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**Title**

Folk Law and Contemporary Coast Salish Tribal Code

**Permalink**

<https://escholarship.org/uc/item/15d551rk>

**Journal**

American Indian Culture and Research Journal , 19(3)

**ISSN**

0161-6463

**Author**

Miller, Bruce G.

**Publication Date**

1995-06-01

**DOI**

10.17953

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## Folk Law and Contemporary Coast Salish Tribal Code

BRUCE G. MILLER

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An important issue facing leaders of elective Indian Reorganization Act tribal governments is how to establish efficacy and create legitimacy in the minds of community members by building the values and ethos of earlier periods into the operation of tribal government and courts. More specifically, DeLoria and Lytle have argued that the “[e]xtensive development of tribal customs as the basis for a tribal court’s decision will enable these institutions to draw even closer to the people.”<sup>1</sup> This paper considers how governments have integrated folk law into the contemporary tribal codes developed over the last two decades by eight Coast Salish tribes of western Washington State. This study does not concern the manner in which colonial, national, or regional governments interpret folk law for use in mainstream courts or for tribal courts operated by the mainstream society. Rather, the focus is on how Indian people themselves approach the incorporation of folk law. The analysis presented here concerns code developed under the authority of tribal governments for use in tribal courts that hold significant, although not complete, jurisdiction.<sup>2</sup> The term *folk law* is used instead of *customary law* in order to refer to uncodified, lived law in use or previously in use at the local level. Customary law, on the other hand, is sometimes used

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Bruce G. Miller is an associate professor of anthropology at the University of British Columbia in Canada and anglophone editor of *Culture*, the journal of the Canadian Anthropology Society.

to refer to elements of indigenous law codified by a colonial administration for its own benefit and purposes.<sup>3</sup>

In explaining the nature of the inclusion of folk law, current analyses of north American Indian tribal legal codes emphasize either the diffusion of legal concepts from the colonizing mainstream society or the ways communities attempt to manage their relations with the outside.<sup>4</sup> The commentary of tribal councillors and judges and a reading of the Puget Sound tribal codes, however, show that the variations between the codes of culturally similar peoples reflect the differences in approach taken by leaders and the circumstances facing each community. These eight closely related tribal communities consider their own prior "legal" practices in quite different ways in several important respects, a circumstance that suggests the utility of the latter approach of emphasizing how communities create codes in order to manage relations with the state. Roger F. McDonnell, for example, noted, concerning Canadian First Nations efforts to codify customary law, that

as the relationships to the state are perceived to change, so too do the customs that . . . [a] culture group will stress. . . . We must bear in mind that our focus on custom possesses a strongly relational, rather than substantive, dimension.<sup>5</sup>

Constructions of folk law have changed as community circumstances change, and the strategic use of folk law will likely continue to be important in managing relations with the mainstream community.<sup>6</sup> It is possible to go further, however, and observe the nature of this relation and the subsequent content of folk law put into play in the tribal legal systems. The present Puget Sound codes manifest this outward-looking quality, and ideas of folk law are most broadly incorporated in code dealing with relationships with the outside world and with children. Folk law is most closely constrained or excluded regarding contentious problems that are internal to the community, engage incompatible or irresolvable concepts, and concern family survival (especially the vexing problem of the allocation of resources). As is true elsewhere, community members hold ambiguous feelings about the interpretations, meaning, and application of folk law—feelings that are apparent in the codes themselves.<sup>7</sup>

Among the crucial issues facing these tribes are how to organize the legal relationship between the constituent extended families in order to avoid the contemporary equivalent of blood

feuds and to facilitate the equitable distributions of the material resources of the polity and maintain tribal cohesion in the face of an intrusive mainstream society. Because formerly seasonally mobile people are now encapsulated in communities without many of the advantages and resources common to the mainstream society, the extended families compete vigorously for the limited resources available to them as tribal members.<sup>8</sup> Further, the availability of resources new to tribes in the period since the 1960s (such as federally funded tribal employment or houses constructed under federal grants) has created new disputes, just as the long period of unavailability of resources following the appropriation of traditional resource areas in the late nineteenth century also generated new sorts of disputes.<sup>9</sup> When conflict arises within the communities, it is difficult for adversaries to avoid each other as was possible even a few decades ago. The ability to move away from the reservation is complicated by the issue of maintaining eligibility for social and health benefits and by the high financial and psychological costs of living elsewhere. These circumstances give rise to tension and exacerbate interfamily disputes in many Indian communities.<sup>10</sup>

Meanwhile, social change, including the changing roles of women, shifting patterns of participation in the labor force, and the changing relationships between youth and elders, complicates the use of folk law and traditional forms of mediation.<sup>11</sup> In addition, a lack of community consensus on values, along with the creation of social class differences based on nontraditional criteria, are said to create grudges and violence. The role of elders is described as constrained; today elders are ordinarily restricted from disciplining members of other families. The cultural emphases placed on oratory and consensus are viewed as losing ground to adversarial debate.<sup>12</sup>

A commentary on traditional and informal dispute resolution processes produced by the Northwest Intertribal Court System (NICS) drew upon the ideas of a sample of elders from three of the constituent communities.<sup>13</sup> The 1991 NICS study shows the variability of viewpoints within the region and points out the context within which tribal code is designed to operate. The major problems of reservation life that are thought to require resolution today are identified as family feuds, alcohol and drug-linked problems, and neighborhood disputes. The NICS study links problems of substance abuse to poverty, powerlessness, and chronic depression.

