

**PUBLICITY RIGHTS AND THE CONFLICT OF LAWS:
TRIBAL COURT JURISDICTION IN THE
CRAZY HORSE CASE**

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Great nations, like great men, should keep their word.

- Justice Hugo Black¹

I. RELATIVES TO STAND UP FOR HIM

Liquor has been a scourge on Indian people. The devastating effects of alcoholism and fetal alcohol syndrome for Indian people are horrific.² In the face of these facts, the Hornell Brewing Company has chosen to

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1. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

2. See MICHAEL DORRIS, THE BROKEN CORD: A FAMILY'S ONGOING STRUGGLE WITH FETAL ALCOHOL SYNDROME (1989).

name one of its beers after Tasunke Witko, known in English as "Crazy Horse." "The Original Crazy Horse Malt Liquor" is sold in many states, although not in the state of South Dakota, within whose borders lies the Rosebud Sioux Indian Reservation, the home of Crazy Horse. Tasunke Witko was one of the great spiritual and political leaders of the Sioux Nation. To allow the name of Crazy Horse to be used to sell liquor suggests that he has no "relatives who can stand up for him."³

Those relatives exist and they have stood up for him. The family of Tasunke Witko has sued Hornell Brewing Company to stop it from using Crazy Horse's name to market liquor.⁴ Seth H. Big Crow, Sr., administrator of the Estate of Tasunke Witko, brought the lawsuit in Rosebud Sioux Tribal Court.⁵ The complaint claims that sale of the defendant's product outside of the Rosebud Sioux Indian Reservation violates various rights owned by the estate in controlling the use of the name of Crazy Horse. These rights include: (1) tortious interference in customary rights of privacy and respect owed to a decedent and his family, amounting to individual and group defamation, (2) inheritable publicity rights in the name of Crazy Horse, and (3) negligent and intentional infliction of emotional distress. The plaintiff further alleges that the defendants were aware of the family's objections to the use of Crazy Horse's name in connection with the sale of malt liquor as soon as plans to sell the beer were made public, and that defendants intentionally and knowingly inflicted these tortious harms to the person and property of Crazy Horse, his family, and the Rosebud Sioux Tribe.

This case raises complicated jurisdictional questions. Some of these questions are unique to tribal courts, such as the question of whether the tribe has "legislative jurisdiction" to apply its law to this kind of off-reservation conduct which harms personal and property rights arguably "located" inside the reservation. Another unique question raised is whether tribal courts have "civil court jurisdiction" (subject matter jurisdiction) over this kind of case. Other questions are similar, but not identical, to those that would be faced by a non-Indian court facing a similar publicity rights claim, such as, personal jurisdiction, legislative jurisdiction (constitutional power under the due process and full faith and credit clauses to apply forum law), and conflict of laws or choice-of-law analysis.⁶

The Rosebud Sioux Tribal Court held that it lacked personal jurisdiction over the defendant brewing company because the company did not sell

3. Amended Complaint at 10, In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. G. Heileman Brewing Co., (Rosebud Sioux Tr. Ct., Sept. 21, 1993) (Civ. No. 93-204) [hereinafter Amended Complaint].

4. *Estate of Tasunke Witko*, slip op. at 1.

5. *Id.*

6. For a summary of my approach to choice-of-law analysis, see Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731 (1990); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1 (1989). See also Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. REV. 1 (1991) (criticizing the Supreme Court's approach to tribal sovereignty questions).

or manufacture beer inside the reservation and thus no “minimum contacts” existed between the defendants and the Rosebud Sioux Indian Reservation.⁷ Relying on *Montana v. United States*,⁸ the court further ruled that it lacked subject matter jurisdiction over the claim since the defendants conducted no activities within the reservation.⁹

I believe these rulings were incorrect. Personal jurisdiction should be recognized over the defendants in this case even if no issues of tribal sovereignty were involved. A company which markets a product nationally may legitimately be held subject to suit at the domicile of the person whose name it is using to market its product, especially when that person or his family objects to use of his name for personal or spiritual reasons. The argument for personal jurisdiction over such a defendant is even stronger in this case, given the fact that the applicable law may well be the law of the Rosebud Sioux Tribe. If tribal law applies, current federal policies of protecting tribal sovereignty under both federal common law and treaty rights present a compelling argument for finding adjudicative jurisdiction to be proper in the tribal court whose law would apply to the case.

The Rosebud Sioux Tribal Court wrongly failed to give any weight to the fact that there is a substantial argument that Rosebud Sioux law should apply to adjudicate the rights of the parties. In the case of non-Indian claims, this fact is theoretically irrelevant to the question of whether the court has personal jurisdiction over the defendant. Just because Texas law applies, the courts do not always find personal jurisdiction over a defendant in Texas courts. The Supreme Court finds it perfectly appropriate for a Georgia court to apply Texas law. However, I want to argue that in the case of tribal law, federal interests in tribal sovereignty suggest that state courts should refrain from asserting jurisdiction over claims which arise under tribal law if there is an available tribal court ready and able to hear the case and litigation in that court will not be unfair to the defendant.¹⁰

Most courts which have addressed choice-of-law considerations in the context of publicity rights have applied the law of the person’s domicile to determine whether that person has publicity rights and whether they are descendible. Those courts that have applied the law of the place of infringement (where the product is sold) have done so when that jurisdiction recognizes publicity rights and the domicile does not. An alternative ap-

7. *Estate of Tasunke Witko*, slip op. at 12-16. On October 25, 1994, the Rosebud Sioux Tribal Court, Judge Stanley E. Whiting ruled that although Rosebud Sioux law recognized inheritable publicity rights, the Rosebud Sioux Tribal Court lacked adjudicative jurisdiction over the case, both because the defendants lacked minimum contacts with the Rosebud Indian Reservation and because the Rosebud Sioux Tribe lacked power to regulate off-reservation conduct of nonmembers of the Tribe in the absence of consent to such jurisdiction. *Id.* The plaintiff has appealed from that adverse judgment to the Rosebud Sioux Tribal Supreme Court. *Id.* at 12-14.

8. 450 U.S. 544 (1981).

9. *Estate of Tasunke Witko*, slip op. at 14-16.

10. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (noting that adjudication of cases by nontribal courts “infringe . . . upon tribal law-making authority” if nontribal courts apply tribal law “because tribal courts are best qualified to interpret and apply tribal law”).

proach would apply the law of whichever jurisdiction is most protective of property rights, in this case publicity rights, when the defendant's infringing conduct takes place in a state other than the domicile of the person whose publicity rights have arguably been violated. In the *Tasunke Witko* case, any of these approaches would point toward adopting the law of the Rosebud Sioux Tribe—Crazy Horse's domicile at the time of death. If most courts would apply the law of the Rosebud Sioux Tribe to determine whether the family of Crazy Horse owns descendible publicity rights in his name, there is a substantial argument that, in deference to federally protected interests in tribal sovereignty, the tribal court should have the power to hear the claim if it wants to do so and jurisdiction would not be unfair to the defendant.¹¹

Some scholars have criticized the disjunction between personal jurisdiction and choice-of-law analysis, suggesting that a court which has the power to apply its law should have the power to hear the case and vice versa.¹² Whether this argument is compelling as a general matter, I believe it is powerfully convincing in the context of tribal courts. Tribal courts should have the power to hear a case in which tribal law can fairly be applied, as long as there is no unfairness to the defendant in being made to defend the suit in tribal court. If there is such unfairness, then of course the case can be heard by a nontribal court applying tribal law.

I therefore want to approach the problem backwards. In Part II, rather than starting with the question of whether the court has personal jurisdiction over the defendants, I want to ask which law should apply, as an ordinary choice-of-law matter in a publicity rights dispute—the domicile of the decedent at the time of death or the place of infringement (generally the place of sale of the product). I will propose a general choice-of-law analysis of publicity rights claims applicable in both the Indian and non-Indian context. I will argue that the law of the decedent's domicile at the time of death should apply to govern publicity rights cases when the domicile recognizes such rights and the place of sale does not, provided that the defendant markets the product nationally and application of forum law does not unfairly surprise the defendant, as it will not in most cases. I will further argue that this rule should at least apply in cases, like that of *Crazy Horse*, when the owner of rights in the name objects to its use, not because the owner wishes to exploit it for commercial purposes, but because the owner wishes the name *not* to be exploited in order to protect personal or religious interests.

In Part III, I will address the special legal issues involved in legislative jurisdiction of tribal sovereigns and civil subject matter jurisdiction of tribal

11. *Id.*

12. See, e.g., Stanley E. Cox, *The Interrelationship of Personal Jurisdiction and Choice of Law: Forging New Theory through Asahi Metal Industry Co. v. Superior Court*, 49 U. PITT. L. REV. 189 (1987); Stanley E. Cox, *Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation—There is No Law but Forum Law*, 28 VAL. U. L. REV. 1 (1993).

courts. Part IV will address personal jurisdiction questions, first, as an ordinary, non-Indian matter, and second, as applied to the tribal court context. Finally, in Part V, I will argue that adjudicative jurisdiction in this case is required not only because of the federal policy promoting tribal sovereignty but because this right is mandated by the solemn treaty promises made by the United States to the Sioux Nation.

II. CHOICE-OF-LAW ANALYSIS OF PUBLICITY RIGHTS

A. THE CHOICE-OF-LAW PROBLEM

Publicity rights cases, like defamation cases, raise intractable choice-of-law questions.¹³ Two problems are apparent. First, it is difficult to localize the place of the harm; both defamation and publicity rights cases can be conceptualized as involving tortious harm, thus the place of the injury would constitute a relevant contact. However, while conduct can often be localized, interests in reputation and one's personal image cannot easily be physically located. The courts have looked at both the place of the infringing conduct and the domicile of the injured party as places where harm may be said to occur. One's reputation and emotional interests exist, if anywhere, where one lives. At the same time, use of one's name or lies told about one obviously cause harm at the place they are communicated because they affect what others in that jurisdiction think about the person whose name or reputation is being abused.

The second problem involves the need to choose between the law of the place of the harm and the law of the place of the conduct when they are in different jurisdictions. This problem is intractable in ordinary tort cases. The problem is especially difficult when we are not able to easily localize the harm. When a defendant acts to use a person's image to sell a product in one state while that person is domiciled (or was domiciled at the time of death) in another state, harm is caused in both jurisdictions. When is it fair to subject a defendant who acts in one jurisdiction to the law of another jurisdiction? Traditional choice-of-law principles emphasize the place of the harm. Yet where does the harm occur?

This problem of localizing the harm affects choice-of-law analysis even when a court is attempting to apply modern conflicts theory which eschews mechanical application of the law of a state where a particular event occurred or contact is situated. Modern analysis requires consideration of state interests and party expectations; at the same time, the existence of a legitimate state interest turns on a "relevant contact." A contact is relevant when the purposes or policies underlying the state's substantive law will be furthered by application to the parties and the conduct involved in the law-

13. See generally Richard Cameron Cray, Comment, *Choice of Law in Right of Publicity*, 31 UCLA L. REV. 640 (1984) (addressing the choice of law problem in publicity rights cases). See also Alison R. Mashin, Note, *Conflicts of Law: Conflicts Bring Harmony to the Picture When Focusing upon Publicity Rights*, 7 LOY. L.A. ENT. L.J. 79 (1987) (discussing publicity rights and the conflict of laws).

suit. How do we determine relevance here? How do we judge what constitutes a contact? Is domicile enough of a contact to justify applying that state's law to intangible property or personal rights when the defendant's conduct occurs in another jurisdiction entirely? Reputational interests and interests in exploiting one's identity commercially arguably exist everywhere. At the same time, domicile has traditionally been the relevant contact for determining ownership of personal property, both tangible and intangible and both during life and at death.

Most courts that have addressed the issue of which law governs the existence and descendibility of publicity rights have mechanically held that the law of the domicile of the decedent at the time of death controls the question of whether a right of publicity exists and has been inherited.¹⁴ A few courts, in contrast, have applied the law of the place where the infringement occurs, generally where the product is sold.¹⁵ Although ostensibly operating in the modern era, these courts have failed to engage in the kind of nuanced reasoning which should be performed as part of modern conflicts analysis. For example, some of the cases have not even considered whether the substantive (internal) laws differed in ways that mattered: if both the domicile and the place of infringement recognize publicity rights and there is no difference between their laws, then no conflict of laws is presented and it does not matter which law is applied.¹⁶

More importantly, from the perspective of modern choice-of-law analysis, these mechanical approaches adopted by the courts have failed to consider whether a different result should obtain when the infringing action takes place in a state which recognizes publicity rights and when that state refuses to recognize publicity rights. This distinction is crucial since, under modern choice-of-law analysis, we are interested in asking whether a state with a relevant contact has a legitimate interest in promoting the policies underlying its law. It is commonplace in modern conflicts analysis that a state may have a legitimate interest in applying its law to a particular case if it has a plaintiff-protecting law, but that a state may not have a legitimate interest in applying its law if its policy is a defendant-protecting one.¹⁷ In-

14. See, e.g., *Acme Circus Operating Co., Inc. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983); *Groucho Marx Productions, Inc. v. Day & Night Co. Inc.*, 689 F.2d 317 (2d Cir. 1982); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981) [hereinafter *Factors II*]; *Bi-Rite Entrs., Inc. v. Button Master*, 555 F. Supp. 1188 (S.D.N.Y. 1983); *Southeast Bank, N.A. v. Lawrence*, 489 N.E.2d 744 (N.Y. 1985).

