.
[93] *Id*.
[94] Jerold H. Israel, *Cornerstones of the Judicial Process*, 2-SPG KAN. J.L. & PUB. POL'Y 5, 12-13 (1993).

D. Assumptions Underlying Adversary System

The adversary legal system is also premised on a number of assumptions regarding the nature of human societies and the nature of human beings. An easily overlooked assumption is that humans and societies benefit from a system that prioritizes individual rights at the expense of individual cooperation. The assumption that the adversary system benefits society rests upon two fundamental ideas. First, freedom is paramount in society. Second, the best way to ensure a free society is to safeguard each human's freedom, individually.

While more obscured, another assumption underlying the adversary system is that humans are autonomous.[95] The belief in individual autonomy is readily apparent when one considers that a primary aim of the adversarial system is to protect individual rights from intrusions by governments and other individuals.[96] A precursor to protecting individual autonomy is, of course, the belief that individual autonomy exists.

The adversary system also assumes that humans behave as rational agents who are driven by self-interest.[97] Adversary litigation assumes that humans formulate and act in accordance with forward-looking strategies designed to optimize solely the individual's own selfish interests.[98] This assumption manifests in the amount of responsibility the system places on the individual disputing parties throughout the adversary process. The momentum of the process relies entirely on and requires individuals to pursue their own interests.[99] Furthermore, a number of the procedural rules governing the adversary dispute process were created on the assumption that individuals directly involved in a dispute would fight so fiercely for their own self-interest alone that rules must be created to keep the process fair.[100]

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[95] Meuti, *supra* note 62, at 332.
[96] *Id*. at 332-33.
[97] *Id*. at 331-32.
[98] M. Neil Brown et al., *The Shared Assumptions of the Jury System and the Market System*, 2006 ST. LOUIS U. L.J. 425, 447-48 (2006).
[99] Meuti, *supra* note 62, at 332.
[100] *Id.* at 337-38.

Dovetailing from the assumption that humans behave rationally based on their own selfish interests, is the assumption that human behavior can be predicted. Every aspect of the adversary system depends for its effectiveness on the proposition that humans behave in predictable ways. The assumption of predictability works in concert with the assumptions of rationality and self-interest. Adversary proponents argue that, because humans are rational beings who are driven to maximize their selfish interests, humans will respond predictably to external variables that either enhance or diminish their self-interest.[101] For instance, the system expects that individuals will be incentivized to pursue adversary adjudication when their self-interests have been infringed.[102] The system predicts that humans will vigorously pursue their cases in order to vindicate or maximize their self-interests or in an effort to avoid the curtailment of their self-interests.[103] Additionally, the system relies on predictable human responses to court decisions. Individuals will avoid violating the final decision because of the threat to the individual's self-interest that results from legal sanctions accompanying the violation.

E. Collateral Effects

The distinct structure, underlying narrative, values, and assumptions of the adversary system have created a number of collateral characteristics that also readily distinguish the adversarial system from other legal systems. These include the system's general inaccessibility and its reliance on lawyers, the limited remedial power of the adversarial system, the interpersonal discord produced by the system, and the need for hierarchical control.

First, for a number of reasons, the adversary system has evolved to a point where it is not readily accessible to the average citizen.[104] The adversary system employs extensive procedural

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[101] *Id*. at 332.
[102] *Id*.
[103] *Id*.
[104] Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 FAM. CT. REV. 36, 36-37 (2002).

and evidentiary rules designed to control the dispute process in order to infuse the structure and safeguards into the adversary process necessary to enable accurate fact-finding.[105] These rules are both extensive and largely unintelligible to the average citizen. Because most individuals alone cannot successfully navigate the rules and the procedures involved with the adversary system, attorneys must play a substantial role in the process.[106] The prevalence of attorneys in the legal system is another distinguishing feature of the adversary system.[107] Unfortunately, and frequently, individuals are unable to afford the attorneys' fees incurred by litigation.[108] Thus, these individuals are unable to use the system to resolve their disputes.[109] Consequently, the courts, while technically open to everyone's claims, are functionally inaccessible to a great portion of the population simply because they do not have the means to engage in the adversary process.

Second, the adversary system is structured to provide litigants with limited remedial measures.[110] The adversary system pits two sides of a dispute against one another in a search for truth to which it can apply neutral legal principles in order to obtain a just result. However, by forcing disputants to engage in a battle of interests, the system creates a zero-sum game in which the only result is that one party is the winner while the other party is the loser.[111] In this system, the neutral decision-maker is limited to issuing an all-or-nothing decision which, inevitably leaves one of the two parties entirely unsatisfied. In addition to being constrained by the win-lose dynamic created by the binary system, courts are usually constrained by the limited remedies they can grant.[112] Remedies for disputes often come in only a few varieties, such as monetary

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[105] Meuti, *supra* note 62, at 337-38.
[106] Goldschmidt, *supra* note 102, at 40.
[107] *Id*.
[108] Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1403 (2008).
[109] *Id*.
[110] Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 38 WM. & MARY L. REV. 5, 1 J. INST. FOR STUDY LEGAL ETHICS 49, 50 (1996).
[111] *Id*. at 49-50.
[112] *Id*. at 64.

damages, injunctions, or declaratory judgments.[113] Thus, resolution of a dispute usually will involve winner-takes-all determination accompanied by a remedy that is essentially a one-size-fits-all outcome for the winning disputant.[114]

Third, individuals who have resolved disputes through the adversary system, especially litigation involving an ongoing interpersonal conflict, often report that the process of engaging in litigation resulted in worsening the interpersonal conflict that gave rise to the dispute in the first place.[115] The disintegration of the relationship between disputants is not entirely unexpected. The adversary system emphasizes competition rather than cooperation, and the goal of winning the dispute trumps the goal of repairing the damage to the underlying relationship.[116] Resolution of the interpersonal discord also goes ignored within the adversary system when parties to the dispute rarely interact with each other, but act instead only through their attorneys.[117] Consequently, in some respects the procedures and processes of the adversarial system further divide the disputants and never really solve their underlying conflict.

