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SPECIAL ISSUE ON TRIBAL JUSTICE

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Special Issue on Tribal Justice

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A Word From the Executive Editors

This special issue of the *Journal of Court Innovation* is devoted to tribal justice. The articles and interviews in this issue examine some of the pressing challenges facing tribal courts as well as the changing relationships of federal, state, and tribal justice systems. Innovation is a common thread running through this issue, as tribal communities across the country are exploring new ways to balance traditional values and practices with new thinking and contemporary needs.

Recent events confirm that we are in the midst of a critical period for tribal justice systems. In October 2009, the United States Department of Justice convened a Tribal Nations Listening Session in St. Paul, Minnesota. This gathering was attended by nearly 400 tribal leaders and close to 100 Department of Justice officials. In his official remarks, U.S. Attorney General Eric Holder lamented that "crime statistics in Indian Country are staggering," and he vowed to work with tribal leaders to find "immediate solutions" and "long term answers to the problems facing tribal communities."

Interest in tribal justice issues is not entirely new in either the federal or state realms. Over the past decade, the federal government has created several new programs designed to support tribal justice systems including the Tribal Courts Assistance Program, the Indian Alcohol & Substance Abuse Program, the Correctional Facilities on Tribal Lands Program and the Tribal Youth Program, which have distributed tens of millions of dollars to tribal communities across the country. Although more funds are needed, these programs reflect an unprecedented degree of federal support.

A number of state initiatives have been developed as well, including the creation over the last decade or so of state-tribal courts forums, which focus on the relationships between state and tribal justice systems. In 2006, for example, New York's Federal-State-Tribal Courts Forum (along with the New York State Judicial Institute; the Center for Indigenous Law, Governance & Citizenship at the Syracuse University College of Law; and the New York Tribal Courts Committee) convened the First New York Listening Conference. The Listening Conference brought together more than 140 state, federal, and tribal judges and other tribal leaders from across New York to engage in a dialogue that continues today, as evidenced by Paul Stenzel's article in this issue.

As this issue goes to press, Congress is considering passage of the Tribal Law & Order Act, a bill that would address several long-standing barriers to the administration of tribal justice. The law would empower tribal courts to imprison Native offenders for up to three years (up from the current maximum of one year). In addition, the law would expand the power of tribal police to arrest non-Native offenders on tribal land, strengthen the federal government's efforts to prosecute serious crimes that occur in Indian Country, and expand funding for many of the programs that support tribal justice systems.

Against this backdrop, we are pleased to present this special issue, which features articles written by some of the country's foremost experts on tribal justice. Carey Vicenti, Associate Professor of Sociology at Fort Lewis College, presents his views on the inherent difficulties of grafting non-Indian institutions, such as "western" courts, on Indian societies with different cultural values and goals. The author provides a "guided tour" through the troubled history of the federal government's treatment of Native American tribes and asks, amid the government's nascent efforts to support tribal justice systems, whether tribal justice is possible without returning to traditional values and practices.

Carrie Garrow, Executive Director of the Center for Indigenous Law, Governance & Citizenship, offers a provocative and timely article arguing that, notwithstanding the Supreme

Court's controversial decision that Native American tribes and nations lack criminal jurisdiction over non-Indians, their treaty powers may support the exercise of such jurisdiction.

Paul Stenzel, a practicing attorney who also serves as court attorney for the Forest County Potawatomi Community, located in northern Wisconsin, investigates the current state of collaboration between tribal and state court systems, including the establishment of tribal-state court forums.

John Clark, staff attorney with the Pretrial Justice Institute in Washington, D.C., offers a survey of pretrial justice programs in Indian Country. Kimberly Cobb and Tracey Mullins, of the American Probation & Parole Association, offer an assessment of the use of probation supervision in tribal justice systems.

In addition to these articles, this issue includes a series of interviews with tribal justice leaders from across the country. Throughout 2009, Center for Court Innovation staff interviewed tribal court judges about the state of tribal justice in their communities. These judges offered the collected wisdom of decades of experience as tribal justice leaders. We offer special thanks to these leaders, who each gave generously of their time and expertise.

Finally, we included several book reviews we thought you might be interested in.

We are very pleased to present this issue and contribute in a small way to the ongoing dialogue about the state of tribal justice in the United States. We hope you find it as enlightening to read as we have in putting it together.

Greg Berman, Juanita Bing Newton, Michelle S. Simon

Full Faith and Credit and Cooperation Between State and Tribal Courts: Catching Up to the Law

*Paul Stenzel**

Introduction

Over the past two decades, interest has been building in the interaction between American Indian tribal courts and state courts. Specifically, state and tribal judiciaries have devoted attention to promoting cooperation, reducing jurisdictional conflicts, expanding tribal court operations, and granting full faith and credit to each other's judgments and orders.[1] The often unspoken but powerful underlying assumption is a genuine recognition that tribal courts play a vital role in dispensing justice

* Paul Stenzel graduated from the University of Wisconsin Law School in 1995. Upon receiving his J.D., he worked as a staff attorney for the Stockbridge-Munsee Community Indian Tribe from 1995 to 2003. In September 2003, Stenzel joined the firm of von Briesen & Roper, s.c., in Milwaukee, Wisconsin, where he continued to practice Indian law. In May 2005, he opened Stenzel Law Office LLC. Stenzel's practice has focused almost exclusively on federal Indian law since the inception of his legal career. His major areas of interest are tribal court development, state-tribal judicial relations, and jurisdictional issues relating to Public Law 280.

1. *See* Nat'l Ctr. for State Courts, Building on Common Ground: A National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts (1994), http://www.tribal-institute.org/articles/common.htm.

in their communities and that state courts can benefit by working hand-in-hand with them.[2]

Borne of a need to address full faith and credit as well as new challenges and issues, a more comprehensive approach to tribal-state relations has taken shape: the tribal-state judicial forum. Since the first Building on Common Ground conference,[3] which was hosted in 1993 by the Conference of Chief Justices of the State Supreme Courts, many states and tribes have created tribal-state forums or committees that meet regularly and address a wide range of issues.[4] These forums have improved the delivery of justice by dispelling ignorance and fostering relationships between state and tribal judges. The results show that the application and carrying out of the law is not a mechanical procedure, but relies on shared human understanding and trust.

Tribal-state judicial forums are gradually improving the full faith and credit landscape. This is occurring in two ways. First, tribal-state judicial forums often develop and advance proposals for new rules addressing recognition of tribal court judgments.[5] Second, the forums themselves foster the kind of personal connections between judges and government officials that help make the law work after it leaves the courtroom.

This article will look at four jurisdictions and the extent to which they offer full faith and credit to tribal court judgments and what role, if any, their tribal-state judicial forums are playing in the issue.

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2. *See, e.g.*, Teague v. Bad River Band of Lake Superior Chippewa, 665 N.W.2d 899, 917 (Wis. 2003) (Abrahamson, C.J., concurring).

3. The conference's mission statement reads, "Tribal, federal, and state justice communities join together in the spirit of mutual respect and cooperation, to promote and sustain collaboration, education, and sharing of resources for the benefit of all people." *See* Tribal Law & Policy Institute, Tribal Court Clearinghouse, http://www.tribal-institute.org/lists/uset.htm (last visited Jan. 10, 2010).

4. *See, e.g.*, WIS. STAT. ANN. § 13.83(3) (West 2010) (creating a "special committee on state-tribal relations"); N.M. STAT. ANN. § 11-18-3 (West 2010) ("A state agency shall make a reasonable effort to collaborate with Indian nations, tribes or pueblos in the development and implementation of policies, agreements and programs of the state agency that directly affect American Indians or Alaska Natives.").

5. *See infra* text accompanying notes 77-101.

What's at Stake

Human activity does not confine itself to imaginary lines on the map. When families, disputes, transactions, and events of the day require or invite intervention from the courts, the resulting orders and judgments are more effective when they can follow the people or events who are the subject of court action. The framers of the Constitution took account of the issue through the Full Faith and Credit Clause.[6] While issues of cross-jurisdiction recognition of judgments between states still persist, the legal foundation for such recognition is enshrined in the Constitution.[7]

Indian tribes don't enjoy such treatment. Only in three specific areas has the federal government seen fit to make full faith and credit requirements explicit in matters involving tribes: domestic violence protection orders,[8] child support orders,[9] and child custody orders in abuse and neglect cases.[10] For all other matters, including divorce, money judgments, employment, guardianship, juvenile delinquency, traffic, commercial disputes, paternity and probate, the issue has been left to each state to work out (or not work out) with the tribes.[11] State courts have to varying degrees been recognizing tribal court judgments either by comity,[12] court rule,[13] or statute[14] for at least

6. U.S. CONST. art. IV, § 1.
7. *Id.*
8. 18 U.S.C. § 2265(a) (2006).
9. 28 U.S.C. § 1738B.
10. 25 U.S.C. § 1911(d).
11. A few states have recognized Indian tribes as territories under 28 U.S.C. § 1738 which contains language similar to the Full Faith and Credit Clause of the U.S. Constitution. *See, e.g.*, Sheppard v. Sheppard, 655 P.2d 895, 901 (Idaho 1982); Jim v. CIT Fin. Servs. Corp., 533 P.2d 751, 752 (N.M. 1975); *In re* Adoption of Buehl, 555 P.2d 1334, 1342 (Wash. 1976). Other states have refused to extend recognition under this statute. *See, e.g.*, Brown v. Babbitt Ford, Inc., 571 P.2d 689, 694 (Ariz. Ct. App. 1977); Red Fox v. Hettich, 494 N.W.2d 638, 647 (S.D. 1993).
12. *See, e.g.*, Mashantucket Pequot Gaming Enter. v. DiMasi, 25 Conn. L. Rptr. 474, 474 (Conn. Super. Ct. 1999) (enforcing a money judgment); Whippert v. Blackfeet Tribe of the Blackfeet Indian Reservation, 859 P.2d 420, 422 (Mont. 1993) (enforcing a declaratory judgment); *In re* Marriage of Red Fox, 542 P.2d 918, 920 (Or. Ct. App. 1975) (recognizing a Warm Springs Tribal Court divorce decree and affirming the trial court's dismissal of the husband's suit).
13. *See, e.g.*, ARIZ. RULES OF PROCEDURE FOR THE RECOGNITION OF TRIBAL COURT JUDGMENTS, *available at* http://www.supreme.state.az.us/stfcf/handouts/rules_recognitn_tribaljudgments.pdf; N.D. R. CT. 7.2; OKLA. STAT. TIT. 12, CH. 2, APP., R. 30; WASH. R. SUP. CT. CIV. C.R. 82.5.
14. *See, e.g.*, S.D. CODIFIED LAWS § 1-1-25 (2010); W. VA. CODE ANN. § 48-2A-1 (LexisNexis 2010); WIS. STAT. ANN. § 806.245 (West 2010).

35 years. The lack of legal certainty with respect to recognition can lead to nightmarish results for parties.[15]

In addition to being in the best interest of their citizens, there are many practical reasons why states and tribes would want to cooperate in recognizing each other's judgments and orders. Nearly all Indian reservations are surrounded by states.[16] Tribal members may live near, but not within, the reservation. Members may travel between jurisdictions frequently, perhaps every day. As a result, tribal court users will sometimes need their judgments enforced off the reservation. Defendant-debtors, for example, may be employed off the reservation. The same is true for state court users: at times there will be a need to enforce a state court judgment on the reservation when assets or defendants are located there.

A Piece of History

The case of Crow Dog, a member of the Brule Sioux tribe in South Dakota, is a critical episode in the evolution of tribal-state relations and American law. Over 125 years after it happened, the case still informs our understanding of modern full faith and credit between tribes and states. Interestingly, the case is not commonly known for dealing with full faith and credit, and that term appears nowhere in the decision. Nonetheless, *Ex parte Crow Dog*[17] has a full faith and credit element, the essence of which carries forward to today. It reminds us of

15. *See, e.g.*, Leon v. Numkena, 689 P.2d 566, 568 (Ariz. Ct. App. 1984) (recounting a "legal tug-of-war" between husband and wife after wife initiated divorce in Hopi tribal court, received an unfavorable result, and then filed a second action for dissolution in Arizona state court); Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985) (After the wife of a deceased tribal member obtained a tribal court ruling regarding disposal of her husband's body, sisters of the deceased obtained a conflicting state court ruling; the ensuing litigation proceeded to the South Dakota Supreme Court, which eventually upheld the original tribal court ruling.), *superseded by statute*, S.D. CODIFIED LAWS § 1-1-25, *as recognized in Red Fox*, 494 N.W.2d at 641 n.2. *See also* Eastern Band of Cherokee Indians v. Larch, 872 F.2d 66, 69 (4th Cir. 1989); *In re* Marriage of Susan C. & Sam E., 60 P.3d 644, 650-51 (Wash. Ct. App. 2002); Teague v. Bad River Band of Lake Superior Chippewa Indians, 665 N.W.2d 899, 914-15 (Wis. 2003).

16. Indian reservations are surrounded by states with a few notable exceptions, such as the Tohono O'odham Nation in Arizona and the St. Regis Mohawk Tribe in New York, which border Mexico and Canada respectively.

17. 109 U.S. 556 (1883).

the difficulty of seeing things from another culture's point of view and the importance of trying to do so.

Crow Dog killed Spotted Tail, a Brule Sioux chief, in 1881.[18] Using its traditional resolution process, the tribe punished Crow Dog by requiring him to support Spotted Tail's family through the provision of horses, blankets, and other supplies.[19] The tribe did not imprison Crow Dog or call for his execution.[20] Local whites were dissatisfied with this result—they felt that a harsher penalty was required to teach the Indians to act in a "civilized" manner.[21] Federal authorities responded by prosecuting Crow Dog for murder under federal law and sentencing him to execution.[22] Crow Dog quickly appealed through the federal courts.[23] The case was argued before the U.S. Supreme Court on November 20, 1883 and decided about a month later.[24]

The issue in the *Ex parte Crow Dog* was whether the federal court had jurisdiction over Crow Dog.[25] The unspoken subtext was whether the Tribe's sanction would be given recognition under 28 U.S.C. §§ 2145-2146. Those sections state:

> Sec. 2145. Except as to crimes, the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
> Sec. 2146. The preceding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing any offense in the Indian country *who has been punished by the local law of the tribe*, or to any case where by treaty stipulations the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[26]

The court reviewed the statutes and treaties involved and concluded that these sections, particularly Section 2146, de-

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18. *Id.* at 557; Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 800 (2006).
19. *See* Hon. Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 737 (2008).
20. *Id.*
21. *Id.*
22. *See Crow Dog*, 109 U.S. at 557.
23. *Id.*
24. *Id.* at 556.
25. *Id.* at 562.
26. Codified as amended at 18 U.S.C. § 1152 (2006) (emphasis added). *See also Crow Dog*, 109 U.S. at 558.

prived the federal district court of jurisdiction where one Indian has committed a crime against another Indian within the Indian country.[27] Towards the end of the opinion, the court showed a flair for the dramatic and, in language unfortunately reflective of the time, confronted the difficulty of one culture/jurisdiction imposing its ways on another:

> It is a case of life and death. It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[28]

In reaching its decision, the court relied on the provision in Section 2146 that excludes from federal jurisdiction crimes committed by one Indian against another within the Indian country. However, the case can just as easily be looked at another way. Section 2146 also deprives the federal court of jurisdiction if the Indian offender has been "punished by the local law of the tribe."[29] Without explicitly saying so, the court was confronting whether to give recognition to the Brule Sioux tribe's punishment of Crow Dog.[30] Under this view, the issue in the case was whether the tribe's sanction against Crow Dog counted as

27. *Crow Dog*, 109 U.S. at 571.
28. *Id.* at 571-72.
29. Codified as amended at 18 U.S.C. § 1152 (2006).
30. There was no thought given to the fact that prosecution by the federal government and tribe were separate sovereigns and therefore permissible. Those ideas came later, most notably starting with *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (holding that the U.S. Constitution does not apply to a tribe when dealing with its own members), and culminating in *United States v. Wheeler*, 435 U.S. 313, 328-29 (1978) (holding that the prosecution of an individual by the United States after prosecution by the Navajo Nation for the same conduct did not violate the Fifth Amendment).

"punishment" under the statute. A greater test of full faith and credit there could not be, as a man's life hung in the balance. For a moment, it appeared that the *Crow Dog* Court had given at least implicit recognition to the tribe's judgment.

This resolution, however, quickly gave way under mounting popular pressure. As mentioned, there was great consternation among the surrounding white population that an individual who committed murder would not suffer severe punishment himself, as judged by the dominant society at the time.[31] Shortly after *Crow Dog* was decided, Congress responded by passing the Major Crimes Act,[32] which conferred upon the federal courts jurisdiction over the specific crimes listed in that statute, even when committed by an Indian against an Indian within the Indian country.[33]

With the passing of the Major Crimes Act, federal law shifted from requiring deference toward tribal judgments in internal matters to a policy of federal intervention and imposition of "civilized" values. Whether Indian tribes will ever have exclusive criminal jurisdiction over their members again is doubtful or, at the very least, a question for the distant future. The Major Crimes Act may have signified an irrevocable shift in federal law. In some jurisdictions, however, state and tribal courts are taking a pragmatic look at their respective needs and forging ahead together.

Wisconsin

Wisconsin is one of the few states with a full faith and credit statute addressing recognition of tribal court judgments.[34] Under this statute, a tribal court judgment will receive full faith and credit if the following conditions are met: (1) the tribe is organized under the Indian Reorganization Act;[35] (2) the judgment is authenticated; (3) the tribal court is a court of record; (4) the judgment is a valid judgment; and (5) the tribal court certifies that it grants full faith and credit to the judgments of Wis-

31. *See* Wahwassuck, *supra* note 19, at 737.
32. Major Crimes Act, ch. 341, § 9, 23 Stat. 385 (1885) (current version at 18 U.S.C. § 1153 (2006)).
33. *Id.* The Major Crimes Act was tested and upheld one year later. *See* United States v. Kagama, 118 U.S. 375, 385 (1886).
34. *See* WIS. STAT. ANN. § 806.245 (2010).
35. *See* 25 U.S.C. §§ 461-479 (2006).

consin state courts and to the acts of other Wisconsin government entities.[36]

Wisconsin courts routinely grant full faith and credit to tribal court judgments under this statute.[37] The most common use has been to enforce money judgments through wage garnishments against a defendant working outside the tribal jurisdiction. Once a tribal court judgment is obtained and the defendant debtor is located, the creditor files the underlying enforcement action (usually a wage garnishment) along with an affidavit from the Chief Judge of the tribal court attesting that the elements of the statute have been met.

These garden variety enforcement proceedings were going along fine until around 1995, when Jerry Teague, the casino manager for the Bad River Band of Lake Superior Chippewa, separated from employment with the Bad River Tribe.[38] Eight years of litigation ensued, including two trips to the Wisconsin Supreme Court, the second of which culminated in *Teague v. Bad River Band of Lake Superior Chippewa*.[39] In the end, the case did not turn on the issue of full faith and credit but rather on the allocation of jurisdiction.[40] However, Wisconsin's statute was tested by the litigation, a by-product of which was the re-establishment of the Wisconsin State-Tribal Justice Forum.

The case involved a relatively routine set of facts that spun into competing simultaneous cases in the state and tribal court systems. When Teague separated from employment, he sued the tribe in state court, seeking enforcement of his employment contract.[41] Meanwhile, the tribe sued in tribal court claiming

36. WIS. STAT. ANN. § 806.245.

37. *See, e.g.*, Teague v. Bad River Band of Lake Superior Chippewa, 665 N.W.2d 899, 914 (Wis. 2003). This Article is setting aside the discussion of full faith and credit in specific areas of the law, such as child support, domestic abuse, and the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (2006), where there is a specific directive for full faith and credit to be granted. *See, e.g.*, 25 U.S.C. § 1911(d) (requiring state courts to give full faith and credit to tribal court child custody orders); 28 U.S.C. § 1738B (requiring full faith and credit between states and tribes for child support orders); 18 U.S.C. § 2265 (requiring states and tribes to give full faith and credit to protection orders).

38. *See Teague*, 665 N.W.2d at 904.

39. *Id.* at 904-06.

40. *Id.* at 914.

41. *Id.* at 902.

the employment contract was void.[42] Despite receiving notice, Teague refused to participate in the tribal court proceeding except for purposes of discovery.[43] The tribal court reached a verdict relatively quickly, while the state court proceeding was still pending.[44] The state court refused to recognize the tribal court judgment pursuant to Wisconsin's full faith and credit statute.[45] The state court eventually entered a judgment of $390,000 against the tribe.[46] Teague began an enforcement action seeking to garnish the tribe's bank accounts.[47]

As the state case worked its way up the appellate ladder, it landed in the Wisconsin Supreme Court for the first time in 2000.[48] The Wisconsin Supreme Court ruled that the state and tribal court should confer and attempt to allocate jurisdiction between the two of them.[49] In its analysis, the Court noted that while Section 806.245 guides parties and courts for issues of full faith and credit, there were no similar protocols to apply to jurisdictional conflicts such as exist for child custody disputes in the Uniform Child Custody Jurisdiction Act (UCCJA).[50] The court stated that development of protocols similar to the UCCJA "between state and tribal courts in Wisconsin is a matter of high priority and should be pursued."[51] In a footnote, the court acknowledged the March 1999 meeting of Wisconsin tribal, federal, and state judges and stated this would be the logical forum for such protocol development.[52]

The case was remanded for the jurisdiction allocation conference, but the state and tribal judges could not agree on how to allocate jurisdiction. After failing to reach an agreement, the

42. *Id.* Because Wisconsin is a Public Law 280 state, *see* 28 U.S.C. § 1360, the state court had a basis for asserting jurisdiction thereby creating competing jurisdictional claims in the state and tribal court. The employment contract did not contain a choice of forum clause.

43. *Teague*, 665 N.W.2d at 902.

44. *Id.*

45. *See* WIS. STAT. ANN. § 806.245 (2010).

46. *Teague*, 665 N.W.2d at 923.

47. *Id.* at 902.

48. *See* Teague v. Bad River Band of Lake Superior Chippewa, 612 N.W.2d 709 (Wis. 2000).

49. *Id.* at 719.

50. *Id.* at 718.

51. *Id.*

52. *Id.* at 718 n.11.

case proceeded to appeal once again. In 2003, a plurality[53] of the Wisconsin Supreme Court ruled that the guiding principle of the case was comity and that state courts should be working with their tribal counterparts to determine where a dispute belongs.[54] The court identified 13 factors to be applied[55] and, applying those factors, ruled that jurisdiction should have been allocated to the tribal court in Teague's case.[56]

The high profile nature of the case and its impact on tribal-state jurisprudence caused a renewal of tribal-state collaboration. State judges in the northern part of the state worked with tribal judges to establish a protocol for applying the *Teague* rule. In 2006, the Wisconsin State-Tribal Justice Forum was re-established with five state and five tribal judges and other staff.[57] The forum organized several judicial educational programs where state and tribal judges could meet and confer. Tribal judges presented at the 2007 annual meeting of the Wisconsin Judicial Conference. Looking ahead, the forum is planning a series of "cracker barrel" meetings where, rather than formal lecturing, state and tribal judges will have informal conversations around a few pre-selected topics or issues that may arise spontaneously.[58]

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53. *See* Teague v. Bad River Band of Lake Superior Chippewa, 665 N.W.2d 899, 916-17 (Wis. 2003) (Abrahamson, C.J., concurring) ("Thus, this case must be governed by principles of comity, not WIS. STAT. § 806.245."). The lead opinion had one author (Justice Crooks) and one vote. Justice Crooks' view of the matter was that the tribal court judgment met the requirements of WIS. STAT. § 806.245 and should have been given full faith and credit by the state court. *See Teague*, 665 N.W.2d at 908.

54. *See id.* at 916 (Abrahamson, C.J., concurring).

55. *Id.* at 917-18.

56. *Id.* at 919. As noted above, Justice Crooks wrote separately that under WIS. STAT. § 806.245 the state trial court should have given full faith and credit to the tribal court judgment invalidating the contract and that would have disposed of the case. *Id.* at 908. The plurality noted the difficulty with this as it gives no weight to the state court judgment and could produce a "potentially absurd" situation if the Tribe were to give full faith and credit to the state court judgment. *Id.* at 916 (Abrahamson, C.J., concurring).

57. *See* Wisconsin Court System State-Tribal Justice Forum, http://www.wicourts.gov/about/committees/tribal.htm (last visited Jan. 10, 2010).

58. *See* Shelly Cyrulik, *District 10 holds crack barrel Conversation*, 17 NO. 3 THE THIRD BRANCH 7 (2009), *available at* http://www.wicourts.gov/news/thirdbranch/docs/summer09.pdf. On May 29, 2009, the first cracker barrel forum, a full faith and credit issue received some attention. *Id.* The issue involved how a tribal court could effectively ensure compliance when the tribal court subpoenas a county sheriff's deputy to testify in the tribal court.

Forum Chair, Wisconsin Judge Neal Nielsen, stated the forum has had a positive effect: "Our state-tribal justice forum has been very successful in promoting cooperative and collegial relations between the circuit courts and tribal courts in Wisconsin. The real value of the forum comes from the opportunity to build professional relationships that are based on mutual respect and trust."[59]

New York

New York's Federal-State-Tribal Courts and Indian Nations Justice Forum (Justice Forum) came into existence in 2004: New York has nine state-recognized Indian tribes,[60] seven of which are federally-recognized.[61] Of the nine, only three maintain Western-style court systems: the Oneida Indian Nation, the Seneca Nation, and the St. Regis Mohawk Tribe.[62] The other six tribes operate more traditional justice systems.[63] The more traditional systems do not always issue formal orders or judgments and, therefore, full faith and credit issues have not been as prevalent in the New York case law.[64]

Shortly after its establishment in 2004, the Justice Forum sought ideas about how it could play a positive role in tribal-state judicial relations. The Oneida Nation of New York re-

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59. Interview with Judge Neal A. Nielsen, III, Circuit Court Judge, Vilas County, Wisconsin, Chair of the Wisconsin State-Tribal Forum, by email (Nov. 9, 2009).

60. *See* New York Federal-State-Tribal Courts and Indian Nations Justice Forum, http://www.nyfedstatetribalcourtsforum.org/history.shtml (last visited Jan. 10, 2010).

61. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648, 13,649-13,652 (Mar. 22, 2007) (listing the seven federally-recognized tribes).

62. *See* Interview with Joy Beane, Executive Assistant, New York State Judicial Institute, by telephone (June 19, 2009).

63. *Id.*

64. This is not to say state-tribal judicial relations have been uneventful. In *Van Aernam v. Nenno*, No. 06-CV-0053C(F), 2006 WL 1644691 (W.D.N.Y. June 9, 2006), Mr. Van Aernam, a member of the Seneca Nation, obtained a federal court injunction against a New York State Supreme Court preventing it from exercising jurisdiction over a divorce proceeding which had been previously adjudicated in Seneca Nation Peacemakers Court. *Id.* at *1, *10. The *Van Aernam* court applied the factors from *Teague*. *Id.* at *7-8. *See also supra* text accompanying notes 38-56. Just four months later, the same federal district court confronted a similar fact pattern as that of *Van Aernam* and applied the *Teague* factors again. *See* Parry v. Haendiges, 458 F. Supp. 2d 90, 97 (W.D.N.Y. 2006). There were some key differences, however, and the court ruled in favor of state court jurisdiction. *See id.* at 99.

sponded that it would be helpful for its court's judgments to receive recognition from New York state courts.[65] The forum responded positively. Dialogue ensued over development of a protocol which addresses both full faith and credit and transfer of cases from state to tribal court.[66] Interestingly, the Oneida Nation's Western-style adversarial court features two judges who are former justices of New York's highest court, the New York Court of Appeals.[67]

New York's experience is characterized by two unique features. First, the protocol is a non-binding, unsigned document more aptly described as a proposed "guideline."[68] There may be some question whether the state court, in the absence of formal rulemaking, statute, or case law, has the authority to implement such a protocol. Aware the protocol's validity could come before him as part of litigation in his court, the state judge in the tribe's district has not pre-judged the legality of the protocol, but also is respectful of the practical needs of the Oneida tribal court and the forum's desire to do something positive.[69] The Oneida Nation and the state court understand that the first few cases under the pilot protocol will be test cases and that there may be challenges.

The second unique aspect of the pilot protocol is that it was developed specifically for one tribe, the Oneida Indian Nation of New York. This was done consciously and out of respect for the differences between the tribes in New York.[70] It is not a reflection of any disharmony among New York's tribes.[71] Just the opposite—the Oneidas and the State of New York wel-

65. *See* Interview with Pete Carmen, Attorney, Oneida Nation, by telephone (Oct. 21, 2009).

66. New York Federal-State-Tribal Courts Forum, Proposed Pilot Program: Rules on Enforcement of Judgments and Jurisdictional Protocol Between the Courts of the Unified Court System of the State of New York Resident in the Fifth Judicial District and the Tribal Courts of the Oneida Indian Nation (proposed Mar. 19, 2008), *available at* http://www.nyfedstatetribalcourtsforum.org/pdfs/Full%20Faith%20&%20Credit-%20Oneida%20&%205th%20Jud%20Distr.pdf [hereinafter *New York Protocol*].

67. Interview with Pete Carmen, *supra* note 65. Those justices are the Hon. Stewart F. Hancock, Jr., who sits as a trial court judge for the Oneida Nation, and the Hon. Richard D. Simons, who sits as an appellate judge. *Id.*

68. Interview with New York State Supreme Court Justice Samuel Hester, Oneida County Supreme Court, Fifth Judicial District, by telephone (Sept. 3, 2009).

69. *Id.*

70. Interview with Pete Carmen, *supra* note 65.

71. *Id.*

comed input from other tribes while at the same time stressing that such tribes would not be required to be part of the new protocol. The result is a rule designed specifically and exclusively for the Oneida Indian Nation.[72]

The New York protocol assumes full faith and credit will be given unless one of five conditions is present: (1) lack of subject matter jurisdiction; (2) denial of due process under the Indian Civil Rights Act; (3) lack of reciprocal recognition by the tribal court; (4) fraud in procuring of the judgment; or (5) state court recognition of the tribal court judgment would do "violence" to some strong public policy of the state.[73] These exceptions are relatively narrow in scope, perhaps reflecting the fact that the rule applies to only one tribe.

The Oneida Indian Nation attorney who was involved in developing the protocol cited the Justice Forum as helpful, indicating that it provided an opportunity to facilitate discussions and a vehicle that was free from the political baggage that burdens other areas of state-tribal relations in New York.[74] He also stated the discussions were educational and constructive as the tribe heard out the thoughtful and considered issues raised by the state judges.[75]

While the New York protocol has yet to be invoked, there are several commercial cases working their way through the Oneida Tribal Court. When they are completed, perhaps before the end of 2009, the tribe expects to seek enforcement under the protocol in New York state court.[76] This will be the first test of the protocol.

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72. It also should be noted that the Oneida Tribal Court has a rule addressing recognition of judgments from outside jurisdictions. *See* ONEIDA INDIAN NATION (N.Y.) R. CIV. P. 34, *available at* http://www.oincommunications.net/codesandordinances/rulesofcivilprocedure/chapter01.pdf.

73. *See New York Protocol*, *supra* note 66, § 1(a).

74. Interview with Pete Carmen, *supra* note 65. The State of New York and New York Oneidas have had, and continue to have, disputes between them in many areas including: land claims, *see, e.g.*, *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974); gaming, *see, e.g.*, *New York v. Oneida Indian Nation of New York*, 90 F.3d 58 (2d Cir. 1996); and taxation, *see, e.g.*, Glenn Coin, *Oneida Nation, banking on tax-exempt status, buys cigarette factory*, THE POST-STANDARD, Sept. 17, 2009, *available at* http://www.syracuse.com/news/index.ssf/2009/09/oneida_nation_banking_on_taxex.html.

75. Interview with Pete Carmen, *supra* note 65.

76. *Id.*

New Mexico

New Mexico's Tribal-State Judicial Consortium was formed in 1997[77] and designated as an advisory committee by the New Mexico Supreme Court in November 2006.[78] The mission of the forum is to "encourage and facilitate communication and collaboration between State and Tribal Court judges on common issues, focusing on domestic violence, domestic relations, child custody, child support, child abuse and neglect, and juvenile justice, and addressing questions of jurisdiction and sovereignty as they relate to each particular issue."[79] The goals of the consortium include educating and increasing collaboration between state and tribal judges.[80]

Between 2000 and 2003, the consortium held a series of cross-court cultural exchanges. Shortly thereafter, the consortium drafted a rule of civil procedure that, had it been enacted, would have guided New Mexico courts in giving full faith and credit to tribal court orders of protection, which the consortium had identified as a problem.[81]

The proposed rule was referred to the New Mexico Supreme Court Rules Committee.[82] The rules committee concluded that tribal court judgments were already entitled to full faith and credit under New Mexico case law.[83] In 1975, the New Mexico Supreme Court had ruled that judgments of the Navajo Nation Courts were entitled to full faith and credit under 28 U.S.C. § 1738 as a territory of the United States.[84] New Mexico courts have cited this ruling approvingly over the years,[85] including one case where the New Mexico Court of Appeals up-

77. *See* Garcia v. Gutierrez, 217 P.3d 591, 608 (N.M. 2009).

78. *See In re* the Tribal-State Judicial Consortium, No. 8500 (N.M. Nov. 29, 2006), *available at* http://www.nmcourts.gov/tsconsortium/docs/About_Us/Supreme_Court_Order.pdf.

79. The New Mexico Tribal-State Judicial Consortium, http://www.nmcourts.gov/tsconsortium/index.php (last visited Jan. 20, 2010).

80. *Id.*

81. *See* N.M. LEGISLATIVE FIN. COMM., FISCAL IMPACT REPORT, H. 156, at 4 (2004), *available at* http://legis.state.nm.us/Sessions/04%20Regular/firs/hb0156.pdf; Interview with Judge Roman Duran, Co-Chairman, N.M. Tribal-State Judicial Consortium, by telephone (June 24, 2009).

82. Interview with Judge Roman Duran, *supra* note 81.

83. *Id.*

84. *See* Jim v. CIT Fin. Servs. Corp., 533 P.2d 751, 752 (N.M. 1975).

85. *See, e.g.*, Chischilly v. Gen. Motors Acceptance Corp., 629 P.2d 340, 344 (N.M. Ct. App. 1980); Garcia v. Gutierrez, 192 P.3d 275, 284 (N.M. Ct. App. 2008).

held an award of punitive damages issued by a Navajo court after the defendant defaulted.[86]

The consortium responded to the rules committee by pointing out that, despite existing case law, there were still many instances of tribal protection orders not being enforced.[87] The rules committee looked at the matter again. This time they identified an unwieldy 36 rule changes that would be required to comprehensively address all of the different areas in New Mexico's statutes where protection orders were mentioned.[88] The New Mexico Supreme Court did not take action and the effort fizzled.[89]

In the face of the New Mexico Supreme Court's inaction, the consortium took a different approach. It devoted itself to getting state courts and the tribal courts in New Mexico to use a similar cover sheet for domestic abuse protection orders, also known as Project Passport.[90] This effort began after several regional meetings with judges, law enforcement officers, and probation officers from state and tribal jurisdictions.[91] These meetings revealed that state law enforcement officers understood that federal domestic violence laws required full faith and credit for tribal protection orders.[92] However, state law enforcement officials were reluctant at times to enforce the orders because they were unfamiliar with the tribal court formats and were not always sure whether the orders had all of the proper identifying information, were still in effect or were properly issued.[93] When asked whether the uniform cover sheet would answer their concerns, the state officers said it would.[94] The consortium then approached the New Mexico Supreme Court with the proposal for a uniform cover sheet.

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86. *See* Halwood v. Cowboy Auto Sales, Inc., 946 P.2d 1088, 1094 (N.M. Ct. App. 1997).

87. Interview with Judge Roman Duran, *supra* note 81.

88. *Id.*

89. *Id.*

90. Project Passport is a national project to get all jurisdictions across the United States to use a uniform cover sheet on protection orders so they will be more readily enforced by law enforcement officers. *See* National Center for State Courts, http://www.ncsconline.org/D_research/descriptions.html (last visited Jan. 18, 2010).

91. Interview with Judge Roman Duran, *supra* note 81.

92. *See* 18 U.S.C. § 2265(a) (2006).

93. Interview with Judge Roman Duran, *supra* note 81.

94. *Id.*

The New Mexico Supreme Court approved the uniform cover sheet for use on October 29, 2008, and it went into effect on December 15, 2008, a remarkably quick turnaround for such a change.[95] Participants in the effort stated that the New Mexico Supreme Court sometimes takes up to a year to approve such proposals and that a lengthy approval process was expected here as well because the issue involved state-tribal court relationships.[96] The quick approval was attributed to the fact that several New Mexico Supreme Court justices had participated in consortium meetings, with between one and three justices present at each meeting, and thereby gained knowledge about and comfort with the issue.[97] As of March 2009, three tribal courts in New Mexico were using the cover sheet and the other tribal courts were in the process of getting the cover sheet approved.[98]

The New Mexico Tribal-State Consortium has also led to individual success stories because of the relationships formed. A tribal court recently handled a juvenile matter in which a child absconded to Albuquerque, about 170 miles from the reservation.[99] The tribal judge called his state court counterpart from the consortium, who was also a judge in Albuquerque. Within a day, the Albuquerque judge signed an order granting full faith and credit to the tribal court order requiring the juvenile's pick-up and return.[100] Moreover, tribal and state law enforcement officers were already working together. Once the state order was delivered to state police, the youth was picked up and returned to the tribal jurisdiction.[101]

The tribal judge believes that he would have been able to eventually reach the same outcome, but estimates it might have taken a week instead of a day without the relationship with his state counterpart, a significant difference considering that the safety of a juvenile was at issue.[102] This story highlights the crit-

95. *See* The New Mexico Tribal-State Judicial Consortium, Project Passport, http://www.nmcourts.gov/tsconsortium/docs/Initiatives/Project_Passport/Project_Passport_Description.pdf (last visited Jan. 20, 2010).
96. Interview with Judge Roman Duran, *supra* note 81.
97. *Id.*
98. These three tribal courts are those of the Laguna, Santa Clara, and Zuni Pueblos. *See id.*
99. *See id.*
100. *Id.*
101. *Id.*
102. *Id.*

ical importance of relationships and personal knowledge when judges are called upon to apply the law. Even when the law is fixed, and presumably known by everyone involved, personal relationships can act as the variable that determines how quickly courts are able to reach the desired outcome.

Minnesota

Minnesota's Tribal Court/State Court Forum has been in existence since 1997.[103] During early meetings, the forum set out to consider its priorities.[104] The group agreed that full faith and credit issues should be at the top of the list.[105] When deciding whether to approach the legislature or the judiciary about these issues, the forum decided that the legislature would be too political in light of ongoing gaming issues between the state and the tribes.[106] As a result, the Forum developed a proposal for a new rule of civil procedure and circulated the proposed rule to the relevant stakeholders in the state and tribal court systems.[107] In 2002, the Minnesota Tribal Court/State Court Forum formally petitioned the Minnesota Supreme Court for a court rule under which tribal court judgments would be given full faith and credit by Minnesota state courts.[108]

After providing some background information about Indian law and the tribes in Minnesota, the petition sought to bolster the case for a full faith and credit rule.[109] It cited two real-world examples in which full faith and credit had critical practical implications. In the first, a hospital refused to acknowledge a tribal court protective order directing custody of a cocaine-addicted newborn.[110] Without recognition of the order, the

103. Robert A. Blaser & Andrea L. Martin, *Engendering Tribal Court/State Court Cooperation*, 63 BENCH & B. OF MINN. 11 (Dec. 2006), *available at* http://mnbar.org/benchandbar/2006/dec06/tribal_court.htm.