15. See, e.g., *Bi-Rite Entrs., Inc. v. Bruce Miner Co., Inc.*, 757 F.2d 440 (1st Cir. 1985). See also, *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981) (without choice-of-law analysis, applying forum law when the defendant's infringing conduct occurred in the forum state).

16. To further the policy of promoting tribal self-determination by allowing tribal courts to formulate their own laws in their own courts, I will argue that when tribal law recognizes publicity rights, the tribal courts in that jurisdiction should have the power to hear the case, as long as this is not unfair to the defendant.

17. RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.10, at 301-04, § 6.15, at 312 (3d ed. 1986 & Supp. 1991) (arguing that the place of the injury has legitimate interests in applying its plaintiff-protecting tort law to deter negligent conduct and compensate victims but that it may have no legitimate interest in preventing a tort suit between nonresident spouses when the rule in question, interspousal immunity, is intended to regulate domestic mari-

deed, I will argue that a case in which the place of sale recognizes publicity rights, while the plaintiff's domicile does not, represents a false conflict such that only the place of sale has a legitimate interest in applying its law. Conversely, when the domicile state recognizes publicity rights and the place of sale does not, the case is a "true" or "real" conflict and a very intractable and difficult case.

In addition, the cases which have addressed the choice-of-law implications of publicity rights have failed to adequately distinguish the following two situations: (1) those cases in which the person whose image has been appropriated wishes to exploit that image herself and (2) those cases in which the person wishes her image not to be used commercially at all or wishes to ensure that her image is not used in a way that is morally offensive to her. This distinction matters because the first case involves merely conflicting economic interests while the second involves a conflict between one party's economic interests and the other party's personal interests in privacy, reputation, or dignity. These differing interests may matter to choice-of-law analysis since the state interests implicated in protecting publicity rights may be more or less strong depending on the interest asserted by the plaintiff. A personal, dignitary interest, especially if it involves fundamental religious sensibilities, may sometimes prevail over mere economic interests, especially when those interests can be furthered in alternative ways.¹⁸

B. THE FALSE CONFLICT OR THE UNPROVIDED-FOR CASE: PLACE OF SALE RECOGNIZES PUBLICITY RIGHTS AND THE DOMICILE OF THE CELEBRITY DOES NOT

In *Bi-Rite Enterprises, Inc. v. Bruce Miner Co., Inc.*,¹⁹ a company in Massachusetts sold posters of British rock stars in Massachusetts. Massachusetts recognized a right of publicity held by the rock star plaintiffs while England did not. Applying Massachusetts choice-of-law principles, the Court of Appeals for the First Circuit applied the law of Massachusetts, the place of infringement (where the posters were sold) to enforce the plaintiffs' right of publicity recognized under Massachusetts law on behalf of plaintiffs who were British celebrities, despite the fact that the law of the domicile of those celebrities (England) did not recognize such rights of publicity. Although the analysis in *Bruce Miner* is less than exemplary, the result is correct. In fact, this kind of case constitutes a false conflict: application of the law of the domicile would further no interests of that jurisdiction but would harm significant interests of the place of sale.²⁰ This case

tal relationships, rather than to encourage activity by residents or nonresidents in the forum without regard to liability).

18. See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 978-91 (1982) (discussing the point that "personhood perspective provides a moral basis for protecting some rights more stringently than others in the context of a legal system").

19. 757 F.2d 440 (1st Cir. 1985).

20. It is important to note that this case arguably represents the reverse of the conflict which

may also be analyzed as an “unprovided-for” case: the plaintiffs’ domicile is a defendant-protecting state while the defendant’s domicile and place of business is a plaintiff-protecting state. My view is that such cases should be resolved either by application of forum law or by application of what the forum sees as the presumptively better law; either of these ways of resolving the case would counsel application of the law of the place of sale recognizing publicity rights.

Publicity rights are recognized to protect the rights of persons to control the commercial use of their names.²¹ Three policy interests are protected by publicity rights. First, the plaintiff whose name or image is a commercially valuable commodity often has acted so as to make that image valuable. Protecting this interest legally as a publicity right rewards the plaintiff who deserves to reap the rewards of her labor. Second, the plaintiff may desire to be left alone or to prevent the use of her name by a company which is marketing a product which is offensive to her. Indeed, she may wish not to have her image used commercially at all. This wish may be based on interests in privacy or it may be based on a desire not to have the public believe that the person has consented to commercial use of her name generally or in connection with this particular product. Third, creating property rights in one’s own image creates incentives for individuals to act so as to make their image commercially valuable. Protection of the publicity right therefore not only rewards the deserving but also creates appropriate incentives to engage in behavior which has the desirable consequence of making one’s image a positive and marketable commodity.

States which refuse to recognize publicity rights or which do not allow them to be inherited protect several different interests. The first is a right of free speech. Public persons become part of the common culture and use of their names cannot legitimately be controlled by individual persons or their families. Interests in free expression and development of culture counsel a narrow interpretation of individuals’ rights to prevent others from discussing or using their images or names.²² This first interest in free speech is closely connected with a second interest in the freedom to participate in and to use the images of the common culture; such images are common property. A third interest protected by states which do not recognize

may exist in the *Crazy Horse* case, for example, a case in which the domicile (the Rosebud Sioux Reservation) arguably recognizes publicity rights while the places of sale may not. *Estate of Tasunke Witko*, slip op. at 5-11 (noting this finding may be dicta since the court went on to determine that it did not have personal jurisdiction over the defendant or subject matter jurisdiction over the case). The proper result in *Crazy Horse* need not be the same as in the *Bruce Miner* case because the policy considerations are different when the location of significant contacts differs.

21. For a recent bibliography of articles on publicity rights, see Frank G. Houdek, *Researching the Right of Publicity: A Revised and Comprehensive Bibliography of Law-Related Materials*, 16 HASTINGS COMM. & ENT. L.J. 385 (1994).

22. James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1437-41 (1992) (arguing that information issues pose conflicts between public and private interests); William T. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1766-79 (1988) (analyzing the Fair Use Doctrine).

publicity rights in a person or that person's family is the interest in promoting vigorous economic competition. Names and images help to publicize and promote useful products. Allowing a person to prevent the commercial use of her name entirely arguably inhibits the ability of businesses to use aspects of common culture to develop workable advertising and promotion policies. The fear of a lawsuit every time a company develops a marketing and advertising campaign will inhibit both investment in new products and the benefits derived from competition.

It must be noted, however, that none of these interests (free speech, common culture, and economic competition) are absolute. States which do not recognize a right of publicity *do* recognize federally protected property rights in the company which first uses the name or image in promoting a product through trademark law. Thus, states which do not recognize publicity rights, or which do not allow those rights to be inherited or to last for more than one generation after inheritance, do not eschew protection of property rights in names and images. Rather, they protect the rights of the first user of the name over the rights of the celebrity whose name is being used, perhaps on the grounds of rewarding the person who invests to make the name or image a commercially valuable commodity as well as interests of efficiency and the protection of that person's rights.

The added issue in this case is the question of whether publicity rights are descendible. States which recognize the descendibility of publicity rights reason that property loses much of its value if it is not inheritable.²³ In addition, survivors of a deceased celebrity may need support, and commercial exploitation of the celebrity's name or the celebrity's image may be their most valuable asset. Conversely, if the person wished his name not to be exploited commercially, the family may have a right to continue to protect this wish after death. This right in no way interferes with protected free speech rights; persons are free to speak about the celebrity, comment on his life, dramatize it, etc. The only thing they are not allowed to do is to use the name or image as the commercial mark of a product.²⁴ Such uses might wrongly suggest to the public that the family "sold out" the person, thereby cheapening his image.

States which refuse to recognize the descendibility of publicity rights analogize them to rights of privacy which do not survive death. If a balance is being made between free speech and property rights in images, the death of the person whose conduct deservedly created marketable fame tips the balance. The survivors are not the ones whose labor or conduct created the merit which should be rewarded by protected property rights. At the point of death, the image of the celebrity becomes part of the common stock of

23. *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods.*, 296 S.E.2d 697, 705 (Ga. 1982).

24. The family of Martin Luther King, for example, would almost certainly have the right under Georgia law to prevent the sale of Martin Luther King Beer under the reasoning of *Martin Luther King, Jr., Center for Social Change*, 296 S.E.2d 697.

cultural property useable by others. It is true that the first company to market successfully a person's name will establish property rights in it but that simply suggests that the company deserves protection for its successful marketing campaign and that it is appropriate to give incentives to the first company to market the name rather than the family of the celebrity.

1. *Plaintiffs' case for application of the law of the place of sale recognizing publicity rights when the place of infringement recognizes publicity rights and the celebrity's domicile does not*

As in *Bruce Miner*, the plaintiff celebrities argue that this case represents a false conflict; the only interested state is the place of sale. That state has legitimate and strong interests in protecting the right of a celebrity to control commercial use of his image both because he deserves protection and because this protection creates incentives to engage in conduct which results in a positive public image. In addition, the place of sale has no interest in discriminating against foreign celebrities; they have the same right to do business in Massachusetts on the same terms as local celebrities. It would be discriminatory to refuse to protect the personal property interests of plaintiffs simply because they are nonresidents.

In contrast, the plaintiffs' domicile which fails to recognize publicity rights is interested only in protecting the free speech and competitive interests of companies doing business within its borders. That jurisdiction does not care whether other jurisdictions limit the freedom of businesses within their borders. The domicile state has no legitimate interest in regulating the conduct of business in other states. In this case, the domicile's regulatory interest is a *deregulatory* one, effectively liberating companies to choose names and images from the common culture to promote business at home. Although the domicile may consider its policy better than that of states which recognize publicity rights, it has no right to extend its protective policy to companies doing business locally in other jurisdictions.

In addition, even if one could identify an interest of the plaintiff's domicile in freeing companies world wide to use the names and images of its public persons in selling commodities, its interest in free speech and free competition is limited by its policy interests in protecting the property interests of those businesses who appropriate the names of celebrities to market products; those interests are protected by trademark law. Although British law in *Bruce Miner* might protect the rights of businesses to sell posters of celebrities or use their images in advertising campaigns at the domicile in Great Britain, it almost certainly would not allow competing companies to use the same celebrity's name for their products. Such conflicting uses would be confusing to consumers and would be prohibited by trademark law. In such situations, the domicile state cannot be said to disfavor property rights in names and images; rather, that state *allocates* the property right in question to the first user of the name rather than the

celebrity himself. Thus, the interest of the domicile in protecting free speech and free competition is weak; such interests are limited as soon as the name or image is exploited. To the extent that the domicile seeks to reward the company which first exploits use of the name, rather than the person whose actions made his name a valuable commodity, it has a right to do so at home. However, it has no right to extend protection to the first user to businesses operating in other jurisdictions.

It can further be argued, using *Bruce Miner* as an example, that the domicile state is not affirmatively interested in *denying* property rights to its residents. Rather, it is interested in encouraging free speech and competition within its borders and in giving incentives to exploit celebrities' images within its borders. It therefore places the rights of the first users over the rights of celebrities themselves. It has no interest in denying such rights to its celebrities in other countries if those countries make a different determination of the balance of interests between the celebrities and the first users. Even if the domicile state is interested in refusing to grant protection for the publicity rights of its residents, this interest cannot legitimately extend to other states. Although one state may refuse to recognize a person's right to contract, that person should be free to go to a state which recognizes her capacity to contract and enter into business in that state.

It might be argued that the *Bruce Miner* case represents the typical "unprovided-for" case. The plaintiffs are domiciled in a defendant-protecting state while the defendant, a Massachusetts company, is "domiciled" and does business in a plaintiff-protecting state. Such cases can be reasonably resolved either by a defendant-protecting choice-of-law rule (dismissing the complaint because no state gives the plaintiff a claim upon which relief can be granted)²⁵ or by application of forum or better law (on the ground that no state objects to application of what the forum views as the substantively just result).²⁶ This designation is inappropriate, however, because it rests on the assumption that the place of sale has no interest in extending to nonresidents the protection of its intellectual property law with regard to business conducted within its borders. This assumption is based on a discriminatory premise. There is no reason for the place of sale to *deny* to a nonresident the right to do business there or to protect his image from unwanted commercial exploitation. The place of sale does not extend to businesses operating within its borders the right to use a person's name for its product without that person's consent. On the contrary, the place of sale has an affirmative interest in denying to businesses operating within its borders the right to exploit personal names and images with consent of the

25. Larry Kramer, *The Myth of the "Unprovided-for" Case*, 75 VA. L. REV. 1045 (1989). Kramer argues, "[T]here is no such thing as an unprovided for case. . . . Such cases result from a mistake in the way interest analysis has been applied." *Id.* at 1047.

26. Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197 (1991).

person whose name is being exploited. This interest extends to nonresidents as well as residents.

Application of the law of the place of sale accords with the justified expectations of the parties. A business operating in Massachusetts has no right to assume that it has the power to exploit the images of foreign celebrities and not local ones, merely because the domicile of those foreign celebrities would authorize such conduct. The business should expect to be governed by the law of the place where it is doing business and thus would have no freedom to commercially exploit someone's image without their consent. A business in Massachusetts must comply with Massachusetts' consumer protection laws, fair trade laws, antitrust laws, and property laws. It cannot be said that the Massachusetts company reasonably relied on application of English law in determining how to conduct its business. A Massachusetts company operating in Massachusetts must comply with local intellectual property law. The defendant cannot be unfairly surprised by application of the law of the place where it is doing business and selling the product. If that jurisdiction recognizes publicity rights, the defendant cannot legitimately claim to escape application of that law simply because the celebrity whose image it is appropriating is domiciled elsewhere.