Finally, the adversary system operates as a vertical justice system, meaning that it relies on hierarchies of power to control the administration, enactment, and enforcement of justice.[118] Adversarial disputes are determined by a third-party, neutral decision-maker, such as a judge or jury.[119] As such, the disputing parties themselves do not participate in the formation of a decision regarding the outcome of their dispute.[120] Because this often results in at least one party, usually the losing party, being unsatisfied, there must be a mechanism in place to ensure that the parties do not deviate from the decision based on their own self-

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[113] *Id*.
[114] *Id*.
[115] Hardcastle, *supra* note 74, at 65.
[116] Laurie A. Arsenault, *The Great Excavation: "Discovering" Navajo Tribal Peacemaking Within the Anglo-American Family System*, 15 OHIO ST. J. ON DISP. RESOL.795, 817 (2000).
[117] Menkel-Meadow, *supra* note 108, at 49-50.
[118] Robert Yazzie, *Life Comes From It: Navajo Justice Concepts*, 24 N.M. L. REV. 175, 177-178 (1994).
[119] Meuti, *supra* note 62, at 337.
[120] Yazzie, *supra* note 116, at 177.

interest.[121] Imposing legal or punitive consequences on individuals who fail to conform to the court's final decision serves as this mechanism by giving the court's judgment the force of law.[122]

III. PEACEMAKING: NAVAJO PEACEMAKING IN THE 21st CENTURY

By the mid-1970's, the acrimonious results of congressional actions imposing Western adversarial principles onto Indian justice systems were becoming apparent.[123] Over generations of federal Indian policy, tribal court procedures conformed more and more to the United States legal system, while becoming more divorced from tribal values.[124] The result was internal conflict and dissatisfaction among tribes whose more flexible justice systems had been wrestled away from decades of unfavorable federal policies.[125]

At this time, however, a number of tribes were defying federal policies and secretly applying rediscovered tribal customary law.[126] Also, a number of tribes were making explicit provisions for informal dispute resolution processes that employed traditional tribal dispute resolution procedures based on tribal conceptions of justice.[127] Tribal support for the employment of traditional dispute resolution mechanisms was further bolstered by the advent of alternative dispute resolution within mainstream Western legal culture.[128] These non-adversarial dispute resolution procedures came to be known as "peacemaking."[129] The "tribal peacemaking" concept was defined as "any system of dispute resolution used within a Native American community which utilizes non-adversarial strategies . . . [and] incorporates some traditional or customary approaches . . . the aim of which is conciliation and

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[121] *Id*. at 178.
[122] *Id*.
[123] *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1366-67.
[124] *See* Bradford, *supra* note 4, at 575.
[125] *See* Delgado, *supra* note 121, at 1367.
[126] Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1038 (1995).
[127] *Id*. at 1048 n. 175.
[128] Bradford, *supra* note 4, at 577-78.
[129] *Id*. at 578

restoration of peace and harmony."[130] Presently, more than one hundred tribal court systems employ some form of tribal peacemaking for resolving civil disputes.[131]

Like the adversary system, the peacemaking process has an ascertainable method of operations and an underlying narrative regarding how justice is best achieved. Additionally, peacemaking reflects certain values and assumptions regarding humans and society. The following part examines specific aspects of peacemaking and contrasts peacemaking with the adversary system for resolving interpersonal civil disputes. Because the Navajo Peacemaking Program is "[p]erhaps the foremost example of native people resetting the peacemaking foundation,"[132] this part specifically focuses on the Navajo system as a model for peacemaking systems, generally.

The Navajo Nation has a long history of utilizing peacemaking techniques for resolving disputes. Even when Congress was attempting to eradicate traditional tribal justice systems by imposing C.F.R. courts upon tribes, the Navajos continued to secretly utilize peacemaking techniques to resolve interpersonal disputes between tribal members. Then, in the early 1980's, the Navajos reformed their judicial systems by formally establishing a Peacemakers Court. Currently, every judicial district within the Navajo Nation includes a Peacemakers Court that provides members with an alternative forum for the resolution of certain disputes. This formal recognition of peacemaking through the establishment of Peacemaker Courts, in addition to the rich history of Navajo peacemaking techniques that endured the federal government's assimilationist efforts, has made the Navajo Peacemaking Program one of the most well-developed peacemaking systems in the United States.[133] As such, the Navajo

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[130] Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV.821, 835 (1996).
[131] Bradford, *supra* note 4, at 579.
[132] Porter, *supra* note 3, at 301.
[133] Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1, 33-34 (1993).

Peacemaking Program provides an excellent and informative case study of the peacemaking process.

A. Method of Operation of Navajo Peacemaking

Navajo peacemaking has a number of defining features that make it a unique dispute resolution system. Peacemaking most closely resembles the Anglo-American dispute process of mediation.[134] While the process can be distinguished from adversarial dispute resolution in many ways, there are three major operational distinctions between the two dispute resolution systems. First, peacemaking encourages cooperative, rather than competitive, conflict resolution.[135] Second, in peacemaking, conflict is resolved through an agreement that is consensual and formulated by the disputants, rather than by a court imposed decision.[136] Third, peacemaking occurs in the absence of detailed governing rules, rather than according to extensive procedural and evidentiary designs.[137] The following section addresses these distinctions in addition to a number of more nuanced differences between the systems that result from these larger divergences.

1. Cooperation Not Competition

One of the most striking differences between the operations of the peacemaking and adversarial system employed in tribal courts lies in the nature of party dynamics encouraged by the systems. The adversary system polarizes disputants by requiring they take sharply conflicting positions, and by providing a competitive forum for them to engage in a legal battle to advance their

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[134] Austin, *supra* note 8, at 354.
[135] Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 Am. Indian L. Rev. 1, 33-34 (1993).
[136] Howard L. Brown, *The Navajo Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 57-JUL DISP. RESOL. J. 44, 45 (2002).
[137] Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821, 836-37 (1996).

positions.[138] Conversely, the peacemaking process employs numerous techniques designed to do the exact opposite—bring the parties into alignment by fostering an environment of cooperation.[139]

For example, Navajo peacemaking promotes party cooperation through creating a more inclusive process. While the adversary process ensures conflict by excluding everyone except the individuals directly involved in the dispute, peacemaking allows anyone who identifies as an interested person to participate in the peacemaking process.[140] By expanding the scope of individuals who can participate in the process, Navajo peacemaking increases cooperation among disputing parties.[141] Frequently, individuals related to a disputant will offer the disputant different perspectives on the disputant's problematic or questionable behavior.[142] By allowing more individuals to participate, disputants hear a range of perspectives beyond solely those of the individual with whom they are disputing. These alternative perspectives encourage the disputant to loosen his grip on his version of events and keep an open mind regarding how best to proceed in resolving the dispute.[143]