104. *Id.*

105. *See* Interview with Henry Buffalo, Co-Chairman, Minnesota Tribal Court/State Court Forum, by telephone (June 19, 2009).

106. *Id.*

107. *See* MINN. TRIBAL COURT/STATE COURT FORUM, AMENDED PETITION FOR ADOPTION OF A RULE OF PROCEDURE FOR THE RECOGNITION OF TRIBAL COURT ORDERS AND JUDGMENTS, app. A at 1-3 (June 26, 2002), *available at* http://maiba.org/pdf/FullFaithAndCredit102402.pdf.

108. *Id.*

109. *Id.* at 4-6.

110. *Id.* at 6.

child would be released to its addicted mother.[111] In the other case, a hold and protect order from a tribal court for two delinquent runaway teenagers was not enforced by local police because they were instructed that they did not have to recognize a tribal court order.[112] As a result, the teenagers were left unprotected for a month longer than needed.[113] In both cases, Minnesota's Uniform Enforcement of Foreign Judgments Act[114] was a legal obstacle to recognition. The statute, which is a procedural statute, only allows recognition of those orders "entitled to full faith and credit."[115]

The examples went in the other direction as well. A Minnesota tribal court had recently refused to enforce a garnishment request against a tribal employee subject to a state court money judgment.[116] The court relied on tribal law, which required that the issuing jurisdiction grant full faith and credit to tribal court orders.[117] The State of Minnesota did not recognize tribal court judgments, so relief was denied.[118]

The forum's proposed rule had the unanimous support of both the state and tribal court judges at the trial level.[119] In addition, the state appellate judges supported the proposal,[120] as did the Minnesota State Bar.[121] The Minnesota tribes were on board.[122] The Minnesota County Attorney Association was not in support.[123] At the public hearing on October 29, 2002, several individuals from various reservations spoke against the rule.[124]

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111. *Id.*

112. *Id.*

113. *Id.*

114. MINN. STAT. ANN. §§ 548.26-548.33 (West 2009).

115. MINN. STAT. ANN. § 548.26 (West 2009).

116. *See* MINN. TRIBAL COURT/STATE COURT FORUM, *supra* note 107, at 6.

117. *Id.* at 6-7.

118. *Id.* at 7.

119. *See id.* at 7-8 (listing various courts that support the rule).

120. *See* Interview with Henry Buffalo, *supra* note 105.

121. *See* Jon Duckstand, *Full Faith and Credit*, 59 BENCH & B. OF MINN. 9 (Oct. 2002), *available at* http://mnbar.org/benchandbar/2002/oct02/prezpage.htm.

122. *Id.*

123. *See* Clara NiiSka, *Supreme Court hears arguments and testimony: Should there be full faith and credit for tribal courts in Minnesota?*, NATIVE AM. PRESS/OJIBWE PRESS, Nov. 1, 2002, *available at* http://www.maquah.net/clara/Press-ON/02-11-01-testimony.html.

124. *Id.*

The Minnesota Supreme Court denied the petition in a two-page order on March 5, 2003.[125] The order acknowledged the valuable efforts of the forum but stated, without explanation, that "the court is not prepared to adopt the proposed rule at this time."[126] The court acknowledged the "need for a better procedural framework to facilitate the recognition and enforcement of tribal orders and judgments where there is an existing legislative basis for doing so, especially in emergency situations involving such matters as child protection and domestic violence."[127] Looking forward, the court ordered the Supreme Court Advisory Committee on the General Rules of Practice to consider rules to provide a procedural framework for the recognition of tribal court orders and judgments.[128] In addition, the court encouraged the advisory committee to explore with the forum the possibility of a tribal court/state court compact to assure reciprocal commitment to any new rule.[129]

Subsequent to the rejection of the proposed rule, the Minnesota Supreme Court adopted a rule[130] that requires Minnesota state courts to give full faith and credit to tribal court orders where required by law and permits discretionary recognition under the principles of comity in other circumstances.[131] The rule went into effect on January 1, 2004.[132]

The co-chair of the forum from that period expressed disappointment about the Minnesota Supreme Court's decision and uncertainty about why the court ruled the way it did.[133] The forum, nevertheless, has continued to meet and thrive. The experience of proposing the new rule brought the forum members together and, even though the Minnesota rules continue to give state court judges discretion in recognizing tribal court orders, tribal court orders are by and large enforced.[134]

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125. *In re* Hearing on Proposed Amendments to the Minnesota General Rules of Practice for the District Courts, No. CX-89-1863 (Minn. Mar. 5, 2003).
126. *Id.* at 1.
127. *Id.*
128. *Id.*
129. *Id.* at 1-2.
130. *See* MINN. GEN. R. PRAC. 10.01(a) (2003).
131. *See* MINN. GEN. R. PRAC. 10.02(a); *see also* Wahwassuck, *supra* note 19, at 737.
132. *See* MINN. GEN. R. PRAC. 10.01.
133. Interview with Henry Buffalo, *supra* note 105.
134. *Id.*

Beyond Full Faith and Credit

Despite the somewhat bumpy road to Minnesota's comity-based recognition rule, it didn't slow down state-tribal cooperation in the state. A remarkable example of full and mutually-beneficial recognition is taking place between the Leech Lake Band of Ojibwe and Cass and Itasca Counties in northern Minnesota.

The particulars of the program between the Leech Lake Band and Cass County are well documented in a law review article[135] and Center for Court Innovation interview,[136] so only a brief summary will be provided here. In 2006, Cass County District Court Judge John P. Smith realized that defendants repeatedly appeared in his court for alcohol-related crimes and traffic accidents.[137] Judge Smith took a chance and reached out to the Leech Lake Tribe.[138] This despite the fact that, less than 10 years earlier, the two governments were involved in litigation over taxation of tribal fee land that went all the way to the U.S. Supreme Court.[139] Judge Smith states he took the risk out of "necessity."[140] Nonetheless, there are many state court judges who likely face the same issues but don't recognize it or can't bring themselves to seek the tribe's help. Judge Smith says that, in looking back, he may have been naïve but he didn't see a downside.[141]

The gamble paid off. The two courts teamed together to form the nation's first joint tribal-state court, the Leech Lake-Cass County Wellness Court.[142] The Leech Lake-Cass County Wellness Court follows the model of treatment drug courts

135. *See generally* Wahwassuck, *supra* note 19.

136. Interview by Center for Court Innovation with Judges John P. Smith and Korey Wahwassuck, Cass County, Minnesota Driving While Intoxicated Court (May 2007), *available at* http://www.courtinnovation.org/index.cfm?fuseaction=document.viewDocument&documentID=782&documentTopicID=21&documentTypeID=8.

137. *See* Wahwassuck, *supra* note 19, at 747; Interview with Judge John P. Smith, Cass County District Court, by telephone (June 19, 2009).

138. *See* Interview with Judge John P. Smith, *supra* note 137.

139. *See* Cass County v. Leech Lake Band of Chippewa, 524 U.S. 103 (1998).

140. Interview with Judge John P. Smith, *supra* note 137.

141. *Id.*

142. Wahwassuck, *supra* note 19, at 747.

which have bloomed over the last 15 years in the U.S.[143] Non-violent alcohol-related offenders receive intense treatment and supervision, with the judges serving as supporters and cheerleaders as much as enforcers and adjudicators.[144] The tribal and state judges share the bench, collaborate over interactive television, and even occasionally preside in the other's courtroom.

The treatment aspect of the court is not new. What is new is that in a state where its supreme court rejected a proposed rule for full faith and credit for tribal court judgments, a state court and tribal court jointly hold court in unprecedented fashion. Furthermore, during the first year of its existence, the joint tribal-state court existed largely only on a handshake.[145] After people began marveling at the success of the program, the judges realized the need to document their innovative relationship that their courts had built.[146] The one-page Joint Powers agreement is brief and does not cite to any specific authority:

> Be it known that we the undersigned agree to, where possible, jointly exercise the powers and authorities conferred upon us as judges of our respective jurisdictions in furtherance of the following common goals: 1. Improving access to justice; 2. Administering justice for effective results; and 3. Foster public trust, accountability and impartiality.[147]

Fifty-two words in all.

The joint tribal-state court in some ways fully embraces full faith and credit: the judges work collaboratively to arrive at a decision with which they will both be comfortable and which will immediately be valid in both jurisdictions. At the weekly

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143. *See* CASS COUNTY LEECH LAKE BAND OF OJIBWE WELLNESS COURT, PARTICIPANT HANDBOOK (May 1, 2007), *available at* http://www.dcpi.ncjrs.gov/dcpi/pdf/wellness-court-participant-handbook-cass-county-leech-lake.pdf.

144. *See* Tribal Law & Policy Inst., Tribal Healing to Wellness Courts, http://www.tribal-institute.org/lists/drug_court.htm (last visited Jan. 18, 2010).

145. Hon. Korey Wahwassuck et al., Address at Walking on Common Ground II (Dec. 10, 2008) [hereinafter *Common Ground II*]. *See also* Wahwassuck, *supra* note 19.

146. *See* Wahwassuck, *supra* note 19, at 733.

147. *Joint Powers Agreement between Judges of the Leech Lake Tribal Court and the Cass County District Court*, *in* CASS COUNTY LEECH LAKE BAND OF OJIBWE WELLNESS COURT, FROM COMMON GOALS TO COMMON GROUND, 4, 4-5 (2007), *available at* http://www.tribaljusticeandsafety.gov/docs/fv_tjs/session_4/session4_presentations/Sustaining_Wellness_Courts.pdf.

drug court sessions, they make decisions jointly. When one judge is absent, the other takes over without skipping a beat.[148]

In some ways, though, the Cass County-Leech Lake Drug Court moves beyond full faith and credit by merging their respective jurisdictions into a new entity. There is no need for cross-jurisdictional recognition because there is only one court. This deep collaboration has been effective,[149] yet it appears that each court has retained its identity. Perhaps joint-powers courts are the way of the future as tribal and state judges search for ways to effectively serve their constituents. It is worth asking how the *Crow Dog* situation might have been handled differently had the federal government and the tribe had a joint powers court in 1883.

Lessons and Themes

Given the diversity of tribal cultures and the different historical relationships between states and the tribes within their borders, there is no single approach or magic bullet that is likely to work across all jurisdictions. However, in reviewing the four examples discussed above, it is possible to draw certain lessons and themes. One of the most important aspects of tribal-state forums is the building of relationships. These relationships create the space within which creativity can occur. The importance of these relationships exceeds the legal foundation or rules in place. The most striking example is the Cass County-Leech Lake Wellness Court, which began operating on a handshake and the mutual trust of two judges who saw a need to work together to address a common problem. On the other hand, in New Mexico and Minnesota, the Supreme Courts refused to adopt full faith and credit rules proposed by those states' respective forums. Nevertheless, the judges in those states continue to work together to achieve the desired outcomes through second efforts. The New York forum has helped

148. Although one judge may preside in the other's absence, the technical aspect of signing orders or warrants remains within each judge's jurisdiction. However, Judge Smith reported that he has full confidence in Judge Wahwassuck's recommendations. *See* Interview with Judge John P. Smith, *supra* note 137.

149. *See Common Ground II*, *supra* note 145 (The Cass County-Leech Lake Drug Court has achieved over 6,500 days of sobriety among its participants, 20 percent are enrolled in higher education programs, and families are being reunited.)

the state and tribal judiciaries rise above what is otherwise a contentious state-tribal relationship.

Another common theme that emerges from these experiences is that the forums that responded to a specific and pressing need achieved greater success than those that lacked such an animating purpose. The Cass County-Leech Lake Wellness Court, a tremendously successful collaboration, was created in response to a specific and widely-acknowledged problem of alcohol-related crimes and deaths. Likewise, Wisconsin's tribal-state forum produced the groundbreaking *Teague* protocol in the wake of a very specific set of facts from the *Teague* case that demonstrated the need to sort out the problem of concurrent state and tribal jurisdiction.

By contrast, the full faith and credit rule proposed by the Minnesota forum was not anchored around a particularly discreet or urgent issue, and the state supreme court rejected the rule. New Mexico's forum, similarly lacking a pressing issue around which to mobilize support, was unable to gain the state supreme court's approval for a new full faith and credit rule. Clearly, Minnesota and New Mexico's forums have achieved important results in their own right, including Minnesota's comity rule and New Mexico's adoption of Project Passport. Moreover, these forums continue to promote improved communication and collaboration in their states. Nonetheless, they have not yet generated the landmark success that Wisconsin and Leech Lake have been able to achieve by focusing on a specific, pressing issue

The New York experience perhaps offers a middle road. Like the Minnesota and New Mexico forums, the New York forum was convened not in response to a specific issue or crisis, but out of a general desire to improve state-tribal court relationships. However, New York took the unique approach of creating a pilot protocol affecting a single tribe and a single state judicial district that both expressed a desire to develop a more formal jurisdiction-sharing agreement. In taking this measured and cautious approach, the New York forum has been able to focus its efforts in an area where cross-jurisdictional support already exists and early success is possible. This approach, although still in its early stages, may offer a model for other state-tribal forums. In the absence of a specific motivating issue or

challenge, a successful approach may be to develop a pilot project: a carefully-tailored interim step attempted with one tribe before proceeding to a statewide rule.

Finally, the theme of enhanced communication (and perhaps a little risk taking) runs through all of the jurisdictions. The law is a notoriously conservative endeavor and changes slowly. Against this tendency to resist change stands the increasing mobility and transience of society, which continues to move faster than the courts, and demands new thinking and new approaches. The state-tribal forums have demonstrated that, when state and tribal judges gather, even with no agenda other than to listen to each other, progress is possible and the administration of justice for both state and tribal jurisdictions can be improved.

Treaties, Tribal Courts, and Jurisdiction: The Treaty of Canandaigua and the Six Nations' Sovereign Right to Exercise Criminal Jurisdiction

*Carrie E. Garrow**

I. Introduction

Since the United States Supreme Court's refusal to recognize Indian nations' sovereign right to exercise criminal jurisdiction in 1978, Indian nations have worked to regain recognition of this right. In 1978, in *Oliphant v. Suquamish Indian Tribe*,[1] a non-Indian challenged the Suquamish Indian Tribe's sovereign right to exercise criminal jurisdiction over him.[2] The Court found that inherent tribal powers could be explicitly and implicitly divested, if these powers were inconsistent with their status as domestic dependent nations.[3] The Court stated, "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try

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1. 435 U.S. 191 (1978).
2. *Id.* at 194.
3. *Id.* at 208-09.

non-Indian citizens of the United States except in a manner acceptable to Congress."[4] Drawing a "protective cloak" of United States citizenship around *Oliphant*,[5] the Court found Indian nations were implicitly divested of the power to exercise criminal jurisdiction over non-Indians.[6] The Court did acknowledge, however, that an Indian nation possesses criminal jurisdiction over non-Indians if the Indian nation has a treaty to that effect.[7]

In 1990, in *Duro v. Reina*,[8] the U.S. Supreme Court held that the Salt River Pima-Maricopa Indian Community could not assert criminal jurisdiction over a non-member Indian.[9] The Court held that tribal authority did not extend beyond internal relations among members.[10] The Court expressed particular concern about the tribal court exercising criminal jurisdiction over a person who was not a member, was not eligible to become a member, and could not vote, hold office, or serve on a jury within the tribal community.[11] Congress quickly reversed *Duro* through an amendment to the Indian Civil Rights Act, commonly known as the "*Duro* fix," thereby acknowledging tribal courts' criminal jurisdiction over non-member Indians.[12]

The United States government's refusal to acknowledge the full extent of an Indian nation's sovereign powers does not stop the practical day-to-day problems of crime in Indian country. Focusing only on sexual assault, American Indian and Alaska Native women are about 2.5 times more likely to be raped or sexually assaulted than women in general.[13] And 34.1 percent of American Indian and Alaska Native women will be raped in their lifetime, while the rate for white women is 17.7 percent.[14] Indian victims of violent crime indicate that over 66

4. *Id.* at 210.
5. *See* N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 22 (2008).
6. *Oliphant*, 435 U.S. at 212.
7. *Id.* at 197.
8. 495 U.S. 676 (1990).
9. *Id.* at 679.
10. *Id.* at 685.
11. *Id.* at 688.
12. *See* 25 U.S.C. § 1301(2) (2006).
13. *See* STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002 5 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/aic02.pdf.
14. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 22 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183781.pdf.

percent of these crimes are committed by non-Indian offenders.[15] And in crimes involving Indian victims, the offender is more likely to be a stranger.[16] Although national data often does not capture the crime rate within each Indian Territory, the Bureau of Justice Statistics illustrate, through three victimization surveys in different Indian nations, the prevalence of crime on Indian territories.[17] Each survey only captured a small amount of the tribal population and the surveys do not afford generalizations, but it is critical to note in one community 88 percent of survey participants report being victims of violent crime; 33 percent in another territory; and 25 percent in the third.[18] Critically, "[c]rime against American Indians nationwide seems to have risen dramatically even as Congress has steadily expanded the substantive scope of the Major Crimes Act."[19] Furthermore:

> [T]he crime rate seems worst in precisely the areas in which the federal government has been most aggressive. For example, despite the federal government's extensive expansion of jurisdiction over Indian country sex crimes in the Major Crimes Act in 1986, the Department of Justice's own study in the mid-1990s showed that Indian children under twelve are raped or sexually assaulted at a rate three-and-a-half times higher than the average child under age of twelve.[20]

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15. PERRY, *supra* note 13, at 9.
16. *Id.* at 8.
17. *See generally id.*
18. *See id.* at 33-40.
19. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 828-29 (2006). The Major Crimes Act, ch. 341, § 9, 23 Stat. 385 (1885) (current version at 18 U.S.C. § 1153 (2006)), was enacted in 1885 by Congress in response to the U.S. Supreme Court's ruling in *Ex parte Crow Dog*, 109 U.S. 556 (1883), that in the absence of a federal statute limiting tribal court jurisdiction, Indian nations possessed exclusive criminal jurisdiction. *Id.* at 571. The Major Crimes Act was the first assertion of federal criminal jurisdiction in Indian country and was a response to a false perception of lawlessness in Indian country as the Bureau of Indian Affairs and other officials did not understand tribal dispute resolution and wanted federal jurisdiction as a mechanism to assert control on Indian territories. *See* CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 87 (2004). The Major Crimes Act does not remove jurisdiction from Indian nations, but rather grants federal courts concurrent jurisdiction over a list of designated offenses. *See id.*
20. Washburn, *supra* note 19, at 829 (citing LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 38 (1999), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/aic.pdf). Washburn notes that from 1992 to 1996, "Indian children under twelve were raped or sexually assaulted at a rate of seven incidents per thousand children" compared to children of all races, who experienced "two rapes or sexual assaults per thousand children." Washburn, *supra* note 19, at 829 n.227.

The statistical data illustrate that crime by non-Indians against Indians is a serious problem that must be addressed to protect Indian people and nations.

The federal government's refusal to recognize the jurisdiction of tribal courts over non-Indians has left Indian people vulnerable to serious crimes. This vulnerability is further exacerbated by the fact that non-Indian offenders often go unprosecuted by the federal government.[21] United States attorneys "have been widely criticized for decades for failing to give proper attention to Indian country cases."[22] This may be a result of the "non-reviewability of the decision to decline prosecution [along with] the weak . . . political accountability of federal prosecutors to Indian communities, and the lack of media interest in Indian country . . . ."[23] Indian nations, and particularly tribal court judges, must find other ways to exercise jurisdiction over non-Indians in order to achieve justice for the numerous victims within Indian country. While many individuals and nations are working to convince Congress to provide a legislative fix[24] that restores recognition of tribal court criminal jurisdiction over non-Indians, some tribal courts are looking for other solutions.

One of the tools that tribal courts have begun to employ is their inherent authority to exercise jurisdiction over people within their territories, as recognized by treaties between Indian nations and the United States.[25] This inherent authority is a critical source of jurisdiction that all tribal court judges and advo-

21. Washburn, *supra* note 19, at 818 n.225.

22. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 733 (2006).

23. *Id.*

24. Indian country advocates are working with Senator Byron Dorgan on the Tribal Law & Order Act of 2009, S. 797, 111th Cong. (as reported by S. Comm. on Indian Affairs, Sept. 10, 2009). Many advocates have argued for language that reverses *Oliphant* and restores recognition of criminal jurisdiction over non-Indians. Other options have included a legislative fix that would allow Indian nations to petition the federal government for this recognition or enter into a compact with state and federal governments regarding restoration of criminal jurisdiction. The current bill does not include a legislative fix. However, there is also some discussion that Congress may sponsor a pilot project with one or two nations. Domestic violence advocates that have worked with Congress on the Violence Against Women Act are also advocating restoration of criminal jurisdiction over non-Indians, as many domestic violence offenders are non-Indians.

25. *See, e.g.*, Means v. Dist. Court of the Chinle Judicial Dist., No. SC-CV-61-98, 1999 NANN 0000013 (Navajo May 11, 1999) (VersusLaw).

cates should use to ensure that Indian nations are able to exercise the full measure of their authority over non-Indians. If Indian nations neglect to invoke their inherent power, recognized by treaties with the United States, the treaties will become simply old and irrelevant documents rather than living documents that recognize and affirm Indian nations' inherent authority as sovereign nations. Moreover, as a source of law recognized by the U.S. Constitution as the "supreme law of the land,"[26] treaties are a defense to jurisdictional attacks by state and federal governments. Even the *Oliphant* Court recognized treaties as a source of jurisdiction over non-Indians.[27]

Treaties provide protection against further federal interference with the rights of Indian people and are legal tools needed to exercise the sovereignty of Indian nations. As Indian nations begin to rely upon their inherent authority and treaties, tribal courts will be able to more consistently exercise jurisdiction based upon tribal laws rather than the laws of foreign nations interpreting Indian nations' jurisdictional powers. Critically, courts will be better able to protect victims of crime, which in turn strengthens Indian nations—victims receive indigenous justice, are healed, and are empowered to contribute to their nations. Where the Western criminal justice system has not been successful in rehabilitating offenders, tribal justice increases the likelihood of restoring Indian and non-Indian offenders who live in or contribute to the Indian community to a healthy way of life.[28]

This article explores the potential uses of Indian nations' inherent authority and treaties to exercise criminal jurisdiction over non-Indian offenders. It first examines several Navajo Nation Supreme Court opinions to highlight the use of Navajo law and treaties as bases for criminal jurisdiction.[29] Next, Haudenosaunee[30] law and the Canandaigua Treaty of 1794[31] are ex-

26. *See* U.S. CONST. art VI.
27. 435 U.S. 191, 195 n.6 (1978).
28. *See* GARROW & DEER, *supra* note 19, at 394-99.
29. *See infra* text accompanying notes 39-62.
30. The Haudenosaunee consist of the Mohawk, Seneca, Oneida, Cayuga, Onondaga, and Tuscarora Nations. They also are known as the Iroquois or Six Nations Confederacy.
31. Canandaigua Treaty of 1794, U.S.-Six Nations, Nov. 11, 1794, 7 Stat. 44, *available at* http://www.cayuganation-nsn.gov/Home/LandRights/Treaties/TreatyofCanandaigua [hereinafter Canandaigua Treaty].

amined to determine whether they provide similar grounds for asserting criminal jurisdiction over non-Indians.[32] Finally, suggestions for tribal court judges and tribal court practitioners are provided to encourage the use of tribal law and treaties as a basis for tribal court jurisdiction.[33]

II. Treaties and Tribal Courts

When a tribal court is confronted with jurisdictional issues, it is imperative that the court examine its inherent jurisdictional authority as defined by tribal laws and recognized by the nation's treaties. Many Indian scholars and attorneys first examine the federal government's interpretation of tribal jurisdiction, ignoring the tribe's own laws. Seneca legal scholar and practitioner, Robert Odawi Porter, notes that in doing so, they have "failed to properly frame the nature of the inquiry."[34] If judges and advocates look first and only to federal Indian law and fail to use tribal law as a basis for jurisdiction, they "concede far too much authority to the United States at the expense of the Indian nations and their inherent sovereignty."[35] In addition to examining tribal law, we also must look to the nation's treaties which recognize the inherent authority of tribal laws.

Indian nations' inherent sovereignty, or the freedom and right of all peoples to determine their destiny as a nation, recognized in treaties serves as evidence of the federal government's acknowledgement of Indian nations' sovereign status and ability to exercise power over those within their borders.[36] Treaties were formulated at a time in history when European nations and the fledgling United States respected Indian nations' sovereign status and military power, and sought to make treaties as a mechanism for preserving peace.[37] Or as Porter states, "[t]he existence of treaties between Indian nations and the colonists should be viewed as conclusive evidence of Indigenous state-

32. *See infra* Part III.

33. *See infra* Part IV.

34. Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1597 (2004).

35. *Id.* at 1598.

36. *See id.* at 1601. *See generally* Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567 (1995).

37. *See* Porter, *supra* note 34, at 1600.

hood,"[38] as treaties are only used by sovereign nations in recognition of each other's statehood.

Thus, when faced with a jurisdictional question, judges and practitioners should engage in at least a two-step process of examining: (1) tribal laws, both written and oral; and (2) any treaties that may acknowledge the nation's inherent authority as a sovereign. The Navajo Nation Supreme Court's decision in *Manygoats v. Cameron Trading Post*[39] is instructive. In *Manygoats*, the court acknowledged that in addressing a jurisdictional question, the court must first examine its own inherent authority, which is found in Navajo laws. Then, it must examine any applicable treaties. Only after this analysis could the court consider any jurisdiction that the federal government may have granted the Navajo Nation:

> [W]e will now address the question of whether the Navajo Nation has civil regulatory and adjudicatory jurisdiction over the employment practices of a New Mexico corporation conducting business on fee land within the territory of the Navajo Nation. However, prior to proceeding to the contemporary Indian affairs law rules on civil jurisdiction over non-Indians, we will first apply the Treaty of 1868 between the United States of America and the Navajo Nation. We do so because there are three foundations for jurisdiction in Indian law cases. Our jurisdiction comes from (1) the inherent authority of the Navajo Nation as an Indian nation, (2) the Navajo Nation's treaties with the United States of America, and (3) federal statutes which vest jurisdiction in the Navajo Nation. We address the treaty issue first, because a treaty constitutes the United States' recognition of our jurisdiction.[40]

The question of tribal court jurisdiction often turns on the political status of the defendant—is he a citizen of the Indian nation, a non-member Indian, or a non-Indian? The answer to this question often lies in the nation's inherent authority, found within its own laws. If United States law challenges this result—as seen in *Oliphant*—the analysis then turns to the nation's treaties to determine if the United States has previously acknowledged the exercise of jurisdiction. For example, the Navajo Nation Supreme Court often relies upon its common law and the treaties made between the United States and the

38. *Id.* at 1601.

39. No. SC-CV-50-98, 2000 NANN 0000003 (Navajo Jan. 14, 2000) (VersusLaw).

40. *Id.* at ¶ 40 (citation omitted).

Navajo Nation when addressing jurisdictional questions.[41] The Treaty of 1868 sets out a boundary description and then states "this reservation" is "set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them."[42] The Navajo Nation Supreme Court explains that this plain language means that the Navajo Reservation exists not only for the Navajos, but other Indians,[43] an acknowledgement by the U.S. government of the Navajo Nation's inherent right to exercise jurisdiction. More importantly, the court relies upon this acknowledgement of its jurisdiction over non-member Indians rather than relying upon federal Indian law's interpretation of their jurisdiction.

A similar result is seen in the Navajo Nation Supreme Court decision in *Billie v. Abbott*,[44] which used the Treaty of 1868 as a basis for holding that the United States' Aid to Families of Dependent Children legislation does not divest the Navajo Nation of its exclusive power to decide the child support obligations of its members who live on the Reservation:

> Implicit in the Treaty of 1868 is the understanding that the internal affairs of the Navajo people are within the exclusive jurisdiction of the Navajo Nation government. And, since the signing of the Navajo treaty, Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation. The sovereignty retained by an Indian tribe includes the power of regulating [its] internal and social relations. Because Navajo domestic relations is [sic] the core of the tribe's internal and social relations, the Navajo Nation has exclusive power over domestic relations among Navajos living on the reservation.[45]

As a result, the court concluded that it had jurisdiction over a Utah official who had seized a tribal member's federal income tax to repay the state for child support.[46]

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41. *See, e.g.*, *id.*; Means v. Dist. Court of the Chinle Judicial Dist., No. SC-CV-61-98, 1999 NANN 0000013, ¶ 11 (Navajo May 11, 1999) (VersusLaw); Navajo Nation v. Hunter, No. SC-CR-07-95, 1996 NANN 0000001, ¶ 32 (Navajo Mar. 8, 1996) (VersusLaw).

42. *Means,* 1999 NANN 0000013, at ¶ 62.

43. *See id.* at ¶ 63.

44. No. A-CV-34-87, 1988 NANN 0000012 (Navajo Nov. 10, 1988) (VersusLaw).

45. *Id.* at ¶ 26 (citations and quotations omitted).

46. *See id.* at ¶ 25.

If tribal courts can use the acknowledgment of their nations' sovereign powers in treaties to extend civil jurisdiction to regulate their internal and social relations, there may also be a basis for criminal jurisdiction. In the seminal case of *Means v. District Court of the Chinle Judicial District*,[47] the Navajo Nation Supreme Court addressed whether it had criminal jurisdiction over a non-member Indian who was charged with battery and threatening his father-in-law.[48] Under the *Duro* fix,[49] the federal government would have acknowledged the Navajo Nation's jurisdiction, as Means was a non-member Indian. However, the Navajo Nation Supreme Court declined to rely upon federal interpretation of the Nation's jurisdiction. Instead, the court examined its inherent authority over people living within the Nation's boundaries by looking to the Nation's own law and their treaties with the United States.[50] The Navajo Nation Supreme Court stated:

> There is a false assumption that Indian nations absolutely lack criminal jurisdiction over non-Indians . . . . [A]n individual who "assumes tribal relations" is fully subject to the laws of the Indian nation with which that person assumes such relations . . . . There are various ways an individual may "assume tribal relations" as a matter of Navajo common law: by entry within the Navajo Nation with the consent of the Nation pursuant to Article II of the Treaty of 1868; by marriage or cohabitation with a Navajo; or other consensual acts of affiliation with the Navajo Nation.[51]

The court used a *hadane*, or in-law, relationship to illustrate how a person becomes a "member" or establishes an intimate relationship that subjects his or her conduct to regulation by the Navajo Nation, regardless of his or her political status.[52] The *hadane* "assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is conducted

47. 1999 NANN 0000013.

48. *Id.* at ¶ 11. *See also* Paul Spruhan, Note, *Means v. District Court of the Chinle Judicial District and the Hadane Doctrine in Navajo Criminal Law*, TRIBAL L.J. (2000-2001), *available at* http://tlj.unm.edu/tribal-law-journal/articles/volume_1/spruhan/index.php.

49. In response to *Duro v. Reina*, 495 U.S. 676 (1990), Congress passed an amendment to the Indian Civil Rights Act, acknowledging Indian nations inherent right to exercise jurisdiction over non-member Indians. *See* 25 U.S.C. § 1301(2) (2006). The U.S. Supreme Court subsequently upheld this statute. *See United States v. Lara*, 541 U.S. 193, 210 (2004).

50. *See Means*, 1999 NANN 0000013, at ¶ 68, 73.

51. Navajo Nation v. Hunter, No. SC-CR-07-95, 1996 NANN 0000001, ¶ 31-32 (Navajo Mar. 8, 1996) (VersusLaw) (citations omitted).

52. *See Means*, 1999 NANN 0000013, at ¶ 73.

within the Navajo Nation, there are reciprocal obligations to and from family and clan members under Navajo common law."[53] Further, "[a]mong those obligations is the duty to avoid threatening or assaulting a relative by marriage (or any other person)."[54]

The court also addressed an issue raised by the U.S. Supreme Court in *Duro*—that non-members are not able to participate in the nation's political processes.[55] The *Duro* Court expressed concern that the defendant's relationship with the Salt River Pima-Maricopa Indian Community was different than that of a tribal citizen and that the defendant did not have a voice in the community: "Petitioner [Duro] is not a member of the Pima-Maricopa Tribe, and is not now eligible to become one. Neither he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima-Maricopa authority."[56] In response to these concerns, the Navajo Nation Supreme Court in *Means* noted that many non-member Indians, including Means, participate in the cultural life of the Navajos and that the defendant also participated in political events, including orchestrating a demonstration within the Navajo Nation.[57] Thus, despite Means' inability to become a Navajo citizen and exercise full citizenship rights, he was still able to participate in other ways within the Navajo Nation and have a voice as a *hadane* within the community.

In *Means*, the Navajo Nation Supreme Court went on to examine the U.S. government's acknowledgement of its jurisdiction over non-member Indians in the Treaty of 1868, analyzing its history and application.[58] The court stated:

> There are two foundations for criminal jurisdiction in the Treaty of 1868, the history of its negotiation, and its application: those who assume relations with Navajos with the consent of the Navajo Nation and the United States are permitted to enter and reside within the Navajo Nation, subject to its laws, and non-Navajo Indians who enter and commit offenses are subject to punishment.[59]

53. *Id.*
54. *Id.*
55. *See id.* at ¶ 47-48.
56. Duro v. Reina, 495 U.S. 676, 688 (1990).
57. *See Means*, 1999 NANN 0000013, at ¶ 48.
58. *Id.* at ¶ 61-67.
59. *Id.* at ¶ 67.

In examining the history, the court noted the purpose of the treaty and concluded that allowing an individual to live in the community and commit a crime would contradict the purpose of the treaty:

> Avoidance of retaliation and revenge is clear in the Treaty of 1868. General Sherman urged Navajos to leave the neighboring Mexicans to the Army, but he told Navajos they could pursue Utes and Apaches who entered the Navajo homeland. The Treaty speaks to the admission of Indians from other Indian nations. The thrust of the "bad men" clause was to avoid conflict. We use a rule of necessity to interpret consent under our Treaty. It would be absurd to conclude that our hadane relatives can enter the Navajo Nation, offend, and remain among us, and we can do nothing to protect Navajos and others from them. To so conclude would be to open the door for revenge and retaliation. While there are those who may think that the remedies offered by the United States Government are adequate, it is plain and clear to us that federal enforcement of criminal law is deficient. Potential state remedies are impractical, because law enforcement personnel in nearby areas have their own law enforcement problems. We must have the rule of peaceful law rather than the law of the talon, so we conclude that the petitioner has assumed tribal relations with Navajos and he is thus subject to the jurisdiction of our courts.[60]

The court found that it had criminal jurisdiction over Means, a non-member Indian, due to his *hadane* relationship with the Navajo Nation.[61] The court stated:

> We return to the basic document which establishes relations between the United States of America and the Navajo Nation. It permitted Navajos to return to their homeland from a concentration camp on the Pecos River in eastern New Mexico. Navajos listened intently on May 28, 1868 when General Sherman explained that they could punish Indians of other nations who entered the Navajo Nation . . . . This court finds that the Chinle District Court has jurisdiction under the Treaty of 1868, the petitioner has consented to criminal jurisdiction over him . . . .[62]

Means established that the Navajo Nation has criminal jurisdiction over non-member Indians not only by virtue of the *Duro* fix, but also through the Nation's inherent authority as a sovereign nation, which was recognized in the Treaty of 1868. With this issue resolved, the question turns to whether the Navajo Nation courts, and tribal courts in general, possess inherent authority, recognized by treaty, to exercise criminal jurisdiction

60. *Id.* at ¶ 76.
61. *Id.* at ¶ 12.
62. *Id.* at ¶ 84-85.

over non-Indians. It should be noted that non-Indians frequently live within Indian territories, are family members of Indian citizens, and obtain the same type of in-law relationship as in *Means*. Nonetheless, the Navajo courts have not yet published an opinion addressing the question whether they have inherent authority to exercise criminal jurisdiction over these non-Indians. The decision in *Means* was not based upon the defendant's political status or citizenship in another nation, but his relationship to the Navajo Nation. It is within reasoning that a non-Indian who has developed a *hadane* relationship with the Navajo Nation may be subject to the Nation's criminal jurisdiction by virtue of the Nation's inherent authority. However, it is not clear whether such inherent authority has been recognized by the Navajo Nation's treaties with the U.S. government. To explore this question further, we turn eastward to the Haudenosaunee nations, located in today's upstate New York, and examine whether the Haudenosaunee nations may exercise criminal jurisdiction over non-Indians based upon their inherent authority, as recognized by the Treaty of Canandaigua.

III. The Treaty of Canandaigua and Tribal Court Jurisdiction

The Treaty of Canandaigua,[63] signed by the Haudenosaunee and the United States in 1794, contains two articles that are important to the jurisdiction discussion. Article II acknowledges that lands reserved by prior treaties are the property of the Haudenosaunee, or Six Nations, and that the United States:

> [W]ill never claim the same, nor disturb them, or either of the Six Nations, nor their Indian friends, residing thereon, and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.[64]

Similarly, Article VII states that the U.S. and Six Nations agree, in order to protect the peace and friendship now established, that:

63. Canandaigua Treaty, *supra* note 31.
64. *Id.*

> [F]or injuries done by individuals, on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: by the Six Nations, or any of them, to the President of the United States, or the Superintendent by him appointed; and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the Nation to which the offender belongs; and such prudent measures shall then be pursued, as shall be necessary to preserve our peace and friendship unbroken, until the Legislature (or Great Council) of the United States shall make other equitable provision for the purpose.[65]

The canons of construction for treaties provide important parameters for our discussion. U.S. Supreme Court decisions dictate that treaties are to be interpreted in light of the context in which the treaty was formed, including the history of the treaty, negotiations, and any practical construction developed by the parties.[66] Treaties are to be construed as Indian representatives understood them at the time of negotiation[67] and liberally interpreted to accomplish the purpose of the treaty.[68] Doubtful or ambiguous expressions are to be resolved in favor of the Indian nation.[69] Just as the Navajo Nation Supreme Court applied these canons in interpreting the Treaty of 1868, one must also apply them in order to properly interpret the meaning of the Treaty of Canandaigua. According to the canons of construction, one must look to the historical context faced by the Haudenosaunee at the time of signing of the Treaty, understand the Treaty provisions as the Haudenosaunee negotiators would have understood them, and resolve any ambiguities in favor of the Haudenosaunee.

Applying the canons of construction set forth in federal Indian law is, however, not without difficulty. Although the U.S. Supreme Court has held that treaties must be interpreted in the manner that Indian representatives understood them at the time of the negotiations, this understanding is only accepted when "the Indian nation can *prove* that its interpretation has a historical basis. And that of course is the trick, because most of the treaty records acceptable in court just happen to be docu-

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65. *Id.*
66. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999).
67. *See* Tulee v. Washington, 315 U.S. 681, 684-85 (1942).
68. *See* Carpenter v. Shaw, 280 U.S. 363, 367 (1930).
69. *See id.*

ments written by Anglo-Americans."[70] The question then arises: how can an Indian nation *prove* that its interpretation has a historical basis if it does not have Anglo-style supporting documents? As it happens, tribal courts have already answered this question. In many tribal courts, questions about tribal traditions or historical accounts of events or activities are resolved by tribal experts or elders who come to court to share their expertise and teach the court about the issue in question.[71] Consistent with this accepted practice, we will look to the Haudenosaunee experts to understand the historical context of the Treaty of Canandaigua, and how the Treaty was understood by the Haudenosaunee negotiators.