Conversely, although the plaintiffs have no enforceable publicity rights at home, they have a right to do business at the place of sale on the same terms as others. They have justified expectations in being able to enter the state where the defendants are acting to market their own products under their own names. Failure to recognize a right of publicity in foreign celebrities would irrationally discriminate against them based on their foreign residency. It cannot be said that such plaintiffs have no legitimate interest in exploiting their names or images in other countries merely because their home country would refuse to recognize property rights in their names or images. Rather, they have the right to do business in Massachusetts on the same terms as Massachusetts residents.

Finally, the plaintiff would argue that there is no need for a single property rule applicable in every jurisdiction. A company which is seeking to use the name of a celebrity may be able to do so in states which do not recognize publicity rights but may not do so in states which do recognize publicity rights. In the case of liquor, states do have local regulations which may prevent marketing of certain products locally under certain trademarks.²⁷

2. *Defendant's case for application of the law of the celebrity's domicile refusing to recognize publicity rights*

The defendant in *Bruce Miner* would argue that both jurisdictions share a basic policy of protecting property rights in names and images.

27. Meg Vaillancourt, *Big Crow's First Stand: Descendant of Crazy Horse Goes Public to Keep Legendary Warrior's Name Off High-Octane Beer*, BOSTON GLOBE, Dec. 4, 1994, at A85.

They merely differ on either the question of whether a celebrity deserves or has the right to control that commercial use or whether that right should go to the first company to exploit the use commercially.²⁸ The domicile of the celebrity is interested in determining whether its residents have a property right in their images. It has a far greater interest in their welfare than do other jurisdictions. If it has no interest in protecting its residents' rights to control their images, other states should be free to allow conduct which exploits their images. The defendant would argue that plaintiffs' argument is thus backwards. This case does represent a false conflict, but the only interested state is the plaintiffs' domicile. The place of sale has no interest in granting property rights to a resident of a state that does not recognize such rights. It would be perverse altruism to limit the competitive freedom of a resident Massachusetts company to protect a nonresident whose domicile has no interest in protecting his rights. Publicity rights also represent a limit on both free speech and competition and should be eschewed if the state which is most concerned with the celebrity has no interest in protecting that celebrity's property rights in his name.

If not a false conflict, the *Bruce Miner* case is an unprovided-for one. The plaintiffs' domicile fails to protect them while the defendant's domicile and place of business does protect the plaintiffs' interests. In such cases, the proper remedy is to rule in favor of the defendant and dismiss the complaint on the grounds that no state extends to the plaintiffs a right upon which relief can be granted.²⁹ The place of sale is interested in limiting the freedom of its businesses only to protect the rights of persons to control their own images. If the only state with a legitimate interest in protecting a person does not consider this interest worthy of protection, then the place of sale should be happy to fall back on its residual presumption of free speech and competitive freedom. The place of sale therefore has a residual interest in not extending its publicity right to nonresidents who are unprotected by the law of their domicile. Neither state gives the plaintiffs a claim, and the place of sale has an interest in freeing its companies from unnecessary regulation.

The defendant would further argue that the plaintiffs have no legitimate expectation of being able to control the use of their names or images since they are domiciled in a jurisdiction which fails to protect this interest. Application of the law of the celebrity's domicile in no way discriminates against that person; rather, a celebrity has voluntarily chosen to live in a

28. This property rights question is analogous to the issue in the famous case of *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805), in which the court had to determine whether ownership of a wild fox should go to the person who labored for several days to get it or to the person who first physically seized it. Similar issues arise in water law as well as oil and gas law. Does ownership of subsurface groundwater, oil, and gas go to the first property owner to dig a well and remove it, or does each surface owner have a right to the share of the resource located beneath their land? See JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 61-66, 69-70 (1993).

29. Kramer, *supra* note 25, at 1062-64. For a critique of this argument, see Joseph William Singer, *Facing Real Conflicts*, *supra* note 26, at 211-17.

jurisdiction and domicile which fails to protect publicity rights. The person's domicile provides a rational connecting factor to use in determining whether or not a person has legitimate expectations of being able to control use of his or her image.

Perhaps most important to the business that wishes to market a product nationally, or in several jurisdictions with a national or regional marketing campaign, is the need to be able to look to the law of a single jurisdiction to determine whether or not it has a right to use the celebrity's name to market its product. The most sensible state to choose is the celebrity's domicile. This argument is similar to the argument for adopting a place of incorporation rule to govern the rights of shareholders or a place of celebration rule to determine whether a couple is legally married. Property and contract rights of this kind should not vary as one travels from state to state or does business in several states. The company needs to be able to look to the law of a single jurisdiction to determine whether it can call a product by a particular name.

Conclusion. It is sensible to say that the domicile state is most concerned with the welfare of the celebrity. At the same time, it is not sensible in the least to say that the domicile state is affirmatively interested in *denying* its citizens the right to control commercial uses of their names and images when such control will not affect business that takes place at home in the domicile state. The domicile state's interests in protecting free speech and commercial freedom does not extend to the conduct of businesses operating in states that regulate this kind of conduct. For this reason, it is appropriate to conclude that the domicile has no interest in applying its defendant-protecting law to conduct in another state when that state has a plaintiff-protecting law.

On the other hand, the place of sale is legitimately interested in applying its publicity rights law to the nonresident plaintiffs who seek to control use of their names and images there. If the place of sale believes that it is wrong for businesses to exploit a person's image or name without their consent, then it remains wrong for a business to do that no matter where the celebrity resides when the celebrity objects to use of his name at the place of the defendant's conduct. In other words, the place of the defendant's conduct has an affirmative interest in preventing its territory from being used for immoral or unconscionable purposes. Further, because the place of sale has an interest in preventing the wrongful conduct of the defendants within its borders, it would be discriminatory to deny the plaintiffs relief simply because they are nonresidents. If the nonresident plaintiff wishes to exploit his own name and image, he has a right to do business on the same terms as resident celebrities. If the nonresident plaintiff seeks to prevent all commercial use of his name, he has an even greater interest in preventing the defendant from engaging in its wrongful conduct. This case cannot therefore be reasonably understood as an unprovided-for case. The place of sale is affirmatively interested in granting the nonresident plaintiff

the same right to control his image at the place of sale as would be granted a resident plaintiff.

FALSE CONFLICT CASE: REVERSE CRAZY HORSE CASE/BI-RITE

	Δ /Domicile State	π /Conduct State
<i>Contacts</i>	<ul style="list-style-type: none"> • domicile of celebrity 	<ul style="list-style-type: none"> • place of sale or infringement
<i>Laws</i>	<ul style="list-style-type: none"> • Δ/has no publicity rights; trademark rights in first user 	<ul style="list-style-type: none"> • πs/have publicity rights
<i>Policies</i>	<ul style="list-style-type: none"> • free competition • free speech • protection of company which first exploits a name or image commercially as incentive to engage in socially valuable advertising of useful products 	<ul style="list-style-type: none"> • commercial profits should go to the person whose labor created the value and thus deserves to reap its reward • privacy; protection of personal image • incentives to persons to act so as to make one's image commercially valuable
<i>Justified expectations</i>	<ul style="list-style-type: none"> • π has no legitimate expectation of controlling the use of their names when their domicile fails to recognize this interest • Δ has a right to look to the law of a single jurisdiction to determine whether property rights exist in a person's name or image; application of the law of the domicile will enhance predictability by choosing the law of a single state to determine this question 	<ul style="list-style-type: none"> • Δ cannot reasonably expect to evade the property laws of the state where it is doing business • non-resident π has the right to do business on the same terms as residents and expect that its property rights will be respected
<i>Interest analysis</i>	<p><i>Domicile state has strong interest</i></p> <ul style="list-style-type: none"> • domicile state has strongest interest in determining whether a domiciliary has the right to control use of his image after his death <p><i>Conduct state has weak interest</i></p> <ul style="list-style-type: none"> • conduct state has no interest in extending a property right to a nonresident which he would not enjoy at home • conduct state's residual interest in free competition and speech should prevail if the state most closely connected with the decedent does not create publicity rights 	<p><i>Conduct state has strong interest</i></p> <ul style="list-style-type: none"> • conduct state has a strong interest in allocating intangible property rights within its borders, regulating business conducted there • conduct state has a strong interest not to discriminate against nonresidents by denying them property rights enjoyed by residents in the forum <p><i>Domicile state has no interest</i></p> <ul style="list-style-type: none"> • in a false conflict case, the domicile has interest in protecting free speech and competition within its borders; no interest at all in denying publicity rights to π in other jurisdictions

C. THE TRUE CONFLICT CASE: DOMICILE RECOGNIZES PUBLICITY RIGHTS AND THE PLACE OF SALE REFUSES TO RECOGNIZE SUCH RIGHTS

The choice-of-law issue which is likely to arise in the *Crazy Horse* case involves a conflict between the law of the domicile recognizing publicity rights in the family of Crazy Horse and the law of states where sales of the beer take place which either do not recognize the descendibility of publicity rights or would hold them to be invalid as to a person who has been dead for over a hundred years.³⁰ Unlike the reverse case discussed above in Part II (B) in which the place of infringement recognizes publicity rights and the domicile does not, this case represents a true or real conflict. Both states are likely to be significantly interested in applying their laws. Resolution of this case is therefore both controversial and difficult. It will be helpful in this situation to start with the defendants' case.

1. *Defendants' case for application of the law of the place of sale denying post-mortem publicity rights in the Crazy Horse case*

The defendants should acknowledge the case as a true conflict but argue that the forum (the domicile state) should engage in "restrained interpretation" of its policy, thereby resulting in a false conflict with the place of sale as the only legitimately interested jurisdiction. The defendants will argue that the place of sale has strong interests in regulating—or in this case, *deregulating*—the conduct of business within its borders. The place of sale wishes to free companies to use the images and names of deceased celebrities to market products, both to protect the free speech rights of companies doing business within its borders and to liberate businesses from the fear of lawsuits by those who wish to control the corporations' commercial speech. Protecting companies from lawsuits by families objecting to the use of common cultural images encourages vigorous marketing campaigns without hurting legitimate interests of the persons whose images are being exploited. These interests are especially powerful when the celebrity has been dead for over a hundred years. In such cases, the name of the person has rightly passed into the fund of common property.

The defendants should concede that the domicile state has strong interests in protecting its domiciliaries from nonconsensual commercial use of their names. The domicile state has legitimate interests in protecting the welfare of its residents whether they are seeking to exploit the commercial

30. This conflict is likely to arise because the Rosebud Sioux Tribal Court found that the tribe would recognize post-mortem publicity rights in the name of Crazy Horse owned by the estate. *Estate of Tasunke Witko*, slip op. at 5-11. This finding could be deemed dicta since the court then went on to determine that it did not have personal jurisdiction over the defendant or subject matter jurisdiction over the case. *Id.* at 12-22. It is also not clear that the issue of the existence of a post-mortem publicity right was fully briefed and litigated. Nonetheless, the opinion of the trial court gives a good indication of where it is likely to go regarding post-mortem publicity rights, and it would certainly be used by a non-Indian court as significant evidence of tribal customary law.

value of their names or trying to prevent such exploitation entirely. If the resident hopes to exploit the commercial value of the name, the domicile state has an interest in protecting the ability of its resident to reap the commercial rewards of his image. If, in contrast, the resident hopes to prevent commercial use of his name, the domicile state has, if anything, an even stronger interest in protecting its resident's interest in preventing such use. The resident may wish to avoid the appearance that he has endorsed a product or he may wish to avoid association with the product for personal or moral reasons. Alternatively, the resident may simply want to prevent a company from turning his name or image into a surrogate for a product, whether or not he objects to the product itself.

When the domicile state recognizes the descendibility of publicity rights, its interests similarly extend to the families of those who died domiciled in that state. If the family wishes to exploit the person's name itself, it has a right to the commercial value of the name as an inheritance and for support purposes. When the family objects to any commercial use at all, it may wish to avoid the appearance that it has endorsed the product. This is especially powerful in the *Crazy Horse* case since the family wishes to avoid the appearance of endorsement of liquor.

The case therefore represents a true conflict at this level of generality. Whether publicity rights are conceptualized as personal property rights or as a rule preventing tortious harm to the resident's reputation, the domicile state, with its plaintiff-protecting law, is concerned with protecting the interests of its domiciliary or that domiciliary's surviving family members. The place of sale, with its defendant-protecting law, is interested in liberating businesses within its borders from fear of litigation by families attempting to limit the company's free speech and business practices.