While the aim of this study was to draw attention to informal processes of dispute resolution that might be of use, the study itself shows the difficulty in employing folk law to handle the contemporary circumstances. The three major categories of conflict reported by the NICS were either not faced in precontact times (in the case of alcohol and drug use and neighborhood disputes) or not easily resolvable under precontact period dispute resolution systems (in the case of blood feuds). Most of the cases that make it to the tribal court concern criminal actions that are likely beyond the ability of community members and informal community processes to handle.<sup>14</sup> Consequently, new processes for the resolution of community problems are contained in these codes.<sup>15</sup>

Code writers face the difficult task of reconciling folk law with the issues and legal demands of the present day. Despite all of the problems, however, tribal court systems appeal to folk law as a concept in order to gain legitimacy internally and as a source of inspiration and ideas. Indeed, folk law is said to offer variegated and dynamic possibilities for tribal communities facing change.<sup>16</sup>

### THE IDEA OF FOLK LAW

The identification of folk law is inherently contentious because of the potential for variation in interpretation along gender, class, and other lines.<sup>17</sup> There are particular problems in the treatment of Coast Salish folk law. Unlike some other groups of the Northwest Coast of North America and elsewhere, Coast Salish folk law is not easily identified by present-day community members, because it does not derive from the functioning of a chiefly system, clan system, the conduct of a redistributive system (sometimes referred to as the feast or potlatch), or taboos such as pollution rules. In addition, Coast Salish concepts of secrecy and the need to hold important knowledge privately within the extended family complicate the effort to identify folk law that receives broad approval within a community.<sup>18</sup> For the purposes of this paper, I rely on three primary sources of information concerning folk law: the ethnographic literature (including recent material produced by community members), my own interviews with tribal code writers, tribal court judges, and council members, and the Northwest Intertribal Court System study.<sup>19</sup>

## **Processes of Folk Law**

Folk systems of law in the Coast Salish region included, and, to a degree, continue to include, a variety of sanctions, especially restitution in the form of negotiated payments, ostracism, and even violent recrimination. Public ceremonies of various sorts were also employed in the process of public debate and resolution of disputes and crimes. These ceremonies included potlatches, summer dances of spirit-powers (notably, in some areas, *sxwayxwey*, which cleanses an insult), and formalized fights. But underlying these institutions is a cultural emphasis on avoidance of conflict through proper training (glossed as "advice"), fear of shamanistic retaliation, the practice of avoidance, fissioning of villages to dampen conflict, and deference towards senior leaders (elders) noted for their ability to model conflict-avoidance behavior and to express cultural values in formalized oratory. Indirect social control and, ordinarily, an absence of physical coercion rather than regulations and sanctions were the hallmarks of these systems. These practices stemmed from a desire to restore the community rather than from abstract notions of punishment and deterrence.<sup>20</sup>

## **Changes in Folk Law**

After contact with Europeans and Americans in the eighteenth century, new concepts of political organization, leadership, and law developed. Loosely affiliated villages were organized under coercive leadership, in some cases.<sup>21</sup> These changes produced some erosion of dispute resolution practices, including the negotiation of payments and games of resolution.<sup>22</sup> Nonetheless, significant elements of contact period practice remained through the 1940s, particularly for tribes without reservations, which were not under the direct and regular scrutiny of BIA Indian agents, police, and courts of Indian offenses. The Sauk-Suiattle, for example, maintained a council of elders until the 1940s, composed of upper-class men who talked to individuals who were engaged in conflict or were thought to be in violation of tribal law. Those who refused to accept the judgments produced in this process were "given the cold shoulder" or, if outsiders, were removed from the community. The elders relied on talking to the parties in dispute before the council meeting and generally offered advice rather than punishment in the hope of producing resolution.<sup>23</sup>

The Bureau of Indian Affairs (BIA) authorized the creation of externally controlled courts of Indian offenses (CFR courts) in 1883 for reservation communities, in part to fill a perceived leadership void following an apparent decline in traditional authority and to diminish the residual authority of traditional chiefs.<sup>24</sup> BIA authority over the court system was diminished with the passage of the Indian Reorganization Act of 1934. However, tribes were encouraged to establish governments and court systems modeled on those of the dominant society. These institutions were poorly funded.<sup>25</sup> The switch to a policy of self-determination in the 1970s was accompanied by efforts of tribes with independent courts and those within the BIA system to rewrite their codes for their own ends. Meanwhile, the Indian Civil Rights Act of 1968 imposed most of the federal Bill of Rights on tribes, thereby establishing new requirements for tribal courts and restricting the penalties that could be imposed. It became unlawful, for example, for a tribal government to enact a law that exacts punishment without a judicial trial.<sup>26</sup> Tribal courts, CFR courts, and traditional dispute settlement institutions and processes all exist in Indian Country at present. A more recent development is the consortium created by several tribes to streamline the delivery of legal services by providing centralized judicial, administrative, and support services.

### **The Incorporation of Folk Law**

My reading of the eight Puget Sound codes and those of sixty other American Indian tribes shows that folk law is incorporated directly into the legal process through the recognition of official or semiofficial community experts (ordinarily elders or some subset of elders) who sometimes have expert standing in the tribal court. A separate survey of American Indian tribal codes found three major systems whereby folk law is incorporated in one legal domain, procedural rules.<sup>27</sup> According to this analysis, in one type no expert system is established, but appeals can be made to concepts of custom if not already accounted for in the law. In a second type, an expert system is established. In a third system, a tribal custom advisor is appointed and serves as a court-appointed expert in the event of dispute or uncertainty.

Folk law is incorporated in the codes in varying degrees of formality and specificity, ranging from extremely vague and

inoperable language to explicit procedural instructions. More specifically, the degree of inclusion of folk law can be sorted roughly into three levels. One is a minimal level characterized by tight regulation, which leaves little room for folk law or interpretation of tradition (several of the Coast Salish fish tax codes are of this sort). Another level is code that is ambiguous concerning inclusion or exclusion of custom, and a final level involves the actual incorporation of folk law as (currently) understood or analogous contemporary practice directly in the code (this occurs most frequently in youth codes). Finally, folk law plays a significant role in some domains of contemporary law and little or no role in others.