At the outset, it is important to understand how the Haudenosaunee viewed treaties in general. As Paul Williams, a scholar on Haudenosaunee treaty-making, has explained, a treaty:

> [I]sn't a written document. It's an agreement. It's a coming together of minds. The written document is merely evidence of that agreement. Usually, it's incomplete evidence. The Haudenosaunee keep a record of the treaties on wampum belts. But nobody says, "That is a treaty." They say, "This helps us remember the treaty," because the treaty, the agreement, is kept in people's minds, the way it was made, in people's minds. And while it may be that details are kept better on paper, people who hold their treaties in their minds keep their treaties *in mind*, and are governed by them and live by them.[72]

In addition to the general Haudenosaunee view of treaties, one must also understand that any treaty after 1613 "would have been an extension of the premise of the 'Guswenta,' or 'Two Row Wampum Belt.'"[73] The Two Row Wampum Belt Treaty was made between the Haudenosaunee and the Dutch in 1613.[74] The wampum belt contains two rows of purple wam-

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70. Robert W. Venables, *Some Observations on the Treaty of Canandaigua*, *in* TREATY OF CANANDAIGUA 1794: 200 YEARS OF TREATY RELATIONS BETWEEN THE IROQUOIS CONFEDERACY AND THE UNITED STATES 84, 87 (G. Peter Jemison & Anna M. Schein eds., 2000) [hereinafter TREATY OF CANANDAIGUA BOOK].

71. Cultural questions often arise concerning custody of children, division of real and person property during a divorce, and wills and estates, as these questions often involve traditional values and laws impacting the court's decision about the proper outcome.

72. Paul Williams, *Treaty Making: The Legal Record*, *in* TREATY OF CANANDAIGUA BOOK 35, 36-37.

73. Venables, *supra* note 70, at 107.

74. Williams, *supra* note 72, at 24.

pum separated by three rows of white wampum.[75] The two rows of purple wampum represent the Haudenosaunee and the Dutch, and the subsequent colonialists who took upon them the Dutch treaties, living side by side, separated by peace and friendship.[76] The separateness of the rows represents that the canoe of the Haudenosaunee and the sailing ship of the Europeans would neither cross nor try to interfere with or steer the other's vessel.[77] In this view, the Haudenosaunee and the colonists were to live side by side in peace, not interfering in each other's government or way of life. "Even now, we use this Two Row Wampum Belt as the basis for all treaties, as we have since that time."[78] Thus, the Haudenosaunee brought to the negotiation of the Treaty of Canandaigua their understanding that the United States and Haudenosaunee exist side by side, as equals, with neither government interfering in the affairs of the other.

In addition to the Two Row Wampum Belt, the Haudenosaunee chiefs who negotiated the treaty were guided by the principles of the Great Law of Peace as taught by the Peacemaker, who formed the Six Nations Confederacy prior to the arrival of the European colonists. The Peacemaker brought the warring Haudenosaunee nations together, the Mohawk, Seneca, Onondaga, Cayuga, Oneida, and subsequently the Tuscarora, into the Six Nations Confederacy and bound them together using the concepts of peace.[79] Peacemaker taught that human beings whose minds are healthy desire peace, and that good minds are capable of resolving disputes peaceably.[80] The purpose of government is to "prevent the abuse of human beings by cultivating a spiritually healthy society and the establishment of peace."[81] Peace is defined as the active striving of humans "for the purpose of establishing universal justice."[82]

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75. *Id.* at 23. *See also* Chief Irving Powless Jr., *Treaty Making*, *in* TREATY OF CANANDAIGUA BOOK 15, 29.

76. Williams, *supra* note 72, at 24.

77. *Id.* at 23.

78. G. Peter Jemison, *Sovereignty & Treaty Rights—We Remember*, *in* TREATY OF CANANDAIGUA BOOK 149, 149.

79. A BASIC CALL TO CONSCIOUSNESS 67 (Akwesasne Notes ed., rev. ed. 1991) [hereinafter CONSCIOUSNESS].

80. *Id.* at 10.

81. *Id.*

82. *Id.*

Moreover, as the government and community strive for peace, decisions are also focused on future generations:

> In any Council, in any decision, the law requires that they ask themselves: what will this do to the seven generations yet to come? What will this do to the natural world? What will this do to peace? These are three lenses through which the lawmakers must see each question.[83]

Thus, all treaty negotiations would focus on maintaining peace through the separation of the Haudenosaunee from the American people, through peaceful relations between the Haudenosaunee and their neighbors, and protecting future generations.

A. Understanding the Historical Context

Prior to 1794, George Washington struggled to address Indian land claims and prevent the Haudenosaunee from joining the Northwest Confederacy of Indians in Ohio who were threatening to go to war.[84] The primary objective of the United States "was to settle the . . . claims of the Six Nations to lands in Ohio [and thus prevent any movement or joinder with the warring Shawnee or Miamis] and the Erie Triangle and to embark on a policy of sincere negotiations and fair payment in land transactions."[85] George Washington did not want the Six Nations to join the Northwest Confederacy because their combined strength could have been insurmountable for the fifteen states.[86] The newly formed Union could not afford another war. In other words:

> The 1794 treaty [of Canandaigua] was a treaty of accommodation, one of military and political necessity. Both parties could put men in the field. Both parties could do battle. Everything was at stake. As a consequence, the father of this country, George Washington, signed an agreement with the Haudenosaunee to forever, in perpetuity, keep peace and friendship among us.[87]

In addition to the threat of war, several other issues were plaguing the Haudenosaunee's relationship with the United States prior to the signing of the Treaty of Canandaigua. The

83. Williams, *supra* note 72, at 36.
84. *See* Powless, *supra* note 75, at 29; Williams, *supra* note 67, at 38.
85. John C. Mohawk, *The Canandaigua Treaty in Historical Perspective*, *in* TREATY OF CANANDAIGUA BOOK 43, 60.
86. *See* Jemison, *supra* note 78, at 152.
87. Chief Oren Lyons (Joagquisho), *The Canandaigua Treaty: A View from the Six Nations*, *in* TREATY OF CANANDAIGUA BOOK 67, 70.

Haudenosaunee had made several treaties since the Revolutionary War.[88] However, there was much confusion regarding these treaties, and the settlers regularly ignored the treaties and continued to encroach upon Haudenosaunee lands.[89] In addition, the 1768 Treaty of Fort Stanwix,[90] which involved a great deal of land loss for the Haudenosaunee, was the result of agreements reached by the United States with young, unauthorized Haudenosaunee warriors, a violation of settled treaty-making rules.[91] New York State also engaged in several land transactions that defied federal law and policy, which stated that only the federal government could engage in land transactions with Indians and that the federal government had the right of preemption.[92] Then New York State and individual state citizens committed a "series of land frauds," leaving even more hard feelings and damaging the relationship between the United States and the Haudenosaunee.[93]

The historical context of the Treaty of Canandaigua is further complicated by the burning issue of widespread murders of Indians by whites.[94] An example of this violence occurred in 1790 when two frontiersmen murdered two Senecas in Northern Pennsylvania.[95] The murder halted surveying of lands acquired in the Treaty of Fort Stanwix and again increased the likelihood of war.[96] Pennsylvania and federal officials who attempted to bring the men to justice did not satisfy the victims' families, as Haudenosaunee customs required blood revenge or compensation.[97] In an address to President Washington in 1790, Cornplanter, Half Town, and Big Tree charged the United States with failure to protect them from intrusion by white set-

88. *See, e.g.*, Treaty of Fort Harmar, Jan. 9, 1789, 7 Stat. 33.

89. *See* Powless, *supra* note 75, at 29. The Treaty of Fort Stanwix of 1784, the Treaty of Fort McIntosh of 1785, the Treaty of Fort Harmar of 1789, and the subsequent 1790 Non-Intercourse Act were all intended to prevent individuals or states from invading or buying Haudenosaunee territory. *See id.* at 29-30.

90. Treaty with the Six Nations at Fort Stanwix, Oct. 22, 1784, 7 Stat. 15.

91. *See* Williams, *supra* note 72, at 39.

92. *See id.* at 37. *See also* The Indian Trade and Intercourse Acts, ch. 33, 1 Stat. 137 (1790); ch. 13, 2 Stat. 139 (1802); ch. 161, 4 Stat. 729 (1834).

93. *See* Williams, *supra* note 72, at 39.

94. *See* Mohawk, *supra* note 85, at 59.

95. *Id.*

96. *Id.*

97. *Id.*

tlers.[98] In a letter responding to the Seneca leaders, George Washington acknowledged the problem of bringing white murderers of Indians to justice, in addition to the other problems plaguing the United States' relations with the Haudenosaunee.[99] This record of white-on-Indian violence illustrates that crime by non-Indians has historically been an important issue for the Haudenosaunee and that negotiations around this issue led to the inclusion of Article VII in the final treaty. Daniel Richter, a scholar of Haudenosaunee history, put it:

> [P]erhaps the best way to understand the Canandaigua Treaty of 1794 is to see it as an effort by its parties to undo some of the damage done in a series of earlier treaties among various Native leaders, the United States, New York, and Pennsylvania—damage epitomized by the competing forces at work.[100]

Chief Irving Powless Jr., an Onondaga Nation Chief, summarizes the historical context behind the treaty negotiations:

> We looked at what was happening to us at that time and the protection that George Washington gave us. He put into law the Non-Intercourse Act and then he said to the Haudenosaunee, "Herein lies your protection." The settlers still came and they still violated the law. We went back to George Washington, Hanadahguyus, and said to him, "Your people are still violating the treaties." George Washington sent out Timothy Pickering to meet with us. We gathered in Canandaigua, New York, in July of 1794. There for a six-month period we discussed the terms of an agreement between our peoples. Many issues were discussed during that six-month period, and these discussions were brought back to our separate nations. On November 11, 1794, we finally signed the treaty. This treaty was between the Haudenosaunee (the Six Nations) and the United States.[101]

B. The Haudenosaunee Negotiators' Understanding of the Treaty

To understand the Treaty of Canandaigua as the negotiators understood it, we must delve into Haudenosaunee law. This law speaks of three types of individuals: Haudenosaunee citizens, "Indian friends" residing and united with the Haudenosaunee, and United States citizens who commit injury.[102] Not coincidentally, these three categories also are found in the

98. *See* WILLIAM N. FENTON, THE GREAT LAW AND THE LONGHOUSE: A POLITICAL HISTORY OF THE IROQUOIS CONFEDERACY 634 (1988).

99. *Id.*

100. Daniel K. Richter, *The States, the United States & the Canandaigua Treaty*, *in* TREATY OF CANANDAIGUA BOOK 76, 77.

101. Powless, *supra* note 75, at 30.

102. *See* Venables, *supra* note 70, at 84.

Treaty of Canandaigua (in Article II).[103] It is important, therefore, to consider how Haudenosaunee law interpreted these three categories and whether the Haudenosaunee could exercise criminal jurisdiction over them.

1. HAUDENOSAUNEE CITIZENS

There is no question that Indian nations may exercise jurisdiction over their own people. Even the United States has acknowledged this right of Indian nations.[104] The basic purpose of Haudenosaunee government is to promote peace and prevent violence,[105] which requires engagement with individuals to restore their Good Minds[106] and facilitate justice. When the Peacemaker united the warring Haudenosaunee nations, he taught that all people have a Good Mind and with a Good Mind people could live in harmony and settle disputes without violence. Using a Good Mind, the Haudenosaunee prohibit or discipline certain types of conduct, such as wife beating, theft, treason, and murder.[107] As an aside, it is worth noting that the federal government has attempted to limit Indian nations' inherent power to regulate the conduct of their own citizens by passing the Indian Civil Rights Act,[108] which limits incarceration for criminal offense to one year and imposes other "due process" requirements.[109] Nonetheless, the federal government has not attempted to interfere with a tribal court's criminal jurisdiction over its own citizens.

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103. *See* Canandaigua Treaty, *supra* note 31. Article VII also addresses Haudenosaunee individuals or citizens who commit injuries upon U.S. citizens; however, that will be left for another discussion.

104. *See* Ex parte Crow Dog, 109 U.S. 556, 571 (1883); Williams v. Lee, 358 U.S. 217, 223 (1959).

105. *See* CONSCIOUSNESS, *supra* note 79, at 10-17.

106. The Good Mind is a Haudenosaunee concept referring to a mind that is healthy, makes good decisions, and has the power to peaceably reason out conflicts.

107. *See* GARROW & DEER, *supra* note 19, at 136.

108. 25 U.S.C. §§ 1301-1303 (2006).

109. *Id.* § 1302(7). However, when applying notions of due process, tribal courts apply their nation's definition of due process. *See* Hopi Tribe v. Mahkewa, No. AP-003-93, 1995 NAHT 0000008, ¶ 33-34 (Hopi App. Ct. July 14, 1995) (VersusLaw) ("The Hopi Tribe is not restrained by due process guarantees in the United States Constitution . . . .).

2. INDIAN FRIENDS

Article II of the Treaty provides that lands are set aside for the Six Nations and their "Indian friends, residing thereon [on recognized Haudenosaunee lands], and united with them in free use and enjoyment thereof."[110] However, the Treaty does not provide a definition of "Indian friends." It is not clear, for example, whether this term includes citizens of a non-Haudenosaunee Indian nation, American citizens adopted into a Haudenosaunee nation, or both. The only explanation offered by the Treaty is the language "residing thereon, and united with them in the free use and enjoyment thereof."[111] Far from clarifying the issue, this phrase simply adds to the confusion. Thus, we must look at how the Haudenosaunee negotiators would have interpreted "friend."

Haudenosaunee law defines "friend" in two ways. First, a non-Haudenosaunee person may be adopted into a Haudenosaunee nation—prior to being adopted, the Great Law simply refers to such a person as a member of a foreign nation, whether he is Indian or non-Indian.[112] Once the person is adopted, he becomes a citizen of the Nation with all its rights and responsibilities and gives up any claim to his former citizenship.[113] There are numerous examples of non-Indians being adopted by the Haudenosaunee, and then becoming valuable citizens and even leaders within different territories.[114] Certainly with the power to adopt, comes the power to regulate conduct. The Great Law requires adoptees to give up the laws of their former citizenship and follow the Great Law.[115] The War Chiefs disciplined new citizens if they committed an offense within the community, and upon the second offense they were expelled from Haudenosaunee territory.[116]

Second, it is possible that a person could become a friend without adoption. If the person arrives with other members of

110. *See* Canandaigua Treaty, *supra* note 31.

111. *Id.*

112. *See* A.C. PARKER, THE CONSTITUTION OF THE FIVE NATIONS OR THE IROQUOIS BOOK OF THE GREAT LAW 49-50 (Iroqrafts reprint 1991) (1916).

113. *Id.* at 50-51.

114. For example, the Mohawk leaders who first settled Akwesasne were former captives from New England who were adopted into the Mohawk Nation.

115. *See* PARKER, *supra* note 112, at 50-51.

116. *See* GARROW & DEER, *supra* note 19, at 80.

an alien nation, following the roots of peace, and agrees to live by the Great Law of Peace, he is allowed to remain.[117] These individuals are not formally adopted, but live peaceably in Haudenosaunee Territory. They do not have a voice within the Council, but may speak through other people or nations.[118] They agree to follow all the provisions of the Great Law, which includes following the principles of the Good Mind and working to keep and restore peace. Inherent in the Great Law is the idea that if an individual commits an offense, he and the victim must be restored to a Good Mind and peace must be restored. It would violate the principles of the Two Row Wampum or Guswentah that the individual could violate the Great Law and flee into the European ship. This would prevent the restoration of peace.

In short, the Haudenosaunee negotiators, experts in the Great Law, would have understood the term "friends," as used in Article II of the Treaty, to include: (1) individuals, both Indian and non-Indian, adopted into a Haudenosaunee nation; and (2) Indians from non-Haudenosaunee nations living among the Haudenosaunee and following the Great Law. The negotiators would have understood these "friends" to be subject to Haudenosaunee regulation of their conduct, including the commission of offenses or crimes. Moreover, they would have understood that the Great Law allows the Haudenosaunee to take necessary actions to address offenses and restore the Good Mind of these individuals.

3. UNITED STATES CITIZENS WHO COMMIT INJURIES

It is less clear whether the Haudenosaunee negotiators would have understood Article II to include non-Indian individuals who had not been adopted by the Haudenosaunee. It is most likely that the Haudenosaunee negotiators would have understood this type of individual to be dealt with separately under Article VII, which contemplates United States citizens who commit injuries to the Haudenosaunee. The Treaty seems to view these individuals as separate from Indian friends. In-

117. *See* PARKER, *supra* note 112, at 30, 50-51. It is unlikely that the Great Law would permit a non-Indian to become a "friend" in this manner, as most alien nations that were adopted in the Confederacy were Indian nations.

118. *See id.* at 51.

cluded in this category are non-Indian settlers who temporarily occupy Haudenosaunee territory and non-Indians who follow the roots of the tree of peace and live within a territory but are not formally adopted into a nation.[119] In either case, the key to this category is that it consists of individuals who have retained their American citizenship.

The question becomes, what type of criminal jurisdiction, if any, does Article VII recognize over these individuals? Again, we must turn to the understanding of the Haudenosaunee treaty negotiators. In the context of the Two Row Wampum and the Great Law, the Haudenosaunee would not agree to any terms that would allow a foreign government to interfere with their government or detrimentally affect the peace of the nations at that time or for future generations. The focus would have been on maintaining and restoring peace once an offense was committed. It is therefore not surprising that the negotiators would agree to notification of the U.S. government when a United States citizen has committed a crime. Notification would allow the U.S. government to discipline its own citizens without interference by the Haudenosaunee government, consistent with the Two Row Wampum. However, the negotiators would not have envisioned allowing an individual to commit an offense and never be disciplined or have peace restored, particularly if that individual would continue to reside within Haudenosaunee territory and the Nation would incur the risk the offense would happen again. Such a result would be contrary to the principles of the Great Law. Keeping in mind that the purpose of Haudenosaunee government is to prevent abuse and promote peace, it is unthinkable that an individual, even if a citizen of another nation, would be allowed to engage in abuse with no consequences.

Article VII contains no language to indicate a concession of Haudenosaunee jurisdiction. The only stipulation contained in Article VII is that "no private revenge and retaliation shall take place."[120] By definition, any regulation or discipline that is based upon the philosophy of the Great Law is far from revenge and retaliation, but rather focused upon restoring the offender's

119. *See* Canandaigua Treaty, *supra* note 31.
120. *Id.*

Good Mind. The perspective of the negotiators would have allowed extradition of offenders to maintain separation. But they never would have understood Article VII to allow for interference in their government's ability to restore peace to an individual who remained in the community or to the community itself.

C. Resolving Ambiguities in Favor of the Haudenosaunee

Any ambiguities within treaties must be resolved in favor of the Haudenosaunee.[121] In analyzing any ambiguities, it is important to keep in mind the purpose of the Treaty, which was to address the ongoing problem of crime and violence, to keep the peace, and to preserve Haudenosaunee land. Bearing these principles in mind, there are three major ambiguities presented by the Treaty that bear upon the question of criminal jurisdiction. First, does Article VII remove the Haudenosaunee's jurisdiction over those who commit misconduct on Haudenosaunee land? Second, what does the Treaty mean when it says that misconduct will be met with "prudent measures?" And third, is the U.S. Supreme Court's *Oliphant* decision, which strips Indian nations of jurisdiction over non-Indian offenders, consistent with the Treaty's provision that the "Legislature of the United States" may make "other equitable provision" for the purpose of addressing misconduct on Haudenosaunee land?

The Treaty's requirement in Article VII that the U.S. government be given notice of wrongdoing on Haudenosaunee land does not imply that the Haudenosaunee must refrain from exercising jurisdiction over the wrongdoer. The Great Law is clear—those who follow the roots of peace, to live under the tree of peace, must abide by the Great Law.[122] There is no provision within the Great Law that would allow for another nation to come in and exercise jurisdiction over a person within Haudenosaunee territory. On the contrary, such interference would directly contradict the premise of the Guswentah. Is it conceivable that the authors of the Treaty envisioned extraditing the non-Indian and returning him to United States' authorities? Most likely, and this would also be consistent with the philosophy of the Guswentah, traveling side by side, but not

121. *See* Carpenter v. Shaw, 280 U.S. 363, 367 (1930) (holding that any ambiguities must be resolved in favor on the Indian tribe).

122. *See* PARKER, *supra* note 112, at 30, 50-51.

crossing. However, it would be unthinkable to allow a person to remain within Haudenosaunee territories and allow another nation to exercise jurisdiction over the person. Thus, if the person is to continue to reside in the territories and not be extradited, the Treaty must be read to permit the Haudenosaunee to exercise jurisdiction and respond to the wrongdoing using its own justice processes.

Article VII also states that, once a complaint is filed with the federal government, "prudent measures shall be pursued."[123] It is clear from the Treaty language that prudent measures cannot include private revenge or retaliation. However, the Treaty does not state that the only prudent measure permitted is to extradite the offender back to federal authorities. On the contrary, the Haudenosaunee would interpret this provision to mean that holding an individual accountable for his conduct through traditional Haudenosaunee processes is permissible as long as there is no revenge or retaliation involved. Typically, the Haudenosaunee would offer a process for the offender to make amends, and this process would include restoring peace to the individual so he does not re-offend as well as making restitution to the victim so peace is restored to the victim and the overall community.

There is often a fear by federal courts that offenders in tribal courts will not be protected by western notions of due process.[124] This fear is unfounded, however, as Haudenosaunee processes include Haudenosaunee notions of "due process" to protect the individual. Everyone has a right to speak.[125] Thus, the offender has the right to tell his side of the story if he chooses to do so. No attorneys are included in a traditional dispute resolution proceeding, as the process focuses on talking things out.[126] However, the offender is not subject to incarceration.[127] Also, because the focus is on restoring peace, there is more emphasis on finding the truth rather than on procedural maneuvering. Moreover, there is much more of a focus on

123. *See* Canandaigua Treaty, *supra* note 31.
124. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).
125. *See* PARKER, *supra* note 112, at 55.
126. *See id.* at 55-56.
127. *See id.*

helping the offender become healthy, which is not traditionally the focus of the western justice system.

Finally, Article VII states that the "Legislature of the United States" may make "other equitable provision" for the purpose of addressing individual misconduct on Haudenosaunee land.[128] The Treaty, however, does not define "other equitable provision" or offer any guidance for what kind of alternative process would be considered acceptable. In the context of the Guswentah, "other equitable provision" must consist of an action that would not interfere with either the United States or Haudenosaunee government.[129]

Since the U.S. Supreme Court's decision in *Oliphant*, however, federal law has explicitly interfered with the Haudenosaunee government's ability to administer justice on its own land. *Oliphant* purports to strip the Haudenosaunee of their authority over non-Indian offenders. At the same time, the Major Crimes Act,[130] which was purportedly enacted to give the federal government the power to prosecute serious crimes on Indian land, has not resulted in the protection of Indian victims.[131] Indian victims are treated very differently, and far less equitably, than non-Indian victims.[132] Despite the federal government's numerous laws and court cases addressing crime and criminal jurisdiction in Indian country, Indians continue to be subject to a much higher rate of crime than non-Indians.[133] Moreover, United States Attorneys continually decline to prosecute cases in Indian country and refuse to share their declination rates.[134] Consequently, Indian victims and nations are less likely to be involved in an equitable dispensation of justice. This is not how the Haudenosaunee negotiators would have interpreted the phrase "other equitable provision." A Haudenosaunee interpretation of "other equitable provision" would never entail a complete removal of jurisdiction over people who

128. *See* Canandaigua Treaty, *supra* note 31.
129. Extradition would be permissible under the Guswentah because it involves returning the other government's citizen to face consequences for their offense under the other government's system of justice. Thus, there is no intergovernmental interference.
130. ch. 341, § 9, 23 Stat. 385 (1885) (current version at 18 U.S.C. § 1153 (2006)).
131. *See generally* Washburn, *supra* note 22; Washburn, *supra* note 19.
132. *See* Washburn, *supra* note 22, at 714-15.
133. *See id.*
134. *See id.* at 733 n.103.

are living within their territories because such an interpretation would violate the Guswentah and principles of the Great Law. In fact, "many Iroquois believe that Article VII constitutes a promise of recognition of parallel legal jurisdiction far greater than they have enjoyed since 1794."[135]

As explained above, United States law requires treaties to be construed and interpreted as Indians would have understood them.[136] Given the Haudenosaunee's understanding of treaties in general, the Great Law, the Guswentah, and the historical context surrounding the signing of the Treaty of Canandaigua, there is little doubt that the treaty negotiators believed they would be able to exercise jurisdiction over individuals who committed misconduct on Haudenosaunee land.

D. The Treaty of Canandaigua in Action

It's nice to sit in the ivory tower of academia and pontificate about using a nation's inherent sovereign powers as recognized by a treaty as a basis for criminal jurisdiction. But what about the real world? How does this affect a Haudenosaunee woman living in Haudenosaunee territory whose live-in non-Indian boyfriend assaults her? Under tribal civil jurisdictional rules, he could be excluded from the territory and a restraining order issued.[137] But it's unlikely that he would be prosecuted under state or federal law. And what if there is some hope to resolve the relationship and a child is involved? Should the child completely lose his father (to exclusion from Haudenosaunee territory) simply because the *Oliphant* Court decided, in a case that occurred thousands of miles away under a completely different historical context, that a tribal court could not exercise jurisdiction over a non-Indian? There must be a better solution to heal and restore the family, if that's the desire of the victim, and keep the community healthy. Using the Treaty of Canandaigua as an example, let's examine how a tribal court[138] might exercise jurisdiction over the offender.

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135. *See* Mohawk, *supra* note 85, at 61.

136. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999).

137. *See* GARROW & DEER, *supra* note 19, at 118 (noting the Navajo Nation courts' use of this tactic).

138. It's important to note that several of the Haudenosaunee nations do not use westernized tribal courts, but still use traditional dispute resolution forums.

Under the philosophy behind the Treaty of Canandaigua, the Haudenosaunee nation and the United States are separate sovereigns and are not to interfere in each other's governance. The offender, as a non-Indian, falls within the provisions of Article VII.[139] No private revenge or retaliation is allowed.[140] A complaint must be made to the United States.[141] Thus, if the Indian nation wanted the individual who committed a domestic violence offense removed or extradited and punished by the federal or state government, they should simply request the removal of the offender.

A real-world success story illustrates how Article VII can work. In 1991, the Onondaga Nation chiefs sent a letter to President Bush, informing the U.S. government of a chemical dump on the Nation's territory.[142] The chiefs stated, "the toxic waste likely came from [United States] citizens," not Onondaga Nation citizens, and invoked Article VII requesting that cleanup occur.[143] One year later, the federal Environmental Protection Agency removed 1,300 drums of solvents and billed a Delaware chemical company.[144] As this was a problem that the Onondaga Nation was not equipped to handle and was not financially responsible for remedying, the federal government was the appropriate entity to resolve the problem. Unfortunately, this process has not been similarly successful in cases of day-to-day criminal activity. The federal government generally has not considered "regular" criminal activity to be serious enough to warrant investigation and prosecution, as illustrated by the discussion above. In these "regular" criminal cases, the "prudent measures" portion of Article VII should allow the Haudenosaunee to deal with the offender using its own justice processes.

These forums, whether they're clan mothers working to resolve the dispute or chiefs, also retain the power and jurisdiction under the Treaty of Canandaigua to exercise jurisdiction over non-Indians.

139. *See* Canandaigua Treaty, *supra* note 31.

140. *Id.*

141. *Id.* Because the federal government has granted New York State criminal jurisdiction, in all likelihood the offender would be turned over to county or state authorities, unless the crime was serious enough to qualify as a federal offense under the Major Crimes Act.

142. *See* Jemison, *supra* note 78, at 155.

143. *See id.*

144. *See id.*

As discussed above, the Treaty of Canandaigua does not prohibit Haudenosaunee jurisdiction over offenders who commit misconduct on Haudenosaunee land. In such cases, the tribal court should give notice to the federal government, as required by the Treaty, that it is exercising jurisdiction over a United States citizen. Notice should include the offense charged, the details of the offense, and any due process procedures in place to protect the accused's rights. It is important for the tribal court to include information about due process protections—the federal government has continually expressed concern about tribal courts exercising jurisdiction over non-Indians because of a perception that these individuals, as non-community members, will not receive adequate due process protections.[145]

Since the Haudenosaunee negotiators envisioned a "prudent measure" under the Treaty to include the restoration of a Good Mind for the offender and victim, the tribal court should focus upon these goals. In a domestic violence case, restoration of a Good Mind may require that the parents no longer live together. However, an appropriate disposition would include measures to heal the offender so he could be a healthy father, provide for the child, and keep the child safe. These measures might include counseling for the offender, a rehabilitation program, community service, restitution to the victim, and whatever else may be necessary to help the individual bring peace back into his life, his family, and those around him.

In addition to restoring a Good Mind for the offender and victim, the tribal court must dispense justice, which may include some form of punishment. Common forms of punishment in tribal court include financial punishment or punishment that requires shaming or requiring the defendant to acknowledge his wrong behavior.[146] Effective forms of shaming include requiring a defendant to request assistance from an elder in becoming healthy, which involves disclosing the wrong behavior, making a public apology, or being temporarily

145. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

146. *See, e.g.*, Pakootas v. Colville Confederated Tribe, No. AP-94-023, 1997 NACC 0000007, ¶ 16, 23 (Colville Ct. App. Mar. 24, 1997) (VersusLaw) (affirming a lower court decision to impose a punishment of $750.00 and a thirty day jail sentence).

banned from tribal activities. Thus the community becomes aware of the offender's behavior and the offender must acknowledge his wrong-doing. In domestic violence cases, physical punishment was traditionally allowed—abusers were sometimes required to hit a hot rock and suffer the hot sparks flying off the stone so they would be reminded never to abuse a woman again.[147] However, this might not be an appropriate form of punishment for non-Indians today as physical punishment is not allowed in the modern western court system. Also, the tribal court should be cautious about incarcerating a non-Indian, as some would argue that incarceration is not a Haudenosaunee form of punishment and is not what the Haudenosaunee negotiators envisioned in agreeing to Article VII.

IV. Concluding Thoughts

It is imperative that tribal court judges and advocates use their own laws to exercise their inherent sovereign powers, as recognized by treaties, to assert jurisdiction over citizens, friends, and even non-Indians. Many treaties address jurisdictional issues, and if nations want to preserve their jurisdictional powers and protect their citizens, they need to exercise these powers. Using the federal government's interpretation of tribal sovereignty, which continually limits the nation's powers to regulate individuals within its territory, will only further the colonization process and limit the nation's ability to protect its citizens. By turning to our own laws and using the federal government's acknowledgement of those laws through treaties, we will be better able to retain our sovereign status and ensure that indigenous justice is present in our communities.

In analyzing treaties, we must ensure that we understand the treaty as the Indian nation, especially the treaty negotiators, understood the treaty. Also, we must understand the Indian nation's philosophy surrounding the treaty. Are there previous treaties that form a foundation for subsequent treaties that address jurisdiction? Furthermore, we must understand the historical context from the perspective of the Indian nation. What

147. *See* SALLY ROESCH WAGNER, SISTERS IN SPIRIT: HAUDENOSAUNEE (IROQUOIS) INFLUENCES ON EARLY AMERICAN FEMINISTS 66 (2001).

problems were occurring prior to the treaty? What was the true purpose of the treaty as illustrated by the historical context? Based on the nation's law, how would they have understood the treaty provisions? Finally, ambiguities are to be resolved in favor of the Indian nation. Thus, analyzing how the nation would interpret the ambiguities based on tribal law is critical. Are there elders who are experts on the treaty who can explain its meaning? Has the Court interpreted the treaty in prior court cases?

All of these steps must be taken to analyze how a treaty impacts Indian nation jurisdiction before beginning to assess whether *Oliphant* or other federal Indian law applies, as the law of the Indian nation is its "law of the land." As we rely upon a nation's inherent sovereign powers, as defined by tribal law and recognized by treaties with the United States, our citizens, friends, guests, and communities will have more peace and become stronger. As our people become stronger, our nations too will strengthen and become what our treaty negotiators were working towards—strong, healthy, and sovereign nations.

21st Century Indians: The Dilemma of Healing

*Carey N. Vicenti**

Note the phenomenon: an Indian jurist and scholar writing to an audience of non-Native jurists about the success (or not) of creating and sustaining non-Indian institutions in the Indian world. If you analyze this phenomenon there are so many things going on. The author may be betraying the secrets and confidences of a group of people to whom he belongs in a quasi-familial way. And the audience bears witness to these disclosures through some twentieth century fascination about the exotic, wondering if the disclosures are authentic. On some levels it is voyeuristic. No one is disposed to ask whether the informant is reliable. (A list of credentials could be produced for the readers but in these cross-cultural regions, Western notions of credentialism are somewhat meaningless, and, in some ways, ethnocentric.) The reflection upon this phenomenon was necessary. In a relativistic world we have to question our points of reference and the nature of our investigations.

In many ways this is a guided tour, and the readers are tourists in Indian country. The author is an Indian guide, and as we depart on this tour there must be understandings at the outset. In spite of the civility of this essay, for instance, there are so many Native peoples who look upon the Western world (and its tourists) with hostility. European-derived peoples have

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always possessed an irrevocable arrogance toward divergent philosophical views.

So let us begin.

Many of the Indian tribes of the United States have set up court systems.[1] Much of that activity began in the late 1800s.[2] It wasn't a voluntary conversion, though. Each tribe had developed ways to deal with discord, transgression of the accepted social order, and harms. Consistent with their world views, they were considered as maladies to be healed through peacemaking and ceremonies. Until the 1880s, it was the general sense of the federal government to take a laissez-faire approach to the internal affairs of Indian peoples.[3] There were occasional interrelations between Indians and non-Indians, personal, social and commercial, but as a general proposition the United States was content to let internal controversies be handled by Indians using their own ways. But during the 1880s Americans were having new ideas about Indians. These ideas were expressed along social and cultural lines outside of—but not ineffective of—Congressional action. The Old West had become saturated with settler population, most of whom hinged their fates upon the acquisition of land—and let us be clear: *Indian* land. As the federal government accommodated those proprietary aspirations it removed the Native population to federally claimed lands reserved for the occupancy of these captive populations.[4] Culturally the Native peoples identified intimately with the lands that were being confiscated and redistributed. An invasive set of cultural values was being applied to these lost lands, a veneer of foreign interests in the capital value of land and its potential commercial products. Indian peoples found themselves on lands that could, at best, be considered lands of retreat and refuge. The willingness of the federal government to allow

1. *See* Nat'l Tribal Justice Res. Ctr., Tribal Court Directory, http://www.ntjrc.org/tribalcourts/tribalcourtdirectory.asp (last visited Jan. 29, 2010) (providing directory of tribal courts).

2. *See* Nat'l Tribal Justice Res. Ctr., Tribal Court History, http://www.ntjrc.org/tribalcourts/history.asp (last visited Jan. 29, 2010) ("The development of tribal courts as they are now known can be traced to . . . the 1880's . . . .").

3. *See* Hope M. Babcock, *A Civic-Republican Vision of* "*Domestic Dependent Nations*" *in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 493-95.

4. *See id.* at 459-61.

them to live as close to an original lifestyle was welcome even in its dearth.

But American social and cultural urges were not containable in that original frontier détente. Sectarian Christian groups felt the crusade-derived need to convert the souls of these captive Native groups. Darwinists of a Chauvinist-American ilk sought to civilize the Indians in the direction of the gentleman-farmer, a notion popularized by Thomas Jefferson and his colleagues. The government responded with its first socio-cultural intrusions into the traditionalist Native world. It began by allowing missionaries to work alongside of the military mission of containment and pacification that was necessary to the reservation policy. Through the Indian General Allotment Act (Dawes Act) of 1887,[5] Native lands were divided into 160-acre "farm" parcels and any excess lands (roughly two-thirds of the original set-aside) was redistributed to non-Indian purchasers as "excess."[6] More troubling—tragic, more precisely—was the adoption of a federal policy to remove all of the children from Native families for a re-education, a brain-washing, into 19th-century settler values for labor, capital, hierarchy, and the white "manifest destiny" to a place of superiority in the emergent American culture.[7]

The European-derived settler populations had stumbled upon peoples who had developed, over many uninterrupted millennia, an entirely divergent world view. Native philosophies consisted of intricate and complex matrices of interrelated ideas that have correlates in contemporary anthropology, sociology, psychology, religion, astronomy, and physics. Through numerous parables and stories the traditional keepers of knowledge meticulously explained to the young the implications of natural and social relations. Their highest achievement was in the formation of an intimate caring society committed to values of mutual respect and concern. The society was interconnected

5. Ch. 119, Sec. 5, 24 Stat. 388, 389 (codified as amended at 25 U.S.C. §§ 331-358 (2006)).

6. *See* 25 U.S.C. § 336 (2006).

7. *See generally* COLIN G. CALLOWAY, FIRST PEOPLES: A DOCUMENTARY SURVEY OF AMERICAN INDIAN HISTORY 358-66 (1st ed. 1999); NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO PRESENT 72, 213-18 (Peter Nabokov ed., Viking Press 1991) (1978); S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 83-90 (1973).

to the natural world, itself an interlocking matrix of natural relations between living beings—birds, animals, rocks, water, mountains, deserts, plants, insects—all of them having a life force. Women and children were acknowledged as spiritual fonts, to be respected as the sources of healthy social life, never to be disregarded, neglected, or abused. Physical power, violence, and retribution were considered to be the instruments of the unhealthy. It was against this socio-cultural backdrop that the U.S. Government then sought to impose the notion of courts and "law" upon these newly congregated captive reservation populations.

A single case involving Indians,[8] though, played a catalytic role in this new philosophy of internal control. On August 5, 1881, a Sioux conflict between Crow Dog and Spotted Tail left the latter dead.[9] The families of the two settled the matter using traditionalist Native principles of restoration and balance.[10] Crow Dog was required to provide for the family of Spotted Tail in the manner that Spotted Tail would have had to if he lived.[11] Many non-Indians viewed this as a form of servitude; the kind recently abolished in the Civil War.[12] Federal authorities sought the death penalty through their criminal courts only to be denied by the Supreme Court of jurisdiction over Indian-on-Indian crimes occurring on Indian lands.[13] The missionary community was outraged at this deference to savagery and sought to have any future violent crimes soundly in federal hands to punish.[14] Congress reacted with the passage of the Major Crimes Act, which created federal jurisdiction over eight crimes that might occur between Indians on Indian lands.[15]

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8. Ex parte Crow Dog, 109 U.S. 556 (1883).

9. *See id.* at 557; *See also* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C.L. REV. 779, 800 (2006).

10. *See* Washburn, *supra* note 9, at 800.

11. *See id.*

12. *See* Hon. Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 737 (2008).

13. *See* Washburn, *supra* note 9, at 801; *Crow Dog*, 109 U.S. at 572.

14. *See* Wahwassuck, *supra* note 12, at 737.

15. Ch. 341, § 9, 23 Stat. 385 (1885) (current version at 18 U.S.C. § 1153 (2006)). This Act has been amended several times to expand the list from the original seven—murder, manslaughter, rape, arson, kidnapping, incest and assault with a deadly weapon—to 18 at present count. *See* 18 U.S.C. § 1153(a). The law is still in existence and though it does not prevent a tribe from passing similar laws, it operates, in effect, to deprive the tribes of criminal jurisdiction as unwitting tribal law

By the end of the century the structure of Native society was irreversibly changed. A foreign people were coercively imposing their cultural values upon Native peoples. These values, though deemed obvious by the dominating captors, were not readily understood by Indians. Their traditional leaders went unrecognized in their rights of authority. Important values of conciliation, wholeness, and harmony were ignored. Most of the children were gone, destined to return (or not) years later, traumatized and scarred by physical, sexual and psychological abuse (later to serve as leaders during years of an American occupation government).[16] Access to traditional places of gathering, hunting, fishing, and contemplation was denied. Their movements were restricted to lands that held little value for sustenance. Moreover, the captors had provided them with unknown foods and clothing. They had been traumatized collectively. As an internal social matter Native peoples were torn between the competing responses of assimilating (and, by implication, collaborating), or silently resisting.