The defendants will argue this is an appropriate case for "restrained interpretation" of forum law (the law of the domicile state). Three separate arguments support this assertion. First, application of the law of the domicile will unfairly surprise companies doing business in other states, upsetting their reasonable investment-backed expectations. When doing business in New York, a company should not have to look to the law of some other state to determine the regulatory rules governing its business in New York. Conversely, the celebrity in question has no legitimate expectation that he has the right to control the use of his name around the world. The right of a business to operate in a state should prevail over the right of a person in another state to reach out and prevent that conduct. For example, a New York company prevented from manufacturing a drug in New York under federal regulations has the right to manufacture the drug in Mexico and sell it in Mexico to Mexican residents if it is lawful to do so under Mexican law. Second, application of forum law would illegitimately interfere in the ability of the place of sale to regulate business transactions centered at the place of sale. Application of the law of the domicile thus not only causes unfair surprise but violates norms of comity. Third, the

defendants will argue that the law of the place of sale represents the better rule of law. It is an inappropriate violation of free speech rights to prevent commercial use of the name of a person who has been dead for over a hundred years. After this much time has passed, that person's image should pass into the common culture. Application of the law of the place of domicile to prevent use of a person's name across the United States takes that name out of the fund of common cultural property. Moreover, when a person has been dead for over a hundred years, the public is not likely to believe the person's family has endorsed the use of his name for commercial purposes; rather, they will assume that the company has adopted the name because it admires the celebrity and wishes to associate itself with his memory.

If these arguments are accepted, then application of the law of the place of domicile is illegitimate. The domicile state, although interested, cannot legitimately assert its interests without violating both the rights of defendants acting elsewhere and the sovereignty interests of other states. Thus, the case represents a false conflict. Only the place of sale is legitimately interested in applying its law.

2. *Plaintiff's case for application of the law of his domicile recognizing post-mortem publicity rights*

The plaintiff should acknowledge the initial intuitive appeal of the defendants' arguments. At the same time, they are seriously flawed, especially in the case of a company marketing a product nationally. First, the defendants' better law argument is severely wanting. The defendants are not, in fact, arguing to protect free speech rights or to protect the use of the celebrity's image as part of the common fund of cultural property. Rather, the defendants are attempting to assert a property right in the name, against *both* the family *and* against competing businesses. If another beer company began marketing Crazy Horse Beer, the defendants would immediately bring suit against that company for misappropriation or for trademark violations. Thus, the case does not represent a conflict between property rights (publicity rights in the family) and free speech or competition rights (in the defendants). Rather, it represents a clash between conflicting property rights—the right of the defendants to expropriate and exploit the Crazy Horse name and the right of the family to control the use of his name.³¹ It is therefore disingenuous for the defendants to eloquently expound on the values of free speech and common cultural property. The

31. The defendants' argument has the same flaws evident in the famous case of *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990), in which the court criticized the idea of recognizing property rights in a person's spleen while vesting such property rights in the doctors who used the spleen to develop medical treatments. *Id.* at 488-93. The court chose to allocate the property right in question to the physicians rather than to the person from whose body the spleen was taken; a concurring opinion suggesting that it was inappropriate to commodify a person's body by recognizing property rights in it was thus belied by its holding. *Id.* at 497-98 (Arabian, J., concurring). See Boyle, *supra* note 22, at 1429-32.

question is one of property law: as between the family of the person whose name is being used to market the product and the company that wishes to exploit the name for that purpose without the family's consent, whose interest should prevail?

With the question posed this way, it is not at all clear that the better law is the law that fails to recognize publicity rights. Failure to recognize publicity rights is not failure to recognize property rights in a name; it is a choice to *allocate* those rights to the company that first exploits the name rather than to vest those rights in the family of the person whose name is in question. A company's interest in exploiting a name is significant; it can help the company market its product and make millions of dollars. Yet recognition of publicity rights in the family will only slightly interfere with the company's freedom. It is perfectly free to go into business to make a new beer, choose a name for it, develop a successful marketing campaign, and bring the product to market. It is even free to use a celebrity's name to market the product if it can obtain the family's consent by purchasing that right from the family. The limitation on its free speech is therefore minimal; it may choose any name for the product it wishes other than the name of a person who refuses to consent to such a use.

In addition, the defendants' free speech claims are not serious. The First Amendment does protect the rights of individuals to speak about, comment on, and even dramatize the lives of famous persons.³² Publicity rights, legitimately construed, in no way infringe on these interests. The First Amendment does not prevent common law or statutory protection of trademarks. In fact, the defendants are asking the court to recognize that they have a right to limit the free speech of others who would seek to market the same or a similar product using the same name.

While the defendants' interests in using the name are therefore weak, the family's interests in preventing use of the name are strong. The family wishes to prevent the perception that the family of Crazy Horse has endorsed the use of liquor. The administrator of the Estate of Crazy Horse is himself a recovering alcoholic.³³ The law of the defendants' place of sale is therefore not so obviously better than the law of the domicile that the publicity rights rule of the place of domicile should be confined to domestic cases at the domicile.

Second, from the standpoint of comparative impairment analysis, the interests of the place of sale are not substantially harmed by application of domicile law. As noted above, the place of sale cannot legitimately be said to have a liberatory or deregulatory law protecting free speech. Rather, like the domicile state, it assigns property rights in names. The only difference between the two states is the identity of the owner. In addition, rec-

32. Stephen R. Barnett, *First Amendment Limits on the Right of Publicity*, 30 TORT & INS. L.J. 635 (1995).

33. Vaillancourt, *supra* note 27, at A85.

ognition of publicity rights does not interfere significantly in the free market at the place of sale. Businesses there are free to use any name they wish as long as they are not adopting a name that will cause confusion among consumers or suggest a false endorsement of the product by a public person without his consent. Companies are sufficiently ingenious to invent new names and marketing campaigns for products. Recognition of a publicity right therefore represents a marginal infringement on the policy interests of the place of sale. On the other hand, allowing nationwide use of the name of a celebrity without his or her family's consent causes grievous harm to the family that wishes to avoid commercial exploitation of that name.

It is commonplace to apply the law of the place of injury when conduct occurs in another state which immunizes the conduct. The place of conduct has the right to protect a person acting within its borders from liability, but if the defendant cannot manage to confine its conduct—or the consequences of its conduct—to a state that protects and immunizes its conduct, the defendant has no right to expect that it will not be liable for the harm it causes. The state where the harm is felt has the right and legitimate power to apply its higher regulatory standard to protect its citizens from harm inflicted over the border. The defendants have no right to stand across the border and fire a gun into the forum, injuring someone there, and expect that the place of injury cannot assert the power to punish them for inflicting the harm. The same result obtains if the claim is conceptualized as an intentional tort rather than infringement of publicity rights. It has long been recognized that a court may apply its own law to conduct occurring outside the state which causes injury inside the state.³⁴ For example, in *Carver v. Schafer*,³⁵ a Missouri court applied Missouri law to impose liability on an Illinois tavern which had served liquor to an intoxicated patron who had subsequently driven to Missouri and caused the death of a Missouri resident in his home state.³⁶ The court ruled that Missouri had the most significant relationship with the case because its interests in both deterrence and compensation were implicated and outweighed Illinois' interest in protecting the defendant tavern from ruinous liability.³⁷ This analysis

34. *Alabama Great S. R.R. Co. v. Carroll*, 11 So. 803 (Ala. 1892); *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976); *Ling v. Jan's Liquors*, 703 P.2d 731 (Kan. 1985); *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978), overruled by *West Am. Ins. Co. v. Westin, Inc.*, 337 N.W.2d 676, 680 (Minn. 1983)(overruling on personal jurisdiction grounds only). See also *Weintraub*, *supra* note 17, §§ 6.9–6.10, at 292–304.

35. 647 S.W.2d 570 (Mo. Ct. App. 1983).

36. *Id.* at 578.

37. *Id.* at 577. For similar results, see *Sommers v. 13300 Brandon Corp.*, 712 F. Supp. 702 (N.D. Ill. 1989) and *Blamey*, 270 N.W.2d at 891. Although *Blamey* was subsequently overruled in *Westin*, 337 N.W.2d at 680, on the ground that the court in the forum had no personal jurisdiction over a tavern which acted locally and had no contacts with the place of the injury, the *Westin* decision is inapposite here. First, the defendant in *Westin* was a local, small tavern; a defendant who does business in many states may be subject to broader jurisdictional rules. Second, the decision in *Westin* concerns negligent conduct and fails to implicate the rule of *Calder v. Jones*, 465 U.S. 783 (1984), in which the Supreme Court unanimously approved personal jurisdiction over nonresident defendants who engage in *intentional* conduct which is purposefully directed

suggests that the place of sale has no right to authorize persons within its borders to commit tortious harm to persons domiciled elsewhere. Nor can the defendant claim to be unfairly surprised by application of the law of the place where the harm is experienced.

It might be argued that a local company acting in Massachusetts would be unfairly surprised by application of Tennessee law if it was to open an Elvis Presley Restaurant in Massachusetts. However, the restaurant has chosen to use the name of a celebrity. Is it really too much to ask for the restaurant to determine whether it is legally entitled to use the Presley name for its restaurant? Obviously, the name is governed by federal trademark and copyright laws. Is it so surprising that it might be governed by the law of Presley's domicile at the time of death if that state recognizes descendible publicity rights? Even if one cannot accept this argument as to a local actor, surely it does not impose undue hardship on a company marketing a product nationally to look to the law of the domicile of the person whose name is being used to determine whether it has the right to use the name. Moreover, even if application of domicile law surprises the defendant, the unfairness to the defendant of applying domicile law is outweighed by the unfairness of depriving plaintiff of the protection of the law of his domicile when harm is experienced there.

Conclusion. The reasons proffered by the defendants to justify restrained interpretation of forum law are therefore less than compelling. While the interest of the domicile is strong, the interest of the place of sale is relatively weak. Although it might be argued that a local defendant would be unfairly surprised by application of the law of a distant state to its conduct, this argument is hard to credit in the case of a national company. Moreover, even in the case of a local defendant, we expect that defendant to engage in careful research under federal law to determine whether the name is available for use. Given the importance of the decision (choosing a name for one's product), it is not especially onerous to ask a company to find out the domicile of the person whose name is being used to determine whether that state recognizes descendible personal property rights in his family to control commercial use of the name.

In any event, if the case represents a real conflict, and both states are substantially interested in applying their law, in this situation a court is confronted with the quintessential hard case. There is no sufficient reason for the forum to give up what it sees as the better law to protect its domiciliary from severe harm at home in deference to the law of another state. In such cases, it is inevitable that the rights of one party will be benefited at the

toward harming a resident of the forum at home. *See also* Thoring v. Bottonsek, 350 N.W.2d 586 (N.D. 1984) (holding that a tavern is not governed by the law of the place of injury when the state in which it is located would not impose negligence liability on it for serving liquor to an intoxicated patron, is distinguishable because it rests on an interpretation of the geographic scope of North Dakota's dram shop statute). It does not address the question of whether the tavern should be liable as a matter of common law under the choice-of-law principle that the place of injury should control unless that result would be unfair to the defendant. *Id.* at 590-91.

TRUE CONFLICT CASE
ESTATE OF CRAZY HORSE

	Δ /Domicile State	π /Conduct State
<i>Contacts</i>	<ul style="list-style-type: none"> • domicile of decedent at time of death 	<ul style="list-style-type: none"> • place of sale or infringement
<i>Laws</i>	<ul style="list-style-type: none"> • π/has publicity rights 	<ul style="list-style-type: none"> • Δ/does not have publicity rights
<i>Policies</i>	<ul style="list-style-type: none"> • commercial profits should go to the person whose labor created the value and thus deserves to reap its reward • privacy; protection of personal image • incentives to persons to act so as to make one's image commercially valuable 	<ul style="list-style-type: none"> • free competition • free speech • protection of company which first exploits a name or image commercially as incentive to engage in socially valuable advertising of useful products
<i>Justified expectations</i>	<ul style="list-style-type: none"> • π has a right to protect its property rights throughout the country • Δ cannot be unfairly surprised that another person might own the name it is seeking to exploit for commercial use • Application of the law of the domicile which recognizes publicity rights will constitute a predictable rule 	<ul style="list-style-type: none"> • Δ would be unfairly surprised by application of domicile law • Δ has the right to rely on the law of the place where it is doing business • π cannot legitimately expect to control Δ's conduct in other states
<i>Interest analysis</i>	<p><i>Domicile state has strong interest</i></p> <ul style="list-style-type: none"> • protecting personal and property interests of domiciliary <p><i>Conduct state has weak interest</i></p> <ul style="list-style-type: none"> • free speech interests weak because Δ is seeking to create a property right in the name, thereby controlling the speech of others • free competition interests are weak; Δ is free to compete; just choose another product name • no unfair surprise that an intangible property right exists in a name and that the decedent's domicile at the time of death has the legitimate power to impose such a property right nationally 	<p><i>Conduct state has strong interest</i></p> <ul style="list-style-type: none"> • protecting rights of Δ to do business freely and to speak freely without interference by another state <p><i>Domicile state has weak interest</i></p> <ul style="list-style-type: none"> • restrained interpretation; do not regulate marketplace in another state even if domicile interests are implicated (both to prevent unfair surprise & to refrain from interfering in the regulatory system of a sister state)

expense of the other and that the powers of one state will be vindicated at the expense of the other. Given the fact that defendants are free to market products and engage in free competition at the place of sale using any name they please which does not cause confusion with other products, application of the forum's law to protect its domiciliary harms the policies of the place of sale less than application of the law of the place of sale would harm the interests of the domicile state. Comparative impairment analysis thus suggests that application of domicile (forum) law is appropriate.

D. PROPOSED CHOICE-OF-LAW PRINCIPLES FOR PUBLICITY RIGHTS CASES

I want to propose a set of alternative acceptable choice-of-law principles to adjudicate cases involving publicity rights. Any of the first three rules is justifiable from the standpoint of both substantive law (property and tort policy) and conflicts law (multi-state policy). I list them in order of preference. Although these rules are intended as ways to resolve publicity rights cases generally, it is striking that application of *any* of the first three rules would entitle the Rosebud Sioux Tribal Court to apply Rosebud Sioux law recognizing publicity rights in the Estate of Crazy Horse.