The scope of topics discussed during peacemaking also fosters cooperation between parties. In the adversary system, trial is the major dispute resolution event, and is comprised solely of the disputants' differing versions of the factual events surrounding the dispute.[144] The meat of trial is conflict; each party tries to convince the decision-maker to adopt his version of events while also attempting to undermine the adverse party's case.[145] While peacemaking certainly affords the disputing parties the opportunities to recount their version of the conflict, peacemaking is not solely a formal contest regarding which party has the more

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[138] *See supra* text accompanying notes 61-62.
[139] Lieder, *supra* note 132, at 33-34.
[140] Ennis et al., *supra* note 130, at 457-58.
[141] *Id*. at 457.
[142] Yazzie, *supra* note 116, at 183.
[143] Ennis & Mayhew *supra* note 133, at 457.
[144] Israel, *supra* note 94, at 16.
[145] *Id*.

convincing story.[146] Instead, during the process, Navajo peacemakers often steer the conversation toward the guiding principles of Navajo teachings or traditions and thereby evoke a belief system the parties share.[147] By discussing Navajo customs and practices with the parties, the peacemaker shifts the discussion to topics of common ground. This shift in dialogue–from what the parties do not have in common to what they do have in common–encourages the parties to view one another with a greater sense of camaraderie rather than suspicion and anger.[148]

2. Consensual Agreement Between Parties

A second operational distinction between Navajo peacemaking system and Westernized adversarial adjudication utilized by tribal courts is the nature of the resolution achieved. The peacemaking process works to develop consensus between the disputing parties.[149] The process concludes when the parties have formulated and agreed to abide by an agreement that resolves the dispute and repairs the parties' relationship.[150] The peacemaker, who works much like a mediator, is a vital resource to the parties throughout this process, and provides them with a respected third-person perspective on the dispute and with ideas for reconciliation.[151] Because there is no phase of the process in which any party, including the peacemaker, is either granted exclusive authority or entirely divested of authority, all participants in Navajo peacemaking exist in egalitarian relationships that enable each individual to actively participate throughout every process of peacemaking.[152] The peacemaking process lies in sharp contrast to the adversary system, which establishes an unambiguous division of power between the parties, who are given exclusive control over

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[146] Ennis et al., *supra* note 133, at 456-57.
[147] *Id*. at 460.
[148] Metoui, *supra* note 15, at 529.
[149] Ennis et al., *supra* note 130, at 456.
[150] *Id*. at 460.
[151] Brown, *supra* note 136, at 46.
[152] *Id*. at 45.

the proceedings and trial, and the decision-maker, who exclusively controls the outcome of the dispute.[153]

Because parties to a peacemaking draft the agreement resolving their dispute, there is no danger that the peacemaker will impose upon the parties an unfair outcome based on favoritism or unfair dealings. Consequently, although the peacemaker cannot have prejudice toward a party or an interest in the outcome of the peacemaking,[154] there is no hard and fast requirement that the peacemaker remain absolutely objective and neutral at all times during the process, unlike there is in the adversary system.[155] In fact, the peacemaker is expected to offer the disputants a point of view grounded in Navajo values, such as harmony, community, and solidarity.[156] Peacemakers also often lecture or instruct the participants on traditional Navajo teachings relevant to the participants' specific problem.[157] Thus, while the peacemaker cannot be partial to a particular disputant, the peacemaker is expected to be partial toward the Navajo point of view and to continually offer this perspective to the parties throughout the peacemaking.[158]

3. Flexible Framework for Dispute Resolution

While a loose framework of rules governs numerous aspects of the peacemaking process, the process is largely designed to afford the peacemaker and parties a great deal of flexibility when resolving a dispute.[159] The rules, devised by the Navajo Nation Judicial Council, provide an outline for the process of peacemaking and generally pertain to what kind of disputes can be resolved by peacemaking, who can serve as a peacemaker and

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[153] *See supra* text accompanying notes 65-68.
[154] *Judicial Branch of the Navajo Nation, Navajo Peacemaking Guide* 728, 744 (Sept. 2004)[hereinafter Peacemaking Guide].
[155] Brown, *supra* note 136, at 46.
[156] *Id*. at 45.
[157] Brown, *supra* note 136, at 46.
[158] *Id*.
[159] Yazzie, *supra* note 118, at 183.

how, and the extent of the peacemaker's role and responsibilities.[160]

Peacemaking can be initiated by disputing parties, or the Navajo District Court may refer a party to the Peacemaker division.[161] Any member of the Navajo Nation who is injured, hurt, or aggrieved by the actions of another may initiate peacemaking.[162] Peacemaking typically is used where the parties to the dispute are members of the Navajo Tribe and where the dispute involves certain personal and community relationships.[163]

Once an individual has requested a peacemaking, or the District Court has transferred a dispute to the peacemaker division, the District Court judge appoints a named Peacemaker to conduct peacemaking proceedings.[164] Typically, each Navajo chapter selects and certifies to the District Court the individuals who may serve as a peacemaker.[165] The rules governing peacemaking provide guidelines for who can serve as a peacemaker and what is necessary for eligibility. In order to be eligible to serve as a peacemaker, a person must have the respect of the community, an ability to work with tribal members, a reputation for integrity, honesty, humanity, and an ability to resolve local problems.[166] The rules specify that one does not need to be a government or religious leader to serve as a peacemaker, rather, the main thing that is desired is that the person chosen will have such respect that the people who are asked to solve their problems by agreement will listen.[167] The clerk of the District Court maintains a roll of

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[160] Brown, *supra* note 136, at 45.
[161] Peacemaking Guide, *supra* note 154, at 738.
[162] Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. Rev. 1, 37 (1999).
[163] Among the disputes routinely handled by peacemakers are: (1) marriage or family disputes; (2) disputes between parents and children; (3) disputes among neighbors, such as complaints for disorderly conduct; (4) disputes arising from alcohol abuse; (5) disputes resulting in harm, annoyance, or disunity in the immediate community; (6) disputes involving business transactions of $1,500 or less; and (7) any other matter the District Court finds should or can be resolved through peacemaking. Peacemaking Guide, *supra* note 154, at 738.
[164] Lieder, *supra* note 135, at 35.
[165] Brown, *supra* note 136, at 44, 45.
[166] Metoui, *supra* note 17, at 529.
[167] Peacemaking Guide, *supra* note 154, at 742.

peacemakers from which peacemakers are appointed.[168] The parties, however, may select their own peacemaker as long as everyone agrees to the appointment.