The U.S. Government had imposed a regime that was not well thought out. It was, in essence, a war-originated response. They were an occupying government. They imposed institutions with which *they* were familiar. Containment and pacification were inherent to this mission. The government created misdemeanor courts through the Code of Federal Regulations (CFR Courts).[17] They issued a code of criminal offenses.[18] They had recruited a number of Indians to provide enforcement (the Indian Police—badges, hats, and tunics—and Indian judges—robes and benches).[19] Outward appear-

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enforcement officials yield their prisoners to the demands of the federal law enforcement officials.

16. As Native peoples became more aware of the Boarding School policy they often hid their children to prevent their abduction. *See* TYLER, *supra* note 7, at 88. The federal authorities kept little record of the numbers of children taken away. *Id.*

17. *Id.* at 90-91. *See also* 25 C.F.R. § 11.100 (2009) (establishing Courts of Indian Offenses).

18. *See* 25 C.F.R. §§ 11.400-11.454.

19. *See, e.g.*, 25 C.F.R. § 11.201 (establishing Magistrate Judges for the Court of Indian Offenses); § 11.204 (establishing who appoints Court of Indian Offenses prosecutors).

ances were that civil "order" had been imposed. Jails were built.[20]

This internal meddling all began in the 1880s. By 1914, after the passage of some thirty years of this interference, there were indeed young Native men and women who had learned the boarding school lessons about the "flag" and the "republic for which it stands." During that same time, however, many non-Indians were beginning to recant the song of "civilization": they retreated into ceremonies that took place out of the sight of non-Indians and, otherwise, produced a discourse of anti-assimilation. Edward Sheriff Curtis had been commissioned by J. P. Morgan to photographically document the disappearing Indian.[21] Archaeologists had discovered the mysteries of Mesa Verde and Chaco Canyon. So many Native youth went off to fight in the Great War.[22] By the end of that war a corps of cynical non-Indians was ready to revamp federal Indian policy. On one track non-Natives were looking to do Indians right, as they saw it. On another track Natives were demonstrating a newfound interest in Western forms of governance. And on yet another track the general American population was forming a romanticized nostalgic fondness for some kind of Indian presence as amiable sidekicks, at the very least.

The convergence of these sentiments found expression in the reforms of the Indian New Deal, a Roosevelt concoction.[23] Franklin Delano Roosevelt was aided by John Collier and Felix Cohen, two disillusioned legal realists, who had gained a *suspecting* sympathy for the undiscovered, unknown part of the Indian world.[24] These guys were from "Track 1." Native leaders

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20. *See generally* TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAILS IN INDIAN COUNTRY, 2007 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jic07.pdf (surveying the current state of Indian country jails).

21. *See American Indian in* "*Photo History*"*: Mr. Edward Curtis's $3,000 Work on the Aborigine a Marvel of Pictorial Record*, N.Y. TIMES, June 6, 1908, at BR316 (book review).

22. *See* ARLENE B. HIRSCHFELDER & MARTHA K. DE MONTANO, THE NATIVE AMERICAN ALMANAC: A PORTRAIT OF NATIVE AMERICA TODAY 228 (1993) (noting that approximately 12,000 Native men and women participated in this war).

23. *See* Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-480 (2006)) (commonly referred to as the "Indian New Deal").

24. *See* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 142 (2006) (describing Collier and Cohen's effort to "abandon[ ] the BIA and allow[ ] the tribes to govern their own reservations with federal assis-

had gravitated to the notion of the "self-determination" that had been inadvertently uttered by President Woodrow Wilson in an attempt to define the contours of the post-WWI globe.[25] Just as the people of India had formed a National Congress in anticipation of Indian independence from Great Britain, so too the "Red" Indians of the United States formed a National Congress of American Indians (NCAI) in anticipation of their own independence.[26] These men were from "Track 2." This was a conformist group of Natives who had come to comprehend the size of the new world order and who had pragmatically determined that living as "domestic dependent Nations"[27] was workable. The Indian New Deal offered them that opportunity by enabling tribes to reorganize as either Constitutional governments or as corporations. In either case, the enabling Act—the Indian Reorganization Act (IRA)[28]—as implemented, seated an immense amount of authority in the Secretary of the Interior to accept or reject the tribes' chosen form of governance.[29] The Secretary was aided by Area Directors, who themselves were aided by Indian Agents (later designated as "Superintendents"). A majority of the recognized Indian tribes accepted the offer to reorganize.[30] With so much power remaining in the federal

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tance"); Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 46 (2006) (labeling Collier the "architect of [Indian] reorganization" and detailing some of his proposals).

25. Woodrow Wilson, President of the United States, Fourteen Points (Jan. 8, 1918). The "inadvertence" of it was that his reference to "self determination" was intended for colonized nations and not indigenous peoples.

26. The National Congress of American Indians (NCAI) remains intact today. *See* Nat'l Cong. Of Am. Indians, http://www.ncai.org/ (last visited Jan. 30, 2010). In its original conception it was to be the basis for a legislative representative of *all* Indian tribes in the United States. Having failed in that mission it is now a voluntary organization that is given some credence by federal lawmakers.

27. This phrase first appeared in *Cherokee Nation v. Georgia*, 30 U.S. 1, 25 (1831), as a simile comparing the Cherokee Nation to Nation-states like San Marino, Monaco and the Vatican – countries known at that time for their independent status that was somewhat "dependent" upon their respective surrounding Nation-State for that independence.

28. 25 U.S.C. §§ 461-480 (2006).

29. *Id.* § 476(d) (giving the Secretary of the Interior the authority to approve or disapprove an organizing tribe's constitutions and bylaws).

30. Of the Indian tribes recognized by the federal government at that time 189 tribes voted to accept the IRA and 77 voted to reject it. *See* FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 144-51 (Rennard Strickland et al. eds., Michie rev. ed. 1982). There are currently over 560 recognized Indian tribes. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648, 13,648 (Mar. 22, 2007); Bureau of Indian Affairs, U.S. Dep't of Interior, Frequently Asked Questions, http://

government, the manner of control went from military to political but it remained nonetheless. Guns and stockades were replaced by linguistic positivist instruments—Constitutions, codes, and court decisions—that defined borders and set lawful authorities.

Through the early twentieth century the general American public was content with Native peoples as useful Hollywood props. We made an entire genre of public entertainment. Our arts—baskets, rugs, pottery—were suitable to more affluent American households seeking social validation of their economic status. There was no resentment that the newly reorganized tribes sought out reparations for lost lands, perhaps because of the obscurity and powerlessness of these small populations.

The reorganized tribes had floundered in the early years of the IRA. Although the organic documents set forth prescriptive measures of the exercise of political power, the words were rarely read by the actual political leaders themselves. The documents were instruments of federal stewardship, not internal tribal governance. Very few tribes actually set up court systems. The former CFR courts continued to mechanically operate. But there were reasons for this. Although there were sufficient numbers of Natives taken to boarding schools for re-education, they didn't necessarily embrace, through comprehension, the Western conception of governance. Theirs was an art of mimicry.

IRA governments were made without the necessary discourse that preceded the adoption of the U.S. Constitution. In no reservation could one find the equivalent of the Federalist Papers. The production of a discourse was virtually impossible for a number of reasons: first, generally illiterate, the documents were, to begin with, nothing more than "leaves;" second, the words used to devise a governing system had no correlative translation in the Native languages, e.g., "constitution," "judiciary," "districts," "executive," etc.; third, a federal presence that had an unbroken history of coercion and repression could have little effect in soliciting genuine and contentious responses, no

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www.bia.gov/FAQs/index.htm (last visited Jan. 30, 2010). Most notable among those rejecting the IRA is Navajo Nation. *See* COHEN, *supra*.

less those that federal officials were even willing to listen to; and fourth, there was a rampant and pervasive distrust of any show of federal donative intent—discourse was seen as a futile exercise.

The IRA documents were lacking in all theoretical underpinnings outside the worn federal intention of control. All the newly educated Indians could do was to recite the common patriotic lyrics of an American legal education. The Native public was a mix of traditionalists who carried forth the broken recollection of prior tribal practices and of those who made no attempt to reconcile Western notions of governance with the stark realities of reservation life. As courts came incrementally into existence, they were used not to interpret and describe the contours of Constitutional governance, but to sort through the challenges of enforcing a budding criminal justice system. If boarding school taught anything well, it was to understand retribution and control. On a continent that had no archaeological evidence of prisons, Indian tribes started building jails with regularity—a pleasant sight to their captors.

In some respects one might consider the IRA era to have been the beginning of the Modern Era. Tribes abruptly had elected legislative bodies, elected political leaders, and built new court systems. They hired their own police and had jails. Rarely did a case appear before a tribal court that was not a criminal case. Although there were the appearances of "self-determination," because these Western systems were so new and unfamiliar to the Native officials (and also because federal authorities were unaccustomed to not being in control) much of the decision-making occurred under federal advisement.

It wasn't until the 1960s that a more apparent "self determination" began taking place. This is truly where the Modern Era in federal Indian law begins. From a distant forum the Supreme Court of the United States regularly limited and circumscribed the powers of Indian peoples. By this time generations of Indian people had attended boarding schools. In fact, the boarding schools were beginning to phase out as involuntary institutions of education. The interstate system of highways brought out a more regular interface with the non-Indian world beyond the reservation boundaries. Many Native peoples found themselves becoming culturally fluent in the two cul-

tures of America and of their tribes of birth. This fluency is most frequently overlooked by non-Natives. On the surface these new Natives wore the same clothes, ate the same foods, aspired to the same goals, and purchased the same commercial artifacts as any typical non-Native. They listened to the same music and watched the same movies. From those appearances an observer would get an impression that they held attitudes, norms, mores, beliefs, habits, and values in common with the dominant society. In some instances they did. It is possible that the same socially-held attributes can emerge from two separate historical origins. It is important, however, to note that the Native peoples of the 1960s were challenged by the demands of American modernity while simultaneously adhering to beliefs historically rooted in their peoples' collective experiences. This schizophrenia generated the social directions of tribal peoples: some took part in open vocal protest and physical resistance against the "system"[31] while others propelled tribal governments into an automatonic involvement in economic development and modernization. These two images are what we now stereotypically see of Indians: Indians of resistance and the modern Indian capitalists.

It is the latter vision that perhaps causes the most confusion to non-Indians. These would appear to be the Indians of today. They have governing systems. They have court systems. Across the country many tribes are owners of casinos. They buy cars and stereo systems, computers and iPods. But they also have modern day maladies. There is domestic violence, alcoholism, child abuse, elder abuse, gambling addiction, and methamphetamines . . . all the usual suspects. From the outside it would appear that the transformation of Native America is complete and thorough. We have the same problems and, thus, it would appear, must need the same solutions.

But there are starkly real differences between Native America and the surrounding American Nation-State. In many respects our apparent conformity remains as a cloak for a com-

31. Examples of such resistance include the physical occupations of the village of Wounded Knee, South Dakota in 1972 and the Bureau of Indian Affairs Building in 1973.

plex state of psychological, social, and cultural conditions. Each Native American struggles with issues of identity, tribal allegiance, and clan and family relations. Each faces a series of essentially contested concepts in regards to every aspect of everyday life. There are no true role models for successful assimilation, successful rejection of non-Indian ways, cultural accommodation, or hybridity.

But the world in which the Native American lives is so much more complicated than a typical American would encounter. Each Native person, for instance, has a relationship with three separate governing entities: tribe, federal government, and state.[32] The tribe is both governmental and familial in its relationship to its members. There are internal social and cultural issues that affect the relationship. There are both defined and undefined obligations operating between the member and the tribe. The U.S. Government plays a prominent and intrusive role as it attempts to monitor and guide tribal development. Health care and education fall squarely into federal hands (although the federal budget does not recognize the depth of this responsibility). And then, from afar the Supreme Court of the United States continues to weigh in occasionally on questions related to Indians.[33] A question about a single tribe will be extended to affect all other tribes whether or not they chose to, or could even, participate in the litigation. The relationship with the state generally is one in which the tribal member is ignored or must convince the state of the equality of his or her citizenship to that of non-Indian citizens. Both the federal government and the state government give the impression of immovable and unstoppable largeness and yet operate on the trivialities of bureaucracy: in spite of the uniqueness of each Native circumstance, there is never a governmental attempt to fit the governmental mission to the particular individual, the particular tribe. The federal and state governments are thus ubiquitous but ineffective. The tribal government, struggling

32. An Indian is a member of his or her tribe, a citizen of the United States (by virtue of the Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2006))—passed without any constitutional basis—and a citizen of the state in which he or she resides. *See id.*

33. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2713 (2008) (holding that a tribal court lacked jurisdiction over an Indian business's claim against a non-Indian bank).

for political meaning within the cross-cultural context, finds itself oriented to providing services. These, of course, are socio-cultural observations.

The everyday political forces weigh heavily upon the Native person. Interpersonal relations all begin with questions about existential identity. Though he or she may not identify it as such, life is invaded, colonized, by foreign values. The American media finds its way into every Indian household. It supplies a normative set of aspirations involving dress, food, employment, relationships, and possessions. It supplies a bundle of American narratives, most notable of which, for this essay, are stories about law and the courts. It is this set of parables that set the expectations of the modern Indian in regards to legal process and outcomes. These narratives have had a normative effect upon the formation of Indian courts and upon the people who work in or are served by the courts. Yet, this takes place against a residual backdrop of fragmented traditional values.

A clarification of the federal role is in order. Beginning as early as 1830 the United States, by determination of the Supreme Court (and not based upon any constitutional provision), has assumed a trust relationship over the affairs of Indian tribes. This trust relationship[34] has been compromised regularly by the government's concurrent role as a representative government of the American public. The breached treaties, the boarding school policies and the breakup of Indian landholdings can all be credited to the capitulation to political forces. But the federal role is indeed prominent. Its power and authority remains in reserve, exercised by the Executive branch when politically prompted, or by the Judicial branch when a case comes to the foreground. It would be a mistake to underestimate the power of the Judicial branch of the federal government in Indian affairs. As mentioned above, the trust relationship was identified by the Court and remains as a federal obligation.[35] Many cases that have come before that body have cir-

34. Treatises have been written on the subject of the "trust relationship." For a most notable and succinct resource on this subject, see COHEN, *supra* note 30 (particularly Chapters 2 and 3).

35. *See id.*

cumscribed the jurisdiction and authority of Indian tribes.[36] In the "modern" tribe, political leaders are aware of the threat to the power and authority of Indian tribes presented by day-to-day matters involving non-Indians. Indian courts have hesitated to exercise authority where such exercise raises the possibility of challenge in the federal courts.

Let us consider the year 1978. As a general proposition this year was not very significant to the American public. It was, however, very significant to Indian peoples. On both legislative and judicial fronts, the Indian world was affected by non-Indian action. In that year Congress passed the Indian Child Welfare Act (ICWA).[37] That Act constituted a congressional recognition that Indian children raised in non-Indian households uniformly had developmental issues that were tied directly to Native identity.[38] The Act gave specific prescriptions to state courts, faced with the placement of Indian children, to show preference for placement into Indian homes.[39] In that same year, Congress also passed the American Indian Religious Freedom Act (AIRFA),[40] an Act that as a policy matter specified that the U.S. Government was to respect the Native American practice of their traditional religions.[41] The Supreme Court baffled Native America, however, in that year. It issued a decision in the case of *Oliphant v. Suquamish Indian Tribe*[42] that explained that Indian tribes could not exercise criminal jurisdiction over a non-Indian because to do so would be "inconsistent with their status" as domestic dependent nations.[43] The case was a significant blow to Indian tribes, their cops, and their courts. It requires more analysis.[44] A second case coming out in that same Court term was *Santa Clara Pueblo v. Martinez*.[45] That case recognized the authority of Santa Clara Pueblo to independently

36. *See, e.g.*, *Plains Commerce Bank*, 128 S. Ct. at 2713 (limiting a tribal court's jurisdiction over a non-Indian bank).
37. Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. §§ 1901-1963 (2006)).
38. *See* 25 U.S.C. § 1901.
39. *Id.* § 1911.
40. Pub. L. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. § 1996 (2006)).
41. *Id.*
42. 435 U.S. 191 (1978).
43. *Id.* at 208.
44. *See infra* text accompanying notes 48-49.
45. 436 U.S. 49 (1978).

determine what meaning it would ascribe to the federally imposed phrase "equal protection of the laws."[46]

Taken as a whole these federal developments energized the two competing components of tribal society. We entered the post-modern realm.

Oliphant could not be a greater example of the persistence of colonialism. Not only were tribes assigned the status of "domestic dependent nations" without a single constitutional basis, but they were being told that the exercise of this kind of power was somehow "inconsistent" with that extraconstitutionally[47] assigned status: it was an imperial decree lacking any rational explanation. All jurists know that the application of the calculus of the criminal law to an accused does not change to suit the race of the defendant. The decision was more revelatory of the distrust that non-Indians had regarding the capacity of Natives to conduct criminal proceedings, but also of a suspicion that Indians might have racial biases regarding non-Indian criminals. And flipped around the *Oliphant* decision somewhat said that it was OK for Indians (even though they too are American citizens) to be subject to the suspected defective guarantees of Indian criminal process, but not for non-Indians to be subject to that process.

Martinez, by contrast, signified a recognition that in a culturally relativistic world it was impossible to determine what meaning could be ascribed to the phrase "equal protection of the laws." Coupled with the legislative signals that Indian tribes should be kept numerically intact (the ICWA) and that Indian religions should be kept intact (the AIRFA), Native communities were given to believe that their traditional ways were

46. *Id.* at 65-66. In 1968, Congress passed the Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 25 U.S.C. §§ 1301-1303 (2006)). This Act required Indian tribes to afford to all "persons" governmental protections to "rights" enumerated therein. *See* 25 U.S.C. § 1302. Most of the rights track the language of the first eight amendments to the U.S. Constitution with minor departures, for instance, that it does not guarantee a right to bear arms (to the one population remaining in America that has regular reliance upon wild game as a source of food and sustenance) and does not prohibit the establishment of a religion (many tribes advocated that their theocracies would be threatened by such language). The "equal protection of the laws" language came from this Act. *Id.* § 1302(8).

47. This description comes from FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 49 (1995). It may be a mere polite attempt to avoid the term "unconstitutional."

indeed valid forms of social organization contrary to original colonial calculations.

For those Natives who had become attuned to a colonial regime they merely had to obey *Oliphant*. The colonial formula still remained intact in large part: Indians were being educated in non-Indian operated schools, tribal leaders were converting tribal economies into capital-pursuit machines, the IRA governments remained intact, and the tribal courts continued to operate.

So our tour requires a moment of reflection.

We don't really know what we're doing here at the beginning of the 21st century; not the Indians, and not the people who think they'd like to help us. Although the United States shares with its domestic dependent partners problems of poverty, drug trafficking, alcoholism, domestic violence, and crime, we cannot be certain that the causes of such are the same. A growing movement of Native scholars has pointed out that our unique problems stem from our status as colonized peoples and the traumatic processes by which we were colonized.[48] Indian peoples are on a quest for independence, social cohesion, and cultural preservation. The individual Indian is seeking identity in a globalized society. We have learned the painful lesson in the field of medicine that a misdiagnosis of a human medical condition can cause iatrogenic repercussions. The focus of the U.S. Department of Justice (DOJ) and the Department of the Interior (DOI) (home to the Bureau of Indian Affairs (BIA)) in recent decades on building court and social welfare systems that replicate Western non-Indian approaches mindlessly continues the process of colonization, ignorant of its iatrogenic potentials. In spite of the willingness of Native leaders to accept the monies and programs offered by DOJ, DOI, and other outsiders, this complicity should be viewed as the gestures of an ailing patient. Best intentions on everyone's part have emerged in advance of the wisdom needed to find proper modes of healing.

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48. *See, e.g.*, EDUARDO DURAN & BONNIE DURAN, NATIVE AMERICAN POSTCOLONIAL PSYCHOLOGY 1 (1995) ("[T]he pain felt by many native individuals . . . [is] a direct result of the colonization process."); Lisa M. Poupart, *The Familiar Face of Genocide: Internalized Oppression among American Indians*, 18 HYPATIA 2, 86-100 (2003).

Tribal courts have, thus, adopted a Western model of justice for use in the Indian world. It calls upon the theories of deterrence, restraint, retribution, and rehabilitation to advise its decisions in regards to transgressions against a tribally adopted "legal" code. From the view of an outsider, with the increasing complexity of Indian tribal economic development, the continued construction of jails, the growing proliferation of treatment programs, and the pervasive presence of social welfare initiatives, Native peoples appear to be on a trajectory aimed towards dealing with their maladies. But that is illusory. Dramatic decreases in quantitative measures of crime and violence are not appearing.[49] To the contrary, gang-related activity on reservations is on the rise.[50] Alcoholism rates are unchanged.[51] Domestic violence is pervasive and continuous.[52] Educational accomplishment is static.[53] Methamphetamine, which in the past was unknown, is now a common source of human decay in tribal communities.[54]

And then there are the hidden qualitative indicators. The once common extended family is rapidly facing entropy, dissembling its healthy role in providing normative guidance to young people. With the invasive ubiquity of Western popular culture young people now face a fate of anomie, identity confusion, and the resulting symptoms of substance abuse and violence.[55] Native societies suffer the erosion of previously healthy cultural systems, practices, beliefs, norms, and mores.

Our tour is at its end. The history recited above has been largely from the perspective of the colonized. We see in you—our sympathetic tourists—a set of jurispathic[56] automatons ex-

49. *See, e.g.*, STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/aic02.pdf.

50. *See* DURAN & DURAN, *supra* note 49, at 43.

51. *See id.* at 24.

52. *See id.* at 35.

53. *See id.* at 24 ("[S]chool dropouts are rated as high as 70 percent in some [Native American] communities.").

54. *See* Dennis Wagner, *Meth lays siege to Indian country*, USA TODAY, Mar. 30, 2006, *available at* http://www.usatoday.com/news/nation/2006-03-30-meth_x.htm.

55. *See* DURAN & DURAN, *supra* note 49, at 32.

56. "Jurispathic" refers to any instance where "courts . . . kill law created by communities." *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 732 (1989).

pressing an interest to help us, but we also sense that that help is tainted by your foreign psychology. Do not mistake, however, that as colonizers there exists an obligation to aid, to provide reparations to the once-colonized populations of Native America. It is, in fact, the recognized law.[57] The question is how to do so without recklessly interfering with or experimenting with the lives of tribal peoples.

The answer is complex and comprehensive. Non-Indian policy makers must start with a legislative inquiry into the nature of internalized oppression and historical trauma—two prominent prongs in a Native-originated scholarship regarding the effects of colonialism. Programs like "Cops on the Beat," "Weed and Seed," and Drug Courts treat symptoms and not causes: innovated support means suspending federal quantitative reporting requirements, i.e., better crime and violence statistics, and looking for qualitative assessments that are developed by the tribal peoples themselves. Movements like "Peacemaking" that so many Natives now pursue must be given open opportunities to flourish. Native cultural reinvigoration must have the capital to bring to fruition Native cultural projects involving spirituality, healing, language, and education. The educational regime of the entire country must be reassessed and altered to allow for a new consciousness regarding American Indians.[58] We must afford functional avenues to protect Native sacred sites, to restore to Indian tribes their cultural patrimony and the remains of their ancestors, to enable them to meaningfully engage in traditional spiritual practices by giving unfettered access to eagle feathers and all other instruments and sacraments of our beliefs.[59] We must allow ourselves to see justice in terms not of "law" but of healing as was the axiom of our ancestors.

It is the general world view of Native America that crime and violence are the symptoms of societal sickness. The history

57. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (recognizing the legal obligation to serve as a trustee in the federal government). More specifically, the Court declared that tribes are "domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." *Id.*

58. *See generally* SPIRIT & REASON: THE VINE DELORIA, JR., READER 129-88 (Barbara Deloria et al. eds., 1999).

59. Most notably, the cactus-sacrament Peyote.

of our dealings with non-Indians has left many of our traditions destroyed and shattered. The duty to restore those traditional is created by the surviving attitudes, beliefs, norms, and mores of our peoples. How the restoration occurs is a matter for our internal discourse. It should be enough for outsiders to know that many of us reject Western notions of justice.

"Justice" is not the exclusive domain of the court system when we are concerned about the conflict of two cultural traditions. "Equal rights" must be redefined to include equal opportunity, as much as is attainable in the American pluralistic matrix, to preserve one's cultural heritage. Native peoples aspire to repose and peace. "Without justice there can be no peace."[60]

60. Martin Luther King, Jr., Address at the Santa Rita Rehabilitation Center (Jan. 14, 1968).

The State of Pretrial Release Decision-Making in Tribal Jurisdictions: Closing the Knowledge Gap

*John Clark**

Pretrial release decisions are made thousands of times a day in federal, state, municipal and tribal courts. The decision, one of the most important in the processing of a criminal case, must also be made quickly. Within hours of arrest, the judicial officer must weigh the defendant's presumption of innocence against the interests of society in public safety and the return of the defendant to court to face the charges. Detaining a defendant who could be safely released leads to unnecessary use of an expensive resource—a jail bed. Releasing a defendant who poses high risks could harm the safety of the community.

Much has been written about the state of pretrial release decision-making in federal, state and municipal courts, including its historical development,[1] descriptions of current practices,[2] highlights of best practices,[3] data on outcomes,[4] and

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1. *See, e.g.*, Wayne H. Thomas, Bail Reform in America (1976); John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. Crim. L. & Criminology 1 (1985).

2. *See, e.g.*, Marie VanNostrand & Gena Keebler, Office of the Fed. Det. Tr., U.S. Dep't of Justice, Pretrial Risk Assessment in the Federal Court (2009), *available at* http://www.luminosity-solutions.com/publications/Pretrial%20Risk

research on evidence-based practices.[5] Very little information, however, is available regarding pretrial release decision-making practices in tribal courts. This is so even though efforts have been made in recent years to learn more about how justice is administered in tribes. In 2002, the Bureau of Justice Statistics of the U.S. Department of Justice conducted a census of tribal justice agencies.[6] That census gathered detailed and very useful information regarding tribal law enforcement, court, and correctional practices—including the availability of probation and other intermediate sentences for those convicted.[7] The census, however, included no questions regarding pretrial release decision-making.

But tribal courts, like their counterparts in federal, state, and local systems, must address the issue of how to assure the safety of the community pending adjudication of the charges and appearance of the accused in court.

What limited information is available suggests that tribal courts may be having difficulty in addressing these issues. According to the Bureau of Justice Statistics, the number of in-

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%20Assessment%20in%20the%20Federal%20Court%20Final%20Report.pdf; John Clark & D. Alan Henry, *The Pretrial Release Decision*, 81 JUDICATURE 76 (1997); JOHN CLARK & D. ALAN HENRY, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PRETRIAL SERVICES PROGRAMMING AT THE START OF THE 21ST CENTURY: A SURVEY OF PRETRIAL SERVICES PROGRAM (2003), *available at* http://www.ncjrs.gov/pdffiles1/bja/199773.pdf.

3. *See, e.g.*, BARRY MAHONEY ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL (2001), *available at* http://www.ncjrs.gov/pdffiles1/nij/181939.pdf.

4. *See, e.g.*, THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS: STATE COURT PROCESSING STATISTICS, 1990-2004 (2007), *available at* http://www.in.gov/idoi/files/US_Dept_of_Justice_Pretrial_Release_Report.pdf; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING, 2002: WITH TRENDS 1982-2002 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fccp02.pdf.

5. *See, e.g.*, John Clark, *A Framework for Implementing Evidence-Based Practices in Pretrial Services*, *in* NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, TOPICS IN COMMUNITY CORRECTIONS: APPLYING EVIDENCE-BASED PRACTICES IN PRETRIAL SERVICES 3, 3 (2008), *available at* http://nicic.org/Downloads/PDF/Library/022997.pdf; Michael R. Jones & Sue Ferrere, *Improving Pretrial Assessment and Supervision in Colorado*, *in* NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, TOPICS IN COMMUNITY CORRECTIONS: APPLYING EVIDENCE-BASED PRACTICES IN PRETRIAL SERVICES 13, 13 (2008), *available at* http://nicic.org/Downloads/PDF/Library/022904.pdf.

6. *See* STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf.

7. *See id.*

mates confined in Indian country[8] jails was up 24 percent from 2004 to 2007.[9] Twenty-two percent of Indian country jails are operating above 150 percent capacity, including 7 percent that are operating above 300 percent.[10] Of all inmates confined in Indian country, 41 percent are awaiting adjudication of their charges.[11]

Conditions of confinement in Indian country jails run by the Bureau of Indian Affairs (BIA) have come under sharp scrutiny. A 2004 assessment of these jails by the Inspector General's Office of the U.S. Department of the Interior described Indian country jails as extremely unhealthy and unsafe facilities, with inmates sleeping on mats on the floor because facilities were holding two to three times their capacity.[12]

This article seeks to pull together information from several sources to assess what is known about the state of pretrial release decision-making in tribal courts and to identify the information needed to close any gaps in knowledge that remain. It reviews tribal appellate court case law on pretrial release decision-making, matches data from a census of tribal justice agencies with data from a survey of jails in Indian country to assess the frequency with which pretrial release decisions must be made in tribal courts, and presents results from focus groups and a survey of tribal courts that handle criminal cases to assess the issues they face in pretrial release decision-making.

This article finds that there is very limited case law from tribal appellate courts on pretrial release decision-making; that the criminal caseloads of tribal courts are very low—500 or fewer criminal cases a year in almost three-quarters of the tribes; and that the populations of tribal jails are small—only eight out of 41 jails hold more than 50 inmates. Notwithstanding the relatively small volume, about a third of tribal jails were

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8. "Indian country" is a statutory term that includes all lands within an Indian reservation, dependent Indian communities and Indian trust allotments. *See* 18 U.S.C. § 1151 (2006).

9. *See* TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAILS IN INDIAN COUNTRY, 2007 1 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jic07.pdf.

10. *Id.* at 5.

11. *Id.* at 6.

12. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF INTERIOR, "NEITHER SAFE NOR SECURE": AN ASSESSMENT OF INDIAN DETENTION FACILITIES 50 (2004), *available at* http://www.doioig.gov/upload/IndianCountryDetentionFinal%20Report.pdf.

operating at or above capacity. The focus group and survey responses, although limited to just 29 tribes, revealed a range of experiences among the tribes in the percent of defendants who are detained before trial and how long-detained defendants remain in jail awaiting disposition of their charges.

Background

Several factors come into play in defining the bounds of this inquiry.

The Existence of Criminal Courts

There are about 560 federally-recognized tribes in the United States.[13] Most of these tribes do not operate criminal courts, leaving all aspects of the prosecution of a criminal case, including pretrial release decision-making, to federal or state courts. According to the 2002 census of tribal justice agencies, 188 tribes operated a court on their reservation; of these, 158 handled criminal cases.[14] Thus, any inquiry into the state of tribal pretrial release decision- making must confine itself to those tribes that operate criminal courts.

Jurisdictional Issues Relating to Tribal Criminal Courts

The jurisdiction over a crime committed in Indian country has been described as "a confusing maze of rules and restrictions," where jurisdiction can be determined by the state the reservation is located in, the nature of the offense, and the identity of the accused.[15] Federal law treats reservations differently depending on where they are located. One set of federal laws establishes concurrent federal and tribal jurisdiction over Indians who are accused of committing offenses on tribal land.[16] But a separate federal law transfers federal jurisdiction over crimes committed by Indians on tribal land to a select group of states.[17] These so-called Public Law 280 states include: Alaska,

13. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648, 13,648 (Mar. 22, 2007).
14. *See* PERRY, *supra* note 6, at *iii*.
15. *See* CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 76 (2004).
16. *See* 18 U.S.C. §§ 1152-1153 (2006).
17. *See* 18 U.S.C. § 1162 (2006).

Arizona, California, Florida, Idaho, Iowa, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington, and Wisconsin.[18] To complicate matters further, state jurisdiction within these Public Law 280 states varies, and several of these states include individual tribes that are excluded from state jurisdiction, reverting instead to concurrent federal and tribal jurisdiction.[19]

The nature of the offense comes into play in determining jurisdiction because of a provision in the Indian Civil Rights Act (ICRA),[20] passed by Congress in 1968. The provision prohibits tribal governments from imposing "for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both."[21] As a result, tribal criminal courts typically confine themselves to hearing misdemeanor and traffic cases, leaving felony cases to the appropriate federal or state authority.

As to the role of the identity of the accused in determining jurisdiction, tribes do not have the authority to prosecute non-Indian defendants.[22] Thus, a non-Indian arrested for an offense committed on tribal land will be prosecuted, if prosecution is brought, in either federal or state court.[23]

The Legal Framework of Pretrial Release Decision-Making

The legal framework for the pretrial release decision in any jurisdiction is defined through provisions of the jurisdiction's constitution and statutes, court rules, and case law. In tribal jurisdictions, the legal framework may also be defined by customs and traditions, some of which may not be recorded in writing.

The pretrial release decision is implicated in at least three amendments to the U.S. Constitution. The Fourth Amendment

18. *See* CAROLE GOLDBERG & HEATHER VALDEZ SINGLETON, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PUBLIC LAW 280 AND LAW ENFORCEMENT IN INDIAN COUNTRY 3 (2005), *available at* http://www.ncjrs.gov/pdffiles1/nij/209839.pdf.

19. *See id.*

20. 25 U.S.C. §§ 1301-1303 (2006).

21. 25 U.S.C. § 1302(7).

22. [*Ed. Note* – for an article arguing that tribes may assert criminal jurisdiction over non-Indian through their Treaty powers, see Carrie E. Garrow, *Treaties, Tribal Courts, and Jurisdiction: The Treaty of Canandaigua and the Six Nations' Sovereign Right to Exercise Criminal Jurisdiction*, in this issue.]

23. *See* PERRY, *supra* note 6, at 65-79.

prohibits "unreasonable searches and seizures."[24] In 1975, in the case of *Gerstein v. Pugh*,[25] the U.S. Supreme Court held that this provision of the Fourth Amendment requires that a person arrested without a warrant must be brought before a judicial officer promptly for a probable cause determination as a prerequisite to continued restraint of liberty following an arrest.[26] In 1991, in the case of *County of Riverside v. McLaughlin*,[27] the Court ruled that the probable cause determination must be made within 48 hours of arrest.[28]

The Fifth Amendment provides, in part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[29] Relating to the issues of pretrial release and detention, the U.S. Supreme Court has held that punishment before trial violates due process,[30] but that the detention provisions of the federal Bail Reform Act of 1984—which allow a defendant to be detained without bail in certain limited situations[31]—comports with due process requirements given the procedural protections built into the law.[32]

The Eighth Amendment reads, in part, that "[e]xcessive bail shall not be required."[33] The U.S. Supreme Court has never directly defined what the term "excessive bail" actually means, but in dicta in a 1951 case, the Court noted that "[b]ail set at a figure higher than an amount reasonably calculated to [assure the defendant's appearance in court] is 'excessive' under the Eighth Amendment."[34]

Tribal courts are not bound, however, by the rulings of the U.S. Supreme Court or any other federal court on U.S. constitutional issues, including what constitutes an unreasonable

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24. U.S. CONST. amend. IV.
25. 420 U.S. 103 (1975).
26. *Id.* at 126.
27. 500 U.S. 44 (1991).
28. *Id.* at 56.
29. U.S. CONST. amend. V.
30. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").
31. 18 U.S.C. §§ 3141-3150 (2006).
32. *See* United States v. Salerno, 481 U.S. 739, 741 (1987).
33. U.S. CONST. amend. VIII.
34. *See* Stack v. Boyle, 342 U.S. 1, 5 (1951) (citing United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926)).

seizure, lack of due process, or excessive bail.[35] While these terms do appear in the ICRA as well as in many of their own constitutions, each tribe is free to interpret these terms as they see fit.[36]

The next legal authority for pretrial release decision-making can be found in the statutes and court rules of the jurisdiction. Many tribes have statutory language addressing the pretrial release decision. An analysis conducted in 2008 of tribal pretrial release statutes and court rules identified many tribes that have provisions as detailed as any state bail statute, addressing every step of the decision-making process from release on citation in lieu of a custodial arrest to release pending appeal of a conviction.[37] Several other tribes, however, have very limited provisions.[38]

Finally, pretrial release decisions are also governed by case law. There have been hundreds of federal appellate court decisions, including some by the U.S. Supreme Court, that address the pretrial release decision, and thousands of decisions relating to state pretrial release decision-making practices. For the past 32 years, these decisions have been identified, analyzed and summarized on a regular basis.[39]

The National Tribal Justice Resource Center, through its web site, lists tribal appellate court opinions on the full range of issues confronting these courts.[40] But these opinions have never been analyzed to assess the state of tribal case law as it relates to pretrial release decision-making.

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35. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.").

36. Individuals can, however, bring habeas corpus proceedings in federal court to enforce the ICRA. *See* 25 U.S.C. § 1303.

37. *See* JOHN CLARK, PRETRIAL JUSTICE INSTITUTE, A GUIDE FOR DEVELOPING TRIBAL CODES FOR PRETRIAL RELEASE DECISION MAKING 43-134 (2008), *available at* http://www.pretrial.org/Docs/Documents/tribal%20codes.pdf.

38. *See id.*

39. These cases are regularly summarized in *The Pretrial Reporter*, a bimonthly publication of the Pretrial Justice Institute. *See, e.g.*, 35 NO. 4 THE PRETRIAL REP. 1 (July/Aug. 2009), *available at* http://www.pretrial.org/Docs/Documents/PTRJulyAug09.pdf.

40. *See* National Tribal Justice Resource Center, Tribal Court Opinions, Tribal Justice System Rulings, http://www.ntjrc.org/triballaw/opinions.asp (last visited Jan. 18, 2010).

Methodology

This assessment of the state of pretrial release decision-making in tribal jurisdictions is drawn from the following:

- A comprehensive review of tribal case law relating to pretrial release decision-making;
- Matching findings from the 2002 Bureau of Justice Statistics census of tribal justice agencies with findings from the 2007 Bureau of Justice Statistics survey of jails in Indian country; and
- Focus group meetings and a survey of tribes.

Review of Case Law Relating to Pretrial Release Decision-Making

The web site of the National Tribal Justice Resource Center contains 1,816 court opinions from 18 tribes.[41] A word check was conducted on the terms "bail" and "pretrial release." Thirty-two cases were identified that contained the word "bail" and 79 that contained either "pretrial" or "release." Each of these cases was reviewed to determine which were relevant to pretrial release decision-making.

Matching Census of Tribal Justice Agencies Data with the Survey of Jails in Indian Country

Census data were used to identify the tribes that have tribal courts that handle criminal cases, and how many cases they handle. The census identified 157 tribes that have courts that handle criminal cases—however, the census did not include Alaska Native tribes and villages.[42] Of the 157 identified tribes, criminal case filing information was available for 144.

Jail survey data[43] were used to identify the capacity of jails in Indian country, the numbers housed in those jails, and the percent of the jail population comprised of unconvicted inmates.