## BACKGROUND

### **The Eight Coast Salish Tribes**

The eight tribes whose codes are reviewed here are located in the largely urban, north-south corridor of western Washington State, along the shores of Puget Sound and adjacent waterways. These tribes are composed of culturally similar peoples, linguistically Coast Salish, but with English-speaking memberships. The traditional economies of all eight tribes were built around fishing, hunting, and gathering, and a rank and class system was supported by elaborate religious and ceremonial life (especially potlatching and winter ceremonial activities). Emphasis continues to be placed on the harvest of salmon for subsistence and for ceremonial reasons and on cedar working.

The tribes range in size from about 200 to about 3,000, with a mean of 1,075 and a total of 8,600 people. All have elective councils (of five to eleven members) and relatively small reservations, although these vary in size from just a few acres to more than twenty thousand. Some important differences between the tribes are the result of federal policies. The eight tribes are all the successors in interest to communities that sent representatives to treaty negotiations in either 1854 or 1855, but several were restored to recognition by the federal government in 1973–74 after a lapse and consequently have small reservations created in the 1980s. Federal policy required the consolidation of diverse peoples onto reservations in Washington State, and all of the present-day tribes incorporated people from a variety of communities.



Federal policy has influenced these eight tribes in similar ways: All engage in regular relations with the Bureau of Indian Affairs and receive health services under the separate Indian Health Services, although some now have direct control of their medical system.

### **Tribal Court Systems**

Seven of the eight tribes are members of a consortium of fifteen tribes, the Northwest Intertribal Court System (NICS), and the eighth, originally an NICS tribe, now has its own court system. The NICS was established in 1979 following the fishing litigation (*US v. Washington*, 1974) that held that the treaties of the mid-nineteenth century gave Indians of Washington State rights to half the salmon catch in state waters, thereby creating a need for fish and game codes and a legal setting for the prosecution of violators. The NICS courts operate under the provisions of the tribal codes and constitutions and federal law, and each tribe's court holds jurisdiction over civil, criminal, traffic, and fisheries issues involving both Indians and non-Indians. Federal law, especially the Major Crimes Act of 1885, muddies the issue of jurisdiction by restricting or creating concurrent jurisdiction with Indian courts in important criminal areas, including murder and other violent crime. Consequently, folk law concerning such crimes is not considered here.<sup>28</sup>

Each tribe has created its own processes to compose code, but there are a number of ways whereby code is ordinarily created. One route is through the tribal law committees, whose work is to consult with code writers in making recommendations to the tribal council. The council can then refine the language and vote to accept or reject the proposed legislation. It is particularly at the committee level that notions of folk law are entertained most significantly. However, code writers are frequently neither enrolled tribal members nor community members and find it a difficult task to fit the ideas emerging from the community and the law committee into the legal structure already in place. This process opens the possibility of miscommunication between committee and code writer. The tribal council, composed of elected representatives of the enrolled members, can pass legislation on its own initiative or vote on suggestions coming directly from the membership or from other sources. Finally, the general member-

ship of the tribe can instruct the council to prepare legislation by vote at the annual general membership meetings.

## FOLK LAW AND PUGET SOUND CODES: AN OVERVIEW

On the surface, the present-day legal codes appear to reflect a viewpoint quite different from that which motivated earlier community practices. There are few explicit provisions for mediation and negotiated restitution, which characterized earlier dispute resolution. Generally, the codes are built upon an adversarial model that balances the interests of citizens against each other in civil action or against the tribe in criminal prosecution. In most instances, the legal system places an emphasis on punishment and rehabilitation rather than on restitution. The codes provide limited opportunities for elders, and none for the upper class, to exercise the authority they held in previous periods as sanctioned arbiters of customary practice. The codes of the eight Puget Sound tribes provide for no formal standing appointment of experts or elders, with a few exceptions; rather, discretion about how to apply custom is ordinarily left with the judge. This suggests, first, that in the Puget Sound region, folk law is thought of as best embedded in dispute resolution practices that precede entry into the formal legal system and, second, that there is less reliance on folk law than in some other bodies of Indian law. Nonetheless, there is significant variation in how the eight tribes treat folk law.

Folk law is broadly contained within the codes through references to the extended family or family networks, and family is defined as many as seven ways in the legal codes of single tribes. How family is defined is critical, because tribal political life is conducted along family lines and in the idiom of kinship.<sup>29</sup> Furthermore, the extended family has always been the fundamental unit of dispute resolution, and the NICS study defines the family as "generally [including] parents, siblings, aunts, uncles, cousins to 3rd or 4th removed (also great and great-great) and in-laws."<sup>30</sup> Family is consistently defined the most narrowly in the sections of the law dealing with economic issues (which regulate competition within the tribe), notably fishing, and most broadly in the sections dealing with provisions for youth and custody. These sections establish guidelines for the treatment of tribal youth in contact with the outside world of nontribal social service agencies and have the intention of limiting outside interference in tribal life.

Folk law is also constrained by provisions of the tribal bill of rights, usually contained in the constitution, that guarantee a wide range of individual rights. In some cases, the bill of rights includes economic rights of equal opportunity and access to resources. These bills contradict the emphasis on social class and extended families that characterized traditional society, especially the families' central role within Coast Salish social, political, and ceremonial organization, including control of access to resources.