Although they are not identical, the peacemaking process resembles mediation.[169] Parties typically sit in a circle and "talk things out," explaining their various interests.[170] Members of the parties' community and family provide input during the process. Notably, unlike the adversary system, there are no rigid rules about what must be discussed and what topics remain off-limits.[171] It is common for the disputants to discuss how they feel about the dispute and what they need in order to come to an agreement.[172] Peacemaking also operates in the absence of rules governing how the peacemaker and parties must come to a resolution.[173] Instead, drafters of the peacemaking rules intentionally omitted procedural requirements in order to give peacemakers and parties the flexibility to employ whatever resolution procedures best fit the situation.[174] While the rules prohibit peacemakers from using force, violence, or violating the parties' rights secured by the Navajo Bill of Rights, the peacemakers remain free to "[u]se any reasonable means to obtain peaceful, cooperative, and voluntary resolution of a dispute subject to peacemaking."[175]

A final noteworthy difference between the rules and frameworks for the peacemaking and adversary process is how the rules of each system approach conflict generally. One of the functions of the procedural and evidentiary rules governing the adversarial system is to distill interpersonal conflict into discrete legal issues.[176] After the conflict has been simplified and broken

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[168] Peacemaking Guide, *supra* note 154, at 741.
[169] *See* Brown, *supra* note 136, at 45-46.
[170] Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 AM. INDIAN L. REV. 297, 304 (2000).
[171] Yazzie, *supra* note 118, at 183.
[172] Porter, *supra* note 5, at 256.
[173] Yazzie *supra* note 118, at 183.
[174] *Id*.
[175] Robert Yazzie & James W. Zion, *Navajo Peacemaking Process* 1, 3, http://www.pokagon.com/sites/default/files/assets/group/tribal-court/2014/navajo-peacemaking-process-1343.pdf (last visited Jan. 23, 2017).
[176] Israel, *supra* note 94, at 12.

into its component legal parts, the trial court judge, after discerning the factual truths relevant to the legal issues in a case, simply applies established legal precedent to reach a decision. [177] Peacemaking has no analogous procedure. Instead, peacemaking takes a flexible approach to conflict and considers more than solely the legal aspects of a dispute.[178] Peacemaking recognizes both the myriad reasons for conflict and the myriad ways conflict affects disputants, and the disputants' families. Individual participants are able to express anything they need to express in order to reach resolution–little evidence or discussion is excluded.[179] Disputants' families are allowed to do the same in order to effectuate reconciliation.[180] Because peacemaking does not limit participation in the dispute resolution process to only those directly involved with the dispute, peacemaking approaches the dispute in a holistic manner that accounts for the complexity and multi-faceted dimension of conflict.

a. Underlying Narrative

The Navajo peacemaking process reflects a narrative about how justice is achieved in dispute resolution situations. In contrast to the adversary system, peacemaking does not seek to achieve justice with mathematical precision by applying neutral legal principles to the facts of the dispute. Instead, in peacemaking, justice is a function of the goals the process seeks to achieve and the means the process employs to achieve them. Peacemaking utilizes Navajo justice concepts, such as "equality, consent, talking things out, and restoring people to good relations with each other in a community,"[181] in order to restore unity and harmony among

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[177] *Id*.
[178] Janelle Smith, *Peacemaking Circles: The "Original" Dispute Resolution of Aboriginal People Emerges as the "New" Alternative Dispute Resolution Process*, 24 HAMLINE J. PUB. L. & POL'Y 329, 347 n106 (2003).
[179] Metoui, *supra* note 17, at 517.
[180] Lieder, *supra* note 135, at 35-36.
[181] Robert Yazzie, The Navajo Peacemaker Court: Contrasts of Justice, 4 (Nov. 10, 1992) (unpublished manuscript on file with the Oklahoma City University Law Review).

the feuding parties.[182] As a general matter, justice is achieved when the disputing parties work cooperatively to come to a consensual agreement that resolves their dispute and restores unity between the parties and among the greater community.[183] Consensus, resolution, and cooperation are best achieved not through coercion, but by using a peacemaker who has the mutual respect of the parties and who can serve as a guide in the process.[184] The peacemaker guides the process using a variety of techniques, including emphasizing the common ground shared by the parties, such as shared tribal traditions and beliefs.[185]

b. Principal Values

The peacemaking process reflects a distinct set of values. Primary emphasis is placed on the restoration of community solidarity and harmony between the parties.[186] Peacemaking, unlike the adversary system, does not give greater weight to individual over community affairs.[187] Peacemaking also differs from the adversary system by valuing the relationship between parties rather than the individual rights of the parties. In so doing, the process gives paramount value to reinforcing community and interpersonal unity instead of individualism.[188]

Peacemaking also places greater value on reaching consensus than on reaching the truth.[189] In this respect, peacemaking lies in sharp contrast to the adversary system. Examining the subjects covered during peacemaker discussions reveals how building consensus between parties and community members is of critical importance to the peacemaking process. As an initial matter, while the individual disputants discuss their understanding of the facts of the dispute during peacemaking, peacemaking discussions, unlike

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[182] Jayne Wallingford, *The Role of Tradition in the Navajo Judiciary: Reemergence and Revival*, 19 OKLA. CITY U. L. REV. 141, 151 (1994).
[183] Porter, *supra* note 5, at 255-57.
[184] *Id*. at 256.
[185] *Id*.
[186] *Id*. at 251.
[187] *Id*. at 250-51.
[188] *Id*. at 251-52.
[189] Yazzie, *supra* note 118, at 185.

adversary adjudication, do not revolve solely around the disputants' differing interests and factual accounts of the dispute. Throughout the peacemaking process, the peacemaker offers insight into how the dispute implicates Navajo stories or traditions and seeks to point out where the disputants have common ground.[190] As a result, a substantial part of the substance of peacemaking focuses on what the disputants share, rather than on their divergent interests.[191]