The jail population data were matched with the census data showing which tribes have criminal courts. Of the 157 tribes with criminal courts, 43 percent ran their own jails, 20 percent used Bureau of Indian Affairs jails, 33 percent relied

41. *See id.*
42. *See* PERRY, *supra* note 6, at 19.
43. *See generally* MINTON, *supra* note 9.

upon county jails, and four percent had no access to jail facilities.[44]

Focus Group and Survey

Three focus groups of tribal justice leaders were conducted—one at the 2007 National Training Conference for Criminal Justice and Community Leaders in Green Bay, Wisconsin, and the other two at the 2007 Tribal Justice and Safety Conference in Santa Ana Pueblo, New Mexico. All tribal justice leaders attending these conferences were invited to attend the focus groups. Approximately 50 tribal justice leaders participated, representing 19 tribes.

Table 1. Tribes Participating in Focus Groups

Name of Tribe	Location of Tribe
Cheyenne River Sioux	South Dakota
Chippewa Cree	Montana
Comanche Nation	Oklahoma
Confederated Salish and Kootenai Tribes	Montana
Confederated Tribes of the Chehalis	Washington
Confederated Tribes of the Umatilla	Oregon
Gila River Indian Community	Arizona
Havasupai	Arizona
Hualapai	Arizona
Kalispel Tribe of Indians	Washington
Menominee Tribe	Wisconsin
Navajo Nation	Arizona, New Mexico, Utah
Pueblo of Acoma	New Mexico
Pueblo of Zia	New Mexico
Standing Rock Sioux	North Dakota, South Dakota
Southern Ute	Colorado
Turtle Mountain Band of Chippewa	North Dakota
Ute Mountain Tribe	Colorado
Zuni Tribe	New Mexico

44. *See infra* app. Table A-1.

To reach other tribes not participating in the focus groups, a brief survey was sent to the tribes identified in the 2002 census of tribal justice agencies as having tribal courts that handle criminal cases, excluding the 19 tribes that had participated in the focus groups. About 140 surveys were sent. Also, since the 2002 census did not include Alaska, the survey was sent as well to the 35 Native tribes and villages located in Alaska with no foreknowledge of whether these tribes and villages had criminal courts. The survey contained the same questions that were asked of the focus group participants. Tribes that did not respond to the first request for information were contacted a second time. Ten tribes responded to this survey.

Table 2. Tribes Participating in the Survey

Name of Tribe	Location of Tribe
Choctaw Nation	Oklahoma
Moapa Band of Paiute Indians	Nevada
Native Village of Kwigillingok	Alaska
Northern Cheyenne	Montana
Pueblo of Picuris	New Mexico
Pueblo of Santa Clara	New Mexico
Pueblo of Taos	New Mexico
Te-Moak Tribe of Western Shoshone	Nevada
Traditional Village of Togiak	Alaska
Yavapai-Apache Nation of the Camp-Verde Reservation	Arizona

Combining the tribes contacted through the focus groups and those responding to the survey, information was collected on a total of 29 tribes that have their own courts that handle criminal cases. With such a small response rate—29 out of 157—these 29 responding tribes cannot be said to be representative of the 157 that handle criminal cases. But, as noted, very little is known about pretrial release decision-making in tribal courts, so any data, however limited, can be useful in efforts to begin closing this knowledge gap.

Analysis

Findings from Case Law Review

The review of tribal case law suggests that tribal appellate courts have not been called upon often to resolve challenges to pretrial release decisions of tribal trial courts. The review identified only three appellate court decisions with relevance to pretrial release decision-making.[45] In one, the Supreme Court of the Navajo Nation was asked to address the issue of whether the trial court's decision to detain a defendant without bail without entering detailed written findings of fact for the denial of bail represented an unreasonable seizure of the defendant.[46] The Court noted that Navajo Nation court rules require that, in deciding to detain a defendant without bail, the court make a finding that "the defendant is dangerous to public safety or that the defendant will commit a serious crime, or will seek to intimidate any witness, or will otherwise unlawfully interfere with the administration of justice if released," and that the court must state its reasons for the record.[47] The Supreme Court noted that there was no requirement that the reasons be stated in writing.[48]

In another case involving unreasonable seizure, the Colville Confederated Tribes Court of Appeals addressed whether a defendant's rights were violated when he did not receive a probable cause hearing within 48 hours of arrest.[49] In ruling that there was no violation, the Court dismissed the defendant's argument that the *Gerstein* and *Riverside* rulings of the U.S. Supreme Court should apply to the tribal court:

> Just as the United States is the ultimate authority on how the Bill of Rights applies to its citizens, so too is the Colville Tribe the authority on how the [ICRA] applies to its members and others over whom it rightfully exercises jurisdiction. Through its Law and Order Code and through court practices over many years, it is clear that the Tribe does not require a probable cause determination before the Court within 48 hours of arrest. Instead, the Tribe has found that the requirements of the ICRA, as well as its

45. *See* Apachito v. Navajo Nation, 8 Navajo Rptr. 339 (Navajo 2003); Williams v. Colville Confederated Tribes, No. AP99-003, 2002 NACC 0000008 (Colville Ct. App. Apr. 30, 2002) (VersusLaw); Norris v. Hopi Tribe, No. 98-AC-000007, 1998 NAHT 0000020 (Hopi App. Ct. Nov. 23, 1998) (VersusLaw).

46. *See Apachito*, 8 Navajo Rptr. at 343.

47. *See* NAV. R. CR. P. 15(d).

48. *See Apachito*, 8 Navajo Rptr. at 345.

49. *See Williams*, 2002 NACC 0000008, at ¶ 20.

> own civil rights statute, are satisfied by an initial appearance within 72 hours of arrest.[50]

In a case that implicated due process, the Appellate Court of the Hopi Tribe ruled that the trial court violated the defendant's due process rights when it refused to release the defendant on personal recognizance without stating why a money bail was needed to assure the defendant's appearance at trial.[51] As the court noted:

> The Hopi notion of due process encompasses the idea that bail should not be punitive. Fundamental fairness requires the court to restrict an individual's liberty interest before trial no greater than the extent necessary to advance the regulatory goals of the Hopi bail scheme. Because assuring the presence of the accused in court remains the central concern of the bail system, a trial judge should impose a bond as a condition of pre-trial release only after determining that the defendant is not likely to appear at trial.[52]

No cases could be identified that addressed issues relating to excessive bail.

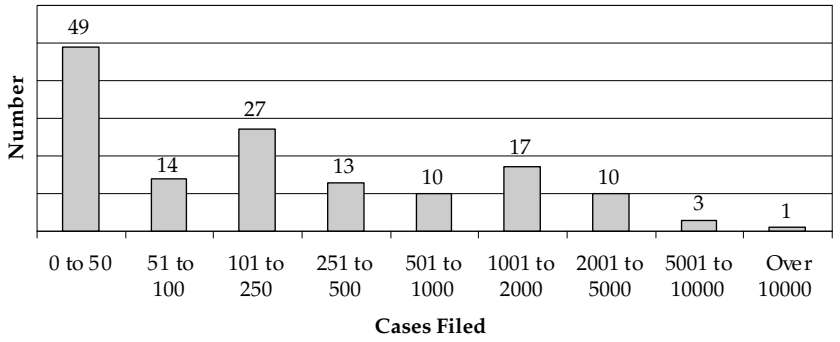
Criminal Case Filing and Jail Population Data

Criminal case filing data, drawn from the 2002 census of tribal agencies, were sought to assess the number of criminal cases in which tribal courts must make pretrial release decisions each year. Forty-nine out of 144 tribes that have criminal courts (and where criminal case filing data are available) handle 50 or fewer criminal cases per year. Added together, 103 tribal courts prosecute 500 or fewer cases per year.

50. *Id.* at ¶ 25.
51. *See* Norris v. Hopi Tribe, No. 98-AC-000007, 1998 NAHT 0000020, ¶ 19 (Hopi App. Ct. Nov. 23, 1998) (VersusLaw).
52. *Id.* at ¶ 26.

Figure 1. Number of Criminal Cases Filed Per Year

(N = 144)

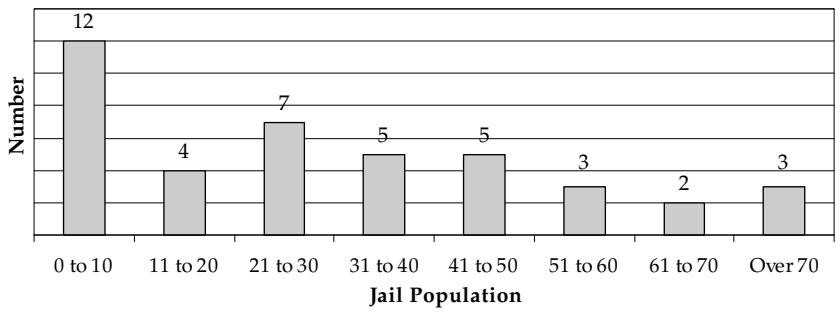


The availability of jail space can impact pretrial decisions made by any court. When the jail is full, especially when significantly over capacity, the court may look to alternatives that would allow for the pretrial release of persons who might otherwise remain in custody.

Data on the populations of jails in Indian country were available for 41 of the tribes that handle criminal cases. Thirty-eight of the jails were run by the tribes themselves, and three by BIA. The population of these jails at midyear 2007 ranged from zero to 241 inmates. Twelve of the jails held between zero and 10 inmates, and four between 11 and 20 inmates. Eight of the jails held more than 50 inmates.

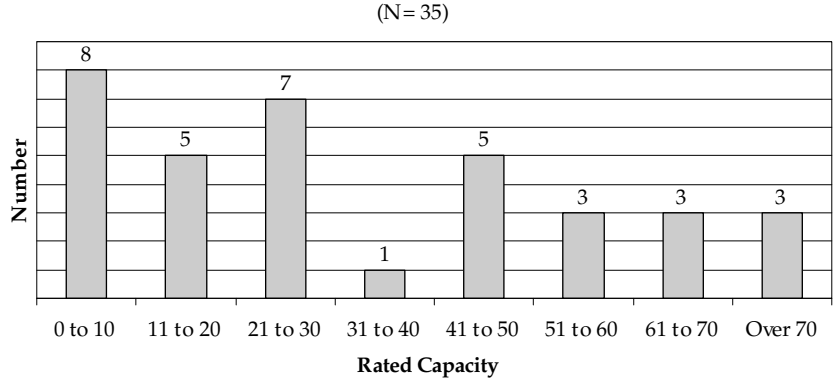
Figure 2. Population of Tribal Jails Where Tribe Handles Criminal Cases

(N = 41)



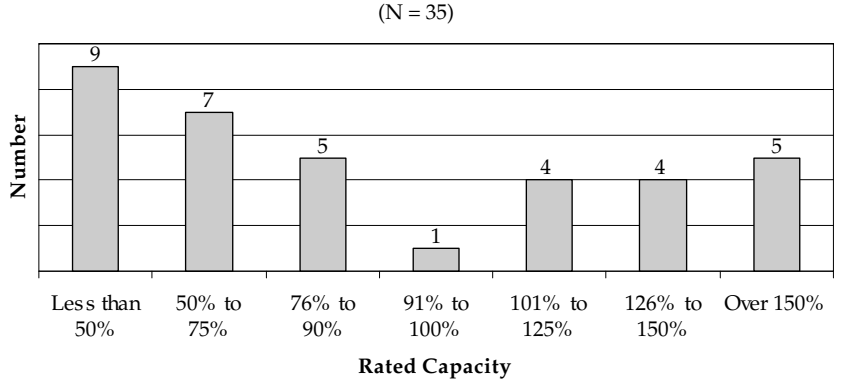
The rated capacity of Indian country jails in tribes that handle criminal cases ranges from 2 to 224 inmates. Nearly a quarter, or eight jails, have a capacity of 10 or fewer. Another nine can hold fifty or more inmates.

Figure 3. Rated Capacities of Tribal Jails Where Tribe Handles Criminal Cases



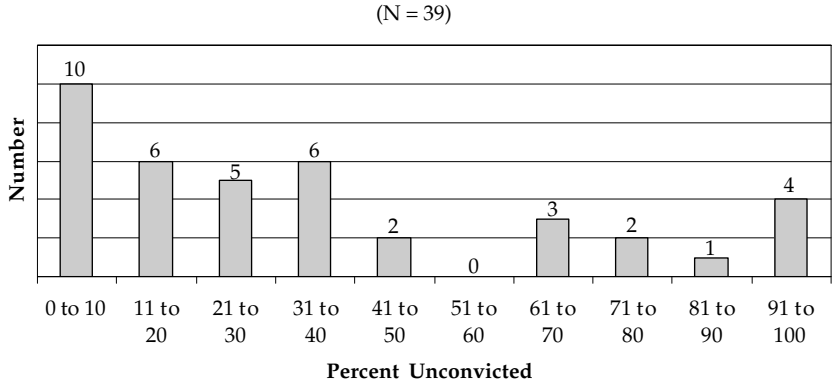
At midyear 2007, 13 of 35 jails in Indian country were operating at or above capacity, including five that were above 150 percent of capacity.

Figure 4. Percent of Rated Capacity Occupied



The percentage of the jail population comprised of inmates not yet convicted ranged from zero to 100 percent. In 10 of the 39 jails, at least 61 percent of inmates were unconvicted. In four, pretrial detainees comprised between 91 percent and 100 percent of the total jail population. In 10 of the jails, unconvicted inmates comprised 10 percent or less of the population.

Figure 5. Percent of Tribal Jail Populations Comprised of Unconvicted Inmates

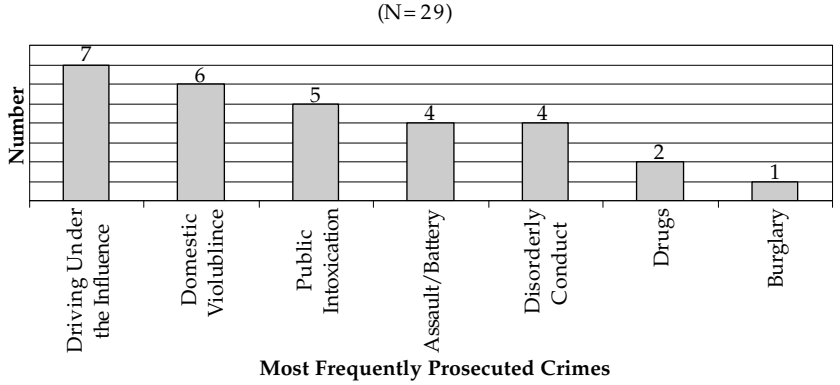


Focus Group and Survey Data

Focus group and survey participants were asked a series of questions designed to assess the state of pretrial decision-making in tribal courts.

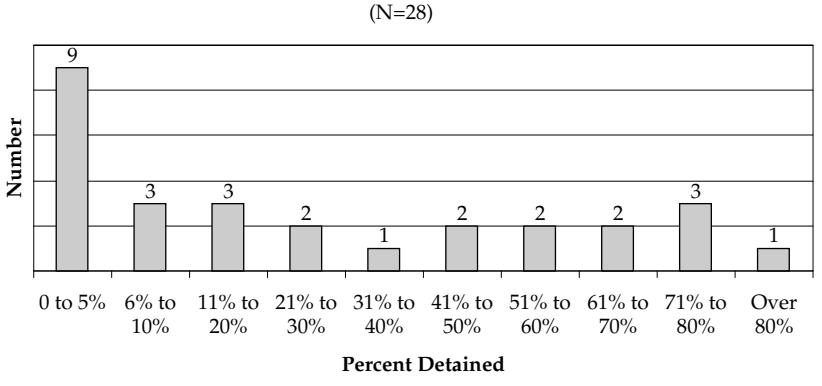
The first question was: *What types of crimes are most frequently prosecuted in your tribal court?* "Driving Under the Influence" was mentioned by seven respondents, or 25 percent, as one of the most frequently prosecuted crimes, followed by domestic violence-related offenses (including violation of protection orders and harassment) — six respondents — and public intoxication — five respondents.

Figure 6. Most Frequently Prosecuted Crimes



The next question was: *What percentage of defendants is detained prior to disposition?* Here, there was a very wide range of responses, going from zero to 85 percent. Of the 28 tribes responding, eight estimated that more than half of defendants remain detained throughout the pretrial period, including four where more than 70 percent remain detained. Nine tribes estimated that the pretrial detention rate is 10 percent or less.

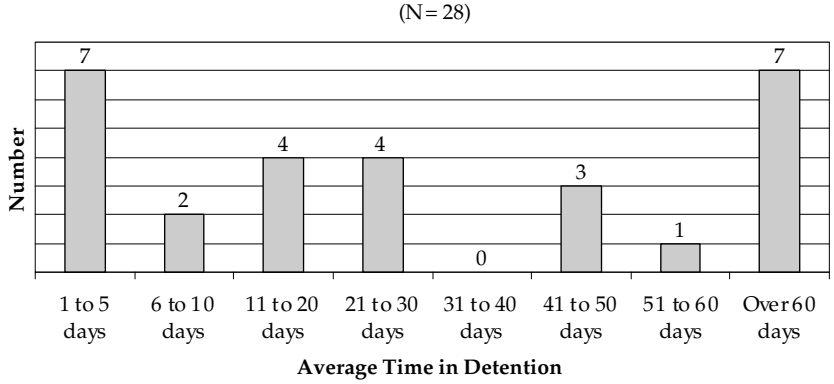
Figure 7. Percentage of Defendants Detained Prior to Disposition



Respondents were next asked: *What is the average length of time that defendants who are not released during the pretrial period spend in pretrial detention?* Once again, there was a wide range

of responses—from one day to two years. In seven of the 28 tribes responding, the average time in detention is 60 days or longer. In another seven the case is disposed of within five days.

Figure 8. Average Time in Pretrial Detention for Detained Defendants For Each of the Tribes



Next, they were asked: *What laws or regulations govern pretrial release in your jurisdiction?* Tribal codes or tribal court rules define the pretrial release decision-making process in most of the tribes. Ten tribes reported having bond schedules, which set forth recommended money bail amounts by offense charged. One tribe reported that if bond cannot be posted within three days the bond is modified to personal recognizance. Four reported having a "cooling off period" in domestic violence cases, whereby the defendant is held for a short time—for example, 12 hours—before being released.

Focus group participants and survey respondents were then asked a series of questions regarding pretrial services. Such services, available in all federal districts and many state and local courts, assure that judicial officers have the information and options available at the pretrial release decision-making hearing to arrive at an informed decision. The information that is gathered generally includes the defendant's current address, length of residence, who the defendant lives with, any concurrent addresses, employment, length of employment, and

substance abuse and mental health problems. The options can include release on the defendant's promise to appear in court, release on conditions (such as reporting to an entity on a regular basis while the case is pending), staying at or away from a certain address or area, substance abuse testing or treatment, setting of money bail, and detention without bail when no condition or combination of conditions can reasonably assure the safety of the community or the appearance of the defendant.

The first of these questions was: *What do you see as the potential benefits of pretrial services in your jurisdiction?* Only two reported having anything resembling pretrial services. One reported that the defender usually tries to gather information about the defendant before the initial court appearance. A judge from another tribe indicated that he asks the defendant the same types of questions that pretrial services programs do. Another tribal representative stated that the tribal probation department does a limited inquiry into defendants arrested and facing initial appearance in court.

There was virtually universal agreement among the tribes participating in the focus groups or survey that pretrial services would be beneficial in tribal justice systems. One representative pointed out that while a formal pretrial program should be available to the larger tribes, those tribes that handle only a few cases a month can get by with a more informal process, such as exists in many tribes currently—whereby some existing system actor, i.e., defender, probation, is responsible for gathering relevant information about the defendant.

Tribal justice leaders identified the following as potential benefits of pretrial services:

- Eliminate arbitrary decision-making through the use of objective assessments of risk
- Assure that judges are making informed decisions
- Allow for a more complete gathering of criminal records from state and federal sources, such as the National Crime Information Center (NCIC), as well as from other tribes
- Assure that the indigent will have access to pretrial release opportunities
- Provide appropriate supervision to better protect the safety of the community

- Provide greater opportunities for defendants in need of services
- Help address the problems of jail crowding
- Give the defendant a chance to establish a track record of compliance with release conditions that might help the defendant at sentencing
- Provide better assurance that defendants who are released pretrial will not lose their jobs while their cases are pending because they are able to go to work rather than being jailed.

Tribal justice leaders were then asked: *What are the obstacles to implementation of pretrial services in your jurisdiction?* Obstacles included: lack of resources to fund pretrial services, the need for training and technical assistance to assure successful implementation, the need to obtain buy-in from tribal leaders, assimilating pretrial services into traditional tribal practices, and sharing information among different tribal justice agencies and parties.

The final question was: *What resources currently exist in your jurisdiction that could be utilized to implement pretrial services?* Five tribes indicated that substance abuse services are available either within the tribal jurisdiction or nearby. Three stated that elders in the community counsel persons with substance abuse problems.

Conclusion

This article has sought to begin to close the gap in the knowledge of pretrial release decision-making in tribal courts. It has shown that tribal appellate courts are rarely asked to address issues relating to pretrial release. Many tribal courts must make a pretrial release decision in a very small number of criminal cases each year, while in many others thousands of decisions must be made. Many tribal jails seem to be operating well within their rated capacities, while many others are grossly overcrowded. While limited by the small number of tribal courts participating in the focus group or survey—only 29 of at least 157 known tribal courts handling criminal cases—it is clear that tribes are experiencing a wide range of circumstances regarding pretrial release decision-making. In many tribes, it

appears that a very large majority of defendants are released, and released very quickly. In others, the opposite seems to be true—many defendants remain detained, often for very long periods of time.

Much more information is needed, however, to close the knowledge gap in tribal pretrial release decision-making. Over the past 50 years, federal, state, and local courts have learned a great deal about pretrial release decision-making, such as how to identify risks of danger to the community and non-appearance in court for each individual defendant, and then how to address those identified risks through the use of appropriate options. Much of this knowledge has been gained by learning from each other. Officials in one state court may adapt their pretrial risk assessment procedures based on the experiences of another state court. One federal court may move to develop a particular pretrial release technique after hearing of the success of that technique in other federal courts. Through the dissemination of information, federal, state, and local courts have not had to seek to improve pretrial release decision-making in isolation of one another.

While each tribe is a sovereign nation, operates within its own customs and values, and makes its own determinations regarding the meaning of such terms as "unreasonable seizure," "lack of due process," and "excessive bail," there is no need for tribal courts to operate in isolation when it comes to pretrial release decision-making. There is much that tribal courts can learn about effective pretrial release decision-making from the experiences of federal, state, and local courts, and, particularly, from other tribes.

There are a number of questions for tribes seeking to improve pretrial release decision-making. While a great deal of work has been done to empirically identify factors related to the risks of pretrial misconduct in federal and state courts, that work has been done on largely heterogeneous populations, charged with the full range of felony and misdemeanor offenses. Because of jurisdictional issues, tribal courts must assess risks for a homogeneous population charged mostly with misdemeanor and traffic offenses. What are the implications of this for risk assessment in tribes? What factors best predict risks of pretrial misconduct in tribes? How can those factors

best be identified? Do those factors vary among tribes? The work done on supervision of pretrial release conditions has likewise focused on heterogeneous populations charged with all offense categories. What pretrial supervision techniques work best for tribal members? Are those techniques transferable among tribes? Many of the pretrial services that are available today can be found in jurisdictions with larger criminal caseloads. How can such services be offered in tribal jurisdictions where maybe only a few criminal cases are heard a month?

These are the types of questions that should be addressed by the 157 tribal courts that handle criminal cases, which are listed in the following table, as well as other tribal courts considering adding criminal jurisdiction.

APPENDIX

Table A-1. Case Processing and Jail Data for Tribes That Handle Criminal Cases

State	Tribe	Annual Number of Criminal Cases	Jail Run By	Tribal Jail Population	Percent of Tribal Jail Population Pretrial
AL	Poarch Band of Creek Indians of Alabama	27	COUNTY	N/A	N/A
AZ	Ak-Chin Indian Community	197	TRIBE	7	26
	Fort McDowell Yavapai Tribal Council	131	COUNTY	N/A	N/A
	Gila River Indian Community of the Gila River Indian Reservation	1,450	TRIBE	241	25
	Hopi Tribe	1,609	BIA	UNKNOWN	UNKNOWN
	Hualapai Indian Tribe of the Hualapai Indian Reservation	400	BIA	UNKNOWN	UNKNOWN
	Kaibab Band of Paiute Indians of the Kaibab Indian Reservation	100	NONE	N/A	N/A
	Navajo Nation	31,057	TRIBE	156	82
	Pascua Yaqui Tribal Council	289	TRIBE	1	UNK
	Quechan Tribe of the Fort Yuma Indian Reservation	6	COUNTY	N/A	N/A
	Salt River Pima-Maricopa Indian Community of the Salt River Reservation	825	TRIBE	69	41
	San Carlos Apache Tribe	3,512	TRIBE	UNKNOWN	UNKNOWN
	Tohono O'odham Nation	UNKNOWN	TRIBE	124	33

State	Tribe	Annual Number of Criminal Cases	Jail Run By	Tribal Jail Population	Percent of Tribal Jail Population Pretrial
	Tonto Apache Tribe of Arizona	20	BIA	UNKNOWN	UNKNOWN
	White Mountain Apache Tribe of the Fort Apache Reservation	UNKOWN	TRIBE	57	30
	Yavapai-Apache Nation of the Camp Verde Indian Reservation	270	BIA	UNKNOWN	UNKNOWN
	Yavapai-Prescott Tribe	40	BIA	UNKNOWN	UNKNOWN
CA	Fort Mojave Indian Tribe of Arizona, California, and Nevada	116	TRIBE	3	100
	Washoe Tribe of Nevada and California	250	BIA	UNKNOWN	UNKNOWN
CO	Southern Ute Tribe	444	TRIBE	33	18
CT	Mashantucket Pequot Tribe	14	NONE	N/A	N/A
ID	Coeur D'Alene Tribe of the Coeur D'Alene Reservation	468	TRIBE	UNKNOWN	UNKNOWN
	Kootenai Tribe of Idaho	UNKNOWN	COUNTY	N/A	N/A
	Nez Perce Tribe of Idaho	296	COUNTY	N/A	N/A
	Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho	2500	TRIBE	19	32
KS	Iowa Tribe of Kansas & Nebraska	10	COUNTY	N/A	N/A
	Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas	20	TRIBE	UNKNOWN	UNKNOWN
	Prairie Band of Potawatomi Indians	5	TRIBE	UNKNOWN	UNKNOWN

State	Tribe	Annual Number of Criminal Cases	Jail Run By	Tribal Jail Population	Percent of Tribal Jail Population Pretrial
	Sac & Fox Nation of Missouri in Kansas and Nebraska	2	TRIBE	UNKNOWN	UNKNOWN
LA	Chitimacha Tribe of Louisiana	7	COUNTY	N/A	N/A
	Coushatta Tribe of Louisiana	2	TRIBE	UNKOWN	UNKNOWN
	Tunica-Biloxi Tribe	2	COUNTY	N/A	N/A
MA	Wampanoag Tribe of Gay Head (Aquinnah)	0	COUNTY	N/A	N/A
ME	Passamaquoddy Tribe of Maine	83	COUNTY	N/A	N/A
	Penobscot Tribe of Maine	121	COUNTY	N/A	N/A
MI	Grand Traverse Band of Ottawa and Chippewa Indians of Michigan	48	TRIBE	UNKNOWN	UNKNOWN
	Hannahville Indian Community, Michigan	279	COUNTY	N/A	N/A
	Keweenaw Bay Indian Community, Michigan	255	COUNTY	N/A	N/A
	Lac Vieux Desert Band of Lake Superior Chippewa	51	TRIBE	0	0
	Little River Band of Ottawa Indians	3	COUNTY	N/A	N/A
	Little Traverse Bay Bands of Odawa Indians	7	COUNTY	N/A	N/A
	Pokagon Band of Potawatomi Indians	0	COUNTY	N/A	N/A
	Saginaw Chippewa Indian Tribe of Michigan	609	COUNTY	N/A	N/A
	Sault Ste. Marie Tribe of Chippewa Indians of Michigan	112	TRIBE	17	0
MN	Minnesota Chippewa Tribe	350	COUNTY	N/A	N/A

State	Tribe	Annual Number of Criminal Cases	Jail Run By	Tribal Jail Population	Percent of Tribal Jail Population Pretrial
	Minnesota Chippewa Tribe - Bois Forte Band of Chippewa	350	COUNTY	N/A	N/A
	Minnesota Chippewa Tribe - Fond du Lac Reservation	50	COUNTY	N/A	N/A
	Minnesota Chippewa Tribe - Mille Lacs Band of Ojibwe	710	COUNTY	N/A	N/A
	Red Lake Band of Chippewa Indians, Minnesota	2,996	TRIBE	43	74
MS	Mississippi Band of Choctaw Indians	1,873	TRIBE	41	29
MT	Assinibione and Sioux Tribes of Fort Peck Indian Reservation	3,036	TRIBE	UNKNOWN	14
	Blackfeet Tribe of the Blackfeet Indian Reservation of Montana	7,795	TRIBE	62	UNKNOWN
	Chippewa Cree Indians of Rocky Boy's Reservation	1,400	TRIBE	10	0
	Confederated Salish & Kootenai Tribes of the Flathead Reservation	2,000	TRIBE	22	41
	Fort Belknap Indian Community of the Fort Belknap Reservation	2,804	TRIBE	UNKNOWN	UNKNOWN
	Northern Cheyenne Tribe	2,000	BIA	34	68
NC	Eastern Band of Cherokee Indians	1,800	COUNTY	N/A	N/A
ND	Spirit Lake Tribe, North Dakota	800	BIA	UNKNOWN	UNKNOWN
	Three Affiliated Tribes of the Fort Berthold Reservation	1,777	BIA	UNKNOWN	UNKNOWN

State	Tribe	Annual Number of Criminal Cases	Jail Run By	Tribal Jail Population	Percent of Tribal Jail Population Pretrial
	Turtle Mountain Band of Chippewa Indians of North Dakota	4,800	BIA	23	13
NE	Omaha Tribe of Nebraska	2,000	TRIBE	48	75
	Winnebago Tribe of Nebraska	30	TRIBE	UNKNOWN	UNKNOWN
NM	Jicarilla Apache Nation, New Mexico	1,200	TRIBE	32	25
	Mescalero Apache Tribe	2,500	BIA	UNKNOWN	UNKNOWN
	Pueblo of Acoma	655	TRIBE	27	11
	Pueblo of Cochiti	90	BIA	UNKNOWN	UNKNOWN
	Pueblo of Isleta	1,075	COUNTY	N/A	N/A
	Pueblo of Jimenez	375	BIA	UNKNOWN	UNKNOWN
	Pueblo of Laguna	950	TRIBE	31	6
	Pueblo of Nambe	22	BIA	UNKNOWN	UNKNOWN
	Pueblo of Picuris	15	BIA	UNKNOWN	UNKNOWN
	Pueblo of Pojoaque	200	COUNTY	N/A	N/A
	Pueblo of San Ildefonso	UNKNOWN	TRIBE	UNKNOWN	UNKNOWN
	Pueblo of San Juan	55	TRIBE	6	0
	Pueblo of Sandia	40	TRIBE	UNKNOWN	UNKNOWN
	Pueblo of Santa Ana	150	COUNTY	N/A	N/A
	Pueblo of Santa Clara	517	NONE	N/A	N/A

State	Tribe	Annual Number of Criminal Cases	Jail Run By	Tribal Jail Population	Percent of Tribal Jail Population Pretrial
	Pueblo of Santo Domingo	540	BIA	UNKNOWN	UNKNOWN
	Pueblo of Taos	162	TRIBE	4	100
	Pueblo of Tesuque	32	COUNTY	N/A	N/A
	Pueblo of Zia	200	COUNTY	N/A	N/A
	Zuni Tribe of the Zuni Reservation, New Mexico	8,131	TRIBE	22	1
NV	Duckwater Shoshone Tribe of the Duckwater Reservation	22	COUNTY	N/A	N/A
	Ely Shoshone Tribe of Nevada	25	BIA	UNKNOWN	UNKNOWN
	Fort McDermitt Paiute and Shoshone Tribes	47	BIA	UNKNOWN	UNKNOWN
	Las Vegas Paiute Tribe	UNKNOWN	BIA	UNKNOWN	UNKNOWN
	Lovelock Paiute Tribe of the Lovelock Indian Colony	6	COUNTY	N/A	N/A
	Moapa Band of Paiute Indians of the Moapa River Indian Reservation	100	BIA	UNKNOWN	UNKNOWN
	Paiute-Shoshone Indians of the Fallon Reservation and Colony	0	TRIBE	UNKNOWN	UNKNOWN
	Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation	220	COUNTY	N/A	N/A
	Reno-Sparks Indian Colony	274	BIA	UNKNOWN	UNKNOWN
	Shoshone-Paiute Tribes of the Duck Valley Reservation	156	BIA	UNKNOWN	UNKNOWN
	Te-Moak Tribe of Western Shoshone Indians of Nevada	83	BIA	UNKNOWN	UNKNOWN
	Walker River Paiute Tribe	UNKNOWN	TRIBE	UNKNOWN	UNKNOWN

State	Tribe	Annual Number of Criminal Cases	Jail Run By	Tribal Jail Population	Percent of Tribal Jail Population Pretrial
	Yerington Paiute Tribe of the Yerington Colony and Campbell Ranch	200	BIA	UNKNOWN	UNKNOWN
	Yomba Shoshone Tribe of the Yomba Reservation	0	BIA	UNKNOWN	UNKNOWN
NY	Onondaga Nation of New York	UNKNOWN	COUNTY	N/A	N/A
OK	Absentee- Shawnee Tribe of Indians of Oklahoma	13	COUNTY	N/A	N/A
	Cherokee Nation	65	TRIBE	UNKNOWN	UNKNOWN
	Cheyenne-Arapahoe Tribes of Oklahoma	UNKNOWN	TRIBE	UNKNOWN	UNKNOWN
	Choctaw Nation of Oklahoma	13	NONE	N/A	N/A
	Citizen Potawatomi Nation	9	COUNTY	N/A	N/A
	Comanche Nation	50	TRIBE	UNKNOWN	UNKNOWN
	Iowa Tribe of Oklahoma	2	TRIBE	1	100
	Kaw Nation	1	COUNTY	N/A	N/A
	Kickapoo Tribe of Oklahoma	10	COUNTY	N/A	N/A
	Muscogee (Creek) Nation	43	COUNTY	N/A	N/A
	Osage Tribe	27	TRIBE	UNKNOWN	UNKNOWN
	Otoe-Missouria Tribe of Indians	19	TRIBE	UNKNOWN	UNKNOWN
	Pawnee Nation of Oklahoma	31	COUNTY	N/A	N/A
	Ponca Tribe of Indians of Oklahoma	50	TRIBE	UNKNOWN	UNKNOWN
	Sac and Fox Nation of Oklahoma	34	TRIBE	23	0

State	Tribe	Annual Number of Criminal Cases	Jail Run By	Tribal Jail Population	Percent of Tribal Jail Population Pretrial
	Tonkawa Tribe of Indians of Oklahoma	UNKNOWN	COUNTY	N/A	N/A
OR	Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon	197	COUNTY	N/A	N/A
	Confederated Tribes of the Umatilla Indian Reservation	132	COUNTY	N/A	N/A
	Confederated Tribes of Warm Springs Reservation of Oregon	519	TRIBE	50	34
	Cow Creek Band of Umpqua Indians	0	COUNTY	N/A	N/A
SD	Cheyenne River Sioux Tribe	7,511	TRIBE	51	67
	Crow Creek Sioux Tribe	1,800	TRIBE	UNKNOWN	UNKNOWN
	Flandreau Santee Sioux Tribe of South Dakota	72	COUNTY	N/A	N/A
	Lower Brule Sioux Tribe of the Lower Brule Reservation	UNKNOWN	BIA	UNKNOWN	UNKNOWN
	Oglala Sioux Tribe	2,000	TRIBE	23	0
	Rosebud Sioux Tribe	1,752	TRIBE	24	100
	Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation	3,000	TRIBE	10	70
	Standing Rock Sioux Tribe of North and South Dakota	2,683	BIA	UNKNOWN	UNKNOWN
	Yankton Sioux Tribe of South Dakota	UNKNOWN	TRIBE	UNKNOWN	UNKNOWN
UT	Confederated Tribes of the Goshute Reservation	2	TRIBE	UNKNOWN	UNKNOWN
	Ute Indian Tribe of the Uintah and Ouray Reservation, Utah	1,084	COUNTY	N/A	N/A

State	Tribe	Annual Number of Criminal Cases	Jail Run By	Tribal Jail Population	Percent of Tribal Jail Population Pretrial
WA	Confederated Tribes and Bands of the Yakama Nation	3,500	TRIBE	UNKNOWN	UNKNOWN
	Confederated Tribes of the Chehalis Reservation	100	TRIBE	7	14
	Confederated Tribes of the Colville Reservation	UNKNOWN	COUNTY	N/A	N/A
	Hoh Indian Tribe	150	TRIBE	40	40
	Kalispel Indian Community	39	BIA	UNKNOWN	UNKNOWN
	Lower Elwha Tribal Community of the Lower Elwha Reservation	120	COUNTY	N/A	N/A
	Lummi Tribe	470	COUNTY	N/A	N/A
	Makah Indian Tribe	500	TRIBE	9	33
	Nisqually Indian Tribe of the Nisqually Reservation	UNKNOWN	TRIBE	53	UNKNOWN
	Nooksack Indian Tribe of Washington	10	COUNTY	N/A	N/A
	Port Gamble Indian Community	121	TRIBE	UNKNOWN	UNKNOWN
	Puyallup Tribal Council	245	TRIBE	8	38
	Quileute Tribe of the Quilete Reservation, Washington	190	COUNTY	N/A	N/A
	Quinault Tribe of the Quinalt Reservation, Washington	252	TRIBE	12	8
	Sauk-Suiattle Indian Tribe of Washington	16	COUNTY	N/A	N/A
	Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation	25	TRIBE	UNKNOWN	UNKNOWN
	Skokomish Indian Tribe	0	NONE	N/A	N/A

State	Tribe	Annual Number of Criminal Cases	Jail Run By	Tribal Jail Population	Percent of Tribal Jail Population Pretrial
	Spokane Tribe	1,000	BIA	15	0
	Squaxin Island Tribe	100	NONE	N/A	N/A
	Stillaguamish Tribe	120	TRIBE	UNKNOWN	UNKNOWN
	Suquamish Indian Tribe of the Port Madison Reservation	81	TRIBE	UNKNOWN	UNKNOWN
	Swinomish Indians of the Swinomish Reservation	200	TRIBE	UNKNOWN	UNKNOWN
	Tulalip Tribes	156	TRIBE	UNKNOWN	UNKNOWN
	Upper Skagit Indian Tribe of Washington	18	TRIBE	UNKNOWN	UNKNOWN
WI	Ho-Chunk Nation of Wisconsin	1	COUNTY	N/A	N/A
	Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin	12	COUNTY	N/A	N/A
	Menominee Indian Tribe of Wisconsin	350	TRIBE	48	19
WY	Arapahoe Tribe of the Wind River Reservation	1,330	BIA	UNKNOWN	UNKNOWN
	Shoshone Tribe of the Wind River Reservation	1,330	BIA	UNKNOWN	UNKNOWN

Tribal Probation: An Overview for Tribal Court Judges†

Kimberly A. Cobb and Tracy G. Mullins***

Introduction

There is great variation among tribes in the amount of discretion that tribal court judges have when imposing sentences and sentencing conditions. Some tribal codes have specific guidelines for how certain criminal offenses are to be treated and provide very little, if any, discretion for tribal court judges.[1] Other tribal codes allow tribal court judges more discretion and provide more general sentencing guidelines.[2] Tribal codes also

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1. *See* Carrie E. Garrow & Sarah Deer, Tribal Criminal Law and Procedure 357 (2004).
2. *Id.* at 367.

may allow tribal court judges to impose other conditions such as probation.[3]

Research suggests that crime and victimization rates involving Native Americans exceeds that of other minority groups across the United States.[4] However, many tribes lack adequate resources and funding to properly enforce laws and incarcerate offending criminals.[5] Tribal jails and detention facilities are crowded and budgets are stretched thin. As a result, there is a growing appreciation for developing:

> [C]ost-effective sentencing strategies that take into account not just the short term goal of protecting the public by imprisoning people who break the law and threaten the safety of the community, but also the longer term goal of helping offenders avoid future criminal behavior, thereby reducing the number of future victims of crime.[6]

Moreover, community supervision[7] is a desirable alternative to address the problems of jail overcrowding, enforce interventions to hold offenders accountable, address offenders' substance abuse issues, help change offenders' behavior and protect the public.