### CODES AND FOLK LAW

The eight tribal codes contain twelve areas in which folk law, as identified in the NICS study, the ethnographic literature, or in interview, is treated as relevant in at least one of the eight contemporary codes, either through direct application or through analogous practice.<sup>31</sup> These twelve areas are (1) the allocation to extended families of use-rights to important resources that, under treaty law, are now tribally owned (but that, under folk law, are the property of individual families); (2) the rights of extended families to control the provision of care for children and the elderly; (3) the rights of extended families, through their leaders, to operate collectively in community political life; (4) the role of elders in adjudicating conflict (which is recognized today in the provisions for elders' councils or seats for elders as consultants to the tribal courts); (5) the prerogatives of elders in formal settings (which is recognized through the creation of legal distinctions that honor elders); (6) regulation of tribal membership based at least in part on affiliation with constituent family networks and on participation in the life of the community rather than on imposed standards of blood quantum or descent from a base roll; (7) the use of restitution to resolve conflict and restore peace in the community; (8) the allowance for community input to the judge in legal proceedings (which approximates the earlier role of community meetings to discuss criminal behavior and to assign sanctions); (9) the allocation of community assets to fulfill ceremonial and spiritual obligations (which is approximated today by legal provisions for the allocation of funds for community ceremonial purposes); (10) the provision for the protection of particular features of the natural environment (through first salmon and other ceremonies that constituted a category of folk law in that the performance of

**Table 1**  
**Folk Law Incorporated in Tribal Code**

Issue	Tribe							
	A	B	C	D	E	F	G	H
rights of family net.	+	-	+	+	+	+	+	-
role of elders	+	-	-	+	+	+	+	+
membership	+	+	+	+		-	+	+
community input on case	-	-	-	+	-		-	-
restitution	+	-		+	-	+	-	+
protect environ.	+	+		+		+	-	+
use-rights	+	-		-		-	-	+
family net. and child care	+	-		+		+	-	-
honor elders	+	+		+	+		+	+
ceremonial provisions	+	+		+	+		-	+
spirit of tribal law—rulings	+	+		+	+	-	+	+
spirit of tribal law—process	+	+		+	+	-	+	+

Plus signs indicate that the code incorporates folk law; minus signs mean the code explicitly rejects. A blank cell indicates that the code is silent (neither implicit or explicit on the subject). A plus sign and a negative sign in the same cell indicates that the code embraces folk law at points and rejects it elsewhere.

such ceremonies regulated the harvest); (11) the allowance for the “spirit of tribal law” in judicial proceedings; and (12) the allowance for the “spirit of tribal law” in judicial rulings. Table 1 shows the absence or presence of these areas in the eight tribal codes, and table 2 summarizes the raw scores for the inclusion or exclusion of folk law in order to indicate roughly the differences in approach in the eight tribal codes.

Raw scores from this chart give a rough idea of the variation in the inclusion of folk law and traditional practice among the tribes' codes. The scores are tabulated as follows:

**Table 2**  
**Raw Scores of the Treatment of Folk Law in Contemporary Code**

<b>Tribe</b>	<b>Positive Score</b>	<b>Negative Score</b>
A	11	2
B	6	6
C	3	2
D	11	2
E	6	2
F	5	5
G	6	7
H	9	3

These scores make clear the order of difference between tribal codes and suggest that the tribes might be roughly partitioned into three groups concerning the treatment of folk law in the contemporary code. Tribes A and D are the most inclusive, and B, F, and G the most exclusive. Tribes E and H fall somewhere in between, and the unelaborated code of tribe C is hard to categorize. The details of how folk law is treated by these eight tribes are more apparent through a consideration of each tribe's code.

### THE EIGHT TRIBAL CODES

The code of Tribe A incorporates folk law as thoroughly and poses as few constraints on traditional practice as any of the eight. The major areas in which folk law appears (in some form) are enrollment, fisheries law (in provisions for ceremonial fishing and the inheritance of fishing sites), and the youth code (for example, requiring the consideration of religious traditions in youth court hearings). In addition, the code is explicit in recognizing experts on custom, although formal bodies of cultural experts are not created. The Enrollment Ordinance specifies that the enrollment appeal board shall consist of "tribal council chairman, a tribal elder, the tribal judge, and the tribal enrollment clerk" (section 11). Presumably, the elder is an expert on folk law who is able to

understand community membership in a broader sense than the strictly biological prescriptions of blood quantum. The Youth Code states that, in questions of uncertainty of interpretation, "tribal law or custom shall be controlling, and where appropriate, may be based on the written or oral testimony of a qualified elder, historian, or other tribal representative" (section 500, 13.3). Specific procedures for qualifying the elder or other community member are not included.

Nepotism rules (article IV, section 3 of the constitution) limit the regular expression of family corporate interests by requiring that no more than one immediate family member of any person on the tribal council shall become a candidate or serve on the council. Immediate family is defined as mother, father, brother, sister, spouse, son, or daughter. Significantly, cousins, traditionally regarded as classificatory siblings, are not excluded and would likely be included within one's family network. Volume 8, section 402 (Rules of the Tribal Court) uses language (which appears in the code of several tribes) that restricts the judge from seeking the advice or opinion of others regarding the merits of a case. This removes the judge from the local social context and creates an emphasis on deterrence, rather than on restoring the defendant to society and reestablishing social harmony, a principle aim of folk law, according to the 1991 Northwest Intertribal Court System study.

By contrast, the code of Tribe B, although lengthy, includes the least application of folk law. Article VI, section 1, of the constitution refers to the need to cultivate and preserve native arts, crafts, culture, and ceremonials, but there is no subsequent enabling legislation. Zoning ordinance 35 3.3.6.1 specifies that some areas of the reservation require protection because of the cultural heritage. A nonspecific passage, ordinance 49, title I.2.2, states that "if the course of proceedings be not specifically pointed out by this code any suitable process or mode of proceedings may be adapted which may appear most comfortable to the spirit of Tribal Law." Finally, fishing ordinance 6.3 allows fishing permits for ceremonial permits for religious purposes. Other than this, the law is silent on the issue of folk law (or custom, as the law code refers to it). The heavy emphasis in the code is on ordinances regulating commercial development.

Similarly, the code of Tribe C is quiet on the issue of folk law, a circumstance that appears to be the result of a general lack of elaboration. This very brief code, however, recognizes tradition in

membership criteria (as do all of the other tribes), although there is a twist in that membership is granted to those on the official census of 1945 and to those born to any member who is a resident of the community. This creates an unusual burden for establishing membership, since membership is contingent on the direct, frequent participation in the life of the community of one's parent(s). This law corresponds to earlier concepts of community membership as deriving from participation in functioning corporate units, with membership established by both birth and marriage.