Additionally, unlike the adversary system, peacemaking does not consider solely the objective facts of a dispute.[192] Peacemaking recognizes and addresses the emotional dimensions of conflict, as well.[193] The peacemaking process recognizes that emotions and feelings are just as important as logic and reasoning rather than ignoring the emotional needs of disputants like the adversarial system.[194] Often, parties' emotions play an important role in peacemaking, as it is often the parties' expressions of their feelings from which the peacemaker discerns the true cause of conflict.[195] Furthermore, expression of emotions and feelings enables both participants in the peacemaking to understand the full consequences of their actions.[196]

c. Underlying Assumptions

Like the adversary system, peacemaking proceeds according to a number of assumptions about the nature of humans and the nature of human societies. A fundamental assumption underlying the peacemaking system is that individuals benefit from a system that focuses on relationships between individuals rather than on the actual individual. Navajo peacemaking places greater value on restoring relationships rather than restoring an individual's ability

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[190] Ennis & Mayhew, *supra* note 133, at 458.
[191] *See* Brown, *supra* note 136, at 45.
[192] Ennis & Mayhew, *supra* note 133, at 458.
[193] Philmer Bluehouse et al., *Hozhooji Naat'aanii*: *The Navajo Justice and Harmony Ceremony*, 10 Mediation Q. 327, 333 (1993).
[194] Bradford, *supra* note 5, at 581.
[195] *Id*.
[196] *Id*. at 581-82.

to exercise his rights.[197] Consequently, in terms of how to provide maximum benefit to individuals and society, the assumptions upon which the adversary and peacemaking systems rely are inversely related. While the adversary system relies on the proposition that providing benefit to an individual will benefit the community, the peacemaking system relies on the assumption that benefits to collective humans will ultimately benefit the individual.

A second and closely related assumption inherent in the peacemaking system is that Navajo tribal members do not exist as autonomous agents. Instead, peacemaking assumes that individuals are bonded to one another through "solidarity."[198] The Navajo understanding of "solidarity" recognizes that an individual exists at one with his physical environment, family, community, and the cosmos.[199] Peacemaking is a critical process to the Navajo as it restores good relations among people.[200]

A third assumption underlying the peacemaking process is that humans are dynamic creatures, motivated by a number of forces, and capable of engaging in cooperative behavior at the expense of their own self-interests. In contrast to the adversary system, which assumes that humans are motivated solely by a desire to maximize their own self-interest,[201] the peacemaker system contemplates a much more dynamic ideal of what it means to be human. Peacemaking operates by fostering cooperation rather than competition.[202] The operation of the system depends entirely on the idea that humans can be motivated by a desire to cooperate and compromise with another person, rather than solely by competition and winning. Additionally, peacemaking assumes that human feelings are motivators of human behavior. This is demonstrated by the fact that a necessary part of peacemaking involves the participants sharing their feelings about the dispute.[203] Peacemaking also rests on the assumption that people can be

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[197] Ennis & Mayhew, *supra* note 133, at 460.
[198] Yazzie, *supra* note 118, at 181.
[199] *Id*.
[200] *Id*.
[201] *See supra* text accompanying notes 99-103.
[202] See *supra* text accompanying notes 138-148.
[203] *See supra* text accompanying note 192.

motivated by respect for others, as the peacemaker is expected to facilitate the resolution of the dispute in the absence of legal authority over the disputing parties.[204]

d. Collateral Effects

The methods of operation, narrative, values, and assumptions associated with peacemaking collectively create a number of additional features that characterize the peacemaking process. These include the system's accessibility and the absence of lawyers;[205] the creation of win-win solutions;[206] strengthening of Navajo communities;[207] and the establishment of a horizontal justice system, or a system of justice that does not rely on hierarchies of power to influence human behavior and in which no person is above another person.[208]

In comparison to the adversary adjudication process, peacemaking has become an incredibly accessible method for resolving certain kinds of disputes.[209] This difference in accessibility can be attributed to a number of factors. First, comprehension of the rules governing the peacemaking procedures and goals does not demand a law degree. The peacemaking rules are written in both plain language and legalese.[210] As such, the rules are designed to inform and educate people about the process and its availability. Second, unlike adversary adjudication, there are no court costs associated with peacemaking. The process requires only that the parties pay to the peacemaker thirty dollars for the peacemaker's time.[211] Third, except for a few narrow circumstances, the process prohibits the use of lawyers.[212] Peacemaking relies on the parties' cooperation and consensus

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[204] *See supra* text accompanying notes 149-50.
[205] Porter, *supra* note 4, at 252.
[206] Yazzie, *supra* note 118, at 178.
[207] Brown, *supra* note 136, at 44.
[208] Yazzie, *supra* note 118, 180-82.
[209] *Id*. 189.
[210] Brown, *supra* note 136, at n. 28.
[211] Formal Peacemaker Court Rules, s*upra* note 156, at 106.
[212] Porter, *supra* note 4, at 252.

building, which requires the parties to directly communicate with one another about personal matters.[213]

Moreover, unlike the adversary system, which always results in a win-lose outcome, the peacemaking process often becomes a non-zero-sum game. That is, participants frequently devise creative win-win solutions.[214] This is largely a function of the flexibility and relational equality that is built into the peacemaking process.[215]

The peacemaking rules intentionally omit reference to how peacemaking must be performed.[216] Because there is no set procedure governing how parties must come to a solution, the parties are able to discuss a number of different alternative solutions to the dispute.[217] Further, because the participants and the peacemakers are equals, and because disputants' family and friends are permitted to give their input throughout the process, peacemaking frequently involves a large group of minds collectively searching for a solution that will benefit everyone involved. Finally, because peacemaking is based on Navajo traditions and customs and does not involve the application of fixed laws to the facts of the dispute, there is no one right answer to the question posed by the dispute. Removing the requirement that the dispute must be resolved with certainty, correctness, and according to precedent allows the parties to the peacemaking an unlimited number of options when devising solutions.