Tribal justice systems are ever developing in many tribal communities. Often, only the basic justice personnel are planned for (i.e., judge, prosecutor, court clerk). Community supervision/probation positions are often an afterthought. In fact, many community supervision/probation officer positions in tribes start out as grant-funded positions. For some tribes, if the grant money is not renewed then the position simply fades away, leaving offenders in the community with no systemic supervision. Other tribes attempt to find ways to write the posi-

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3. *Id.* at 379-81.

4. *See* ANDREA WILKINS ET AL., CRIMINAL JUSTICE IN INDIAN COUNTRY: REDUCING CRIME THROUGH STATE-TRIBAL COOPERATION 3 (2008), http://www.ncsl.org/Portals/1/documents/statetribe/CJIC_08.pdf. *See also* STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002 6 (2004), http://bjs.ojp.usdoj.gov/content/pub/pdf/aic02.pdf.

5. *See* WILKINS ET AL., *supra* note 4, at 3.

6. AM. BAR ASS'N, COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, RECOMMENDATION 103A 4 (2007), *available at* www.abanet.org/leadership/2007/midyear/docs/journal/hundredthreea.doc [hereinafter ABARECOMMENDATION].

7. In this Article, the term community supervision and probation will be used interchangeably. However, it should be noted that, in general, community supervision can encompass pre-trial release and parole, in addition to probation services.

tion into their new tribal budgets once they see the value and benefit the position provides to the tribal community.

The Bureau of Indian Affairs reports that there are 564 federally recognized tribes currently in the United States[8] and 226 federally unrecognized tribes.[9] While it is difficult to get an accurate count of the number of tribal courts (which may or may not include Healing to Wellness Courts, Drug Courts, and other specialized courts), the National Tribal Justice Resource Center Tribal Court Directory reports approximately 330 tribal courts are currently in operation.[10] The most recent information available pertaining to probation in Indian Country from the Bureau of Justice Statistics (BJS) indicates that of the 314 tribes responding to the last census, 70 percent of those operating their own tribal court system indicated they offer probation for adults and 66 percent indicated they offer probation for juveniles.[11]

What is unclear from the BJS census is how tribal courts defined and carried out the function of probation within their tribes. Probation may be offered as an alternative sentence; it may entail merely paying a fine with little or no other compliance monitoring. The probation function may be unsupervised or be overseen by the tribal court judge, court clerk, or elder in the community rather than being monitored by a designated probation officer, as typically ocurs in state/county jurisdictions. While in some instances it is appropriate and useful to assign an offender to unsupervised probation, for community supervision to be used effectively and systematically as an alternative sentence, it is important to have a trained professional monitor offenders' compliance with their imposed conditions.

As in county, state, and federal justice systems, the size of caseloads that tribal probation officers carry varies; however, there are some tribal probation officers that carry caseloads in

8. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648, 13,648 (Mar. 22, 2007). *See also* Bureau of Indian Affairs, U.S. Dep't of Interior, Frequently Asked Questions, http://www.bia.gov/FAQs/index.htm.

9. *See* Mantaka American Indian Council, Unrecognized Tribes, http://www.manataka.org/page237.html.

10. *See* Nat'l Tribal Justice Res. Ctr., Tribal Court Directory, http://www.ntjrc.org/tribalcourts/tribalcourtdirectory.asp.

11. *See* STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002 iii (2005), http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf.

excess of 400 offenders. Considering the role of a probation officer is not only to monitor compliance, but also to assist offenders in accessing services to help them change their behavior, large caseload sizes (in addition to large geographical areas some tribal probation officers are required to supervise) can create barriers to effective supervision. It is also common in tribal justice systems for a probation officer to supervise a dual caseload consisting of both adult and juvenile offenders—which often have very different needs and require the probation officer to have two unique skill sets.

Community supervision: the conditional release and supervision of offenders in a community setting.

For tribes that do have probation officers, the background and level of training that these individuals receive is quite diverse. Some have degrees and experience in the criminal justice system or a related field, while others may only have a high school degree and/or no formal background or training on criminal or juvenile justice issues. One important factor that cannot be overlooked is the importance of those belonging to the tribe, working for the tribe. While tribal probation officers may come to the position with varying educational, professional, and personal backgrounds, experiences, and training, those who come to the position as a member of the tribe they are serving are able to incorporate the values, beliefs, and teachings of their tribe into their supervision of tribal offenders.[12] Professionalization of the field of tribal probation is an important topic that needs to be explored with a focus on how it can yield greater accountability of offenders and enhance public safety goals in tribal communities, but the value of the cultural and spiritual knowledge and history that tribal probation officers can bring to the field of probation must not be overlooked.

12. *See Culture, Spirituality and Involvement in the Criminal Justice System*, *in* JOHN POUPART ET AL., AM. INDIAN POLICY CTR., SEARCHING FOR JUSTICE (2005), http://www.airpi.org/research/SearchingforJustice/sjfindcauses/sjfcul.htm.

What is community supervision?

Community supervision—the conditional release and supervision of offenders[13] in a community setting—can include the supervision of individuals placed on pre-trial release, diversionary status, probation, and/or parole. Community supervision is sometimes used as an alternative sentence. That is, an adult offender or juvenile delinquent who has been found guilty of or has plead guilty to a crime is released into the community, in lieu of serving jail time, on the condition that they follow and adhere to certain conditions of release (e.g., pay a fine, perform community service work, attend a drug treatment program, submit to random drug tests). If the offender/delinquent violates the conditions of supervision, he or she can be referred back to the court and possibly incur additional penalties and/or serve jail time.

A resolution adopted by the American Bar Association (ABA) in 2007 urges prosecutors and other criminal justice professionals to utilize community supervision for offenders in appropriate cases.[14] It acknowledges that qualifications for eligibility for community supervision will vary among locales; however, it is generally advisable when the offender:

- poses no substantial threat to the community;
- is not charged with a predatory crime, a crime involving substantial violence, a crime involving large scale drug trafficking, or a crime of equivalent gravity;
- has no prior criminal history that makes community supervision an inappropriate sanction; and,
- is not currently on parole or probation, unless the supervising authority specifically consents.[15]

At its core, community supervision has myriad (and often overlapping) benefits to communities, offenders, and to tribal justice systems.

13. While individuals under supervision, such as those on pretrial release, are typically referred to as defendants, the word offender will be used throughout this document as a general reference to individuals under supervision—regardless of the point of supervision.

14. *See* ABA RECOMMENDATION, *supra* note 7, at 1.

15. *Id.*

Benefits to Tribal Justice Systems

Benefits to Tribal Justice Systems

- Provides a viable option to jail or other confinement
- Frees limited space allocated for confining offenders for those offenders who pose the most threat to public safety
- Provides cost-savings to tribes
- Adds credibility to the tribal justice system and to imposed sentences
- Provides judges with pertinent and relevant information about offenders to aid in decision making
- Increases accountability of offenders
- Directs offenders to needed services

One of the most significant benefits of community supervision is that it serves as a viable alternative to jail or other confinement that can result in cost savings for the tribal justice system. The costs associated with operating a jail can be an onerous financial commitment for tribes, and there are sometimes questions as to whether these expenditures provide a level of value to tribal communities which makes the investment worthwhile.[16]

Jail crowding, for those tribes that have facilities, is a pressing issue in many tribal communities. In 2004, 13 tribal jail facilities were under a court order or consent decree to limit the number of detainees/inmates they housed and/or maintain certain conditions of confinement such as detaining inmates under humane conditions, not housing juveniles, separating males and females, and limiting detoxification holds to eight hours.[17]

Sporadic enforcement of imposed jail terms for offenders in some tribal communities also can present problems for justice authorities. For example, in communities whose facilities are operated by the Bureau of Indian Affairs (BIA), the jail administrators may opt not to follow a tribal judge's ruling or detention orders; thus, the orders could possibly be set aside and the inmate released.

Despite the challenges related to jailing tribal offenders, the reality is that confinement of some individuals—whether in tribal jails, county/state jails or federal institutions—is neces-

16. *See* Eileen M. Luna-Firebaugh, *Incarcerating Ourselves: Tribal Jails and Corrections*, 83 PRISON J. 51, 51-66 (2003), *available at* http://tpj.sagepub.com/cgi/reprint/83/1/51.pdf.

17. *See* Todd D. Minton, *Jails in Indian Country, 2004* 4 (2006), BUREAU OF JUSTICE STATISTICS BULLETIN, November 2006, at 1 *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jic04.pdf.

sary for community protection and public safety. However, not all offenders pose the same level of risk to public safety. Many tribal offenders are sentenced to jail terms simply because there is no alternative available that sends the message to the offender and to the community that something is being done.

Not all offenders are alike—each has a unique set of factors that leads him or her to engage in criminal or delinquent behavior. Yet, many times the justice system attempts to apply a one-size-fits-all approach to sanctions and interventions with offenders and is surprised when the results are not as good as they would like. Community supervision officers can gather information about offenders from a variety of sources (e.g., criminal histories, screening information, various assessment results, interviews with offenders and families and other social networks of support) to make informed judgments about the likely causes of the individual's criminal or delinquent behavior.[18] This information can be provided to tribal court judges in pretrial release report, a pre-sentence investigation report, or a post-sentencing report, as needed, to modify or update sentencing conditions or address probation violations. These types of reports help judges make decisions about who presents a higher risk of re-offending and needs to be confined to protect the community, who is most suitable for probation, and what types of services and conditions will be most effective at decreasing an offender's propensity to engage in criminal or delinquent behavior.

Community supervision offers tribal justice systems a viable alternative to jail or confinement, provides a credible means for enforcing conditions of release, and helps identify and direct offenders to needed services. Compliance monitoring enhances the credibility of the justice system, improves accountability of offenders, an protects the public safety. Concurrently, secure confinement can be more effectively utilized for those who are a public safety threat.

18. *See* FAYE S. TAXMAN ET AL., TOOLS OF THE TRADE: A GUIDE TO INCORPORATING SCIENCE INTO PRACTICE 8 (2004), *available at* http://www.nicic.org/pubs/2004/020095.pdf.

Benefits to Communities and Victims

Tribal sentencing policy often takes into account the premise that the offender is a member of the tribal family, and therefore, "tribal communities have a great incentive to ensure that tribal defendants receive treatment and/or rehabilitation so they can become well-functioning community members."[19] Effective community supervision practices can facilitate a process toward meeting that goal for tribal communities. In addition to monitoring compliance with sentencing conditions—often viewed as the law enforcement side of probation—the other main goal of probation is to provide assistance to offenders that will help them in changing their attitudes and behaviors. This blended approach is referred to as a behavioral management approach to community supervision. The behavioral management approach to supervision can lead to enhanced public and community safety by using supervision strategies aimed at motivating offenders to change, helping offenders gain skills useful to be a productive contributor to the community, and ensuring compliance with goal-oriented conditions of supervision.[20]

Benefits to the Community and Victims

- Chance for restoration
- Enhanced public safety
- Enhanced credibility and accountability of the tribal justice system

Through interviews and assessment of an offender's likelihood to re-offend and factors present in an offender's life that increase their likelihood to continue to engage in criminal and delinquent behavior, probation officers gather information which they can use to determine and direct services to meet the needs of individual offenders. Prioritizing and targeting services to the individual needs of offenders (e.g., antisocial attitudes, values and beliefs, low self-control, criminal peers, substance abuse, dysfunctional family) has been shown to produce reductions in recidivism, thereby enhancing public safety.[21]

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19. GARROW & DEER, *supra* note 1, at 358.

20. *See* TAXMAN ET AL., *supra* note 20, at 2.

21. *See generally* CRIME & JUSTICE INST., IMPLEMENTING EVIDENCE-BASED PRACTICE IN COMMUNITY CORRECTIONS: THE PRINCIPLES OF EFFECTIVE INTERVENTIONS (2004), *available at* http://www.nationalinstituteofcorrections.gov/Library/019342.

Allowing the offender to remain in the community also increases the opportunity for him or her to repair the harm—to the extent possible and appropriate given the nature of the offense—caused by his or her actions to victims, families, and/or the community. Reparation can be sought through various means including restitution, targeted community service, individual and family counseling, and sentencing circles or other restorative methods to help mend broken and damaged relationships.

Benefits to Offenders

Community supervision benefits the offender in numerous, potentially life-changing ways. While on community supervision, the offender can participate in services geared to alleviate the precipitators of his/her criminal behavior. Tribal probation officers can: identify and devise a supervision and treatment plan aimed at addressing factors that have been shown to contribute to criminal behavior (e.g., history of antisocial behavior, antisocial personality, antisocial values and attitudes, criminal/deviant peer association, substance abuse, and dysfunctional family relations); help offenders identify and determine how to avoid places, situations and events in their lives that can create or set off certain behaviors at certain times; and provide services to reduce the likelihood that offenders will recidivate.[22] For most people (including offenders), change is a process and does not occur overnight. Through effective community supervision practices, probation officers facilitate the change process for offenders "through a series of interactions that provide the [offender] with the opportunity to learn about his/her behavior and patterns, to acquire new skills to address

Benefits to the Offender

- Remain at home
- Maintain connection to the community
- Maintain (or seek) employment
- Access to needed treatment and other resources/services
- Maintain (or encourage) involvement in spiritual and cultural practices

22. *See* TAXMAN ET AL., *supra* note 20, at 3-4.

problematic issues, and to develop the self-maintenance tools to ensure long-term success."[23]

Being placed in community supervision can open up access to group, family, and individual counseling, alcohol and substance abuse counseling and treatment services, anger management interventions, and programs aimed at strengthening parenting skills (which could have long-ranging, generational benefits), educational and vocational training services, and other programs and services that incarceration simply is not equipped to provide. Returning offenders to the community with unmet treatment needs has been highly correlated with recidivism risk.[24] By contrast, these services have the capacity to modify an individual's behavior and reduce the likelihood of reoffending.

In addition to accessing needed treatment services, offenders placed on community supervision can continue to work and/or seek employment so they can provide for themselves and/or their families and dependents and remain productive members of their community. They also can maintain involvement (or be encouraged to become involved) in spiritual and cultural practices.

How Can Judges Utilize Community Supervision Officers?

Probation officers wear many hats, depending on how their systems operate, how their duties are designed, and what role judges need them to play. One way tribal court judges can utilize community supervision officers is for information gathering. Community supervision officers can be charged with conducting screenings and risk/need assessments and preparing sentencing recommendations (pre-sentence investigation

23. *Id.* at 4.

24. *See* Thomas H. Williams, *What Works? Evidence-Based Practices in Parole and Probation*, 2007 J. CMTY. CORR. 5, 6, *available at* http://www.csosa.gov/Olipa/pubs/what_works_evidence_based_practices.pdf. Link appears to be broken for this web address; address is listed in many places but does not get to the article, Also can't find journal.

reports) based on the information collected. Having such information synthesized in a meaningful way allows a judge to make sentencing decisions based on information known to have an influence on risk of recidivism (e.g., prior criminal history, ties to the community/family, employment status, mental health status, etc.). Community supervision officers can gather this information and take this responsibility off the judge and/or court clerk, who are already overburdened with growing caseloads and other administrative duties.

Role of a Tribal Probation Officer

The myriad roles of a probation officer revolve around two primary functions—surveillance and services. Need to change citation form. Common tasks associated with these functions include, but are not limited to:

- Assessing the risk and needs and investigate the background of an offender to provide the tribal court judge with relevant and pertinent information about the offender to consider during sentencing.
- Using risk and needs assessment information to identify the level of supervision required of offenders on probation and develop an appropriate case plan.
- Developing a case/supervision plan that outlines the conditions of probation and a plan for services targeted to help promote positive behavior change of offenders and incorporate culturally-focused interventions when available.
- Monitoring the activities and behavior of the offender using both evidenced-based strategies and tribal-based resources such as elders.
- When appropriate, providing access to services to help bring about positive behavioral changes in offenders (e.g., restorative justice programs, substance abuse assessment, substance abuse treatment, mental health counseling, job readiness development, involvement in spiritual or cultural activities).
- Applying graduated sanctions (e.g., more frequent reports to the probation officer, more frequent drug tests, probation violation report, recommendation for revocation) to respond to noncompliant behavior.
- Providing appropriate rewards or incentives (e.g., travel permits, early termination from probation, decreased frequency of drug tests) to respond to compliant behavior.

Additionally, probation officers monitor conditions placed on offenders to assure compliance. This increases offender accountability and the credibility of the tribal justice process. In instances where an offender placed on community supervision begins to exhibit signs of noncompliance or is charged with a probation violation, judges can utilize the community supervision officer's unique perspective and knowledge about the offender for additional justification when making revocation decisions. Through their more regular contacts with the offender and his or her family and social net-

works of support, as well as through the results of subsequent re-assessments, community supervision officers often have helpful insight into what may have prompted the offender to relapse or violate. For example, in some instances, the community supervision officer can inform the judge about extentuating circumstances surrounding the situation. In other cases, the supervision officer may be able to point out and demonstrate willful noncompliance with certain conditions of supervision.

Another way tribal court judges can utilize community supervision officers is in the rallying of community resources to address offenders' criminogenic issues. Through their understanding of offenders' needs (e.g., drugs, alcohol, housing, mental health) in the community, tribal probation officers can provide information to tribal court judges that can aid them in making more informed decisions about the use of existing and the development of new resources and services for tribal court offenders.

In addition, community supervision, by its very nature, relies on the provision of offender services by a multitude of community-based agencies. Judges often do not have the time to assess community resources to identify available services and form alliances for services; community supervision officers have the capacity to do so. For tribal judges, this task is often magnified by a lack of resources and services available on tribal land, the travel distance to available non-tribal resources, and/or lack of Memorandums of Understanding/Memorandums of Agreement (MOU's/MOA's) with neighboring county/state agencies to provide needed services. Additionally, many tribes are inhibited by their reliance on contracts with federal agencies, such as Indian Health Services, to be the sole provider of services. Nonetheless, it is essential for tribal judges to assist in identifying varying services available to offenders that address criminogenic needs to increase the sentencing options available to judges and provide a richer menu of options to ensure offenders are receiving interventions based on their individual risk and needs.

In addition, having a community supervision system in place within the tribal justice system will ideally increase the capacity of tribes to implement mandates under the Adam

Walsh Child Protection and Child Safety Act of 2006.[25] Because sex offenders are considered a dangerous offender population and their crimes have an impact on their victims for a lifetime, constant and close supervision is essential. When tribal probation officers are provided with the appropriate training, tools, and resources they can assist tribal courts in monitoring community notification, offender registration, residence, and GPS requirements, as well as provide the court with notices of violations when necessary.

How Can a Tribal Court Judge Support Community Supervision of Offenders?

There are many ways in which a tribal judge can support community supervision practices. First, tribal court judges can gain a better understanding of and appreciation for what probation officers can do so they can utilize tribal probation officers to their fullest potential.

Ways Tribal Court Judges Can Support Community Supervision

- Educate yourself about what probation officers do and about evidence-based practices of community supervision.
- Consider ways to implement and utilize community supervision services more effectively
- Provide necessary judicial backing and support probation officers need when working with offenders and monitoring and enforcing conditions
- Professionalize the position of probation officers
- Provide opportunities for training, continuing education, and professional development of probation officers
- Review current tribal code and advocate for changes that will enhance community supervision services and practices
- Provide adequate tools and resources to enable probation officers to implement supervision practices shown to be more effective
- Plan for prolonged sustainability of the position

Tribal court judges also can provide needed judicial backing and support for probation officers to enforce and monitor conditions of supervision and work with offenders on changing their behavior. Judges

25. Pub. L. No. 109-248, 120 Stat. 587 (2006). The Act is a mandatory sex offender registry in which federal, state, local, and tribal jurisdictions must collect, update, and share information (such as social security number, place of employment/education, address(es), photographs, demographics, vehicle registrations, license plates, and other information) of convicted sex offenders released into the community. *See id.* § 114.

have the ultimate authority, in most cases, to decide what sanction is imposed on each offender before the court. If community supervision is granted, the judge determines how long the probation will last, how much will be paid in fines, restitution, and supervision fees, and assigns any special supervision conditions he/she deems necessary to steer an offender toward rehabilitation (e.g. drug testing, counseling, home visits, etc.). If a probationer breaks a condition of supervision, the judge has the authority to revoke community supervision and require the offender to serve the original sentence imposed by the court or to impose more severe sanctions while remaining under community supervision.

Tribal court judges can also provide credibility to the community supervision process and the position of probation officer by working to professionalize the position in the eyes of the court and the community. This can be done by creating an official job description which outlines duties, responsibilities, and expectations of those in the community supervision/probation position; conducting personnel performance reviews and evaluations; ensuring that the community supervision/probation officer receives adequate initial training and continuing education so they are knowledgeable about current evidence-based practices for working with tribal offenders;[26] and preparing for the continuation of the position by advocating its adoption into the tribe's annual budget and eliminating the dependence on grant funding for prolonged sustainability.

Community supervision/probation officers need many tools in their toolbox to provide good, effective supervision to a diverse population of offenders. Comprehensive and ongoing training to improve knowledge of offender issues and enhance job skills is certainly critical; however, tribal court judges can assist community supervision/probation officer in gaining access to other needed resources as well. For example, tribal court judges can work to ensure that, under their watch, probation officers have access to the needed assessment instruments (screening, risk/need, specialized, and strength-based) as well

26. The American Probation and Parole Association website provides information on training opportunities and resources on effective community supervision practices. www.appa-net.org.

as have the latitude to individualize supervision/treatment plans according to the results of those assessments. Additional tools and resources that may benefit some community supervision/probation officers include access to training and appropriate and proper safety equipment to protect officer safety (e.g., bullet-proof vests, less than-lethal weapons, etc.), drug and/or alcohol testing supplies, electronic supervision tools, reliable transportation, and back-up assistance from law enforcement officers when needed to conduct safe search and seizures.

Tribal court judges also can be instrumental in conducting a review of current tribal codes to ensure that they support good probation practice and, when necessary, advocate for modifications to the code. For example, proactive supervision practices require probation officers to supervise offenders beyond the boundaries of their offices by stepping out into the community and visiting with offenders in their homes, at their workplaces, and in other community settings. Tribal court judges can work with tribal leaders, when necessary, to establish policies and procedures that allow supervision officers to conduct home and employment visits to aid in monitoring and enforcement activities.

Conclusion

Tribal court judges have an important role to play in developing and sustaining effective community supervision programs in their communities. Tribal justice systems are not new; they existed long before federal, state, and county systems, but they are being asked to address new challenges and taking on new forms and dimensions within which community supervision/probation can play a vital role. The key is for tribal court judges to recognize and have a full understanding of how implementation and utilization of effective community supervision practices can benefit their system and their community and use these services to their fullest potential.

Tribal court judges are in a unique position to effect changes within systems not currently utilizing community supervision/probation strategies. They often times oversee the tribal justice system and are able to take the steps necessary to either initiate the use of community supervision/probation or

enhance what currently exists to make it a more valuable justice resource. Jail crowding is a nationwide justice issue, and is often exacerbated in Indian Country; probation offers a cost-effective and community oriented approach for the release of low-risk offenders back into the community where they can maintain family and community connections, receive treatment interventions, and repair the harm they have caused the tribal community. With the assistance and support of tribal court judges, offender supervision in Indian Country can mesh evidence-based practices for community supervision with traditional tribal-specific interventions and practices.

Reflections on Tribal Justice: Conversations with Native American Judges

In preparation for this special issue, staff from the Center for Court Innovation conducted a series of interviews with tribal court judges from across the country. The resulting discussions touched upon a wide range of issues, including the relationship between tribal courts and tribal sovereignty, the impact of U.S. Supreme Court decisions on tribal communities, the historical development of tribal courts, and many other important topics. These transcripts, which have been lightly edited for space but not for content or language, describe some of the unique challenges facing tribal justice systems and highlight new (and traditional) ideas for strengthening tribal justice systems for the future.

INTERVIEW

ABBY ABINANTI, CHIEF JUDGE, YUROK TRIBAL COURT, KLAMATH, CALIFORNIA, AND CALIFORNIA SUPERIOR COURT COMMISSIONER

Abby Abinanti has served as Chief Judge for the Yurok Tribal Court for three years. She also serves as a Commissioner for the California Superior Court, handling juvenile delinquency cases. The Yurok Tribe has the largest Native American population in the state of California, according to the tribe's website. The Yurok Reservation extends from the mouth of the Klamath River, at the Pacific Ocean, and runs approximately 44 miles upstream, one mile on either side of the Klamath River. Prior to European contact, the Yurok Tribe had a justice and dispute resolution system that included mediation, payment or punishment as part of the resolution process. A village leader or group of leaders would listen to the complaint, dispute, or problem and arrive at a settlement. Thirteen years ago, the tribe re-established a tribal government, and the Yurok Tribal Council subsequently established a constitution and tribal court.

*Interviewed by Juli Ana Grant**

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* At the time she conducted this interview, Juli Ana Grant was a manager for Domestic Violence, Sex Offense and Family Court Programs at the Center for Court Innovation. She currently works for the Office on Violence Against Women at the U.S. Department of Justice's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART Office).

Do most tribal members live on the reservation or off the reservation?

Off the reservation, but fairly close. The reason for that is basically economically-based. It's very hard to work on the reservation.[1] We don't tax because the economic base just isn't there. We have an unemployment rate that hovers around 70 percent plus.[2] We don't have any industry, so it's not really feasible to tax and it would be pretty unfair and not a good idea. In addition to the economic challenges, there are a lot of logistical challenges because to get from one end of the reservation to the other is very complicated; it takes a couple of hours.

What types of cases do you hear as a tribal court judge?

When I first started, we were doing a lot of fishing cases. Now we're in the process of expanding our jurisdiction. We're moving into dependency, and we've had some environmental violations. Now we have a children's code. We have a protective orders' ordinance, which is basically restraining orders for domestic violence and civil harassment. We're looking at a family code; we have a first draft of that. We're looking at a housing code; we have a first draft of that. We also now have a first draft of an elders and adults in need protection code. We do general civil, so we're pretty much on an upswing now; we're expanding.

How have you funded the tribal court expansion?

Trying to fund a tribal court is a complicated endeavor. You need many things to be operational as a court and it is not a money-making operation. There's no way you're going to impose enough fines and fees to make it pay for itself. It's just too demanding, so you're looking at general fund money to fund it and if you have a very poor economic base, then you're always going to struggle.

We've looked at a lot of the new funding opportunities from the federal government. We've written a lot of grants. A big part of the problem for California tribes being under Public

1. *See* Robert J. Miller, *American Indian Entrepreneurs: Unique Challenges, Unlimited Potential*, 40 ARIZ. ST. L.J. 1297, 1308 (2008) (noting the "lack of economic activity in general and the horrendous unemployment rates on most reservations").

2. *See* BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF INTERIOR, 2005 AMERICAN INDIAN POPULATION & LABOR FORCE REPORT 39 (2006).

Law 280[3] is that we don't have access to Bureau of Indian Affairs' [Bureau] money for the purposes of tribal courts. Even though I understand that money is very limited, it would help us, and I think that the Bureau's basis for refusing funding to us is not meritorious.

I know one of the challenges you have in trying to get cases to the tribal court is that the state courts have to identify the tribal members who are entering that system?

Right, there are several challenges. You almost have to go subject matter by subject matter. If you're looking at dependency, for instance, we have 180 plus kids in the state system, so we have to work out an arrangement to transfer those kids over to share jurisdiction and then we have to look at, "Okay, if we have new offenses, are we going to file in the state court or are we going to file in the tribal court?" You have to figure out where you want to file, what services are available; it's pretty complex. For instance, although we have the ability to approve foster care homes, we cannot provide them funding. We're working on an agreement whereby we'll eventually be able to do both of those things. But each thing that you want to do is fraught with complications.

Is the tribal court different in some fundamental way from state court?

Our court is much more grounded in the citizenry and more responsive to what people want. We're very keenly aware of trying to resolve problems as opposed to apportion guilt or responsibility. It's more, "Okay, this is the issue. How are we going to resolve this so that we can go forward?" If this is a violation, is it enough to give you a fine and make this even and we can start over? What's the most important thing? The

3. Enacted in 1953, Public Law 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 28 U.S.C. § 1321-1326 (2006)) mandated the transfer of the federal government's criminal and civil jurisdiction over cases occurring on tribal lands to the state governments in several enumerated states: California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska (upon statehood). The law also allowed other states the option of assuming criminal and civil jurisdiction over cases occurring on tribal lands within their borders. Public Law 280 has been the source of much controversy and has greatly complicated questions of criminal jurisdiction and law enforcement responsibility in the affected tribes and states. See, e.g., Carole Goldberg et al., Law Enforcement and Criminal Justice Under Public Law 280 (2007), available at http://www.tribal-institute.org/download/pl280_study.pdf.

most important thing is that you don't violate the rule, because the rule—meaning fishing in this case—is important because this is an important, shared resource and this is how we've all decided to manage it. So it isn't that you just broke the ordinance or the law here. It's necessary for you to understand why the ordinance exists so you don't do it again because it's a resource we all share.

How many cases are in the tribal court and how do you handle appeals?

Right now there are around 300 cases in tribal court. We have an appeals court, but we're looking at redoing our appellate system in a consortium with Yurok, Hoopa, Karuk and Smith River tribes. We would provide each other with certain assistance, including an appellate panel made up of representatives from all the tribes. We've already created a Tribal Court Association and are cooperating on a four-tribe grant for CASA.[4] We've also received as a group a grant to do more domestic violence advocacy.

How does the four-tribe coalition hope to address domestic violence?

We're developing self-help access centers for domestic violence victims with advocates who can explain how to get restraining orders and hook victims up to other services. Among the four tribes, we've received funding for five access center locations and are thinking of creating a Native-specific 800 line.

What shelter system do you use?

At the moment we use the state shelter system. We had proposed, but didn't receive funding for, our own shelter system that would have looked somewhat like the Underground Railroad. It would have provided on-reservation places to stay on a temporary basis while victims are accessing services. The idea was to approach community members to open their homes

4. *See* Court Appointed Special Advocate for Children, http://www.casaforchildren.org/ (last visited Mar. 1, 2010). Through a grant awarded to the Northern California Tribal Court Coalition, four Tribes (including the Yurok) collaborate with CASA on issues affecting Native children. *See generally* ABBY ABINANTI, PASSPORTS FOR NATIVE CHILDREN: A BEST PRACTICE APPROACH FOR TRIBAL ADVOCATES WORKING WITH NATIVE CHILDREN WHO HAVE SUFFERED ABUSE (2006), http://nc.casaforchildren.org/files/public/community/programs/Tribal/0710_passports_for_native_children_0000.pdf.

to do that, and so it would have been a community-based short-term sheltering system. But for now, we are cooperating with county-based programs to provide services to our population.

The collaboration between the state and tribal systems seems important in many regards. How do you envision the Yurok, other surrounding tribes, and the state courts working together? What do you think are the strengths and challenges of working together?

As I mentioned, we have decided to work together through our Tribal Court Association on certain projects, including CASA and the domestic violence access center. A third project we're going to work on is a training program for all the tribal courts on the creation of forms. We want our forms to conform to each other's and also teach our information-technology and court staff how to create forms.

I think we're going to be—depending on what things get funded—evolving more and more protocol for transfer of cases and concurrently supervising cases, both in dependency, delinquency, and probably domestic violence and cases where the primary problem is drug or alcohol abuse. It's an intensive effort to get protocols with the surrounding state jurisdictions in place and have the services available so they really perceive us as able to do a better job. For instance, we just got funded for a person who will liaison between our kids who are on probation and the Del Norte County juvenile delinquency system, the idea being we will do much more intensive case management. As we are able to demonstrate more success than their local system, hopefully they'll transfer some of their cases to us.

What services in the surrounding counties do the Yurok Tribal Court use?

Right now what happens is that we're not utilizing them in the sense that, "You provide this and we provide that." What's happening is that they take cases and they do whatever, and sometimes we come in and say, "Hey, we can really do this better, this part."

We want to get to a better place where we can say, "Okay, you guys take this part of it and we'll take that part of it." Or, "You take it all" or "We'll take it all." It's really in my mind going to be driven by our ability to correct the problem that has

brought the person in contact with the system and to redress the issues.

Do you feel that the innovations taking place in state courts, like the development of problem-solving courts, can or should inform the work of tribal courts?

I think the funding available to them ought to inform our work. I think that we have a lot of the basic skill sets and that we need to encourage ourselves to go back to our basic skill sets, to take time in formulating how we want to approach our problem-solving and to make sure that it is really culturally evolved from how we would have solved problems.

One of the projects we're working on is to have a cultural component of a wellness court, which works with substance-abusing defendants, so that there's a cultural plan. And part of that plan will be that we'll provide language teachers, and they will be required to give language instruction to people who are involved in wellness court twice a week at their home.

We need to be very careful when we adopt one model and impose it somewhere else. We can borrow an idea, but how we flesh it out might be very different. And it needs to be different. And people need to be encouraged to understand and to look at the differences. Part of the big problem here is that that isn't happening. "Here's our wellness court. You guys want one?" "Sure." And then it ends up looking like their wellness court and that's a big mistake for everybody because it's not going to work. Very well-meaning people get themselves caught up in these things that end up not working and then everybody's just totally frustrated and can't understand why it's not working. In fact, it's not working because the idea is great, but the model has to be tailored to the community, and there are not a lot of people who know how to do that.

For instance, we need to have a language and a community service component. Those kinds of things have to be there and if they're not there, it's just not going to work, because community service for us is a cultural prerequisite. We also need to require participants to learn traditional practices. You get to choose from a whole bunch of things. For instance, if you decide you want to learn to can fish, there are three classes. First, you learn how to do it; in the second class you help out,

and in the third class you help out again and then you get a supply of jars and a steamer to do it yourself. If you want to learn how to smoke fish/meat, same thing. The third time we go to your house and we build a smokehouse for you. You couldn't say, "We're going to run over and do that in New York" and they'd go, "Huh?" because it doesn't work. A citizenship class will also be required.

When you say that any court response needs to be based on how the tribe solved problems in the past, what do you mean?

Clearly there's a couple of hundred years of time. There was a huge gap because of the invasion, and our practices didn't evolve. But that doesn't mean that the approach isn't the same. Our approach to problem-solving has to be run by an overriding philosophy and then you evolve the practices. So what I'm working on and a proponent of is an evolution of practices; not evolution of approaches necessarily, because approaches change much slower.

To have an approach change is a huge thing in any culture. Practices change as times change. For instance, we know that families are really important and that shared resources are really important. You take those important things and then you say, "OK, we had the invasion and the practices we had a couple of hundred years ago aren't going to work." We didn't have methamphetamine and we didn't have booze and we didn't have cars. There are pluses and minuses. You have to evolve your practices to meet the good and the bad that came and if we had not been in such a defensive position, we would have been doing that, but we didn't, so now you have to do it. You can't just go, "We're going to skip it and become somebody else." You know, that's been the whole effort until now, and that hasn't really worked for us.

Do you think it's difficult to talk about tribal law and tribal justice systems when there over 560 federally-recognized tribes?[5]

I think that it's hard to talk about it if you are talking about practices. I don't think it's hard to talk about it if you are talking about philosophy and how you allow people to create and

5. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648, 13,648 (Mar. 22, 2007);

support them to do that. But there's very little support. You look at these requests for proposals and the requirements are so rigid and so, frankly, chaotic. There is nothing that says, "Okay, we're going to go out to a tribe and we're going to create a system." It's all, "Here's 47 different agencies with 177 different applications, all of them different." It is the most chaotic thing I've ever seen. If I created something like this, people would say, "Are you mad?"

As someone who works in both systems, what do you think are the most common misconceptions that practitioners in state courts have about tribal courts?

I think they have no confidence in us. There is this kind of overriding idea that we are wild beings on the edge of civilization and that's been true forever. And heaven forbid that you being a non-Yurok would ever end up in a Yurok court; God only knows what would happen to you. And it's like, "Geez. We can't possibly do any worse than you've done to us, so what's the problem here?" But you can't really say that because that's considered rude. But it's a fact; you know what I mean? It's very hard to take that view you see coming towards you when you see what they've done. It's like when you're in a dependency meeting and they say, "It's very important that you do this and this and have these important safeguards in and this process and this procedure." And I'm thinking, "I've been a state court judge for how long and how many kids have I placed in foster care? How many kids have been raped, abused, murdered, otherwise killed in placements I've put them in? That were licensed?" And no state system can say that hasn't happened.

The state system is not in a great position to be critical in my opinion, but it doesn't stop them. This amazing, mind-altering position they get into when they think they need to tell other people what to do. There's no ability to be humble. At my worst in tribal court I haven't done as bad as you've done at your best, so what the heck! Again, you don't say that because that is really rude and I understand that, but it's still like, "Come on!"

Bureau of Indian Affairs, U.S. Dep't of Interior, Frequently Asked Questions, http://www.bia.gov/FAQs/index.htm (last visited Jan. 30, 2010).

I think there's also no recognition or no acceptance of responsibility for how a situation got to the way it is. How did reservations come about? The working model of a reservation is economically not feasible. Period. I didn't dream up reservations and neither did Yurok. Neither did any of my ancestors. So to look at us and go, "You have 70 percent plus unemployment."[6] Well look at the model of how they were created. It is consistent with the model. And that's what you have to look at. And we have to look at that and go, "Okay. It was consistent with the model they developed so now we have to alter that in some fashion." We cannot continue to buy into what they've created for us, which they take no responsibility for. Nonetheless, it is our life.

Every little detail contributes. There's no historical sense of how it got to that place. No historical sense of why we have this view toward this or that. So California Indians hate going into court; they hate judges; they hate the system. Now why is that? California had a slave statute,[7] and who was enslaved? Indians. And how would you do that? By going to court and getting orders. Some might say, "Well okay, 1850, that was a long time ago." Well, you know what it is? Memory-wise, it isn't that long ago because people have that memory inside themselves. Maybe not the specifics, but they certainly have the attitude of the people they came from towards the institutions. They may not understand where it came from, but they have it. And so now you have to go back and explain to them, "This is why, and that's not serving us, so this is what we need to do."

How important is it for state and tribal courts to develop collaborative relationships and what do you think can effectively promote communication and collaboration? What do

6. *See* BUREAU OF INDIAN AFFAIRS, *supra* note 3.