The code of Tribe D, as noted, has a relatively elaborate treatment of folk law (referred to variously in the code as custom, tradition, or tribal law). Judges are given broad latitude to apply folk law in two ways: If the course of legal proceedings is not specified in the ordinance, any suitable process may be adopted that appears in keeping with the spirit of tribal law; secondly, the judge has latitude in sentencing to conform to "traditional . . . remedies" (chapter IV of the Law and Order Code, section 4.5). In both cases, however, there is no further detail. Additionally, the Family Code (chapter 1.4.140) specifies that a "Qualified elder, Historian, or other tribal representative" who has been certified by the tribal council may testify concerning traditions and customs of the tribe. Also, the Family Code (part II, 2.1.010) contains an explicit recognition of traditional patterns of child care, which permit parents to place a child with another care-giver for a brief or a long period. This action by itself is not held to indicate that the child is in need of care action. Furthermore, part III (chapter 3.1.010) states, as an issue of intent, that termination of parental rights is never recognized, even in cases of extreme abuse or neglect because of tribal customs of child-rearing within "the supportive network of extended family and community."

There is a case of an explicit reworking of traditional themes to achieve similar outcomes as in the past. Chapter 1.8.010 of the Family Code establishes an Indian child welfare committee, in lieu of an elders' council, to recommend to the Indian child welfare worker measures to be taken to protect tribal families as the elders' council did in previous generations. Although elders may be on this council, the measure does not specify this.

Finally, sections of the law appear explicitly to overturn customary practices in the interests of contemporary needs. Section 3.02 of the fishing ordinance specifies that access to specific net

sites and drift locations will be determined on a first-come, first-served basis, instead of as allocated by the earlier patterns of family network control of locations.

The code of Tribe E treats folk law most significantly in two ways: by allowing for folk law where there is uncertainty in the code and through repeated reference to the "extended family." Other references are also included. Title 15-Youth Code 15.01.030 holds that, "[w]henever there is uncertainty or a question as to the interpretation of certain provisions of the code, tribal law or custom shall be controlling, and where appropriate may be based on the written or oral testimony of a qualified elder, historian, or other tribal elder."

The code recognizes the family network in several places. The Youth Code, title 15.02, defines extended family as follows:

[T]his term shall be defined by the law or custom of the Indian youth's tribe, or in the absence of such law or custom, shall be a person who has reached the age of 18 years who is the Indian child's grandparent, grand aunt or grand uncle, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first, second, or third cousin or step parent.

The Youth Code (15.05.090) calls for consideration of the availability of resources for youth in the extended family and attempts to keep youth within the extended family in cases of termination of parental rights.

References to folk law show up in several other parts of the code. The fishing ordinance authorizes a special fishing permit for religious and ceremonial purposes; the liquor ordinance recognizes the importance of elders and programs for them through earmarking at least 15 percent of the tax received for elders' programs; and the gambling ordinance treats noncommercial, culturally sanctioned "traditional tribal games," which serve as a medium of conflict resolution (such as bone gambling), as separate from other forms of gambling. The code moves away from folk law in forbidding a judge from discussing a case or seeking advice within the community (title 10.04.010) and in the bill of rights (article IX of the constitution), which guarantees equal rights.

The code of Tribe F is unique among the eight in its specificity about where folk law stands in relationship to other systems of law:



In cases otherwise before the trial and appellate court . . . , decision on matters of both substance and procedure will be based on the following in the following order of precedent:

1. the constitution and bylaws . . .
2. Statutes . . .
3. Resolutions . . .
4. Customary law, custom, traditions, and culture of the . . .  
Tribe (Title 9 Basis of Decision 9.4.01).

Furthermore, the law specifies that, in the absence of tribal ordinance or other law sufficient for a dispute or criminal procedure, then U.S. federal rules of procedure will apply, and the court will determine whether federal law is applicable. This is a much more concrete procedure than the vague references to the application of the "spirit of tribal law" that frequently occur in other codes, and folk law has a clearly limited role in the law. For example, unlike some other tribes, Tribe F includes no provisions in the membership code allowing the membership committees to grant membership on bases other than the formulistic requirements set forward (that is, reference to descent from someone on the 1934 roll, and of 1/8 blood quantum) in order that community recognition of membership may supplement the postcontact emphasis on blood quantum.

Allowance for folk law does appear in title 12, the youth ordinance (typically the site of explicit references to custom), particularly in regard to the role of the extended family and protection of youth from interference by outsiders. Allowance for tribal law or custom is made through the written or oral testimony of a qualified elder, historian, or other tribal representative. However, as in the other cases where this language appears, the reference is to contact with outside service providers and agencies. The youth ordinance forbids service providers from holding tribal youth in detention, from criticizing the youth for expressions of their heritage, for hair styles or personal tastes; most importantly, the ordinance specifies that "[a] youth shall be permitted to attend the funeral and any related activities for his parent, guardian, custodian, or any member of his extended family. . . ." This is a significant passage, because the various ritual observances surrounding death are among the most important of all Coast Salish practices. Title 12, chapter 12.06.010, in a section on placement preference for youth, gives the youth's extended family as second preference after parents. Title 11 defines "extended

family member” as, “to the extent consistent with tribal law and custom, any adult who is competent to care for a youth, and who is the youth’s grandparent, aunt or uncle, brother or sister, first or second cousin, step parent, or other family member including non-Indian people.” Limits are placed on the relationships between extended family members in title 11, chapter 11.02.01, the amusement game and gambling ordinance (a person under 18 must be accompanied by a member of his/her immediate family or guardian). Title 12 defines parenthood as meaning biological parents or a person who has lawfully adopted a youth, including “adoptions under tribal law or custom.”