Another collateral effect of the peacemaking process is that it has positively impacted the Navajo communities in two major ways. First, the peacemaking process often strengthens and restores the relationship between the disputing parties.[218] Unlike the adversary system, in which the parties never attempt to repair their relationship, a primary goal of peacemaking is to resolve and end the parties' conflict. Second, Navajo tradition and customs are protected and reinforced through peacemaking as a result of their

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[213] Yazzie, *supra* note 118, at 182-83.
[214] *Id*. *at 178.*
[215] *Id*.
[216] *Id*.
[217] *Id*.
[218] Arsenault, *supra* note 116, at 805.

use in resolving disputes.[219] Peacemakers often seek to guide parties to common ground by initiating discussions about Navajo beliefs or traditions the parties share. In doing this, the peacemaker reminds everyone participating in the peacemaking of Navajo customs.[220] The collective effects of the many annual peacemakings are a strengthening of the Navajo knowledge of and appreciation for the Nation's customs.[221]

Finally, peacemaking operates as a horizontal justice system, meaning that it is grounded in equality between the participants.[222] In peacemaking, the parties are not given authority over the peacemaker or each other.[223] Likewise, the peacemaker has no legal authority over the parties and cannot force them to resolve their dispute.[224] Furthermore, while parties have the option to have the Navajo District Court certify their peacemaking agreements as judgments carrying the force of law, most parties opt not to involve the court.[225] Instead, they choose to honor the peacemaking resolution in the absence of official legal enforcement. In peacemaking, the importance of group solidarity, and respect for the peacemaker take the place of the force and coercion employed by the adversary system.[226]

IV. DUELING DISPUTE RESOLUTION SYSTEMS AND COMPLEX ADAPTIVE SYSTEMS THEORY

A. Two Distinct Dispute Resolution Systems

Peacemaking and adversarial litigation are the two widely divergent dispute resolution processes that Indian tribes use to

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[219] Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZONA L. REV. 739, 742 (1990).
[220] Brown, *supra* note 136, at 46.
[221] Porter, *supra* note 4, at 251.
[222] Yazzie, supra note 118, at 180.
[223] *Id*.
[224] *Id*. at 182.
[225] Brown, *supra* note 136 at 46.
[226] Yazzie, *supra* note 118, at 181.

resolve interpersonal civil disputes today.[227] While peacemaking has been gaining popularity in recent years, the majority of disputes on reservations are still resolved in tribal courts pursuant to some version of the Anglo-American adversary method.[228]

Some contemporary scholars, however, have advanced strong policy arguments supporting the conclusion that peacemaking, rather than the adversarial tradition employed in tribal courts, should be the primary mechanism by which tribal members resolve conflict.[229] The crux of the argument supporting a peacemaking preference is the fact that peacemaking strengthens communities. [230] Advocates of the process assert that tribal communities are benefited by using a dispute resolution system that promotes values such as community wellbeing and the importance of relational harmony.[231] Additionally, scholars argue that utilization of the adversary system promotes values, such as individualism and autonomy, that are not only antithetical to tribal values, but that also undermine a tribe's sense of community and general wellbeing.[232]

While some scholars argue that the adversarial system eats away at tribal communities, other scholars argue that the key to strengthening tribal communities is strengthening the Anglo-American justice procedures utilized by tribal courts. These scholars posit that the sovereignty of tribal communities depends on state and federal courts recognizing tribal court decisions.[233] Demonstrating greater fidelity to the Anglo-American legal practices will give tribal courts the legitimacy they will need in order to receive the comity necessary for tribal sovereignty.[234] As such, there are many scholars who support tribal courts' use of

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[227] Mathew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 Int'l. Legal Persp. 185, 201 (2002).
[228] Metoui, *supra* note 17, 517.
[229] *See supra* text accompanying notes 8-9.
[230] *Id*.
[231] *Id*; Yazzie, *supra* note 118, at 182-83.
[232] *See supra* text accompanying notes 8-9.
[233] *See supra* text accompanying notes 10-12.
[234] *Id*.

Western adversarial legal traditions and propose that the courts adhere to Anglo-American procedures even more rigidly.[235]

Both sides of the debate offer persuasive arguments for their opposing positions. However, the scholars are not divided on every issue. Those advocating for greater reliance on peacemaking and those advocating for stronger Western traditions in tribal courts share at least one common goal. Both camps aspire to ensure that tribal dispute resolution systems enhance the wellbeing of tribal communities. The following part of this article seeks to add insight to the debate by examining not the policy reflected by preferring a particular dispute resolution system, but by examining the relative effectiveness of the peacemaking and adversarial justice systems.

The analysis included in the following section relies on two basic assumptions. First, it is assumed that the wellbeing of tribal communities is affected not only by the policy furthered in choosing to prefer a specific dispute resolution system, but also by the effectiveness of the chosen dispute resolution system. In other words, in order to truly benefit tribal communities, the dispute resolution system must effectively resolve conflict between tribal members. Second, it is assumed that the dispute resolution system that best responds to the dynamics of human social systems, as defined by scientific theory, will be a more advantageous strategy for dispute resolution.

Based on these assumptions, the first section of this part first considers the dynamics governing human social systems as explained by complex adaptive systems theory. The features and principles with implications for legal systems are also explored. The second section of this part then analyzes the relative effectiveness of each dispute resolution system in terms of how each best adapts and responds to human social systems. This part ultimately concludes that, because the peacemaking system is better adapted to the workings of human social dynamics, peacemaking is a more effective and consequently the preferable method of dispute resolution.

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[235] *Id*.

B. Using Complex Adaptive Systems Theory to Analyze Competing Dispute Resolution Methods

1. Overview of Complex Adaptive Systems Theory

Complex adaptive systems (CAS) theory is a field of study that has been used to understand and explain the behavior of a number of complex phenomenon, from ecosystems to the human immune system to the weather, all of which are considered "complex adaptive systems."[236] Despite their widely divergent natures, CAS share a number of similar properties and features, and behave according to the same general dynamics. Like an anthill or the human brain, groups of humans or human social systems also function as complex adaptive systems.[237] Consequently, human social systems exhibit the same organizing principles, dynamics, and properties as other CAS found throughout the rest of nature.[238]

The understanding that human social systems function as CAS has major implications for a number of fields, especially the law—specifically, dispute resolution. The subject matter on which the law acts is human behavior, and, in the case of dispute resolution laws, it is human conflict. If CAS theory can shed light on the dynamics and properties of human social systems and the relationships between the individual human components, then we can assess the relative effectiveness of dispute resolution procedures by comparing how well adapted the dispute resolution system is to the CAS dynamics of human societies. Furthermore, it is safe to assume that a dispute resolution system that fails to accommodate the nature of the dynamics of human societies, ultimately will be less effective than a system that does accommodate the dynamic ways that human systems behave.