7. 1850 CAL. STAT. 133, *available at* http://www.indiancanyon.org/ACTof1850.html. Entitled, "An Act for the Government and Protection of Indians," the law technically prohibits outright slavery; however, the only risk for the white man who enslaves an Indian is a $50 fine. *Id.* The law also allows for various forms of "indentured" servitude, including forcing Indians deemed "vagrants" to be forced to work for four months for the "highest bidder." *Id.* § 20. Whites can also "contract" for the labor of an Indian minor. *Id.* §§ 3, 19. Understandably, some people informally call this the "California Indian Slave Act." *See, e.g.*, Diana G. Tumminia, California Indians Memorial: Timeline, http://www.csus.edu/indiv/t/tumminia/MEMORIAL.HTM (last visited Mar. 1, 2010).

you think state courts can learn about the administration of justice from tribal courts?

We're institutions that occupy the same space. We're similar and we can and should share. I think if we can create a successful model, and I think we have a fairly good chance of it, we can actually provide them with a lot of assistance, just like this whole collaborative court, wellness court stuff.

I think what can be learned depends on—like anything else—which tribal court you're talking about. I think they could learn a lot from ours in the way that we are really committed to solving the problem and in making the people feel like this is theirs. This is not me fining them and taking the money; these are our resources and this is why we're doing it. And if you think it's wrong, then tell me why you think it's wrong and let me talk to someone from fisheries and see if they agree. Let me see . . . this is not something that I do to you, this is something we are doing together. I just think the whole philosophy, if you sit through month after month with us up there, it's just different. And you go, "Well, okay, you didn't do very well with your kids this month. I know you and you must feel bad about that and what are we going to do about it to make it better? Everybody in this courtroom wants to make it better—I don't care what side of the table, so what are we going to do? And if you can't make it, I understand that, because sometimes people can't." So you just go with that. It's not me versus them. It's us together coming to that decision.

Where would you like to see innovations in tribal court?

Part of the problem with being innovative is that we've been encouraged to create systems that really mirror state court systems. I think if I had the ability I'd go back out there with the tribal courts and go, "You know what? We need to take a serious look at how we want to do this, and how you want to train people to be in your court." What is your philosophy? How are you going to do this? Most tribal courts are going to say, "We want a culturally-consistent tribal court," but then have a really hard time with how to establish those practices and principles. I think a lot of work needs to be done.

What do you see as the next steps for the Yurok Court system?

I think to continue to grow our court system we have to do a community needs assessment. It's key because the community needs to start thinking about—in its own mind and hearts—what it means to have a place you go to try to resolve problems and how is that going to look for us and how are we going to make it ours and why is it important for it be to ours. How is this going to take us into the next hundred years and make us and our kids and our grandkids have a better life? How is this going to restore harmony to our community and allow us to go forward in a positive way? Without harmony what are we?

We really have to find a way to come back to our sense of what it is to be "Yurok" and have our institutions reflect that, which is not to say you don't have to draw the line sometimes and say, "You can't do that because you can't. It's not right." A lot of people in the dominant society don't want to go, "Well you can't say it's right or wrong." Actually in our culture, you can. "It's not right to treat children like this. And if you're going to do something that's not right, we're going to say 'no,' you can't do that."

INTERVIEW

P.J. HERNE, CHIEF JUDGE, ST. REGIS MOHAWK TRIBAL COURT, AKWESASNE, NEW YORK

P.J. Herne was appointed in 2008 to serve as Chief Judge of the St. Regis Mohawk Tribe. The St. Regis Mohawk Indian Reservation (SRMIR) straddles the U.S.-Canadian border at the St. Lawrence River. The U.S. portion of the SRMIR is located in Franklin County in northern New York. The Canadian portion is located across the intersection of Ontario and Quebec. In June 2009, Judge Herne spoke about the challenges of expanding a tribal justice system and opening lines of communication between tribal and state courts.

Interviewed by Aaron Arnold and Robert V. Wolf***

Prior to becoming Chief Judge, you worked in state courts. Can you tell us about your experience?

My first job was in criminal defense so when I joined the District Attorney's Office, I'd already had close to 10-years experience on the other side of the aisle. It was a pretty big role reversal, but learning the ropes on the other side was a good experience. I've also worked for tribal government with our Tribal Gaming Commission, and I have been in private practice.

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* Aaron Arnold is director of the Tribal Justice Exchange at the Center for Court Innovation.

** Robert V. Wolf is director of communications at the Center for Court Innovation.

You're in the process of building your tribal court system. What institutions are currently in place?

Historically, our tribal council has had the power to decide issues such as land disputes and other matters.[1] But in the last 30 years we've had a population explosion. So we're trying to get a forum in place that can handle the caseload that's now being created.

We have the basic parameters of civil procedure law in place.[2] We have a fully functioning traffic court,[3] which opened in 2000 and is doing well. The traffic court had to be accepted by the community at first, but that eventually has happened and the traffic court is actually starting to generate revenue.

Our next project is family court.[4] We're developing a court to handle child support issues. And in a recent referendum, we asked our community whether they wanted our tribal council to handle land disputes or if they'd prefer the tribal court to handle them, and, in this instance, they preferred that the tribal court be involved. So next on the agenda are land issues. I envision that pretty soon, when we have an ordinance in place governing land issues, we'll have a lot of cases generated by land disputes.

What is the most common misconception that practitioners in state courts have about tribal courts?

Many in the practicing bar think we have to follow New York law, but that's not the case. Far from it. We can make our own laws. So practitioners need to become educated. Our main body of laws can be found at: www.srmt-nsn.gov/tribalcourts.htm.

What do you see as the biggest obstacles to the optimal functioning of tribal courts?

Historically when we've tried to build a court system, we've had stops and starts. We're trying to avoid that this

1. *See* ST. REGIS MOHAWK TRIBE CONST. art. I, § 3, *available at* http://www.tribalresourcecenter.org/ccfolder/saint_regis_mohawk_const.htm.

2. *See* ST. REGIS MOHAWK TRIBE R. CIV. P., *available at* http://www.srmt-nsn.gov/LawsOrdinances/RulesOfCivilProcedure.pdf.

3. *See* ST. REGIS. MOHAWK TRIBE, TRIBAL TRAFFIC CODE (1998), *available at* http://www.tribalresourcecenter.org/ccfolder/st_regis_traffic.htm.

4. *See* Press Release, St. Regis Mohawk Tribe, Tribal Court to Establish Family Court (Apr. 20, 2009), *available at* http://srmt-nsn.gov/press_releases/TribalCourtToEstablishFamilyCourt_042009.pdf.

time. We're proceeding slowly, making sure we're operational and get accepted.

Getting some of the state agencies comfortable that there will be a tribal court coming on-line, that will handle cases that they'd typically see the state county courts handle, is another challenge. We're going department by department, but it isn't always easy. New York is a multi-headed type dragon, agency-wise. You need to deal with one agency on one issue, and then on another issue, you have to contact another agency even though the issue is very similar to the first issue.

We have multiple agreements on a number of issues, such as policing. Setting up our family court has required us to examine and strengthen our own tribal Department of Social Services, by repatriating services that are eligible for direct funding; and, we're looking at different funding issues to provide services in the territory. We still have a lot of structures we want to put in place. If you were to get elected to a family court position in New York State, everything you needed would be in place. Up here, we're trying to develop everything and implement as we go. So we're trying to move slowly. Right now, we're looking at issues we can address early and gain experience in. We need time to build knowledge and garner acceptance in our community.

In general, how do you think tribal members perceive the tribal justice system?

I think right now there's some hesitation. They clearly don't want a forum that will merely apply New York law. They want to see the work product behind it, and people like myself need to earn the acceptance and respect of the people, which is obvious. And what I keep reminding them is, "Look, if we're not doing this, the state courts will end up doing it for us."

We have a local radio station, and I've gone on the air to announce that we're considering doing a tribal child support unit, and it didn't take long before we had more than 40 questions from the community, which we answered. We plan to do another radio show soon.

It's a misnomer to think that because we're all Indian, we have a homogenous viewpoint. That's 180 degrees from the

truth. We're probably some of the most diverse communities anywhere, but diversity brings a lot of good ideas to the table, and we try to keep communication open and listen to all those ideas.

Why did the St. Regis Mohawk tribe decide to start a family court?

There were a couple of factors. For one thing, when you look at local level judges doing family court work, they're working locally. They're elected locally,[5] and serving a local population. We wanted the same thing. A state judge in family court is held accountable to his or her community and we'd want it no differently for us. We want the community to be able to see and respond to what the judge is doing. In our family court, my position will be elected like all the judges in the state.

The other thing we're looking at is having the Tribal Nation establish the guidelines and procedures it wants. Our guidelines might be consistent with New York, or they might be different. When I first came on as Chief Judge, we conducted an assessment to help us decide whether or not to establish a child support court, and we learned that other Tribal Nations throughout the country are accepting in-kind contributions for child support, like provision of firewood, or grandma or grandpa daycare, or products of hunting and fishing to provide for your family. That kind of in-kind payment is not at all accepted in the state courts, which is why I recommended to our tribal council to establish our own child support system.

Why did you decide to tackle child support first?

We reviewed a lot of case decisions out there, and we ranked them according to how they'd be accepted. Tribal child support laws are the most widely accepted off the reservation because states are federally required to give tribal court child support orders full faith and credit.[6] For that reason, child support is one of the easiest areas to implement.

In addition, when we surveyed the local state courts, we found over 300 open child support cases from our community alone, so we're certain there's a workload there. And with

5. *See* N.Y. CONST. art. VI, § 13(a).
6. *See* 28 U.S.C. § 1738B (2006).

child support, there are always other things involved, like health care costs from birthing, housing, access to benefits like Medicaid, etc. Appropriate child support has a big impact on people's lives.

What other initiatives do you hope to pursue as Chief Judge of the St. Regis Mohawk tribal court?

I'm trying to introduce, along with our family court, a family drug court. In doing research for that, I came across the Leech Lake Bank of Ojibwe Tribal Court [in Cass Lake, Minnesota].[7] They have a drug court with a joint powers agreement with the Cass County District Court, allowing the Tribal Nation court judge and local county court judge to sit on a case together and better deliver services. You can avoid some forum shopping that way and end jurisdictional disputes that might arise.

The drug court model is the kind of thing we're looking for. The shared decision-making aspect of it appeals to us. To bring more minds to the table is something that really makes sense to us in our communities.

Next would be the New York Federal-State-Tribal Courts Forum,[8] which was created in 2004 and every six months brings together representatives from the various court systems, including interested members of all nine state-recognized Indian Nations and tribes, in an attempt to promote communication and collaboration between tribal and non-tribal courts within New York. This effort is important for state and tribal court systems to begin developing a positive relationship. One of the great things they've done is they've agreed not to talk about issues that would break down a conversation, like land claims and gaming.

I think the key is in keeping the lines of communication open and looking for ways to work with state courts. Recently,

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7. *See* Leech Lake Band of Ojibwe Tribal Court, http://www.llojibwe.org/legal/tribalcourt.html (last visited Jan. 20, 2010). [*Ed. Note* – This issue contains an interview with Korey Wahwassuck, who currently serves as Associate Judge of the Leech Lake Band of Ojibwe Tribal Court.]

8. *See* N.Y. Federal-State-Tribal Courts and Indian Nations Justice Forum, http://www.nyfedstatetribalcourtsforum.org/ (last visited Jan. 20, 2010). [*Ed. Note* – for a complete description of the N.Y. Federal-State-Tribal Courts and Indian Nations Justice Forum, see Paul Stenzel, *Full Faith and Credit and Cooperation Between State and Tribal Courts: Catching Up to the Law*, in this issue.]

those of us in the forum were talking about getting our tribal marriage certificates recognized within the state.

They're not?

Some are and some aren't. The rules governing state acceptance are about as clear as mud. We've gotten great assistance from the participants in the forum, including Judge Marcy L. Kahn and Judge Edward M. Davidowitz, who co-chair the forum.

The Akwesasne reservation sits across the border of the United States and Canada. What special challenges does this unique geographic position pose for the tribe's justice system?

Our southern border is in New York and our northern border is in Quebec and Ontario. It's far more problematic for those governments to handle legal matters and far easier for us. We'd be far more effective in working out things with ourselves. With regard to a child support matter, imagine if one parent was living in the northern portion in Canada and the other parent was in New York. It would be far easier for us to resolve than anyone else. Right now, it's a pretty fragmented approach.

Have you surveyed other tribal justice systems to get ideas?

We do as much research as we can. Doing research and looking at other models has never been easier, thanks to the internet. That's how we found out about what they're doing in Leech Lake.

What can state courts learn about the administration of justice from tribal courts? Can you think of any examples of tribal court practices that state courts might explore?

When I was in the District Attorney's Office, I tried to bring restorative justice practice to the table. As a prosecutor you get a lot of defense attorneys or defendants saying, "How can I resolve this? What can I do so that you will agree to reduce this?" I'd say, "Make it right what you've made wrong and we can talk about a plea." It was a fairly effective approach. We were able to resolve a lot of cases that way. Victims might feel better if they were paid back or restored and be more willing to let the case go.

Innovation is sometimes hard to foster in state court systems. How common is innovation in tribal systems?

I think trying to make innovation and tradition work together is a goal. One goal we have is to make our court user-friendly. What I've seen on the outside is that a lot of courts were losing their user-friendliness or have lost that, so we're trying to keep that goal in mind here. On the innovation side, my court administrator/court attorney is trying to take advantage of technology, like implementing electronic filing. Fortunately, we have the benefit of being able to take what the state has had to learn expensively or painfully over the years and adopt it, like doing an appearance over the phone.

INTERVIEW

B.J. JONES, TRIBAL COURT JUDGE AND DIRECTOR, TRIBAL JUDICIAL INSTITUTE, UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW

Before becoming the director of the Tribal Judicial Institute at the University of North Dakota School of Law, B.J. Jones was litigation director for Dakota Plains Legal Services. Jones also serves as Chief Judge of the Sisseton-Wahpeton Oyate Court, Chief Judge of the Prairie Island Indian Community Court, Chief Justice of the Turtle Mountain Tribal Court of Appeals, Special Magistrate of the Non-Removable Mille Lacs Band of Ojibwe Tribal Court, Associate Judge for the Fort Berthold District Court, Associate Judge for the Standing Rock Sioux Tribal Court, Associate Justice for the Oglala Sioux Tribal Court and the Flandreau-Santee Sioux Tribal Courts, Deputy Judge for the Leech Lake Band of Ojibwe and special judge for several other tribal courts.

Jones has devoted his law practice to serving indigent residents of South and North Dakota Indian reservations and adjoining counties. He has represented clients in federal, state, and tribal courts as well as in administrative hearings. His areas of expertise include federal entitlements, Indian law, domestic relations, and health law. He is a 1984 graduate of the University of Virginia School of Law and is admitted to practice in several state, federal, and tribal courts.

Interviewed by Aaron Arnold and*
*Robert V. Wolf***

* Aaron Arnold is director of the Tribal Justice Exchange at the Center for Court Innovation.

** Robert V. Wolf is director of communications at the Center for Court Innovation.

Is it difficult to talk about tribal law and tribal justice systems generally when there are hundreds of tribes, including over 560 that are federally recognized?[1]

Yes, it is very difficult to generalize amongst all these tribes, and I speak from personal experience. Right now I am the chief judge in Minnesota for a tribal court with a jurisdiction extending mainly to family and election matters. That's vastly different from the tribal court where I'm the chief judge in South Dakota, which has a much broader jurisdiction with about half the cases criminal prosecutions. Some tribes have courts that deal with only a limited number of issues, such as employment disputes. So trying to generalize what a typical tribal court looks like is almost impossible to do.

Do rules and procedures differ dramatically from court to court? Even if, for example, two tribal courts both deal with civil matters, can they operate very differently?

They can be vastly different. Each tribe has its own rules, its own civil procedures, its own civil substantive law, and many times the tribe will adopt a lot of state law, which obviously can vary from state to state. I go to South Dakota, North Dakota, Minnesota, and occasionally into Montana, and I always have to be sensitive to what the tribal code says. Treaties also contribute to the variation. I always tell my students that the first thing I do when I go into a community is read whatever treaty that tribe has with the United States because those treaties are alive and tribal law should be adhered to and respected. So, yes, there is a diversity of law that governs tribal courts.

What is the biggest obstacle facing the optimal functioning of tribal courts today?

The biggest obstacles that we're dealing with are the generations of dysfunction that have been brought about by some of the policies of the United States government. A lot of the disputes that you see in court have a root cause that goes back generations, and a lot of the crimes are alcohol and drug-re-

1. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648, 13,648 (Mar. 22, 2007); Bureau of Indian Affairs, U.S. Dep't of Interior, Frequently Asked Questions, http://www.bia.gov/FAQs/index.htm (last visited Jan. 30, 2010).

lated.[2] They have historical antecedents, and we in the justice system have to work in tandem with those who are trying to make the community well before we're going to see any progress. I think we have to work with tribal leaders and those in the healing professions to try to help the community deal with a lot of the historical things that have happened within families and within the tribes.

How does that manifest itself in your work as a judge?

Just yesterday, for example, I had a custody dispute between a grandparent and a father of a child. The rules say I'm supposed to apply the old model of swearing people in, having them testify and cross-examine each other, but, you know, it's not effective. There were a lot of issues this young man wanted to talk about that had happened to him as a young man. He and his mother had never really been able to sit down and address those issues, and I'm sure she had things that happened to her in her family that she needed to explain to him. So we kind of went off the record and started engaging more in a traditional-type discussion of things, but everybody talked; there were some visitors there who wanted to talk too. It takes a lot longer, but a lot of these things don't get aired in a Western-model type system where you just talk about what's relevant evidence, things like that. I think most tribal judges are like that: we skirt around the surface of the real problem, and we never really take the time to let people air their real grievances and real hardships.

I think in tribal courts now, we're trying to get back to a system that goes right to the root cause of a conflict. The majority of the crime I see occurring has historical antecedents. I could point to a young woman who commits a crime and comes to court. I could point out a situation that occurred 20-25 years ago that probably explains why she's doing what she's doing, yet nobody ever helped her heal from the trauma she suffered. In the criminal justice system we're dealing with a lot of victims who went uncured over the years. And tribes are having to go back and confront some pretty sad realities—not

2. *See* STEWART WAKELING ET AL., NAT'L INST. OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS 15 (2001) (noting that "the crimes that most occupy police in Indian Country . . . are directly or indirectly related to alcohol abuse).

only what happened to them but what they've done to their own members. That's what we're trying to do in court systems.

How would you describe the fundamental differences between tribal and non-tribal jurisprudence?

I think non-tribal systems rely too heavily upon solutions by others: judges, lawyers. In tribal court we're trying to emphasize that the solutions lie within the community and lie within the persons who engage in conflict. In tribal courts, the lawyers and the judges are really secondary. It's the people who are involved in conflict that have to find their own manner of resolving it because the community is going to rely upon them to make it a healthy community in the future. To me it's a lot more internally-driven rather than externally-driven by judges and lawyers.

Do you see the judge as more of a facilitator—someone who tries to make sure the various participants have a chance to express themselves and come to a resolution—rather than someone who makes determinations and issues orders?

A lot of times people are more satisfied with an outcome, even if it's contrary to their wishes, when they feel that somebody has listened to what they had to say. There are so many problems in Indian country that have never been aired because nobody was willing to listen, so I think the number one quality of a tribal judge is to sit there and listen and then make a decision that people perceive as fair, and perceive as the product of listening to their problem. A lot of people see the state court system as not really interested in listening—unless an attorney is speaking—and applying rules that are concrete and non-malleable and based exclusively on what some legislature has said. So I think the tribal court judge needs to be more of a listener than a law-applier.

What are the most common misperceptions that practitioners in state courts have about tribal courts?

One is the mistaken belief that all decisions in tribal courts are driven by political factors or considerations. I'm amazed by the number of attorneys who have told me they represent a bank, and they make no attempt to repossess collateral or foreclose on properties because they say they have understood that the tribal court is not available to provide a remedy to a non-

member. Then they come into court and they realize that the system is actually more creditor-friendly than the state court system. So I think the number one misperception is that the tribal court is politically-driven, will never make a decision contrary to a tribal member's interest; it's just simply not true.

The number two thing is that tribal courts make decisions based upon some mystical, unwritten law that defies common sense or defies common understanding by non-Indians. Again, that's untrue. I mean, if you ask non-Indians who live in tribal communities, who understand the families, understand the values of the community, they're probably more comfortable going into a tribal setting than a state court setting. There's nothing mystical about what happens in tribal court. Most tribes have written law.[3] Sometimes written law is contrary to tribal values and customs, but it's sometimes written by attorneys familiar with state law because tribes like to have laws that are understandable by outside attorneys, and they think that gives them credibility with the outside world.

You've talked about what you see as the proper role of tribal court judges as listeners and appliers of traditional law. Given the fact that some tribes have chosen to contract with attorneys from other tribes or even with non-tribal members to be judges, what effect do you think that has on those tribal courts?

It really depends on who is providing services to the tribe. I think a lot of tribes would say they would prefer to have someone from the outside coming in to be judge just because of all the multiplicity of relationships in Indian communities. Relationships are big things in tribal communities; everybody knows who they're related to, and there's oftentimes a perception that because the judge is related to such-and-such person, it can't possibly be a fair system, so some tribes prefer to bring in outsiders who have no relationships with anyone in a case.

I've seen a lot of successful ventures between tribes and outside attorneys, or outside law firms that come in and run justice systems, and it's because the outside attorneys are really

3. *See* Tribal Law & Policy Inst., Tribal Codes or Statutes, http://www.tribal-institute.org/lists/codes.htm (last visited Feb. 22, 2010) (providing database of tribal codes and statutes).

sensitive to understanding tribal values and trying to incorporate those into the justice system. But, of course, you can also have people coming applying purely state law, who are not really interested in hearing from people. They'll look at a case and say, "You have to rule according to the law," and they'll just go into court and not give people the chance to express their opinions. That's not a very positive thing in the community. Again, listening to people express their feelings is an important aspect of tribal justice; that's why a lot of the hearings in tribal courts go on longer than state court proceedings.

And we rarely resolve disputes by motions—motion to dismiss, motion for summary judgment—because they're kind of contrary to how tribes decided disputes. Tribes didn't decide disputes by writing letters to each other. They decided them by getting together, talking for hours and hours and hours, and reaching a consensus. I think that's one thing that outside attorneys have to realize: there's not going to be a lot of motion practice, where they get to throw out cases or resolve disputes by written motion.

Let's stay with that theme for a second. What do you think that state courts can learn about the administration of justice from tribal courts?

Well, the number one thing I think they need to learn is that tribal courts administer justice for impoverished or poor people a lot better than state courts. My biggest critique of state courts is that they're not user-friendly for people without attorneys. We have tribal members who live all over the country, who come back to the tribal court to get their legal matters resolved—not because they don't think they could get a fair shake in state court, but they just don't have the resources to get a voice in state court.

One thing about the tribe I work for in South Dakota, the Sisseton-Wahpeton, is that the tribe allows its members to get divorced in its court wherever they live. We have people coming into our court from all over the country, and one of their typical complaints is they don't have the resources to go into the state court and get an attorney, and when they try and do things *pro se* in state court, they come up against all these barriers. The tribal court is much more user-friendly to indigent per-

sons. Many people get a sour taste in their mouth in state court because they're told, when they come in to talk to clerical staff, "Just go away, don't come back until you get your attorney"—that's one thing we do a lot better.

Another thing we do a lot better is just let people be heard. I hear so many complaints about state court from say, grandmothers, who come to court for cases about their grandchildren in state court, and they think they're going to be heard. They wave their hand, they raise their hand to be heard, and the judge says, "No, I can't do that. That's out of order; I can't let you just talk." In the tribal court, we listen a lot better, I think.

Thirdly, I think that we do a little bit better job of trying to learn the values and customs of people we administer justice for.

How important do you think it is for state and tribal court systems to have a good relationship or even have collaborative relationships? And how can they go about promoting better communication?

I think it's done on a local level. My perception working in Minnesota, North Dakota, and South Dakota and being involved in tribal state forums all over the country, is you need to develop that local relationship. What happens on a statewide level oftentimes sabotages tribal/state relations, but that doesn't mean you can't have good relations on a local level. Here in Minnesota, for example, we have a great relationship between the Prairie Island Tribal Court and the local state courts. We go out with state court judges every other month for breakfast and we talk about the issues. One of the reasons we do that is we have concurrent jurisdiction over a lot of disputes. We don't want people running back and forth to courts doing forum shopping because it wastes judicial time, and it's just not productive. So, we have a state tribal judges forum here in Minnesota where we get together and talk about things like each other's orders and when one court should defer to the other court's jurisdiction. We talk about child support. We talk about custody orders. We talk about a variety of issues that we deal with, and it just requires you to sit down with the state judges and work one-on-one.

Most of these state judges want to develop good working relationships with tribal courts. It's when you deal with the state-level issues that conflict comes into play, and you just have to be able to deal with that conflict, and keep a good local relationship with the state judge. I think state judges want to learn from tribal court judges. One thing about tribal courts that state judges are most impressed with is the number of cases we process compared to the state court. On some reservations, there are tribes that are processing 8,000 to 9,000 cases a year; whereas the state courts in those areas are processing maybe two to three-hundred—yet the state court has more resources.

How—given the fact that the state courts have more resources, and, as you said, tribal hearings can be more involved and more time consuming—can tribal courts handle that many cases?

Well, a lot of them just don't rely upon attorneys to do things for them. They empower people to do things for themselves. If you look at a typical divorce complaint, there's no reason why an attorney needs to prepare that; anybody can fill in a blank. You look at some of the Montana tribes that handle that volume of cases and see that they have no attorneys at all involved in the system: the prosecutors are lay people, the defense are lay people, the judges are non-attorneys, yet they handle that volume of cases.

Now sure, you're going to go look at a case and say, "Wow, this was not done right. This is a violation of due process." But if people are content with the resolution of a matter, who are we to complain about the method that was utilized? I think it's the fact that they've discovered—and this is really antithetical to most attorney's creeds—but they've discovered that you don't need attorneys to resolve disputes, and that's how they've kept costs down. I'm not advocating for a system like that because I think most tribes realize that there is room for attorneys who are sensitive to the fact that tribes do things differently, but I think that's how costs have been kept down by a lot of tribes.

In the state court system, we sometimes pride ourselves on the idea that we're undergoing an unprecedented period of innovation and growth. We're seeing problem-solving courts,

restorative justice, community justice, and other ideas, many of which really aren't original to us but have roots in tribal justice practices. Do you feel that some of these innovations taking place in state courts can inform the work of tribal courts? Are there any specific programs or initiatives in the state courts that you feel could translate to tribal courts?

I'm not really attuned with too much that goes on in state courts. I don't practice there that much anymore. I do know that, for example, the drug court movement that started in Florida[4] is ideally suited for tribal justice systems because of its whole theory—that crime is oftentimes committed because of addiction, and if you help with the addiction, you overcome the crime. I think that's why so many tribal courts have chosen to seize upon the opportunity to start such courts.

The model for the drug court is, I believe, the most relevant for crime in Indian communities. I think 95, 96 percent of the crime that goes on is drug or alcohol related,[5] and I think tribes have taken it a little bit further and instead of saying, "Crime is a result of an addiction," they say, "Crime is a result of an addiction that is a result of a trauma," and you have to find out the trauma. Maybe there's a historical trauma—how the tribe was dealt with historically as the root cause—or maybe there's an individual family trauma that the person has to deal with. But that model, the drug court model is perfectly, ideally suited for tribes.

And then there's the problem-solving model.[6] We run a treatment court in Sisseton-Wahpeton. We try to invite as many community members into the partnership as we can. You need to get the perspective of a variety of the community members to really know what's going on and try to propose a solution that'll work. So I like that model applied to Indian communities. There's a myth out there that state court models don't

4. *See generally* Hon. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 454 (1999) (noting that the "first [Drug Treatment Court] was established in Miami, Florida, in the summer of 1989").

5. *See* WAKELING, *supra* note 2.

6. *See generally* Greg Benjamin & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, *in* JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 73, 73-86 (Bruce J. Winick & David B. Wexler eds., 2003).

work in tribal communities. I don't think that's correct. I think the state court model that's strictly based on the adversarial system is not going to work in most tribal communities. But state court models based upon problem-solving like the drug court model, the restorative justice model, really come from tribal thought processes, so I think they work really well in tribal communities.

Can you talk more about historical trauma? It's such a huge issue, and we wonder how it's addressed in the justice system, or how the justice system can even begin to address it?

Well, let me give you an example from treatment court. Most of the participants we have in this court have been convicted of a felony—a drug or alcohol-related crime in state court. And they've received a suspended sentence, with the opportunity to expunge their conviction if they complete our treatment court. A lot of them are really young people. We had a young lady—only like 20, 21—but she already had multiple driving-under-the-influence charges and some violent charges; when she got intoxicated she was very violent. We had a situation where she was allegedly assaulting a deputy, and one of the things we knew with her was that she had been the victim of some pretty horrific abuse, and nobody had ever helped her confront it, and nobody ever helped her perpetrator confront it, and he was a family member. So what we did was instead of just working with her, we worked with him, to help him confront what had happened with him. When we got them together, he fully explained to her what had happened to him. She didn't know why she had been victimized, and thought it was her fault. When she got an understanding of what had happened to him, in a way she got a little healing from that. So by working to heal her perpetrator, we kind of helped heal her. That's what I mean by historical trauma.

What's happening with the present generation? You could probably explain a lot by looking at what happened a hundred years ago. But nobody ever took the time to go back and try to help those people heal. So you have to go back and find the oldest generation that's still living, still suffering from trauma, and work with them before you're ever going to help the youngest generation. It's a little unorthodox to say to a victim,

"Hey, you need to grieve for your perpetrator," but that's kind of what we had to do in this particular case.

Is innovation difficult to foster in tribal justice systems? And how do you mesh the idea to innovate and create change in tribal justice systems with the desire to adhere to traditional practice as well?

Innovation is tough in one sense because a lot of the tribal courts that exist today are based upon a tribal code and rules that evolved from the old courts that the Bureau of Indian Affairs set up.[7] It's really hard to be innovative when you have a really restrictive tribal code.

I've tried to get innovative, for example, in probate cases. There are a lot of customary laws about what would happen to property after a person's death, and a lot of these customary laws run totally contrary to most of the probate codes from the Bureau of Indian Affairs that tribes have enacted. The Bureau of Indian Affairs laws specifically attempted to do away with the customs and traditions.[8] Now for example, I may be hearing a probate case, and the probate code specifically says, such-and-such person gets this property. Well, what's happened if the family has burned everything on that property? And, one of the family members is saying, "Hey, I want this code strictly adhered to. I want them to reimburse me for all this property that's been burned," but maybe under customary law, burning was what was supposed to happen. Or, under customary law, each of the decedent's friends had a right to come in and choose some of this property, and now what happens if one of the heirs says, "Hey, the code says I get all this property." So, the tribal codes sometimes inhibit innovation because they are the by-product of an assimilationist code that was enacted by the Bureau of Indian Affairs.

The number one problem we have with innovation in the court system is that we have some pretty rigid tribal codes that

7. *See* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 147 (2006) ("The first tribal courts for many reservations were the old Courts of Indian Offenses . . . . These courts [were] Article II courts created by the Secretary of the Interior and run by the BIA to regulate the reservation activities of Indians.").

8. *See id.* ("The BIA enacted reservation law-and-order codes as federal regulations for every activity of reservation life from crimes to curfews to religious ceremonies.").

need to be revised or looked at. I think the Justice Department's funding of tribal courts has been much more open-minded than the Department of Interior's because the Justice Department has said to the tribes, "Here's money. You design the systems the best way you see fit for your community," whereas sometimes [the Bureau of Indian Affairs] has said, "Here's some money. You need to hire a judge, prosecutor, probation." And by using that money they'd steer the tribe towards a western system. If you hired a peacemaker in court, I doubt the Bureau of Indian Affairs would pay for that position because they would say, "That's not part of the justice system." So I think the Department of Justice has been more conducive to innovation than the Bureau of Indian Affairs.

How important is it for a tribal justice system to have an independent judiciary?

It's extremely important that the tribal court have an independent judiciary, as long as the tribal court understands there are boundaries beyond which it can't go. I think if you look at cases where there's been conflict between tribal courts and tribal governments, a lot of those conflicts were maybe due to the tribal court exceeding their authority. Tribal governments need to be a little bit better explaining in their codes the limits of a tribal court's jurisdiction. Can a tribal judge, for example, overturn an election when there's not been a formal protest of the election? Can people just go right to the court and ask that the election be overturned? That's where conflict comes in.A lot of people believe tribal courts are not independent because you can't march into them, and get some active tribal government overturned. But the same thing is true about state and federal courts: you can't just march into a state court and get a state judge to overturn a decision that the governor made to expend money in a certain area.[9] A lot of this is overblown, this notion that, "Oh tribal courts aren't really independent branches of government because they're limited in their powers and they can't overturn what a tribal government's done."

But I do believe that a lot of tribal courts do suffer from their limited ability to address wrongs that tribal governments

9. *See, e.g.*, Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 615 (2007) (finding no taxpayer standing over executive discretionary spending).

have perhaps inflicted upon tribal members. Many tribal governments recognize this and now are starting to execute limited waivers of immunity, allowing themselves to be sued in tribal courts.[10] I believe that this is because they understand that if the remedy is not provided internally by the tribal courts, one day the federal courts may opt to start exercising jurisdiction over internal conflicts. This is an evolving process. Maybe 50 years from now it'll be better to judge whether tribal courts are truly independent. If you look at the early federal courts, there's no way you could say they were really independent branches of government. Most states ignored what the federal courts did. In fact, I'm pretty sure there was a U.S. Supreme Court decision that ordered Georgia not to execute a Native man.[11] The state of Georgia openly ignored it with impunity; nothing was ever done to Georgia even though they executed a man in violation of a U.S. Supreme Court stay of an order.

Tribal courts are evolving. To judge them now as not being truly independent when they're relatively young is a little premature. Give them some years and let tribal government and tribal courts air out their differences and work out a resolution. Then we can judge them.

It does sounds like you're saying that, within certain boundaries, an independent judiciary is important for the overall health of a tribal government.

Maybe, if that's what the people want. I always think it's up to the people. Maybe the people don't want a judge who's beyond the control of the tribal council because ultimately everybody should be accountable to the people. And I personally don't think judges should be able to come into a community, and say, "I made the decision. I'm the judge. You can't question what I do." To me, yeah, that sounds like independence, but it's not what independence means in a tribal community. So I think most tribal people will say they don't want judges like

10. *See generally* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137 (2004).

11. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 12 (1831) ("The individual, called in that bill Corn Tassel, and mentioned as having been arrested in the Cherokee territory under process issued under the laws of Georgia, has been actually hung; in defiance of a writ of error allowed by the chief justice of this court to the final sentence of the court of Georgia in his case.").

that; they want judges who can be removed when they step out of line. But it should be up to the people what kind of system they want. I don't necessarily accept the premise that an independent judiciary is essential to effective tribal government; it's up to the people.

Do you think that tribal court innovations are being adequately promoted and shared among the tribes themselves?

That's a real good question. I think we really—with so many tribes and so many good things going on—we really don't know what all the tribes are doing that's innovative and can help other tribes. I am amazed every time I go to a conference and talk to a judge, and he's telling me about some innovative thing they're doing in their community. I was talking to a judge who has a veterans' court where they get veterans to judge the misdeeds of other veterans in criminal and civil cases. I thought that was greatly innovative. But you would never find out about this unless you met someone who was involved.

We have a real need, I think, for maybe a publication or something, about innovative practices in tribal courts. We've been trying to throw something like that together but it's just so difficult to find out what's going on in tribal communities because tribes just are so busy with dispensing justice that they don't have time to toot their own horn sometimes. I think it would be a great idea to have some publication canvas all the innovative things going on in tribal communities.

INTERVIEW

DAVID RAASCH, JUDGE, STOCKBRIDGE-MUNSEE TRIBAL COURT, BOWLER, WISCONSIN

In October 2009, David Raasch was elected Judge of the Stockbridge-Munsee Tribal Court. Judge Raasch also serves as a tribal justice specialist for Fox Valley Technical College, providing training and technical assistance to tribal communities across the country.

*Interviewed by Aaron Arnold**

What do you see as the biggest obstacles facing tribal courts today?

The biggest obstacle that I see in tribal courts today is they lack criminal jurisdiction over non-Indians because of the *Oliphant* decision.[1] [There are] domestic violence cases involving intermarriage with non-Indians, the infiltration of methamphetamines, especially in the border tribes, coming in from Mexico or Canada. There's a lack of federal law enforcement and insufficient tribal law enforcement.[2] Even with adequate law enforcement, [tribal courts] lack jurisdiction to prosecute these cases and I'm not sure if those prosecutions

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1. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194-95 (1978), the U.S. Supreme Court held that tribal courts do not have inherent criminal jurisdiction over non-Indians and may not assume such jurisdiction unless specifically authorized to do so by Congress.

2. *See* U.S. DEP'T OF JUSTICE, REPORT OF THE EXECUTIVE COMMITTEE FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENTS (1997), *available at* http://www.usdoj.gov/otj/icredact.htm.

rank as a priority in federal or state systems if they happen in Indian country.

Do you have any ideas about how that fundamental problem can be addressed?

I think the only way to correct [the jurisdiction problem] is through legislation, through Congress—like the *Duro* fix,[3] do a fix on *Oliphant.* It can and should be fixed. In some tribes, 54 percent of the crimes against Native Americans are committed by non-Indians.[4] It's like a free pass.

Any other major obstacles you see facing tribal court systems?

Of course, we'd like the resources that the states have, especially in tribes where they're closing down tribal detention centers because they're inadequate. You never hear of that in the state system. You never hear of them closing a prison; they'll fix it and bring it up to standards, but in Indian country they simply close them and leave them with a great difficulty of lengthy distances to travel and that sort of thing.

You've had some experience in dealing with both tribal and non-tribal justice systems. What would you say are the fundamental differences between Indian and non-Indian justice?

I think the non-Indian justice system deals primarily with law and I think tribal justice systems try to focus more on relationships, and community health, and less punitive-type remedies and more healing—restorative, if that's a good word—that concept.

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3. In *Duro v. Reina*, 495 U.S. 676, 688 (1990), the U.S. Supreme Court held that tribal courts do not have criminal jurisdiction over non-member Indians. Congress responded to this decision by enacting the "*Duro* fix," 25 U.S.C. § 1301(2) (2006), legislation recognizing the inherent authority of tribal courts to exercise criminal jurisdiction within their reservations over all Indians, including non-members.

4. *See* Rob Capriccioso, *Law expert: State of federal Indian law contributes to epidemic of violence*, INDIAN COUNTRY TODAY, Mar. 31, 2009, *available at* http://www.indiancountrytoday.com/home/content/41971652.html (noting that "approximately one-quarter of all cases of family violence against Indians involve a non-Indian perpetrator"); Eileen Shimizu, *Blackfeet want remedy for Oliphant v. Suquamish*, INDIAN COUNTRY TODAY, Mar. 20, 2009, *available at* http://www.indiancountrytoday.com/archive/41568937.html (detailing lobbying efforts for a legislative solution to *Oliphant*).

And along those lines, what do think are the most common misconceptions that people in the state court system have about tribal courts?

I think one of the great misconceptions is, because many of the tribal judges are not law-trained, that perhaps we cannot afford justice or due process or be fair. I think there's also the misconception, at least I've heard some of the federal courts' concerns, that because there's no separation of powers in many of the tribal constitutions that the courts are simply acting at the direction of the tribal councils.

Let me follow up on that. How important do you feel it is that tribal judges be law-trained?

I don't think it's necessary. Growing up in an Indian community, knowing the people, knowing the community, knowing the problems. . . I think tribal judges are more problem-solvers than, say, state judges. I don't think we have to be law-trained to be problem-solvers. I don't think we have to be law-trained to be healers. I don't think we have to be law-trained to administer justice or provide due process.