First alternative

As between the law of the person's domicile (at the time of death) and the law of the place of sale or infringement, apply whichever law protects publicity rights in the person or that person's family.³⁸

This proposed rule is the simplest for courts to administer. It results in application of the law of the place of sale when that state recognizes publicity rights and the domicile does not—a case I have characterized as a false conflict. Conversely, it authorizes application of the law of the domicile when that state recognizes publicity rights on the ground that the celebrity or his family has the right to control the use of his name and that vindication of this policy interest neither interferes with strong policy interests of the place of sale nor violates the legitimate expectations of the defendant who has used a person's name without obtaining his (or his family's) consent to market a product.

Second alternative

1. When the place of sale or infringement recognizes publicity rights and the domicile of the person (at the time of death) does not, apply the law of the place of sale or infringement.
2. When the domicile recognizes publicity rights and the place of sale or infringement does not, apply the law of the domicile unless the

38. *Estate of Presley*, 513 F. Supp. 1339 (evading analysis of the choice of law question, the court applied forum law, which was also the law of the place of the defendant's conduct rather than the law of the plaintiff's domicile and recognized publicity rights under the law of the place where the conduct occurred).

defendant is a local actor that would be unfairly surprised by application of the law of another state.

This principle recognizes an exception to the rule in the first alternative for local actors who do not market products nationally on the ground that in such cases, the defendant is more likely to be unfairly surprised by application of foreign law and that it is appropriate for the domicile state to engage in restrained interpretation of its policy in deference to the ability of the state of sale to regulate local conduct.

Third alternative

1. When the place of sale or infringement recognizes publicity rights and the domicile of the person (at the time of death) does not, apply the law of the place of sale or infringement.
2. When the domicile recognizes publicity rights and the place of sale or infringement does not, apply the law of the domicile when the plaintiff asserts a right to prevent all commercial use of the name or image of the person.

This principle recognizes a different exception to that proposed in the second alternative when the interest being protected by the plaintiff is a personal interest rather than an economic interest on the ground that the defendant may make money in an alternative manner using another name, but that plaintiff has a strong personal interest in preventing nonconsensual association of the name with a product.

Any of these three rules strikes me as a reasonable approach to adjudicating publicity rights cases. Two rules I do not advocate are as follows:

Fourth alternative

Apply the law of a person's domicile (at the time of death) to determine whether descendible publicity rights are recognized in that person or that person's family.

Although this rule has the advantage of simplicity and is considered the traditional rule, it arguably results in application of the law of a disinterested state when the domicile fails to recognize publicity rights and the place of sale does. It might be argued that, in such cases, the person in question has no legitimate interests in, or expectations of, being able to control the commercial use of his or her name or image and that recognition of a publicity right would unnecessarily infringe on the freedom of the defendant without protecting the plaintiff's justified expectations. In my view, the rule, if justified at all, is justified by its simplicity. I do not think this is a sufficient virtue to adopt the rule, however, given the fact that it results in what I view as the discriminatory refusal to extend forum law to nonresidents when no legitimate interest of the domicile state is involved.

Fifth alternative

Apply the law of the place of sale or infringement.

This rule has the advantage of predictability and is the only alternative which would apply the law of the place of sale rather than the domicile of Crazy Horse at the time of death where the place of sale refuses to recog-

nize publicity rights. I find this alternative unacceptable because it allows substantial harm to the plaintiff in violation of the policies of the plaintiff's domicile while vindicating only weak interests at the place of sale. As discussed above, the policies of the place of sale protecting free speech are weak, given the fact that the first commercial user of the name will have trademark rights to limit the free speech of others. The policies of the place of sale promoting free and vigorous competition are weak for a similar reason; businesses at the place of sale are free to adopt any name or marketing campaign they like as long as they do not infringe on the trademarks or publicity rights of others. The limits imposed by publicity rights are narrow; they merely prevent a company from using a person's name to market its products without obtaining the consent of that person or her family. Nor is there any unfair surprise to the defendant in applying the law of the domicile. In general, personal property rights, including the in-heritability of rights at death, are determined by the law of a person's domicile.³⁹ Marital property rights are similarly determined by the law of a person's domicile. If an entire product line is going to be marketed under the name of a public person, it is not surprising that the law prevents this from happening without that person's consent. Thus, comparative impairment analysis counsels against adoption of this rule.

The courts which have addressed choice-of-law analysis of publicity rights have chosen between the law of the place of sale and the law of the celebrity's domicile. Most of the courts have mechanically applied the law of the domicile on the ground that personal property rights are traditionally determined by that jurisdiction.⁴⁰ I have argued that the courts which have mechanically applied the law of the domicile when the domicile fails to recognize descendible publicity rights violated the first canon of the conflict of laws by applying the law of a state that has no interest in applying its law.⁴¹

Other courts have applied the law of the place of sale. At the same time, the cases which have applied the law of the place of sale have either been overruled⁴² or have done so to vindicate and protect publicity rights, not to defeat them.⁴³ In effect, the courts which have properly applied modern choice-of-law theory have applied the law of a jurisdiction which

39. Weintraub, *supra* note 17, at 463.

40. See, e.g., *Acme Circus Operating Co.*, 711 F.2d 1538; *Groucho*, 689 F.2d 317; *Factors II*, 652 F.2d 278; *Button Master*, 555 F. Supp. 1188; *Southeast Bank*, 489 N.E.2d 744 (all applying the law of a decedent's domicile at the time of death to determine whether a right of publicity existed or survived death of the decedent). See also *Mathews v. ABC Television, Inc.*, No. 88 CIV. 6031 (SWK), 1989 WL 107640 (S.D.N.Y. Sept. 11, 1989) (not reported in F. Supp.) (applying domicile law to determine whether a publicity right exists).

41. Compare *Groucho*, 689 F.2d 317 (applying the law of the domicile to deny the plaintiffs a right to enforce descendible publicity rights) with *Bruce Miner*, 757 F.2d 440 (applying the law of the place of sale to vindicate such rights).

42. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978) [hereinafter *Factors I*], overruled by *Factors II*, 652 F.2d at 281.

43. See *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994); *Bruce Miner*, 757 F.2d 440; *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir. 1956).

recognizes publicity rights, whether it is the domicile or the place of sale. The reigning approach legitimately creates a presumption in favor of publicity rights, as suggested in alternative rule # 1.

III. TRIBAL SUBJECT MATTER JURISDICTION

A. INTRODUCTION

The *Crazy Horse* case, of course, is not an ordinary choice-of-law case. It involves the complicated questions associated with tribal court jurisdiction. As a preliminary matter, it may be helpful to note that the question of whether a tribal court has jurisdiction over a case blurs four issues that are ordinarily separated in jurisdictional analysis of non-Indian courts. First, personal jurisdiction concerns the question of whether the forum has sufficient contact with the defendant to justify haling the defendant into the forum court to defend the claim. Second, legislative jurisdiction analysis addresses the question of when the forum may constitutionally apply its law to govern the dispute. Third, when it is constitutional to apply the law of more than one jurisdiction, choice-of-law analysis addresses the question of whether a court should apply forum law or defer to the law of another jurisdiction with a closer connection to the case. The fourth issue is whether there are any circumstances in which the tribal court lacks the power to hear the case even though the defendant has minimum contacts with the forum and tribal law could legitimately be applied to regulate the defendant's conduct. This last issue is most analogous to the category of subject matter jurisdiction in federal and state courts, for example, limits on the capacity of the court to hear particular classes of cases.

The Rosebud Sioux Tribal Court determined that it lacked both personal jurisdiction over the defendant and subject matter jurisdiction over the claim. Although Judge Whiting acknowledged that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands,"⁴⁴ he found that the court lacked subject matter jurisdiction over the claim under the holding of *Montana*.⁴⁵ Judge Whiting interpreted *Montana* to deny jurisdiction both (a) because the defendants lacked minimum contacts with the Rosebud Sioux Reservation, and (b) because the defendants' conduct did not take place on tribal lands, there was no consensual relationship between the defendants and the tribe, and the court was "unable to conclude that the marketing of the Original Crazy Horse Malt Liquor had a direct effect on the political integrity, the economic security or the health or welfare of the Tribe."⁴⁶

The tribal court wrongly interpreted both legislative jurisdiction cases,

44. *Estate of Tasunke Witko*, slip op. at 15.

45. 450 U.S. 544.

46. *Estate of Tasunke Witko*, slip op. at 14-16. See also *Montana*, 450 U.S. at 565 (discussing exceptions which may allow a tribe to obtain civil regulatory authority).

such as *Montana*, and adjudicative jurisdiction cases, such as *World-Wide Volkswagen Corp. v. Woodson*.⁴⁷ The question of whether a tribal court has adjudicative jurisdiction over a case is distinct from the question of whether it has legislative power to apply its law. In the non-Indian context, it is commonplace that the tests for personal jurisdiction, subject matter jurisdiction, and legislative jurisdiction (constitutional power to apply a state's law) constitute different inquiries. In *World-Wide Volkswagen*, for example, the Supreme Court held that a New York seller was not subject to personal jurisdiction in the courts of Oklahoma when a car it sold was involved in an accident in Oklahoma because the defendant lacked minimum contacts with the place of injury.⁴⁸ The Court did not hold that a New York court would be constitutionally precluded from applying Oklahoma law had the lawsuit been brought in New York state court. That issue is governed by *Allstate Insurance Co. v. Hague*,⁴⁹ and *Phillips Petroleum Co. v. Shutts*.⁵⁰ While the test for personal jurisdiction focuses on contacts between the *defendant* and the forum, the test for legislative jurisdiction also counts contacts between the *plaintiff* and the forum as relevant; it is traditional, for example, to apply the law of the place of the injury when it differs from the place of the defendant's conduct. While it could be argued that application of Oklahoma law would be fundamentally unfair to the New York defendant, it is true that there may be situations in which the defendant cannot be sued at the place of the injury (no personal jurisdiction) but that a legitimate forum could apply the law of the place of the injury (legislative jurisdiction). Conversely, it is possible for personal jurisdiction to exist at the defendant's domicile or place of business, where minimum contacts certainly exist, when at the same time, it would be unconstitutional to apply the law of the forum. This would occur, for example, when the forum has no contacts related to the claim as in *Phillips Petroleum*, where suit was proper in Kansas, but Kansas forum law could not be applied to adjudicate rights of royalty holders of gas-producing land who were members of a nationwide class action suit because of "Kansas' lack of 'interest' in claims unrelated to that State."⁵¹

Judge Whiting, in the tribal court decision, wrongly relied on *Montana* to adjudicate the question of whether the court had adjudicative jurisdiction. The ruling in *Montana* related to *legislative jurisdiction not adjudicative jurisdiction*. The *Montana* line of cases, including *Montana* itself, *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,⁵²

47. 444 U.S. 286 (1980).

48. *Id.* at 295.

49. 449 U.S. 302 (1981) (stating that "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair").

50. 472 U.S. 797 (1985) (applying the test from *Hague* and holding that "[A]pplication of Kansas law to . . . this case is sufficiently arbitrary and unfair as to exceed constitutional limits").

51. *Id.* at 822-23.

52. 492 U.S. 408 (1989).

and *South Dakota v. Bourland*⁵³ concerns regulatory jurisdiction, otherwise known as prescriptive or legislative jurisdiction; this issue addresses the question of whether a tribe has the power to apply its law to regulate the defendants' conduct. The issue of adjudicative jurisdiction or *civil subject-matter jurisdiction* of the tribal court concerns the question of whether a claim can be adjudicated in tribal court against a particular defendant. This issue is governed, not by *Montana*, but by *Williams v. Lee*,⁵⁴ *National Farmers Union Insurance Co. v. Crow Tribe of Indians*,⁵⁵ and *Iowa Mutual Insurance Co. v. LaPlante*.⁵⁶

B. LEGISLATIVE JURISDICTION

I have argued that Judge Whiting wrongly concluded that tribal courts only have adjudicative jurisdiction over a case if tribal law applies. However, even if tribal courts are only entitled to take civil adjudicative jurisdiction if they can apply tribal law, (a proposition I dispute) the *Montana* line of cases, including *Montana*, *Brendale*, and *Bourland* in no way prevent application of Rosebud Sioux law in the *Crazy Horse* case. *Montana* and *Brendale* arose in the context of heavily allotted reservations and required an inquiry regarding the extent to which allotment of the reservation creating a checkerboard pattern of fee and non-fee land had deprived the tribe of authority over activities on fee land within the reservation. The question in *Montana* was whether the tribe could apply its law to regulate the hunting and fishing activities of non-Indians on fee lands within reservation boundaries.⁵⁷ Similarly, the question in *Brendale* was whether the tribe could apply its zoning law to fee lands within the reservation owned by nonmembers. The issue in *Bourland* was whether the tribe could apply its hunting and fishing regulations to fee simple land owned by the United States when that land had been taken by eminent domain with some tribal rights reserved in it.⁵⁸

All three cases thus concern *land use regulation* of fee lands owned by nonmembers within reservation borders. *Montana* held that a tribe could not apply its hunting and fishing regulations to the conduct of non-Indians on fee simple land which the non-Indians owned inside the reservation.