An effective way to define complex adaptive systems is to break apart the words included in the term "complex adaptive

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[236] J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1441 (1996).
[237] *Id*.
[238] J.B. Ruhl, *Thinking of Mediation as a Complex Adaptive System*, 1997 B.Y.U. L. REV. 777, 783 (1997).

systems." First, a "system" is anything comprised of two or more agents that interact.[239] A system is considered a "complex" system when the system includes a large number of agents that not only interact with each other, but also exist in interdependent relationships with one another and their environment.[240] Interdependence means that the agents of the system influence and are influenced by one another.[241]

A complex adaptive system displays two additional properties: "emergence" and "adaptability."[242] "Emergence" refers to the process by which large-scale, system level behaviors emerge as a result of the self-organization of and relationships between individual agents.[243] For example, in human systems, political parties, the economy, and language all constitute "emergent" behaviors.[244] Systems demonstrate "adaptability" when these emergent behaviors are capable of actually changing in response to, or adapting to, stimuli from the environment.[245] The ability of political parties to change in response to changing social norms, over the course of time, is an example of an "adaptable emergent" behavior that human social systems demonstrate.

CAS also share a number of defining characteristics that separate them from other kinds of systems. As an initial matter, CAS defy reductionist logic.[246] This means that one cannot attempt to understand the system by breaking it into its basic component parts and subsequently studying the behavior of the parts.[247] CAS are greater than the sum of their parts, and at the whole-system level exhibit an array of properties that are not expressed by any of

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[239] *Id*. at 785.
[240] Carla Crandall, *If You Can't Beat Them, Kill Them: Complex Adaptive Systems Theory and the Rise in Targeted Killing*, 43 SETON HALL L. REV. 595, 608 (2013).
[241] *Id*.
[242] *Id*. at 605-06.
[243] *Id*. at 605.
[244] Roy J. Eidelson, *Complex Adaptive Systems in the Behavioral and Social Sciences*, 1 Review of General Psychology 42, 48 (1997).
[245] *Id*.
[246] J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 893-94 (1996).
[247] *Id*. at 894.

the component parts.[248] Additionally, one cannot seek to fully understand the working of a system's component part by removing it from the system and studying its behaviors.[249] Any part of the system can only be understood fully when it is considered along with the historical, environmental, and social context within which the part exists.[250]

These principles suggest that human societies cannot be understood by examining the behavior of single individuals. Consequently, while a single individual may display a wide array of behaviors, a single individual will never completely capture the breadth of behaviors exhibited by the system itself. They also suggest that a single human being likely cannot be understood outside of the context of the relationships within which the human being exists. The human's behavior is largely defined as a result of social and environmental relationships and constraints. To understand the operation and behavior of a single human, the human must be studied in relation to its environmental and social context. Finally, the principles indicate that conflict, itself, cannot be understood when it is separated from the historical, environmental, and social context in which it arose.

A second feature of CAS is that they are highly unpredictable as a result of the non-linear relationships between their component parts.[251] CAS are comprised of diverse component parts interacting in a diverse array of relationships, responding to one another and their environment.[252] The complexity of the interactions involved in CAS renders the system subject to non-linear dynamics and unpredictability.[253] Non-linearity means that small changes to the system at the component level can yield disproportionately large changes within the system at the system level.[254] Because of CAS's non-linearity, the system's long-term behavior is inherently unpredictable.[255]

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[248] *Id*.
[249] *Id*.
[250] *Id*.
[251] Ruhl, *supra* note 238, at 790.
[252] Crandall, *supra* note 240, at 605.
[253] *Id*.
[254] *Id*.
[255] *Id*.

That human social systems exhibit non-linear and unpredictable dynamics has important legal implications, especially for dispute resolution. The unpredictability of human social systems suggests that dispute resolution systems should remain flexible and adaptable in order to respond to unexpected behavior from human subjects.[256] Additionally, given the inherent unpredictability in complex human social systems, laws and policies should not be based on the assumption that human systems can always be governed effectively by rigid sets of rules.[257]

Another notable feature is that CAS are comprised of a large number of diverse semi-autonomous component parts, and the resiliency of the system itself is a function of the relationships among its individual component parts.[258] In order for CAS to be sufficiently adaptable to maintain its existence in the face of environmental disturbances, there must be sufficiently close relationships among the system's component parts. [259] This principle suggests that for human systems, social cohesion and the quality of relationships between individuals directly impacts the ability of human communities to survive external disruptions or change.

A final feature of CAS is that they actually are strengthened through disturbance and change.[260] Internal and external change or disturbance is inherent in the operation of the system, and responding to disturbance results in increasing the system's resiliency and adaptability in the face of even greater change.[261] Consequently, the introduction of disturbance or change within a system is actually beneficial to the system.[262] The implication for human systems of this CAS characteristic is that internal and external conflict that disturbs human social systems is not necessarily an aberrant phenomenon that should be viewed negatively or with surprise. Instead, conflict among individuals

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[256] Eidelson, *supra* note 244, at 55.
[257] *See id*.
[258] *Id*. at 62.
[259] *Id*.
[260] *Id*.
[261] *Id*. at 54.
[262] *Id*.

within a social system is to be continually expected and resolved on an ongoing basis.

2. Application of CAS Theory to the Adversary and Peacemaking Systems

When using systems theory to analyze the relative effectiveness of peacemaking versus the Western adversarial approach to dispute resolution, a clear pattern emerges: peacemaking is better adapted to the complex, adaptive social dynamics of human societies, and as such, peacemaking is likely more capable of serving as an effective dispute resolution system than the Western adversarial tradition. Peacemaking is better equipped to deal with the dynamics of human social systems for a number of reasons.

First, peacemaking approaches conflict and the individuals involved from a holistic rather than reductionist standpoint.[263] As such, peacemaking more effectively evaluates conflict and what is needed for consensual resolution. For example, peacemaking allows anyone who has an interest in a conflict to be a party to a peacemaking.[264] As a result, family members and close friends of disputants routinely participate in the process.[265] Peacemaking approaches conflict holistically by including all of the parties who are affected by a conflict, and by ensuring that all of the repercussions of the main conflict are considered when coming to a resolution, even if these repercussions were felt by those other than actual disputants. The Western adversarial system is just the opposite, as it allows only those immediately affected by the conflict to participate in the litigation.[266] Excluding everyone other than the parties directly involved simplifies the conflict. It also approaches resolution of the entire conflict by considering only a fractional representation of the parties affected by the conflict. Because the effects of the conflict are never fully apprehended, the

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[263] Smith, *supra* note 178, at 344-45.
[264] Metoui, *supra* note 17, at 530.
[265] *Id*.
[266] Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Fact-finding*, 61 Duke L. J. 1, 3-4 (2011).

solution devised by the adversary system likely fails to completely resolve the original problem.