The code of Tribe G includes the familiar references to the use of folk law, such as this:

[I]f the course of proceeding be not specifically pointed out by this code, any suitable process or mode of proceeding may be adapted which may appear most comfortable to the spirit of Tribal Law. (Title I General Rules 1.4.05)

Further, title 3.4.04 (civil procedure) allows the court to request the “advice of counselors familiar with these customs and usages” in the event any doubt arises about custom. The importance of elders and their standing in dispute resolution, noted in the Northwest Intertribal Court System study, is recognized through provisions exempting those over sixty-five from paying fish taxes on the first five thousand dollars of income per year and by allocating elders’ programs 15 percent of income from the taxation of liquor.

But the code of Tribe G is ambiguous about the most significant of all traditional institutions, the extended family. Chapter 1.3.04, which deals with conflict of interest in the appointment and removal of judges, merely notes, “No Judge shall be qualified to act as such in any case wherein he has any direct interest,” an idea imported from the mainstream society. Unlike other code, there is no specific reference to family membership nor definitions of membership given. However, section 1.8.08 is more specific and states that “no person shall be qualified to sit on a panel of the Court of Appeals in any case wherein he has any direct interest or wherein any relative by marriage or blood, in the first or second degree, is a party.” Assuming that this refers to second cousins, even this definition of family is narrow in Coast Salish terms. Title 9.4.06 forbids a law enforcement officer from permitting any member of his immediate family from interfering with his duties

or from discussing information obtained by virtue of his official position. Title 29.1.01 (elections) defines those "directly related" as son, daughter, husband, wife, mother, father, sister, or brother and restricts people directly related to a candidate from serving on the election committee. Other relatives are not so restricted.

The code makes a dramatic about-face in title 11.3.01 (domestic relations) in carefully separating the properties of husband and wife. Property and pecuniary rights of both, obtained before and after marriage, are not subject to the "debts or contracts" of the other. A husband or wife may "manage, lease, sell, convey, encumber as fully to the same effect as though he were unmarried. . . ." This conforms to traditional patterns of inheritance, which privilege siblings and family network members who together form corporate groups for the management of resources, property, and incorporeal spiritual goods. Title 8, Juvenile Code, as is the case with other tribes, is more expansive in the application of family. The first priority in adoption procedures is given to "extended family members," a phrase that is not used elsewhere in the code and is not defined.

Notions of folk law are embedded directly in the code of Tribe H in several places. Section 4.500 of the sentencing guidelines provides that sentences "may be of a nature customary . . . [and] reflect traditional . . . remedies." The judge is given latitude in this regard, with the very important exception of fishing offenses. However, even the fishing ordinance recognizes traditional practice in giving preference for ceremonial fishing and in sanctioning the system of "traditional use sites," which by custom are held as usufructory rights. The code specifies that failure to use the site during one fishing season lays the site open to claim by others, a practice with some antiquity. All sites must be registered, and, in the event of dispute, the fish committee can order the area abandoned or shared. The hunting ordinance also gives priority to ceremonial hunting, especially for elders' lunches and for funerals. Further, "designated hunters" can provide for the elderly and infirm.

Notions of folk law also show up in the "utility sanction guidelines," which specify that sanctions be taken only if needed, with the minimum action necessary and after an effort is made to balance the interests of the tribe, the miscreant, and the neighbors. Finally, the ordinance establishing the juvenile court provides that a "principle of least restriction" be applied when dealing with juvenile offenders. In both cases, these provisions appear to

coincide with traditional values of respecting personal autonomy, even for children, where possible. Further, children detained in facilities shall not be ridiculed for expressions of their cultural heritage and shall be permitted to attend the funerals of a named set of relations. This is the only place in the code where the family, as constructed culturally, is spelled out and includes sister, brother, mother, father, aunt, uncle, grandfather, grandmother, and cousin (it is notable that the code does not incorporate family otherwise and that this section of the juvenile code was later replaced).

The code retains a traditional flavor in the broad latitude it provides in defining membership. The adoption ordinance, section 2, allows the enrollment committee and the tribal council to "take into consideration other factors such as family blood lines, participation in the Tribe, tribal identification, and the applicant's personal identification with the . . . tribe in determining the quantum of . . . [tribal] blood. . ."

The code explicitly creates a nontraditional legal context in a variety of areas, including the following: in the guarantee of economic rights to individuals; in the imposition of impartiality and impersonality in court proceedings (prohibiting discussion between jurors and others involved in a case and in excusing witnesses with personal knowledge of a case); in allowing for termination of parental rights if a child is abandoned or willfully and repeatedly injured; in failing to mention extended families or networks in the provisions for appointing guardians for minors; in specifying that "any person who, lacking the legal right to do so, interferes with another's custody of a child, shall be guilty of an offence" (leaving out a role of extended family members); in requiring a high school diploma or GED (equivalency) for those under eighteen who wish to fish during school hours; in failing to include provisions making a married minor an adult (as occurs in several other codes).

## CONCLUSION

One aim of this paper has been to show where, how, and to what ends folk law has been included in the codes of a group of tribes in Washington State with significant legal jurisdiction, including the right to create both civil and criminal code. Although many legal concepts and practices are clearly imported, the variability in emphasis in the eight codes demonstrates that they are best

understood as responses generated by the communities to their own localized, historical conditions and not simply by a diffusionary model emphasizing the importation of Western legal concepts. Although the codes differ, they all provide legal mechanisms useful for the management of internal conflict and external intrusion. Tribal councils respond to the pressing demands placed on their communities by the outside world in part by developing tribal specializations that result from assessments of what is possible. Undersized, chronically underfunded tribal governments and staffs select among various possibilities in allocating personnel and resources; they do not hope to achieve everything at once.<sup>32</sup> Some governments (such as that of tribe D) devote much of their energy to cultural issues, others (tribe B) to economic development. Such decisions, in turn, influence the direction the legal system will take and the relative emphasis or de-emphasis of folk law.