53. 113 S. Ct. 2309 (1993).

54. 358 U.S. 217 (1959).

55. 471 U.S. 845 (1985).

56. 480 U.S. 9, 15 (1987). It has been contentiously argued that tribal courts have the power to apply tribal law alone. The Conference of Western Attorneys General argues, for example, in its recent treatise, the *American Indian Law Deskbook*, CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK (1993), that tribal adjudicatory jurisdiction should exist only when the tribe can apply its law or when the defendant agrees to jurisdiction. *Id.* at 136. Yet the treatise gives no cites to support this claim. For a critique of the bias in this treatise and this particular argument, see Joseph William Singer, *Remembering What Hurts Us Most: A Critique of the American Indian Law Deskbook*, 24 N.M. L. REV. 315, 327 (1994).

57. See also *Bourland*, 113 S. Ct. at 2320 (deciding whether the tribe could apply its hunting and fishing regulations to nonmembers on fee lands owned by the United States within the reservation).

58. *Id.* at 2309.

Brendale held that tribes are sometimes, but not always, disabled from applying their zoning and environmental laws to non-Indian owners of fee simple land inside the reservations. *Bourland* suggested in *dicta* that tribes have no power whatsoever to regulate land use on fee simple land owned by non-Indians unless they consent to such jurisdiction.⁵⁹

In contrast, this case concerns tort law and intangible personal property rights of tribal members. The tribal laws at issue here do not regulate the use of nonmember land. Rather, they regulate conduct by anyone who causes harm to tribal members or nonmembers *inside reservation borders*, especially when that harm is inflicted on a tribal member at home on tribal land or on restricted trust allotment land. Neither *Montana*, *Brendale*, nor *Bourland* prevents a tribe from applying its tort law to a nonmember who acts to cause harm *to a tribal member on tribal land within the reservation*. While these cases may preclude application of a tribal zoning law directly to a nonmember fee simple owner, none of them precludes, for example, a nuisance lawsuit in tribal court when the use of the fee land causes substantial and unreasonable harm to tribal property interests.

This case is therefore similar to *National Farmers Union*, in which a tribal member was injured in an accident inside the reservation. In *National Farmers Union*, a child who was a member of the Crow Tribe was injured at a school located inside the reservation. The school was owned and operated by a government entity that was a subdivision of the state of Montana and it was located on fee land owned by the State of Montana. Despite the fact that the injury occurred on fee land owned by the state, the Supreme Court held that the case should be heard in the first instance in tribal court. Judge Whiting concluded that tribal courts can only hear cases in which tribal law applies; however, the Supreme Court must have believed that tribal law could apply in *National Farmers Union* even though it involved tortious conduct by a nonmember on fee land. If such a case could never be governed by tribal law or could never be legitimately adjudicated in tribal court, there would be no need to let the tribal courts hear the case in the first instance to determine whether they had legitimate jurisdiction. The inevitable conclusion is that the Supreme Court believed that in at least some cases of tortious injuries on fee land tribal law could apply. This principle has even more force when the tortious injury is felt by a tribal member at home on tribal land.⁶⁰

59. Justice Thomas' attempt to overrule through *dicta* the balance worked out by Justices Stevens and O'Connor in *Brendale* is unconscionable. *Brendale* held that tribes are sometimes entitled to apply their zoning laws to nonmembers who own fee land inside the reservation. If the Supreme Court sees fit to overrule this holding, it should do so honestly and openly. In other areas, such as abortion rights, the Supreme Court has been extremely reluctant to overrule recent constitutional determinations. For an example, consider the refusal to reconsider *Roe v. Wade*, 410 U.S. 113 (1973), in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

60. See, e.g., *A-1 Contractors v. Strate*, 63 U.S.L.W. 2359, No. 92-3359, 1994 WL 666051 (8th Cir. Nov. 29, 1994), holding that "the general divestiture of tribal civil jurisdiction over the activities of non-Indians recognized in *Montana* is applicable only to fee lands owned by non-Indians."

When anyone acts to cause harm to a person at home, the state where that home is located has the power and responsibility to apply its protective laws against the defendant even if the defendant has acted in a defendant-protecting state. The place of the injury has significant, and often overwhelming, interests in applying its more plaintiff-protecting law against nonresidents who harm their residents within their borders. It might be argued that the harm to a person's personal and intangible property interests in his name cannot be easily localized and that the only observable or tangible factor worth considering is the place of the defendant's conduct, for example, where the product is sold. Yet this argument contradicts the law of defamation where courts routinely find harm to one's reputation at home. It contradicts the law of marriage, where the domicile is held to have strong interests in regulating the marital relationship and in determining marital personal property rights. It contradicts the law of succession, where the domicile at the time of death is taken to be the significant factor in determining what state can define and allocate personal property rights owned by the decedent at the time of death. If use of one's name without one's consent harms a person—and the law of both privacy and publicity rights holds that it does—the harm is suffered not only at the place where defendant acts but at the place where plaintiff is—and that makes plaintiff's domicile relevant. Thus, even if *Montana* is relevant to the question of whether the Rosebud Sioux Tribal Court has civil adjudicatory jurisdiction over the *Crazy Horse* case on the ground that tribal courts can only apply tribal law, it in no way precludes assertion of jurisdiction. Rather, *Montana* is distinguishable from the *Crazy Horse* case, and in no way prevents application of Rosebud Sioux law to protect a tribal member injured at home by off-reservation conduct.

C. CIVIL ADJUDICATIVE JURISDICTION

The question of whether the Rosebud Sioux Tribal Court has the power to hear this claim against a nonmember defendant has been described by the United States Supreme Court as one of "civil subject-matter

The court noted that *Montana* and *Brendale* rested on the special policies underlying the Dawes Act. Dawes Act, 25 U.S.C. § 331 *et seq.* The court concluded that nonmembers who purchased land in fee simple inside reservations assumed that they would be able to develop that land and thus would be free from tribal land use regulations. 1994 WL 666051 at *4. *Bourland* also rested on the extent of tribal power over fee lands. *Bourland*, 113 S. Ct. at 2316-17. An *en banc* decision reversed *A-1 Contractors* as this article was being printed. *A-1 Contractors v. Strate*, No. 92-3359, 1996 WL 65742 (8th Cir. Feb. 16, 1996). Over vigorous dissents by four judges, the court held that *Montana* divested tribes of all civil jurisdiction over nonmembers unless consensual relations or vital tribal interests existed and that no vital tribal interests justified jurisdiction over an on-reservation automobile accident involving only nonmembers. As the court noted, this interpretation of *Montana* is inconsistent with significant language in *National Farmers Union*, and is in no way required by *Montana*, as the dissenting opinions show. In my opinion, the original panel decision was a correct application of United States Supreme Court precedents. In any event, *A-1 Contractors* is distinguishable from the *Crazy Horse* case since it involves a lawsuit between nonmembers. When the harm is imposed on a tribal member at home, the policy concerns of *Montana* and *Brendale* are absent.

jurisdiction”⁶¹ or “tribal court [civil] jurisdiction.”⁶² The test for determining whether adjudicative jurisdiction exists in tribal courts is governed by *National Farmers Union* and *Iowa Mutual*. The test articulated in *Iowa Mutual* states, “Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.”⁶³ Thus adjudicative jurisdiction presumptively exists in tribal courts for any conduct that takes place on lands within reservation borders which causes harm to anyone inside the reservation. Just as states can regulate conduct outside their borders, so should tribal authority extend to off-reservation conduct which is intentional and which is purposefully directed at causing harm to a tribal member at home.

The Supreme Court has explained that tribal court jurisdiction is especially important in cases in which tribal law applies since “[a]djudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.”⁶⁴ When the claim is one that can legitimately be governed by tribal law, a strong presumption exists that the claim may be heard in tribal court.

The rights asserted by the plaintiff encompass not only publicity rights but claims to reputational interests and spiritual interests in the name of Crazy Horse. This aspect of the plaintiff’s claim is therefore based on a legal rule that is not identical to the law of publicity rights or the law of defamation or invasion of privacy developed in other states. It would be difficult for a state or federal court to determine accurately the scope and content of Rosebud Sioux law until it has been developed in Rosebud Sioux courts. Since any court adjudicating this case is likely to apply Rosebud Sioux law to determine whether the estate owns a right of publicity or other personal or reputational interests in the name of Crazy Horse, there is a strong policy reason for finding jurisdiction in the Rosebud Sioux Tribal Court to be proper. The tribal court is best able to formulate and interpret Rosebud Sioux law. When a person acts outside a reservation, intentionally causing harm inside it in violation of tribal law, the tribal court has the power to protect its people from that harmful conduct. In this case, the defendants have intentionally acted to cause harm to property and personal rights located inside the Rosebud Sioux Reservation.

The Supreme Court specifically held in *Montana* and *Brendale* that tribal legislative jurisdiction (power to apply tribal law) to a nonmember exists when that conduct “has some direct effect on the political integrity, the economic security, or the direct health or welfare of the tribe,” even

61. *National Farmers Union*, 471 U.S. at 855.

62. *Iowa Mut.*, 480 U.S. at 15.

63. *Id.* at 18 (citations omitted).

64. *Id.* at 16.

when that conduct occurs on nonmember fee land inside the reservation.⁶⁵ When a nonmember engages in conduct off the reservation which has foreseeable, direct effects inside the reservation, the tribe has the power to apply its law to protect its people from harm. To fully vindicate this policy, jurisdiction should be proper in tribal court unless this is unfair to the defendant.

Judge Whiting wrongly concluded that no tribal interests were present here that would be protected by application of tribal law. As noted above, states have a strong interest in protecting people within their borders, both residents and non-residents, from harm to person or property. States routinely apply their negligence law to automobile accidents involving non-residents. Negligence liability serves to deter negligent conduct and thus promotes safety on the roads. A state has a strong interest in ensuring that both residents and non-residents may travel safely within the state.⁶⁶

Since most courts hearing this claim would apply Rosebud Sioux law,

65. *Montana*, 450 U.S. at 566; *Brendale*, 492 U.S. at 428.

66. *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482, 486 (9th Cir. 1987) (applying the longer statute of limitations of the place of injury to allow a negligence claim to be heard on the ground that "[i]nsofar as drivers tend to be more careful when their chances of incurring liability are more substantial," the place of injury had an interest in imposing such liability as a deterrent measure); *Hurtado v. Sup. Ct. of Sacramento, California*, 522 P.2d 666 (Cal. 1974) (stating that the imposition of liability in automobile accident cases is intended to deter negligent conduct causing injury in the forum).

This interest has similarly been recognized in the case of tribes. In *A-1 Contractors*, a panel of the Eighth Circuit held that the tribal courts of the Three Affiliated Tribes of the Fort Berthold Indian Reservation had personal jurisdiction over an automobile accident involving only non-Indian parties which occurred on public roads inside the reservation. 1994 WL 666051. Quoting the Supreme Court in *Montana*, the Eighth Circuit explained that "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory.'" *Id.* at *3 (quoting *Montana*, 450 U.S. at 563). The court also explained that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at *6. See also *Montana*, 450 U.S. at 565. The Eighth Circuit specifically rejected the argument that "the underlying tort does not so threaten the tribe's political or economic security so as to warrant tribal court jurisdiction within the meaning of the second *Montana* exception." According to the Eighth Circuit:

We think the tribe, like a state, has an important and legitimate interest in protecting the health and safety of its members and residents on the roads and highways on the reservation. In addition, we think the tribe, like a state, also has an important and legitimate interest in affording those who have been injured in accidents on those roads and highways with a judicial remedy. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of dispute[s] affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). Whether the tribal court has subject matter jurisdiction is not controlled by whether the applicable substantive law is tribal law or state law or federal law. Courts often adjudicate disputes under substantive law different than that of the forum. Tribal court jurisdiction is an important aspect of tribal sovereignty, and refusing to recognize its existence would have a demonstrably serious, adverse effect on the political integrity of the tribe.

Id. at *6. An *en banc* decision reversed *A-1 Contractors* just as this article was being printed. *A-1 Contractors*, No. 92-3359, 1996 WL 65742 (8th Cir. Feb. 16, 1996). The dissenting judges agreed with the original panel decision. See discussion *supra* note 60. A similar result was obtained in *Hinshaw v. Mahler* where the Ninth Circuit held that tribal court civil subject-matter jurisdiction existed over a wrongful death claim arising out of an on-reservation accident involving no members of the tribe since such jurisdiction had "not been limited by treaty or statute." 42 F.3d 1178, 1180 (9th Cir. 1994).

A-1 Contractors and *Hinshaw* are distinguishable from the *Crazy Horse* case because they involve non-Indian victims. When anyone, whether or not a tribal member, acts so as to cause

the law of the decedent's domicile at the time of death, and because the defendants intentionally and knowingly infringed on intangible personal property rights owned by a resident of the Rosebud Sioux Reservation, both civil legislative and civil adjudicative subject matter jurisdiction are present. The next question is whether the tribal court has personal jurisdiction over the off-reservation conduct of a defendant who causes harm on the reservation or who infringes on intangible personal property rights in a tribal member's name.