Another way that peacemaking reflects holistic thinking is the essentially limitless scope of issues that can be considered when resolving a dispute.[267] Parties to a peacemaking are permitted to discuss anything they need to discuss in order to resolve a dispute and often engage in dialogues that would otherwise be excluded in an adversarial context.[268] Furthermore, in peacemaking all contributing factors to the conflict including environmental, social, and historical factors, are examined to address the underlying issues that precipitated the problem.[269] In addition, the mental, spiritual, and emotional well-being of all of the participants is addressed.[270]

Western adversarial litigation, on the other hand, takes an entirely different approach to conflict. The adversarial system breaks conflict down into fragmented component legal parts and addresses solely the legal aspects of a dispute.[271] Adversarial litigation also largely excludes the historical and contextual evidence framing the dispute.[272] The adversary system approaches conflict by removing it from the context in which it arises, and by breaking it into smaller pieces in order to understand its larger whole. This approach is quintessentially reductionist. Again, because conflict is a part of a complex adaptive human social system that cannot be understood through reductionist methods,[273] the adversary system fails to properly assess the problem. As a result, it is likely not as effective at finding an effective solution.

Peacemaking is also better adapted than the adversarial system to dispute resolution in complex human systems, because peacemaking accounts for the fact that individual human behaviors and relationship dynamics are often unpredictable. Peacemaking accommodates this reality by employing flexible procedures for the dispute resolution process that allow for whatever tangential

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[267] Yazzie, *supra* note 118, at 183.
[268] *See id*.
[269] Smith, *supra* note 178, at n. 140.
[270] *Id*.
[271] *See* Menkel-Meadow, *supra* note 110, at 50.
[272] *Id*.
[273] *See supra* text accompanying notes 240-43.

discussions and creative solutions are required to reach the resolution between the parties.[274] Conversely, the adversarial system follows extensive and rigid procedural and evidentiary rules that define every aspect of the dispute resolution process.[275] This rigid order often comes at the expense of allowing the parties to fully explore what they need to resolve their dispute, because often what the parties need cannot be precisely predicted at the outset. Because the flexibility inherent in peacemaking makes the process capable of responding to the unpredictability of human social systems and individual human behavior, peacemaking is better able to adjust to meet the evolving needs of the participating parties necessary for reaching a consensual solution.

Another way peacemaking is better adapted to the dynamics of human social systems is that peacemaking, unlike the adversary system, functions not to vindicate individual rights, but rather to restore relationships.[276] CAS theory has established that a system's ability to endure requires sufficiently close relationships among a system's component parts.[277] The resiliency and adaptability of human social systems to withstand change and continue thriving is directly related to the cohesion between the systems parts[278]–i.e. the relationships among the humans in the social system. Peacemaking focuses on restoring these relationships, first and foremost. Conversely, the adversarial method never actually aspires to resolve the conflict between the parties. Instead, resolving the interpersonal conflict between the parties is an afterthought to the primary goal of determining and validating the legal rights of the parties to the dispute.[279]

One final way in which peacemaking is more adapted to the dynamics of human social systems is the fact that dynamic change and conflict inherent in social systems, and actually, at reasonable levels, make communities stronger. The adversarial system is not adapted to the fact that conflict is inherent in CAS, and the fact that

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[274] *See supra* text accompanying notes 154-180.
[275] *See supra* text accompanying notes 70-76.
[276] *See supra* text accompanying notes 183-85.
[277] *See supra* text accompanying notes 258-59.
[278] Eidelson, *supra* note 244, at 62.
[279] Freedman, *supra* note 83, at 57.

the continual resolution of disturbance within a CAS makes the CAS more resilient in the long run. This is demonstrated by the adversarial system's inaccessibility, which has the effect of making the process completely unattainable by parties whose conflict often goes unresolved.[280] While there is no principle in the adversarial system that directly denies access to the courts, the courts today are far more inaccessible than peacemaking. Because peacemaking is so simple, inexpensive, and accessible to the average person,[281] it is a dispute resolution system capable of handling the dynamic and ongoing change that is inherent in human complex adaptive systems.

A pattern emerges when using CAS theory as a lens through which to analyze and assess the adversarial and peacemaking dispute resolution systems. Traditional peacemaking methods, such as those employed by the Navajo Nation, are far better adapted than the adversarial system to the complexity of human social systems. Given its superior adaptability to human social dynamics, it is reasonable to conclude that peacemaking processes are more successful than Western adversarial processes at resolving interpersonal disputes. Given its greater effectiveness, peacemaking can likely provide benefits to tribal communities that employment of the adversarial system cannot.

V. CONCLUSION

One of the greatest assimilationist feats of the United States was to inculcate Anglo-American legal traditions such as adversarial litigation in tribal justice systems. Despite this influence, many tribes have retained or reintroduced traditional dispute resolution methods, or peacemaking, as a part of their current legal practices when resolving interpersonal disputes among tribal members.[282] Tribes utilizing both peacemaking and adversarial litigation have dual justice systems that reflect largely

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[280] *See supra* text accompanying notes 104-09.
[281] Justice Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 351 (2011).
[282] *See supra* text accompanying notes 1-6.

divergent values and assumptions.[283] Although peacemaking is gaining momentum, tribes still employ the Western adversarial system more frequently when resolving disputes between members.[284] While scholars have weighed in on the desirability of continuing to use adversarial practices in tribal courts, the effectiveness of each system must also be considered when assessing which dispute resolution model to primarily rely. Because traditional peacemaking is better adapted to human social dynamics, peacemaking is likely more effective at restoring relationships and resolving interpersonal conflict. Given the importance of utilizing the most effective dispute resolution system when resolving interpersonal civil disputes among tribal members, peacemaking could possibly provide greater benefits to tribal communities than utilization of the adversarial system.

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[283] *Id*.

[284] Metoui, *supra* note 14, 517.