The fact that folk law is least deployed in areas of ongoing dispute, especially the access of community members to tribal resources, and most developed in areas of least dispute, particularly concerning tribal youth and their relations with the mainstream community, reflects a lack of consensus within all of the tribes about the content of folk law and some reluctance to apply folk law in the present context. Tribes are, at present, experimenting in quite different ways with how best to regulate the relations between extended families, between generations, and between the tribe as a whole and the individuals who compose it. The experimental nature of the codes and the ambiguous feeling towards folk law are quantifiable: Six of the eight tribes have rejected community involvement in the judicial decision-making process; four tribes incorporated the concept of restitution, and three rejected it. There is also ambiguity about fundamentals of traditional social organization, or what might be considered folk law of inheritance and ownership: Use rights to resource sites are embedded in the law of only two tribes and were rejected by four others; extended families are rejected as institutions with rights of ownership (to some degree) by seven of the tribes, and rights and responsibilities for children of extended family members are acknowledged in three and restrained in four. However, six of the codes allow for the spirit of tribal law to be incorporated both in the legal process and at the stage of rulings. Six of the tribes have recognized the distinctive contributions of elders as experts in folk practice, although the provisions are quite unelaborated.

Some tribes, particularly tribes A and D, have chosen to recognize principles of traditional social organization in the law. Others (tribes B and H) have rejected this position and have emphasized universalism of access to resources as an issue of individual entitlement, without consideration of family organization. The use of various definitions of family within the codes of single tribes is a further indication of this ambiguity and of the complexity of creating code that emphasizes traditional values and addresses current issues. The use of a variety of definitions of family can be regarded as a significant strategy for sidestepping irreconcilable issues. All of the Coast Salish tribal law committees, whatever their approach, face difficulties in meaningfully merging folk law into tribal code.

Further research might be productively concerned with considering more closely the changing application of folk law in tribal legal systems as financial and political circumstances change and as tribal leadership changes. The current development of large-scale multimillion-dollar gaming operations by several of the tribes in question will produce new economic opportunities and new pressures on leaders that perhaps will result in an emphasis on economic development within tribal codes. Variations in tribal population and the degree of urbanization and institutional completeness ought to be considered. But equally important is what such analysis can reveal about community politics, especially the relationship between communal and individual rights, and vexing contemporary social and ethnographic problems of understanding intergenerational relations and changing conceptualizations of *elder* and resource management. Tribal codes, especially in their treatment of folk law, remain an underused resource for comprehending these issues.

#### ACKNOWLEDGMENTS

I wish particularly to thank Elbridge Coochise, chief justice of the Northwest Intertribal Court System, Ralph Johnson of the University of Washington Law School, and Ted Maloney, attorney for the Upper Skagit tribe, for their assistance. In addition, I thank the several tribal councilors and tribal law committee members who provided ideas. Any errors in fact and interpretation are my own.

## NOTES

1. Vine Deloria, Jr. and Clifford Lytle, *The Nations Within* (New York: Pantheon Books, 1984), 248.

2. For a discussion of the constraints on the tribal courts and problems of jurisdiction, see Ralph W. Johnson, R. and Rachael Paschal, eds., *Tribal Court Handbook for the 26 Federally Recognized Tribes in Washington State* (Olympia, WA: Office of the Administrator for the Courts, State of Washington, 1991), 166.

3. The distinction between the concepts of folk law and customary law is important, because it draws attention to relations of power. Vincent notes, "It is useless . . . to look to 'customary law' for resistance to superordinate institutions of power or privilege" (Joan Vincent, *Anthropology and Politics: Visions, Traditions, and Trends* [Tucson: University of Arizona Press, 1990], quoted in Peter Just, *Law and Society Review* 26 [1992]: 379). Tribal codes themselves make references to tribal law, custom, and tradition.

4. Miller points out that there is little literature concerning the details of the new tribal code employed in the contemporary tribal court systems operated by tribes in the U.S. (Bruce G. Miller, "Contemporary Tribal Codes and Gender Issues," *American Indian Culture and Research Journal* 18:2 [1994]: 43-74.) Most of the current literature argues that Indian court systems rely on concepts imported from the mainstream legal system and consequently are largely devoid of folk law (see, for example, Samuel J. Brakel, *American Indian Tribal Courts: The Costs of Separate Justice* [Chicago: American Bar Association, 1979]; Russel Lawrence Barsh and J. Henderson Youngblood, "Tribal Courts, the Model Code, and the Police Idea in American Indian Policy," *Law and Contemporary Problems* 40 (1976): 25-60; Carla Christofferson, "Tribal Court's Failure to Protect Native American Woman: A Reevaluation of the Indian Civil Rights Act," *The Yale Law Journal* 101 (1991): 169-85; Sharon O'Brien, *American Indian Tribal Government* (Norman: University of Oklahoma Press, 1989); Susan Lupton, "American Indian Tribal Codes," *Legal Reference Services Quarterly* 1 (1981): 25-41; Frances Frances Svensson, "Liberal Democracy and Group Rights: The Impact of Individualism and Its Impact on American Indian Tribes," *Political Studies* 27 (1979): 421-39. See Ralph W. Johnson and Susan Lupton, *Indian Tribal Codes* (Seattle: University of Washington School of Law, Marian Gould Gallagher Law Library, Research Studies Series 1, 1981) for a discussion of the early reliance of tribal codes on state and federal legal language.

5. Roger F. McDonnell, "Contextualizing the Investigation of Customary Law in Contemporary Native Communities," *Canadian Journal of Criminology* (July-October 1992): 299-316.