IV. PERSONAL JURISDICTION

A. THE INDIAN CIVIL RIGHTS ACT

The Rosebud Sioux Tribal Court is not subject to the strictures of the Fifth or Fourteenth Amendments⁶⁷ but is bound by the terms of the Indian Civil Rights Act (ICRA),⁶⁸ which specifically provides that “[n]o Indian tribe in exercising powers of self-government shall . . . (8) . . . deprive any person of liberty or property without due process of law”⁶⁹ Although the ICRA clearly prohibits tribal sovereigns from denying any person “due process of law,”⁷⁰ it does not implicitly incorporate every constitutional decision by the United States Supreme Court interpreting the Fifth and Fourteenth Amendments. On the contrary, “due process” for the purpose of the ICRA is not necessarily identical to “due process” under either the Fifth or Fourteenth Amendments for two reasons.

First, the ICRA creates a statutory, not a constitutional right. Thus, the touchstone in interpreting the ICRA is not the United States Constitution but the intent of Congress when it passed the ICRA in 1968. Second, as the Supreme Court held in *Santa Clara Pueblo v. Martinez*,⁷¹ and in numerous other cases, any statute affecting tribal sovereignty must be read against the “backdrop” of Indian sovereignty.⁷² In *Santa Clara Pueblo*, the Supreme Court noted:

Two distinct and competing purposes are manifest in the provisions of the ICRA. In addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal “policy of furthering Indian self-government.” This commitment to the goal of tribal self-determination is demonstrated by the provisions of Title I itself. Section 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed, selectively incorporated and in some in-

harm to a tribal member at home on tribal land, the tribe has the power to apply its law to protect its members from harm.

67. *Talton v. Mayes*, 163 U.S. 376, 384-85 (1896).

68. 25 U.S.C. §§ 1301-03.

69. *Id.* § 1302.

70. *Id.* § 1302(8).

71. 436 U.S. 49 (1978).

72. *Id.* at 60. See also *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973).

stances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments. [F]or example, the statute does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases.⁷³

Because the ICRA must be read against the backdrop of Congress' concern for respecting tribal sovereignty while protecting both members and nonmembers from "arbitrary and unjust actions of tribal governments,"⁷⁴ it is evident that the ICRA does not, by its own terms, require tribal sovereigns to follow Supreme Court precedents slavishly in interpreting the meaning of "due process of law" for purposes of 25 U.S.C. section 1302(8). If such were the case, the tribes might be disempowered from exercising tribal sovereignty in cases in which no unfairness resulted to the defendant and important tribal interests were implicated. This cannot be what Congress intended. Rather, tribal courts are empowered by both inherent sovereignty and treaty-recognized powers to exercise traditional powers of self-government so long as they avoid arbitrary and fundamentally unfair exercises of authority.

In addition, *Santa Clara Pueblo* itself requires federal courts to defer to tribal court interpretations of the ICRA in cases which are not governed by the *habeas corpus* remedy.⁷⁵ If a defendant in a tribal court proceeding may bring an action in federal court after exhausting remedies in tribal courts pursuant to *National Farmers Union* and claim that the tribal courts have misinterpreted the ICRA, the ruling in *Santa Clara Pueblo* would be effectively circumvented and a federal cause of action for violation of rights protected by the ICRA would be established. This result would make a mockery of *Santa Clara Pueblo* and would contravene the intent of Congress to respect tribal sovereignty by choosing tribal fora as the appropriate arena for bringing the ICRA claims.

Tribal courts should, of course, look for guidance to Supreme Court personal jurisdiction considerations to determine whether requiring a defendant to come to tribal court to defend a claim comports with due process. At the same time, the tribal court has the power and responsibility to consider tribal interests in protecting tribal members from conduct which intentionally and knowingly causes harm to tribal members at home in violation of tribal law. In such cases, federal courts should only find that the tribal court lacked personal jurisdiction over a defendant if it is fundamentally unfair to require the defendant to appear in tribal court.

In this case, there has been no showing of fundamental unfairness to the defendants. The defendants market and sell their product nationally in the vast majority of jurisdictions. Given the strong tribal interests involved, the Rosebud Sioux Tribal Court should be able to take jurisdiction over

73. 436 U.S. at 62-63 (citation omitted).

74. S. REP. NO. 841, 90th Cong., 1st Sess. 5-6 (1967).

75. *Santa Clara Pueblo*, 436 U.S. at 66.

this case as long as no substantial inconvenience to the defendants can be shown.

B. GENERAL PERSONAL JURISDICTION LAW

Even if the Rosebud Sioux Tribal Court is bound by the United States Supreme Court's precedents applying the Fifth and Fourteenth Amendments' due process clauses in developing personal jurisdiction law, it erred in finding no personal jurisdiction over Hornell Brewing Company. Misconstruing the unanimous decision in *Calder v. Jones*,⁷⁶ the tribal court wrongfully assumed that jurisdiction could exist only if the defendant conducted activity inside the Rosebud Sioux Reservation. In *Calder*, the defendants working in Florida wrote an allegedly libelous article about a public figure domiciled within California for a magazine sold nationwide, including California. The defendants were writers who had never been to California or whose trips to California were unrelated to the plaintiff's claim. Despite the defendants' complete lack of activity inside California, the Supreme Court unanimously held that personal jurisdiction over the Florida defendants was proper in California courts because the defendants had engaged in intentional, tortious actions "expressly aimed" at the forum and because the defendants "knew that the brunt of the injury would be felt" in the forum.⁷⁷ Because the defendants engaged in conduct in Florida intentionally and knowingly "directed at" a California resident at home in California, the Court explained that jurisdiction "over petitioners is . . . proper in California based on the 'effects' of their Florida conduct in California."⁷⁸ According to the Court in *Calder*:

Under the circumstances, petitioners must "reasonably anticipate being haled into court [in the forum]" to answer for the truth of the statements made in their article An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.⁷⁹

In this case, the defendants intentionally engaged in conduct which arguably violated tribal law by infringing on the plaintiff's personal property and reputational rights in the name of Crazy Horse. The defendants' actions here were committed with knowledge of the harm; they continued to sell Crazy Horse Malt Liquor after the plaintiff notified them of the harm and the possible violation of tribal law. As in *Calder*, the defendant's conduct outside of the Rosebud Sioux Reservation was intentionally directed at the tribe and its members and knowingly caused harm inside the reservation. It was not "mere untargeted negligence."⁸⁰ As Justice Rehnquist explained:

76. 465 U.S. 783 (1984).

77. *Calder*, 465 U.S. at 789-90.

78. *Id.* at 789.

79. *Id.* at 790 (citations omitted).

80. *Id.* at 789.

[P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation.⁸¹

Despite the Court's reference to newspaper sales in California, if the case is properly understood, this fact was not crucial to the holding that California had jurisdiction. The fact that the defendants acted intentionally in Florida to cause harm to the reputation of the California plaintiff at home was essential to the holding. The sales of the magazine in California were relevant, but only to the question of the defendants' knowledge that their actions would cause harm to the plaintiff's reputation at home in California. The Court reaffirmed the importance of the defendant's intent in *Burger King Corp. v. Rudzewicz*.⁸² The Court stated, "[A] forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents. A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."⁸³ *Calder* thus stands for the proposition that personal jurisdiction is proper over a defendant who acts intentionally to cause harm to a legally protected interest of a resident of another state, knowing that its conduct will cause harm at the victim's domicile to personal or property interests located at the domicile.

This result is supported by recent cases which have interpreted *Calder*. For example, in *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*,⁸⁴ the Eighth Circuit held that a South Dakota court had personal jurisdiction over the out-of-state actions of a California corporation which had allegedly infringed on the trademark of a South Dakota corporation. The Eighth Circuit noted that the Supreme Court in *Calder* had "made a sharp distinction between 'mere untargeted negligence' and 'intentional, and allegedly tortious, actions' aimed expressly at the forum state."⁸⁵ The defendant's intentional conduct in California and elsewhere and its knowledge that its trademark infringement would harm the plaintiff at its place of business in South Dakota was sufficient, by itself, to find personal jurisdiction in the courts of South Dakota. Other cases similarly support this result.⁸⁶

81. *Id.* at 789-90.

82. 471 U.S. 462 (1985).

83. *Id.* at 473 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957)).

84. 946 F.2d 1384 (8th Cir. 1991).

85. *Id.* at 1390 (quoting *Calder*, 465 U.S. at 789).

86. See *Hugel v. McNell*, 886 F.2d 1 (1st Cir. 1989) (personal jurisdiction in a defamation case was proper in the victim's domicile where it was foreseeable that the brunt of the injury would be felt); *VDI Technologies v. Price*, 781 F. Supp. 85 (D.N.H. 1991) (personal jurisdiction in New Hampshire was proper over a nonresident defendant who sent letters to customers of the plaintiff New Hampshire corporation knowing that the "brunt of the injury" caused by those actions

The defendants may argue that a defendant can reasonably anticipate being “haled into court”⁸⁷ only if it “purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.”⁸⁸ This argument misconstrues the holding of *Hanson v. Denckla*.⁸⁹ In *Hanson*, the Pennsylvania settlor of a trust to be administered in Delaware by a Delaware trustee moved to Florida. After the beneficiary’s death, the legatees under the residuary clause of her will brought a claim in Florida against the Delaware trustee for a declaratory judgment on what property passed under the residuary clause. The Supreme Court held that the unilateral move by the settlor to Florida was not sufficient to grant Florida courts personal jurisdiction over the Delaware trustee.

Neither *Hanson* nor any other Supreme Court case has held that the defendant must conduct activities in the forum as a prerequisite to personal jurisdiction. Such an interpretation of *Hanson* would be patently inconsistent with the ruling in *Calder*. Rather, *Hanson* holds that personal jurisdiction is usually proper when the defendant purposefully conducts activities in the forum and causes harm there. Conversely, when the *only* contact with the forum is the fact that the plaintiff lives there, personal jurisdiction over the nonresident defendant is ordinarily absent. The “mere ‘unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.’ ”⁹⁰

In this case, we have much more than the unilateral activity of the plaintiff in locating or residing in the forum. Here the defendant engaged in intentional conduct and knowingly infringed on personal rights and property rights owned by the plaintiff and administered by an estate at the plaintiff’s domicile. The defendant’s conduct in this case caused harm to property and personal rights of a forum resident at home. As Justice O’Connor’s plurality opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court*,⁹¹ explains, “minimum contacts must come about by an action of the defendant purposefully directed toward the forum State.”⁹² Conduct may be “purposefully directed” at the forum not only when the defendant “purposefully avails itself of the privilege of conducting activities within the forum State” but when the defendant acts outside the forum *intentionally to cause harm within it*. This is the core meaning of *Calder*.⁹³

would be felt by the plaintiff in New Hampshire); *Velcro Group Corp. v. Billarant*, 692 F. Supp. 1443 (D.N.H. 1988) (similar result in patent infringement case); *Lex Computer & Management Corp. v. Eslinger & Pelton, P.C.*, 676 F. Supp. 399 (D.N.H. 1987) (similar result in defamation case).

87. *World-Wide Volkswagen*, 444 U.S. at 297.

88. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

89. 357 U.S. 235 (1958).

90. *World-Wide Volkswagen*, 444 U.S. at 297 (quoting *Hanson*, 357 U.S. at 253).

91. 480 U.S. 102 (1987) (O’Connor, J., plurality).

92. *Id.* at 112.

93. *Id.*

Products liability cases, relied upon by the tribal trial court, illustrate but one method by which a plaintiff may establish the purposefulness requirement in *Hanson*. When the defendants market products within the forum state, they have taken deliberate action pointed toward the forum. As the Supreme Court explained in *World-Wide Volkswagen*:

[I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others.⁹⁴

In other words, these cases stand for the proposition that in a negligence or strict products liability case, targeting a defective product toward a forum by marketing is sufficient to establish minimum contacts in a case in which the plaintiff is injured in the forum state.

The plaintiff in this case is not complaining that a bottle of The Original Crazy Horse Malt Liquor exploded or contained dangerous ingredients, but rather that the appropriation of the name "Crazy Horse" damaged personal and property interests within the reservation. Thus, defamation cases, such as *Calder*, present the closest analogy to right of publicity cases since they involve intentional harm to reputation—a harm likely to be centered or felt most keenly at the plaintiff's home state. Publicity rights constitute personal property rights generally governed by the law of a person's domicile. Intentional harm to those rights causes harm centered at the plaintiff's domicile.

In the case of defamation, the harm to the plaintiff's reputation is likely to be centered at home. In the case of publicity rights, the harm is also centered at home, at least where the plaintiff is seeking to prevent the defendant from using his name to protect privacy and dignitary interests, as is the case here. The cases which have found personal jurisdiction insufficient when the defendant acted in another jurisdiction to cause harm in the forum either involve negligent conduct (rather than intentional conduct)⁹⁵ or intentional conduct which, unlike defamation and publicity rights, does not involve harm that is centered at the plaintiff's domicile, such as unfair competition,⁹⁶ tortious interference in contractual relations,⁹⁷ or wrongful

94. 444 U.S. at 297. See also *Asahi*, 480 U.S. at 111-12 (personal jurisdiction over a nonresident manufacturer is proper if its conduct was "purposefully directed toward the forum State" through action which "indicate[s] an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State").

95. See, e.g., *Westin*, 337 N.W.2d 676.

96. See, e.g., *Hicklin Eng'g, Inc. v. Aidco, Inc.*, 959 F.2d 738 (8th Cir. 1992) (holding that Iowa courts had no personal jurisdiction over a Michigan defendant who allegedly engaged in unfair competition against the plaintiff by conduct outside Iowa).