6. Although the historic relationship between mainstream legal systems and Coast Salish Indian communities remains largely unexamined, it is likely that Coast Salish people have long used legal systems for their own purposes. Asher noted the early use of white courts by Coast Salish Indians of Puget Sound interested in imposing sanctions on Indian assailants and also resisting white law when it was perceived as subverting tribal sovereignty (Brad Asher, "They Are Satisfied if a Few Could Be Hung": Indian Legal Consciousness and

White Law on Puget Sound, 1875–1889" [Paper given at the American Society for Ethnohistory Annual Meetings, 1993]).

7. See Carol LaPrairie, "Aboriginal Crime and Justice: Explaining the Present, Exploring the Future," *Canadian Journal of Criminology* (July–October 1992): 290.

8. Miller, "Women and Politics: Comparative Evidence from the Northwest Coast," *Ethnology* 31 (1992): 367–84.

9. Ibid.

10. LaPrairie, "Aboriginal Crime and Justice," 288. See also Miller, "Women and Tribal Politics: Is There a Gender Gap in Indian Politics?" *American Indian Quarterly* 18 (1994): 25–42, for a discussion of interfamily disputes.

11. Swinomish Tribal Mental Health Project, *A Gathering of Wisdoms* (LaConner, WA: Swinomish Tribal Community, 1991), documents, for example, the changing relationship between grandparents and grandchildren and the erosion of grandparents' authority. In addition, those finding employment outside of the reservation communities have been largely unable to participate in folk law practices.

12. Northwest Intertribal Court System (NICS), "Traditional and Informal Dispute Resolution Processes in Tribes of the Puget Sound and Olympic Peninsula Region" (Unpublished manuscript, 1991).

13. Ibid.

14. See "Tribal Justice Survey, March 1995" (Unpublished manuscript, National American Indian Court Judges Association) for data concerning categories of cases entering the NICS courts.

15. Several tribes within the Northwest Intertribal Court System have created peacemaker programs, also known as tribal community boards, as alternatives to the tribal courts and as a vehicle for the application of traditional dispute resolution processes (NICS, "Traditional and Informal Dispute Resolution," 1). Other tribes have rejected this idea.

16. McDonnell, "Contextualizing the Investigation," 301.

17. See, for example, Roger M. Keesing, *Custom and Confrontation: The Kwaio Struggle for Cultural Autonomy* (Chicago: University of Chicago Press, 1992).

18. The Gitksan, a matrilineal people of northern British Columbia, for example, speak of a traditional set of laws that are upheld by house chiefs and that consider such topics as inheritance, land rights, adoption, resource access, and a range of criminal activities (Office of the Hereditary Chiefs of the Gitksan and Wet'suwet'en, "The Gitksan and Wet'suwet'en," pamphlet, n.d.). The contemporary Nuuchahnulth describe traditional social practices of chiefly families as constituting Nuuchahnulth law in a variety of categories, including family laws (Roy Haiyupis, "Nuuchahnulth Family Law," *Ha-Shilth-Sa* (May 26), 6–7). A number of scholars have described the difficulty some communities have in identifying folk law, in translating concepts into English, or in gaining consensus on this topic. For example, McDonnell, in "Contextualizing the Investigation," expresses concern about a process of the "creative elaboration of custom," the invention of tradition, and that codification will "do little more than promote the views and concerns of some natives over other" (p. 312). These are important concerns, but they are not the focus of this paper.



19. Ethnographic sources that provide information concerning Coast Salish folk law in the contact period include June Collins, *Valley of the Spirits* (Seattle: University of Washington Press, 1974); William W. Elmendorf, *The Structure of Twana Culture*, Washington State University Research Studies 28:3, Monographic Supplement 2; Erna Gunther, "Klallam Ethnography," University of Washington Publications in Anthropology 1 (1927): 171-314; Marion W. Smith, *The Puyallup-Nisqually*, Columbia University Contributions to Anthropology 32 (1940); Wayne Suttles, "Private Knowledge, Morality, and Social Classes among the Coast Salish," *American Anthropologist* 60 (1960): 497-507. Recent, detailed, community-produced ethnographic accounts include Swinomish, "A Gathering of Wisdoms," and NICS, "Traditional and Informal Dispute Resolution."

20. NICS, "Traditional and Informal Dispute Resolution." Collins, *Valley of the Spirits*, 119, provides two categories in which corporal punishment was socially sanctioned. She gives an example in which a man who had killed by use of supernatural spirits was executed. Men and women guilty of incest were said to have been executed, but Collins provides no examples.

21. See, for example, Collins, *Valley of the Spirits*.

22. See NICS, "Traditional and Informal Dispute Resolution" for details of this erosion of dispute resolution processes.

23. *Ibid.*, 88.

24. Johnson and Pascal, *Court Handbook*, 5.

25. *Ibid.*, 3.

26. *Ibid.*

27. Ralph Johnson and Richard Davies, *Indian Tribal Codes: A Microfiche Collection of Indian Tribal Law Codes* (Seattle: University of Washington School of Law, Marian Gould Gallagher Law Library, Research Studies Series, 5, 1988).

28. NICS Judge Elbridge Coochise has noted that Washington State has authority under PL 83-280 to prosecute major crimes but frequently fails to. Some tribes have responded by prosecuting these crimes themselves (personal communication, April 1995).

29. Miller, "Women and Politics."

30. NICS, "Traditional and Informal Dispute Resolution," 111.

31. Vi Hilbert, a well-known Upper Skagit elder, distinguished between ancestral rules and teachings in noting the relevance of legal innovation:

We can't apply the rules of our ancestors to today's world, but the teachings of those rules can be adjusted to any time in history because they're done with honor and respect. Those are the two magic words: honor and respect (Hilbert, quoted in NICS "Traditional and Informal Dispute Resolution," 12).

32. Robbins described the struggles faced by tribal governments and administrations due to limited resources and the sorts of specializations that result. (Lynn Robbins, "Upper Skagit [Washington] and Gambell [Alaska] Indian Reorganization Act Governments: Struggles with Constraints, Restraints, and Power," *American Indian Culture and Research Journal* 10 (1986): 61-73.