97. See, e.g., *Keystone Publishers Serv., Inc. v. Ross*, 747 F.2d 1233 (8th Cir. 1984) (finding no personal jurisdiction in Iowa over California residents who allegedly interfered in contractual relations by using an Iowa corporation's subscription list to contact customers in California).

discharge.⁹⁸ When the harm to the plaintiff is not centered at the plaintiff's domicile, but at the plaintiff's place of business, or the plaintiff's place of employment, it is correct that jurisdiction is not proper at the plaintiff's domicile. In such cases, it is correct that jurisdiction is not proper at the plaintiff's domicile unless the defendant acted there. In contrast, in defamation and publicity rights cases, the harm is centered at the plaintiff's domicile; it is therefore proper to conclude that the defendant's out-of-state conduct is "purposefully directed" toward that jurisdiction and the defendants can be required to answer in the courts of the plaintiff's domicile for the harmful effects of their conduct.

V. TRIBAL SOVEREIGNTY AND TREATY RIGHTS

*[A]ll Treaties made, or which shall be made, under the Authority of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*⁹⁹

Let us assume that the Supreme Court is likely to uphold as constitutional a choice-of-law rule which applied the law of a person's domicile to determine whether he has a descendible publicity right.¹⁰⁰ This means that, in the non-Indian context, we could expect that the plaintiff, Estate of Tasunke Witko, could bring a claim against the defendant, Hornell Brewing Company, in any jurisdiction in which it manufactures or sells the beer and ask the court in that jurisdiction to apply Rosebud Sioux law (the law of the domicile of Crazy Horse at his death) to the question of whether he has inheritable publicity rights. While such a court could constitutionally apply the law of the place of sale, it could also constitutionally apply the law of the domicile. Assuming from the decided cases that many, if not most, courts would apply the law of the domicile, should the Rosebud Sioux courts have the power to formulate what that law is?

Of course they should. Refusing to allow the Rosebud Sioux courts to hear the case would prevent a crucial exercise of tribal sovereignty. As the

98. *Pennebacker v. Wayfarer Ketch Corp.*, 777 F. Supp. 1217 (E.D. Pa. 1991) (finding no personal jurisdiction in Pennsylvania over a New York defendant who hired and fired the plaintiff in New York merely because the plaintiff resided in Pennsylvania and received the phone call firing him there); *Geary v. Goldstein*, 782 F. Supp. 725 (D.R.I. 1992) (wrongly holding that Rhode Island courts had no personal jurisdiction over defamation and right of privacy claims based on actions in New York when the parody was not aired on television in Rhode Island). The decision in *Geary*, like the decision of the Rosebud Sioux Tribal Court in this case, misconstrued the holding of *Calder* by wrongly assuming that *Calder* required an act by the defendant inside the state of the plaintiff's residence such as the sale of the magazines. As explained above, *Calder* rested on the fact that the defendant's conduct outside the forum was purposefully directed to causing harm to a California resident at home in California. The result in *Geary* could only be justified if there was no likelihood the New York conduct would become known to Rhode Island residents and therefore cause no harm to the plaintiff's reputation at home—an unlikely result indeed given the airing of the show in New York.

99. U.S. CONST. art. VI.

100. The Supreme Court is likely to uphold the constitutionality of applying the law of the domicile because it is the traditional conflicts rule used to govern personal property rights. See *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988).

Supreme Court noted in *Iowa Mutual*, "Adjudication of such matters by any nontribal court also infringes upon tribal law making authority, because tribal courts are best qualified to interpret and apply tribal law."¹⁰¹ The "federal policy supporting tribal self government"¹⁰² is strong and is vindicated by allowing tribal courts to formulate tribal law.

Tribal courts do not have unrestricted power to assert personal jurisdiction over foreign defendants. They are bound by the due process requirements of the ICRA (although no direct claims for violation of the Act may be brought in federal court) and by Rosebud Sioux due process rules. When tribal law applies, however, the tribe should be able to assert power over a nonresident defendant to apply its own law in its own courts unless it is fundamentally unfair to the defendant to require it to defend the lawsuit in those courts. Given that most courts would apply Rosebud Sioux law, the only important issue should be whether it is procedurally unfair for a national beer company, selling beer in many states, to defend a publicity rights lawsuit in Rosebud Sioux court. The answer to this question is almost certainly no.

In addition, the treaties with the Sioux Nation protect the tribal sovereignty of the Rosebud Sioux Tribe. "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."¹⁰³ Failure to allow the tribe to assert legislative and adjudicative jurisdiction in this case would violate the solemn promises made by the United States in its treaties with the

101. *Iowa Mut.*, 480 U.S. at 16. According to the Court, "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo*, 436 U.S. at 65. "[T]ribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments. . . . [E]fforts by the federal judiciary to apply the statutory prohibitions of § 1302 [the Indian Civil Rights Act] in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity." *Id.* at 71-72.

102. *Iowa Mut.*, 480 U.S. at 16. As the Supreme Court stated:

We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. See, e.g., *Three Affiliated Tribes v. World Engineering*, 476 U.S. 877, 890 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n.5 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, n.10 (1980); *Williams*, 358 U.S. at 220-21. This policy reflects the fact that Indian tribes retain "attributes of sovereignty over both their members and their territory," *United States v. Mazurie*, 419 U.S. 544, 557 (1975), to the extent that sovereignty has not been withdrawn by federal statute or treaty. The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the reservation of Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. Tribal courts play a vital role in tribal self-government, cf. *United States v. Wheeler*, 435 U.S. 313, 332 (1978), and the Federal Government has consistently encouraged their development.

Id. at 14-15. See also *National Farmers Union*, 471 U.S. at 856 ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination" (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 332; *Merrion*, 455 U.S. at 138 n.5; *White Mountain Apache Tribe*, 448 U.S. at 143-44, n.10; *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Williams*, 358 U.S. at 223)).

103. *Wheeler*, 435 U.S. at 323.

Rosebud Sioux Tribe.¹⁰⁴ *The Treaty of Fort Laramie, between the United States and the Sioux—Brule, Oglala, Miniconjou, Tanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee and Arapaho*, signed on April 29, 1868,¹⁰⁵ ratified February 16, 1869, and proclaimed February 24, 1869, provides, in article 1:

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.¹⁰⁶

This provision clearly provides that the Sioux Nation agreed to federal *criminal* jurisdiction over nonmembers who committed wrongs against the persons or property of the members of the Sioux Nation. By implication, the Sioux Nation did not surrender *civil jurisdiction* over nonmembers who “commit any wrong upon the person or property of the [Sioux] Indians.”¹⁰⁷ It would therefore violate the terms of the Treaty of Fort Laramie, which remains in force, to deprive the Rosebud Sioux Tribal Court of jurisdiction over nonmembers who violate the property rights of members of the Rosebud Sioux Tribe recognized by tribal law.

The 1868 *Treaty of Fort Laramie, between the United States and the Sioux—Brule, Oglala, Miniconjou, Tanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee and Arapaho*, signed on April 29, 1868,¹⁰⁸ ratified February 16, 1869, and proclaimed February 24, 1869, provides that the lands described in that Treaty shall be “set apart for the absolute and undisturbed use and occupation of the Indians.”¹⁰⁹ The treaty with the Sioux signed on February 28, 1877,¹¹⁰ provides that all provisions of the 1868 treaty not in conflict with the 1877 treaty were continued in

104. On the importance of protecting treaty-based sovereignty, see Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); Robert Laurence, *The Abrogation of Indian Treaties by Federal Statutes Protective of the Environment*, 31 NAT. RESOURCES J. 859 (1991); Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543 (1991); Singer, *Sovereignty and Property*, *supra* note 6; Mike Townsend, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 YALE L.J. 793 (1989).

105. Fort Laramie Treaty of April 29, 1868, 15 Stat. 635 (1868).

106. 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 998 (1904).

107. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 253-54 (1982 ed.). According to Cohen:

In the civil field, however, Congress has never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country. Furthermore, although treaties between the federal government and Indian tribes sometimes require tribes to surrender non-Indian criminal offenders to state or federal authorities, Indian treaties do not contain provision for tribal relinquishment of civil jurisdiction over non-Indians.

Id.

108. 15 Stat. 635.

109. 15 Stat. 635, art. 2. See also 2 KAPPLER, *supra* note 106, at 998 (reprinting art. 2 of the Fort Laramie Treaty).

110. Ft. Laramie Treaty of February 28, 1877, 19 Stat. 254 (1877).

force, and further provided that "each individual shall be protected in his rights of property, person, and life."¹¹¹ Chapter 404 of the Acts of the 50th Congress, Session II, passed March 2, 1889,¹¹² creating the Rosebud Sioux Reservation, provides that all provisions of the 1868 Treaty "not in conflict" with the Act "are hereby continued in force."¹¹³

The state and federal courts cannot enforce tribal customary law without knowing what it is; this requires a judgment of the Rosebud Sioux Tribal Court defining the right of publicity under tribal law. In the 1877 treaty, the United States solemnly promised to protect the rights of "property, person, and life" of each member of the Sioux Nation. Although the right described by the Rosebud Sioux Tribal Court is not identical to rights of publicity recognized by many states, it is sufficiently close to it to be deemed comparable and sufficient to count as a cognizable property right.¹¹⁴ Jurisdiction must exist because the United States is bound by its treaty commitment to protect and enforce this property right.

It might be argued that a non-Indian court could apply Rosebud Sioux law in the same way that it applies Saudi Arabian law to events centered in Saudi Arabia. It determines foreign law by having the parties present expert evidence about the law. Experts could testify about Rosebud Sioux law in a non-Indian court. This procedure is certainly permissible, but it is clearly second best. A federal or state court is presumptively competent to interpret what state law is in another jurisdiction; it is less competent to construe tribal law. We allow our courts to apply the law of Saudi Arabia because we want to give a remedy to cases which may legitimately be heard in the United States. Tribal courts represent a different situation. They are within the geographic borders of the United States and constitute an available alternative court system for applying and adjudicating rights based on tribal law.

More important, given the availability of such fora, tribal courts should presumptively be entitled to enforce tribal law in order to effectuate the federal policy of protecting tribal sovereignty, a policy which is rooted in the treaty promises of the United States toward the Sioux Nation. The treaty of 1877 specifically promises to protect the "property, person, and life" of each member of the Sioux Nation. The treaties with the Sioux Nation expressly reserved civil jurisdiction over property claims against "bad men among the whites." To deny jurisdiction in this case would violate the United States' solemn promise to protect the personal and property rights of the members of the family of Crazy Horse by depriving them of access to the only forum which can most appropriately formulate and apply tribal law.

111. *Id.* at art. 8. See also 1 KAPPLER, *supra* note 106, at 168, 171 (reprinting art. 8 of the Fort Laramie Treaty of 1877).

112. Ft. Laramie Treaty, 25 Stat. 888 (reprinted in 1 KAPPLER, *supra* note 106, at 328).

113. *Id.* at art. 19. See also 1 KAPPLER, *supra* note 106, at 336.

114. See *Martin Luther King, Jr. Center for Social Change*, 296 S.E.2d 697.

VI. CONCLUSION

When a person desires not to have his name used to sell a product, a company that insists on using his name is not attempting to assert its right to free speech. Indeed, the company who uses the name will insist on protecting its trademark against infringement by others, thereby limiting other companies' freedom of speech. The issue is one of allocating property rights. The presumptively better law would protect individuals' rights not to have their names used to market products without their consent, both to protect their own property rights in the commercial value of their names and to protect their privacy and liberty interests in preventing nonconsensual commercial use of their images and preventing the appearance of endorsing the product.

Regardless of which law is better, it is apparent that a state which intends to protect the right of companies within its borders to use the name of a person for its product without that person's consent has only weak interests in applying this law. Neither free speech nor free competition is at stake, given the fact that the first company to appropriate a name will protect that name as a property interest against others. On the other hand, the state that seeks to protect a person or his family domiciled in that state from nonconsensual use of his name has strong interests to protect, especially when those interests are non-economic. It is not necessary to use someone's name without their consent to market a product; it is necessary to prevent such a violation when it would bring shame on the person whose name and image is irretrievably tarnished. A state which recognizes such individual rights has the legitimate power to assert them against a defendant operating elsewhere in the United States.

If the Rosebud Sioux Tribe is entitled to apply its law to prevent a beer company from marketing liquor named after a political and spiritual leader of the Sioux people, the Rosebud Sioux Tribal Court should be entitled to hear a case against that company, unless the defendant demonstrates that such jurisdiction would be fundamentally unfair. A national company is not likely to be able to meet this burden. On the contrary, the treaty promises of the United States encompass a promise to respect tribal sovereignty, as well as the lives and property of members of the Sioux Nation. Tribal sovereignty implicates the rights of the Rosebud Sioux Tribe to formulate its own laws to define the kinds of personal property and privacy rights belonging to its members. These promises to protect tribal sovereignty and property are not outdated; nor do they form the mere "backdrop" upon which federal Indian law questions should be resolved. They are the "supreme Law of the Land." The treaty of 1868 with the Sioux Nation "reserved" both lands and sovereignty to the Sioux Nation. The Rosebud Sioux Tribal Court presumptively has adjudicative jurisdiction over "bad men among the whites" who harm members of the tribe at home. As long as such jurisdiction is not fundamentally unfair to the de-

fendant, the due process requirements of the ICRA are met. The ability to fashion and apply tribal law in this situation is an inherent and crucial aspect of the tribal sovereignty which the United States promised to reserve to the Rosebud Sioux Tribe.