How important do you feel it is that tribal court judges be tribal members and, even a step farther, for judges to be members of the particular tribe that they're going to be sitting in?

I think it's extremely important that tribal judges be tribal members of the court that they're sitting in, simply because you're making decisions that affect the community and if you're part of the community you'll have a greater understanding of that community. You're not running a remote justice system if you are from that community, or familiar with that community, or a member of that community.

Do you have any feelings about how important it is for tribal courts to have a separation of powers from the tribal council?

I think it is extremely important that there is judicial independence. Whether there's a separation of powers in the tribal constitution, or they amend the constitution to create a separation of powers or not, I think that judicial independence should be recognized by tribal councils and one way to do that is to let the community decide who the judges are, not have council-appointed judges and to remove all perceptions of influence. I

think it's extremely important that the judiciary be independent and be perceived to be independent of any tribal council.

Let me move on to the issue of the relationships between tribal courts and state courts. In general, how important do you think it is for state and tribal court systems to develop strong communication and collaborative relationships?

I think it's extremely important because in today's society nobody lives in isolation anymore. Many times, as we found out in developing the relationships in Wisconsin, the state and tribal courts are not only dealing with many of the same questions—and I'm more familiar with the Public Law 280[5] side of it—not only asking the same jurisdictional questions, but many times dealing with the same people. And many times, where there is intermarriage between a tribal member and a non-Indian, I think that [communication] fills those gaps.

How do you feel state and tribal court practitioners can most effectively build these relationships? How do you feel judges can most effectively create these relationships?

I've had this discussion many times and many people think there has to be legislation or formal agreements, MOUs, MOAs, or protocols.[6] Basically, it's the simple thing that you and I are doing now—we're talking. I think the fact that we can sit down and talk, and we don't have to agree on everything, but we'll understand everything better and we'll understand each other and we can still work together. So I think it's a ques-

5. Enacted in 1953, Public Law 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 28 U.S.C. § 1321-1326 (2006)) mandated the transfer of the federal government's criminal and civil jurisdiction over cases occurring on tribal lands to the state governments in several enumerated states: California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska (upon statehood). The law also allowed others states the option of assuming criminal and civil jurisdiction over cases occurring on tribal lands within their borders. Public Law 280 has been the source of much controversy and has greatly complicated questions of criminal jurisdiction and law enforcement responsibility in the affected tribes and states. *See, e.g.*, CAROLE GOLDBERG ET AL., LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 (2007), *available at* http://www.tribal-institute.org/download/pl280_study.pdf.

6. *See, e.g.*, JERRY GARDNER, TRIBAL LAW & POLICY INST., IMPROVING THE RELATIONSHIP BETWEEN INDIAN NATIONS, THE FEDERAL GOVERNMENT, AND STATE GOVERNMENTS, http://www.tribal-institute.org/articles/mou.htm (calling for the "use of written cooperative agreements - such as Memorandums of Understanding (MOUs) - to improve the relationship between" state governments, the federal government, and Indian nations).

tion of how to start talking and say, "how can we work together or how can we be better at what we do? How can we help each other increase the ability to respond to the needs of the communities or the people we're working with?"

Assuming that these two different systems can start to develop stronger relationships, what do you think state courts can learn about the administration of justice from tribal courts?

I think that they can learn that locking people up and punishing is not improving our society. It's keeping people safe from some people, but I don't think the majority of people in our jail systems, at least, are really a threat to society, to life and property. I know the local jail here is filled with driving after revocation and drunk drivers. I think there's an ability for tribes to work with their spiritual beliefs, their traditions, their customs to deal with some of the underlying issues that cause these people to be in the behavioral patterns they are and I don't think the state really does a good job of that. I think they tend to lock them up and hope that they've changed when they get out, but we know that hasn't happened because we now incarcerate more people per capita than any country in the world.

Do you know of any examples of where a state court system has consciously tried to take a practice from tribal courts and incorporate it in its own system?

Absolutely. Judge Edward Brunner, who's on the District Court of Appeals here in Wisconsin, employed a restorative justice process in a couple of different cases when he was on the circuit court bench, one of them involving the death of a young Indian girl at a house party. Of course, he had to impose the prison sentence, but stayed the sentence under certain conditions and he really worked with the victim's family to ensure that their wishes and feelings were listened to, as well as the needs of the offender—trying to heal and make this a productive person again. I think that's one of the underlying reasons he won the William Rehnquist Award.[7]

7. *See* Rosland B. Gammon, *Brunner receives national recognition*, WIS. L.J., Aug. 2, 2006, *available at* http://www.wislawjournal.com/archive/2006/0802/brunner.html.

What was the reaction, if you know, among other state court judges, when they saw this approach being used?

Well, he obviously got enough letters of support for the award and I know of other cases . . . . There was a young lady who was killed in a drunk driving accident who had a small child. The offender's sentence included having to keep a job and having to walk or ride his bike or somehow go past this accident scene everyday on his way to work as a reminder and to work and set aside money for the surviving child's college benefits. I think what state court judges can learn from us is some sort of creativity in working with the victims and the offenders and the public in general. The trouble is they're sometimes so bound by mandatory sentences.

That case you just described—the DWI case where the girl was killed—was that a state court case or a tribal court case?

State court. Judge Brunner handled that one also.

Do you see Judge Brunner's approach spreading to other judges?

I do. In fact, when we have these informal roundtable discussions between state and tribal courts, many of these state judges inquire if they can transfer their case or use tribal traditions or cultures or practices as part of the sentencing, such as sending a Native offender back to the tribe to go to sweat lodges and that sort of thing. We're getting a lot of inquiries about that.

Let me flip that question around then. In the state court systems, we feel like we're undergoing a period of change, where judges and lawyers are starting to talk about things like restorative justice and problem-solving justice and therapeutic jurisprudence, many of which have roots in traditional tribal justice. Some of those ideas have spawned specific practices, like drug courts, mental health courts, and such. Do you feel that these innovations taking place in the state courts can inform the work that's going on in tribal courts and is it appropriate for tribal courts to borrow lessons from the state courts about innovations that are taking place there?

I think any idea we can get from any place—whether it's a state court or any other institution or culture that works to protect women and children and to heal people who have addic-

tions and underlying issues—has value. I don't think it makes much difference where the source idea comes from; I think it's the result of the idea that's important. So yes, if they have an idea that works, I'm certainly open to trying anything that works, conventional or unconventional.

Again, in the state court systems, especially with groups like the Center for Court Innovation, we're always trying to innovate and change and reform and find better ways for the justice system to get better results. What do you feel the role of innovation is in tribal court systems and how does it fit in with the desire to retain traditional practices?

We've been innovative all of our lives. That's one of the reasons we're still here. We have overcome or survived tremendous oppressive tactics of the federal government. We've been invaded; we haven't been conquered. We've been innovative in ways of survival for centuries and so I think to hang on to old traditions could sometimes be harmful and I think we've always innovated ways to move forward and to look to the future. I think innovation is just part of us.

Do you feel that tribes are doing a good job of sharing these innovations with each other in the area of tribal justice? Do you think that the tribes are sharing this information so that everyone can take advantage of what's working?

I think we can do a much better job of sharing information not just between tribes, but within tribes. There are many great ideas being used and we hear about them at conferences. We should be hearing about them at staff meetings and we're not, so I think we can do a much better job of sharing innovative ideas. It's not that we have to copy the idea, but we take concepts and we work with them and we can manipulate them and mold those into our community. You know, it's like the bird doesn't use every stick it picks up to make a nest. It only takes the ones that fit its nest.

Do you have any specific ideas about how practitioners like yourself, or outside organizations like us, or the government, or others can work together to accomplish that, to share this information better?

I think through publications is one good thing. I think, not being fearful that someone is going to say, "You can't do that

because it violates some statute or some mandatory sentencing rule." I think we just have to be open and have honest open dialogue, not keep things to ourselves. I always think if a person found a cure for all cancers and then decided he wasn't going to share it unless he sold it; that would be a crime. I think we should share and we don't have to copy the ideas or the innovations or the programs, but we certainly can gather thoughts and ideas and improve what we're doing.

I'm also interested in the relationship between tribal law and tribal culture. How important do you feel tribal law is in supporting or restoring tribal culture?

That's a tough question. The tribal law I think is absolutely necessary today because many tribes have, I hate to say lost, but misplaced the use of their culture and their traditional practices. So I think the law is very important, with the understanding that the law is simply a guideline. I don't think it's an absolute. Laws should have cultural components as far as, "What do you do when the law is broken? What did they do before?" I think you can blend the two together, but the law is necessary because the culture isn't fully understood by all Native American people and it's certainly not understood by non-Native American people.

I'd like to ask you about peacemaking. I was speaking with Judge Barbara Smith,[8] and she mentioned that when she wanted to learn about peacemaking, she went to Wisconsin and you were one of her mentors in that area. Could you explain what peacemaking means to you and how it fits into tribal justice?

I sort of said this before. The adversarial system is very rigid; it has very rigid sets of policies and procedures in law and they all, especially in the criminal area, come down to a finding of guilt or innocence and of course "guilty" then leads to a sentencing, a punitive stage. Peacemaking doesn't work that way. Peacemaking looks at the relationships that have been damaged. "What can we do to sort of repair this?" I don't like "restore" because we can't restore them back as if nothing happened, but maybe we can repair them and make them

8. [*Ed. Note* – This issue contains an interview with Barbara Smith, who currently serves as the Chief Justice of the Supreme Court of the Chickasaw Nation.]

stronger—look at the relationship of the parties involved, or the community involved, and how we get that to be better and stronger.

Peacemaking is more of an educational process than an adversarial process. In peacemaking we get to learn about the feelings of the other person; we get to learn ideas. Some of the peacemaking that I've been involved in, where people can simply be at each other's throats for years and years and years simply because they've never talked—it goes on to that same simple communication process of conversing with each other like you would build relationships between state and tribal agencies or practitioners. It's the same thing with peacemaking: it's about the relationships involved and less about the law. We find it extremely beneficial and not only that, but I think for future generations we're setting an example of how to resolve differences and disputes, rather than calling 911 or suing somebody. We're teaching our young ones that there is a different way, a better way. Will it work in every case? No. I'm not that idealistic to think that we can heal everybody or resolve every problem, but I think we could sell most of our prisons if we did more of this.

Do you feel that peacemaking can translate into the state court system?

Absolutely. It already has. They call it mediation; it's a form of peacemaking. Peacemaking's deeper than that, though. It goes down to—not so much compromise, but more understanding. But they're already using alternative methods of dispute resolution rather than pounding the gavel and making findings.

So you think expanding that kind of approach into more kinds of cases would be a way to get away from the punitive, adversarial nature of these cases?

Absolutely. In fact, I always hoped when I was a judge that I'd become unemployed because of peacemaking.

Any other thoughts you'd like to share about the state of tribal courts today and where you see them going?

I think we've been in sort of a cultural and traditional revival for some 20 years now. It took us a while to recover after

the Indian Reorganization Act[9] and it took us a while to recover and establish our governments and survive, but I think we're starting now to look more at language, and traditions, and practices, and I think a lot of Native Americans are finding a lot of pride in that. I think they're finding a lot of sacredness in being different. I have a lot of hope for the future. I have a lot of hope, I think the traditional ways, or the traditional philosophies, the peacemaking processes, that sort of thing—those are ways to address some of those issues in our communities, especially the alcohol abuse, drug abuse, those sorts of things. We all know that the other system hasn't reduced any of those numbers at all, so I'm hopeful for the future and I hope more tribes incorporate their own justice systems, and not so much the adversarial system, but more of the: "How did they do it before the Europeans got here? What worked then? Can we use some of those things that worked then? Can we incorporate those into what we do today?" And reverse the roles and say, "our dispute resolution is the original dispute resolution and if our original stuff doesn't work, we'll have a trial and use the adversarial system as the ADR."

9. Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at §§ 25 U.S.C. 461-479 (2006)). Also referred to as the "Wheeler-Howard Act" or the "Indian New Deal," the Indian Reorganization Act, among other things, encouraged the creation of tribal constitutions (generally based on the American model). *See*, *e.g.*, Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006).

Interview

Barbara Smith, Chief Justice, Chickasaw Nation Supreme Court, Ada, Oklahoma

Barbara Smith is Chief Justice of the Supreme Court of the Chickasaw Nation. She is currently serving her third three-year term on the Supreme Court. She previously served as District Court Judge for the Chickasaw Nation.

*Interviewed by Aaron Arnold**

In your experience, how important is it for tribal court judges to be members of the tribes in which they sit?

I think it's very important. The problem has been in recent years that a whole lot of tribes didn't have people they can draw from. The Chickasaw Nation—we're pretty fortunate because we have a tradition and history of being well-educated, so we have had people to draw from. If you're a tribal judge [for the Chickasaw Nation], you have to live within the nation boundaries. I was living in Norman [Oklahoma]; I had to move across the river into the nation in order to be a tribal judge.

When I first started I didn't think it really mattered, but the longer I have done this . . . I do see that it is important for judges to be Native first and I think it is important, really important if you can, to draw from your own citizenship for your tribal judges. Like the states or the United States, we don't

* Aaron Arnold is director of the Tribal Justice Exchange at the Center for Court Innovation.

draw outside our citizenship in order to bring judges into our area.

I know that some tribes contract with non-Native judges for the reason that they don't have any tribal members who are attorneys or not enough to draw from to be judges. In your opinion, would it be preferable to use a tribal member who is not an attorney rather than use someone else from outside the community who is an attorney?

I think it is important to have law-trained judges. The problem is it's not always easily accessible, so you do have to go with what is accessible to your tribe. Some places, they are so far away from things and there aren't a lot of tribes to draw from, so you have to draw your best person that you can find [to serve as a judge]. In my opinion, it's preferable that they be Native American first and foremost, but sometimes that's not possible.

What would you say are the biggest differences between the role of a judge in a tribal court system and a judge in a state court system?

I'm not sure. Speak a little more about that.

I've heard some tribal judges say things such as, "A state court judge is under constraints to hear cases with a certain amount of speed and is concerned primarily with preserving a certain process, where we tribal court judges have more flexibility to look at the person before us as a whole and decide how can we really go about approaching this case in a way that heals the people who it affects and we can take our time a little more and we can take a more holistic approach to justice." That seems to be a common theme.

I think that is part of the culture of Native American people and tribal justice systems. I think the irony is that that's where state and federal judges are going. I practice law, so I see a lot of different judges outside of tribal courts, and they are changing. They are really changing to more of what we have known as our traditional culture and working with the community to try to make it a more healing situation. I'm very hopeful. Have you seen all of the problem-solving courts that the federal government is funding with all these grants? See, they're changing. They're moving back to where we were

before *Ex parte Crow Dog*.[1] It is shifting back. I think the better way is to have a more therapeutic jurisprudence and I think tribal people have known that for a very long time. The non-Indian courts and the Indian courts are coming at it from different directions, but I see us heading into the same river and going the same direction.

What do you see as the biggest obstacles facing tribal courts today?

One, I think there is still some bias, either racially or culturally, in the non-Indian system against the recognition of tribal courts as real courts. We need to see both sides of the road, so that we can help the non-Indian court judges understand how we work, how both sides work. I think that's really better than trying to isolate. I know in Oklahoma we have some judges who still have biases against tribes. Those are hard to overcome, but I think education and reaching out—maybe doing what New Mexico and Wisconsin and other states have done to bring both types of judges together to understand one another[2]—that brings respect and knowledge.

What do you see as some of the most common misperceptions that people from outside tribal court systems have about tribal court systems? You mentioned that there's an overall

1. 109 U.S. 556 (1883). This case involved a murder on an Indian reservation in the Dakota territory. *Id.* at 557. Crow Dog, a member of the Brule Sioux Nation, killed Spotted Tail, a Brule Sioux chief. *Id.* The families of Crow Dog and Spotted Tail agreed, consistent with traditional Sioux principles of justice, that Crow Dog would provide "restitution" to Spotted Tail's family in the form of money, horses, and other provisions. *See* Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 737 (2008). Neighboring whites, unsatisfied with this perceived miscarriage of justice, demanded that Crow Dog be punished. *Id.* Crow Dog was subsequently prosecuted by federal authorities and sentenced to death. *Id.* at 737-38. Shortly before his scheduled execution, the U.S. Supreme Court decided in *Ex parte Crow Dog* that the federal government had no jurisdiction over crimes that occur between Indians on Indian land. *See Crow Dog*, 109 U.S. at 572. Crow Dog was freed. *Id.* Congress responded to this decision in 1885 by passing the Major Crimes Act, 18 U.S.C. § 1153 (2006), which conferred upon the federal government authority to prosecute serious crimes — murder, kidnapping, rape, assault, incest, arson, and burglary — that occur between Indians on Indian land. *Id.* § 1153(a). Together with later legal developments, the Crow Dog case and the Major Crimes Act have had the practical effect inhibiting tribes' ability to respond to crime using traditional methods of justice.

2. [*Ed. Note* – In this issue, Paul Stenzel (*Full Faith and Credit and Cooperation Between State and Tribal Courts: Catching Up to the Law*) details some of these state-tribal collaborative efforts in New Mexico, Wisconsin, and other states.]

racial and cultural bias at times. Do you see any specific misperceptions that state practitioners have?

There are a lot of things that people outside the tribe don't understand. And some that people inside the tribe don't understand. They don't really get why we're sovereign. They really don't understand that. My brother and I teach tribal sovereignty at the University of Oklahoma. Students sometimes say, "We were conquered. So why are we sovereign?" They just don't understand tribal sovereignty. You have to understand that or you don't ever understand why there are tribal courts and how they work. The news media and everyone used to make fun of President Bush when he was asked about why tribes were sovereign and his response was, "Well, because they're sovereign."[3] That was a more difficult question to answer than we were giving him credit for. So those are things that have to be cleared up. Why are tribes still sovereign?

Students also don't get why we even have our own courts. They don't really. I get questions like, "Are those real courts? If you appeal it, does it go to the Supreme Court . . . the United States Supreme Court?" They just have no clue as to how this all works. Part of that is because we were all educated by the same public school system. A lot of lawyers still ask me, as a lawyer and as a judge, "Where do I appeal my case?" They don't understand that the appellate process is within the tribal court system. And that's it—that's your appeal. You're done.

Tribal sovereignty [is the biggest misperception] but then, from there, it's very easy to explain why we have tribal courts.

You've already started to address my next question. How important do you think it is for state and tribal court systems to begin developing collaborative relationships and how do you feel that they can most effectively do that?

I think it's very important. In Oklahoma we have 39 tribes. It's important because our jurisdictions cross one another constantly, so it's important for tribal judges and state judges to have a mutual respect and understand each other's jurisdiction, which is not an easy quest. It's very complicated.

3. *See* Carl Hulse, *Bush Leaves Behind Giggling Democrats as He Hits Trail*, N.Y. TIMES, Aug. 10, 2004, *available at* http://www.nytimes.com/2004/08/10/politics/trail/11TRAIL-TRIBAL.html.

You have counties, you have municipalities, and in Oklahoma they're all right within tribal jurisdictions. So we're all in there together.

As tribes get more economically developed and their court systems grow, it is a growing problem for everyone to understand how to work through this. I have found it difficult in Oklahoma because a lot of state judges don't want to give up any of their power or jurisdiction. But then there are other state judges who are just dying to know because it reduces their dockets, it reduced the problems they're going to run into. In Oklahoma we're going to try to start small with certain areas like the Chickasaw Nation and see if we can get a little conference together of just the judges so we can take off our posturing and deal with "Who are we?" and "Why is it that we can do this?" I think most judges, if you can explain to them and teach them your perspective, they're appreciative of that. Again, it's about teaching and helping everyone understand. But we're not there yet in Oklahoma.

I've seen you at a couple of conferences make presentations on the role of peacemaking in tribal justice systems. I wonder if you could speak a little bit about what peacemaking means to you and what you think the proper role of peacemaking is for tribal justice systems.

I was introduced to peacemaking when I first became a tribal judge. The judicial branch sent me out on a journey to learn about peacemaking because they had heard about the Navajo's peacemaking and they wanted to have that within their court system. I went to Wisconsin and Judge Dave Raasch[4] was kind of my guide through all of this. I met peacemakers from the Mohican tribe and from the Ho-Chunk tribe. And really, they taught me about peacemaking.

As an attorney, I just assumed it was mediation. . .just another word for mediation. In this journey that I went on I learned that it is so much more than that. Mediation is about an issue. Mediation is you go in and you've got some issues you need to resolve. Peacemaking is about relationships. If you heal the relationship or help people learn how to heal the relationship—because it's a lifetime tool—then they can solve is-

4. [*Ed. Note* – An interview with Judge Raasch also appears in this issue.]

sues themselves. But you have to heal the relationship first. That's really what peacemaking is all about: it's about the relationship.

When you go to non-Indian courts to resolve some kind of issue, there are usually two parties; there's a plaintiff and a defendant and those are the two people involved. Those are the only two people that really have any chance to say something. It's also limited because of the rules of evidence and the rules of the court. So the lawyers get to talk a lot, but the parties don't really get to speak very much. And so peacemaking tries to resolve that issue. In peacemaking, there may be two people at the center of the issue, but there are many people around those people that this affects. Once you bring people in to talk about things, everybody gets to talk. One of the things these peacemakers taught me was there's great healing in being able to tell your story; in being able to tell your story without judgment; to tell your story without criticism; to tell your story without anger. You just get to tell your story.

At the end there's also great healing in listening, in hearing the story of other people. We really don't listen very well. That was one thing that Dorothy Davids, the Mohican peacemaker, taught me. I kept wanting to interrupt and ask questions and finally she [said], "You aren't listening. You have to learn how to listen, to listen without thought of what you're going to say about what I'm saying." It was kind of a revelation, because as lawyers, that's all we do. We are listening so we'll know what we are going to say about what you said. In peacemaking, one of the things that everyone has to agree to is that you will listen; as long as that person has the talking piece, you listen without comment, without any kind of judgment or criticism. It has changed how I practice law, because I have become a better listener and people need to be able to tell their story—their whole story, no matter how long it is, they need to be able to tell it. We're kind of in a society right now of sound bites and text messaging, little bitty bits and people don't really get to speak and tell their story very often. I think that's hurtful. Peacemaking allows everyone to come together and talk, say what they want to say.

I'll give you an example. We had a young girl who was a minor; she was 16, but she wanted to petition the court for ma-

jority and to move out of her grandfather's house, where she lived with her sister. One of the judges said, "Why don't you go and talk to the peacemakers?" Part of what we do is we have them, if they can, write out their problem and each party gets to do that. It was all set up and she had written out her story and she had given it to the peacemakers. When the time comes for peacemaking, the grandfather and the sister show up, but she does not. What we have learned is that that's okay. We're still going to have the peacemaking circle. There are two people there that are going to tell their stories and get to listen to each other and they get to hear why this little girl wanted [to move out]. So the peacemaking continued anyway, without this little girl. The peacemakers later asked me, "What do you think? Do you think that was a good thing? We really didn't know what to do. We didn't know whether to go ahead." I said, "I think that's really good." The grandfather and the sister, they go back home and the little girl who wanted to move out is still living there. What we learned from that was that these two people healed and the little girl who had filed this petition, she decided to stay because their relationship had changed. It was resolved, even though she wasn't there. They changed; they were able to help her. And she stayed; she decided not to do the petition, and everything worked out well.

It sounds like in the Chickasaw system the district court judges would refer people to the peacemakers if they feel it would be useful. It's almost like a separate or parallel system to the more standard adversarial court.

It is, with some additions. Peacemaking is a tool the judges can use. But our peacemaking is also available if you do not have a court case and you just want to take your family over, or take your brother over; you guys just want to go and meet with the peacemaker, you can do that. You do not have to file a court case in order to do that.

Is peacemaking used in criminal cases?

You know we don't do much criminal [law] right now. It can be. I have talked with a lot of tribes where it is used. I met with a parole officer—he's the parole administrator for a big region in Wisconsin—he uses this for people who come out of prison. They sit in circles and they use peacemaking to help

those people who are trying to come back into society. He said that it's just been huge because it reduces recidivism of the people he's dealt with returning from prison.

Let me tell you a story. I have a nephew who was attacked by some young man when he was 16. My nephew was beaten pretty badly and had to have major surgery. It was really frightening to our family. I don't think we'd ever felt that kind of anger towards other people. That just wasn't part of our nature. But the anger was so great and hurtful and everything was about the anger, and everything was about the fear. . .all of these negatives issues. This went on for a long time, like several years. It appeared that this problem was between the victim and the perpetrator; it wasn't. This affected the victim's family, friends—a huge circle of people. I don't know, but I would guess that it affected the perpetrator's family and friends. It's a wide community that one crime affects and that is where the healing and the peacemaking, I think, is so important. We always look to peacemaking to help with child custody or divorce and visitation—family matters. We really should look at it to help in the criminal area too, because it helps to heal the community, whether your community is your family, or whether the community is your family and friends, or your community is your whole tribe, or your whole city. That's what's missing in our criminal system.

The question I always come back to in my own mind is—is this something that can be tried outside tribal justice systems or is it too intertwined with Indian culture and tradition?

I have used it outside tribal justice systems. A family in Norman asked me to do a peacemaking circle because they had a child who was doing drugs and their whole family was just fragmented by it. We had our peacemaking circle and this was the first time that they were able to sit down and talk. They had not been able to do that as a family for a year or two, they had been so fragmented. And they cried—they just talked and listened to one another. We didn't solve all their problems. In the end, the young man, he got up and left. He said, "I just can't do this anymore." But I talked to them later. They went on vacation; they were able to talk to one another. And they are not

tribal people. So I don't think this is limited to tribal people at all.

With that in mind, how can a state court system, to which this entire concept would seem foreign, begin to try to incorporate a peacemaking approach into its existing structure?

Well, it's interesting. I went to the Oklahoma Supreme Court—they have a mediation program where they train mediators to go around and help with mediation in state district courts.[5] I went up and helped them learn about peacemaking and we talked about what they could do with it.

I ended up at the other end of it a couple of months back [as a lawyer]. This mediator came into this mediation—there were three lawyers there and they started to speak and I finally I just went, "You know what, I want to recommend that all the lawyers leave the room." And so we did. And the mediator turned to me, he said, "You know, I heard you at the Supreme Court, and I used that in my mediation, and I am so glad that you suggested that the lawyers leave." So we left them there. They did a peacemaking circle. They didn't bring in all the extra people they could have. And they came to a consensus, an agreement. It's there. It's really a philosophy that your mediators—or other people who are trying to help resolve issues—it's a philosophy they have to adapt.

In the context that you just described where you were working with a mediator from the state system, I imagine the mediator was not Native American, right?

No, he was not.

So he stepped in as a peacemaker of sorts in that situation. Do you feel that someone from a non-Native background can acquire the mindset or the skills needed to become an effective peacemaker?

Oh yes, because it's about relationships. It isn't about issues, it's about relationships and it's about helping people navigate through those.

It's difficult to get lawyers to step into the light. Law school and lawyering, it is intense and great training and we

5. Oklahoma established this program through the Dispute Resolution Act, OKLA. STAT. ANN. tit. 12, §§ 1801-1813 (West 2009).

learn to be adversaries on issues and it's difficult to change that. So it's a hard sell. It took a while for me to understand what they were talking about—all those other people. But it really has changed the way I practice law. It's changed the way I approach every case, because lawyers are really the leaders in cases—the judge is there to "do the courtroom," but lawyers are leaders in cases.

In one case, one of my young lawyers had been handling a guardianship that had gotten way out of hand. I said I'll go help and there we were in court and it was funny. Here we were in state court and the only Native American in the group was me and we went outside and stood in the foyer. And we were in a circle, because that's the way people gather. We were in a circle and everyone was saying whatever they wanted to say and we got it resolved and when we got back to the office the young lawyer turned to me and said, "You used that peacemaking." And I thought, I didn't even realize I had done that. He was right, I had. That's when I kind of realized there are other ways to practice law than "the fight." We can be healers.

What do you feel state courts can learn about the administration of justice from tribal courts, and have you come across any specific examples of programs that state courts are using or can use that come from a tribal tradition?

I've already mentioned one—all of these new problem-solving courts that state courts are using: mental health courts, juvenile courts—I've even seen prostitution courts.[6] All types of courts that are trying to help people. I know they're shooting for healing people and helping them return to society, but I think that they can learn a great deal.

We have a great judge in Cleveland County that I admire, Judge Lucas. When he came in as judge he was pretty—you know how some judges can be demeaning and overpowering and trying to frighten the people and he has changed so. I gave him one of the peacemaking books that I always have people read, and hopefully that was helpful to him. But he has changed so that when he does the drug courts he uses more of a

6. *See, e.g.*, Sam Merten, *Courting Hookers*, DALLAS OBSERVER, July 9, 2008, *available at* http://www.dallasobserver.com/2008-07-10/news/courting-hookers/ (detailing Dallas County's efforts to create a prostitution court).

therapeutic jurisprudence, because he is kind and hopeful and encouraging and the clients want to do well for him. They need that; it is a healing process just in itself. He could be mean and threatening, and he could do those things, but those things don't work. I do think state courts could learn from that: that people are people. They need encouragement; they need to want to do this for you—not only you, but for themselves. They need that healing moment, even if it's a moment.

The other thing that I think [state courts] are missing the mark on is that they need to address the culture of the people they're dealing with, because people need a cultural base. Most Americans these days, especially those in trouble—they have no base. They have no sense of who they are and how they got here . . . pride in their connection. They need that and they don't really get that. I think it's a huge error and I think that's something that tribal people have been able to hold on to, even though there have been many attacks against our cultural base. We still have it. I know I am Chickasaw. I know who my ancestors are. I know some history; I'm learning more. It's healing to a person who's floundering in this world, it's healing to know what your base is—your cultural, or ancestral, or your community base. There are a lot of people in the United States who wouldn't even know where to start, just wouldn't know where to find out who they are. They're just here. They're just today and that's not enough. I do think state courts should take that and help people learn about who they are. Once you know who you are, you have a better chance at being able to move forward.

Let me follow up on that: can you think of any specific ways in which a judge or a court can promote those kind of values and help people find a connection to their culture and their history?

I was a teacher before I was a lawyer, before I was a judge. I think that should be a part of whatever counseling or program [that people are ordered to complete]. I think there should be a separate, "I'm going to help you find out who you are, who your people were, where you're from. I'm going to help you build a cultural base." That should be the groundwork that goes along with any of the counseling, or any of the anger man-

agement, all of those things, because that helps you find peace in who you are.

I have a young man who's in trouble in the state juvenile system and as I was sitting with him in detention on Monday and talking to him I said, "Are you Native American?" And he said, "Yeah, yeah. I'm Chickasaw and Choctaw." And I said, "Are you a citizen of one of those tribes?" And he said, "No, no. My Mom, she never . . .. My Dad is, but they never did, you know, get my citizenship." I thought, you know, there's a start for this young man. There's where someone needs to help him start. He needs a guide through this to help him get connected. So many of these people—and he was one of them, they're not connected to anything. He can't read, so he can't be successful in school. He has a learning disability. He is Native American, but doesn't really know anything other than he might be Chickasaw or Choctaw. That's the place to help him build who he is. And from there he has a chance.

I want to try to flip that question around and pose it the other way. Do you feel that tribal courts can take the ideas that are being developed in state courts systems—like wellness courts and mental health courts and restorative justice initiatives—and incorporate those back into tribal courts?

The road goes both ways. I think we can all learn from each other and take the best parts of each other—it would lead to nothing but a positive outcome. I think it's important that we stay abreast of all this. I always think whatever is good for people will be good for both courts.

In the state court systems, we're always looking for ways to innovate, ways to improve the way justice is administered. How common is innovation in tribal court systems and how do you mesh the desire to innovate and improve with the desire to adhere or to return to traditional practices?

I think there's a misconception that traditional practices are stagnant and I don't think that tribal people were ever stagnant. People have a tendency to say, "the traditional way was this way and that was the only way it was." We are people of evolution; we evolve and we change. Native people were very good at changing with the seasons, changing with the terrain, changing with the situation and adapting, so when you talk

about innovation and traditions I think they are easily melded together. And I do know there are people on both sides of that that disagree with me and feel that traditional is just one way. But we are making traditions every day as we move forward in this world and we have always moved forward in this world. We have never stayed in one place. I think that it's the only way to go: tradition and innovation—they should be together.

It seems that tribes across the country are working to redefine how they want to structure their own justice systems and that the federal government is starting to make it possible for tribal communities to handle justice in their own ways. Assuming that you agree with that premise, do you think that tribes are doing a good enough job of sharing with each other the kinds of ideas and practices and best practices that they're developing in their individual communities?

I think that we're giving it a good try here. You have to remember we're at the early stages of this. The Chickasaw Nation—we're pretty well developed, but we've only been doing this since 2003. That's not very long. I will say that the federal grants we've received have enabled us to travel to other places, to meet other people from other tribes. We have—for a century or more, been isolated. We didn't even know about each other because of the assimilation approaches to tribal people. Are we doing a good enough job? I think we're doing a great job. Can it be moved forward and better and bigger? I think it will every day. I think it will evolve and we will be more connected and we know more about one another. I love it, and if my father were alive, he'd love it. He was a Native person. He and his sisters would be amazed at what's happening today in Indian country. They would be just amazed and thrilled.

INTERVIEW

KOREY WAHWASSUCK, ASSOCIATE JUDGE, LEECH LAKE BAND OF OJIBWE TRIBAL COURT, CASS LAKE, MINNESOTA

Korey Wahwassuck is Associate Judge of the Leech Lake Band of Ojibwe Tribal Court. The Leech Lake Reservation overlaps four counties in northern Minnesota—Cass, Itasca, Hubbard, and Beltrami. In 2006, Judge Wahwassuck teamed up with Cass County District Court Judge John Smith to create the first joint jurisdiction tribal-state court in the nation, the Leech Lake-Cass County Wellness Court. In 2007, Judge Wahwassuck and Itasca County District Court Judge John Hawkinson partnered to create a second joint jurisdiction court, the Leech Lake-Itasca County Wellness Court. Today, Judge Wahwassuck is working to establish a joint jurisdiction juvenile court with all four counties.

*Interviewed by Aaron Arnold**

Could you tell me a little bit about your background, how you got involved in tribal justice and how you became a judge?

I graduated from the University of Missouri Law School in 1991. After I graduated, I worked as a prosecuting attorney, both municipal and county, and also was in private practice. In 1995, I started working on prisoners' rights issues, both in the state and federal systems, and I became involved with helping Native American prisoners get access to their old ways and culture. It was very disheartening to see people denied the right to

* Aaron Arnold is director of the Tribal Justice Exchange at the Center for Court Innovation.

be who they are. One of my clients was even denied a final request for a sweat lodge before he was executed in Missouri. Watching that man die without the benefit of "last rites" was a real turning point for me. After that, I began working with three of the four tribes in Kansas and concentrated my work on Indian law issues. In 2001, I took the bar in Kansas and was admitted there, so I did a lot of tribal law work prior to coming to Minnesota to work for the Leech Lake Band of Ojibwe as a tribal attorney. I first came up here in 2003 and spent 2½ years doing the Band's Indian Child Welfare Act[1] cases, both in the tribal court and state courts—in Minnesota and throughout the United States. I took the bench in March 2006 with the Leech Lake tribal court and have been a full-time judge since then.

As a tribal court judge, how would you characterize the biggest differences between tribal courts and state courts?

State courts are very limited in what they can do because they are bound by what statutes dictate. In tribal court systems, we have a lot more freedom to put culture and tradition into the mix and get to fundamental fairness—not that the state systems don't, but their hands are tied in a lot of ways. We're able to bring more people to the table in a more flexible way and to respond in a way that helps heal our tribal folks.

I'll give you an example: recently there was a child protection case that was extremely contentious. There were multiple attorneys involved and motions were flying back and forth. In a state court system, it would have been a very adversarial hearing. It made a huge difference because we were able to just rearrange the furniture and put some coffee out and it changed the whole dynamic. In state court, it probably would have been at least a half day of oral arguments and people feeling very angry about things. Instead we were all able to sit down and help the family make some long-range plans that benefited the kids. Instead of everyone going away angry, the family mem-

1. 25 U.S.C. § 1901-1963 (2006). The Indian Child Welfare Act, passed in 1978, imposes federal requirements on state child welfare proceedings involving Indian children. According to the statute, "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ." *Id.* § 1902.

bers were able to sit across the table and take ownership in solving their own problems. I think that flexibility and being able to be responsive in that way is a huge difference between the state courts and the tribal courts.

Do you see any misperceptions that practitioners in the state courts have about tribal courts?

My experience has been that there are more misperceptions than knowledge out there. Those in the state court system here in Minnesota, even within the last five years, do not have a lot of knowledge about tribal court systems. When Judge Smith[2] and I first started our collaboration on the Wellness Court, we did a presentation for state judges. We had supreme court justices, appellate court judges, and district court judges and we gave them a pop quiz on Indian law and I don't think very many of them passed.

How did they like that?

It was an eye-opener. I think that it really started a lot of conversation and helped the dialogue open between the systems. It was a positive thing.

You mention the flexibility that tribal courts have and how they are not bound by the statutes that bind state courts. How do you balance flexibility and the ability to get to the root of problems with consistency and fairness?

It's rooted in common goals. Take, for instance, the child protection cases: we're looking out for the best interests of the children and a lot of the goals that we are trying to achieve are the same [as those of state courts]. The misperception that we have "no written laws" or that it's a "lawless place" can be corrected through communication and letting people see the process and educating people.

The state system can be boxed in by rigid rules and procedures, and that can be a limitation. My experience is that state court judges want things to be better and want to be able to respond in better ways, but there's only so much they can do with the laws that they have to follow. I think sometimes we're "overlawed" with statutes—if you can focus on the outcome,

2. For a full discussion of the development of the Leech Lake joint jurisdiction courts, see Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733 (2008).

then you can find ways to reach better results. Our juvenile code might not be as thick as a state code, but we're trying to get to the same place. Just like the state system, we're trying to do what's best for the children. We stay focused on that.

With that in mind, what do you see as some of the biggest obstacles that are facing tribal courts today?

Money. I think that's a huge problem. There are tribes everywhere that are building their justice systems and expanding their jurisdiction and the types of cases that they're handling. Leech Lake is a perfect example; they want to build a juvenile delinquency program and have more of a hand in these cases, but there is no infrastructure to provide supervision to these kids. The Band doesn't have the resources to start a program from scratch, and we've applied for grant after grant and things are very competitive now. These days, tribes are competing against each other for scarce resources.

Also, there is a lack of understanding of how competent tribal justice systems are and the positive results that they can reach. Tribal judges need the ability to get to the table in different places so that people see tribal justice in action. I'm really blessed to have a full-time position. I can actually get out to see what's happening other places and have that dialogue. The majority of tribal judges across the country are part-time, and as much as they may want to get out there and make changes, there are simply not enough hours in the day. It all boils down to hard choices tribal systems have to make about how to use limited resources.

How important do you think it is for a tribal court judge to be, first of all, Native American and, second, a member of the specific tribe they're sitting in?

I think it's very helpful if they're Native American because I think that creates a level of comfort for people who come before the court. Tribal members who come before a Native American judge may feel that they're treated more fairly and in a culturally appropriate way. But it all depends on the person. I know that there are non-Indian judges out there who do an excellent job as well.

As far as a tribal member being a judge, I think it can be very difficult. I would love nothing more than to be able to be a

judge for one of the tribes down in Kansas, but we're related to everyone. I think that that makes it very difficult. One thing that shapes the perception of tribal courts is that family connection thing. That's not to say that most tribal member judges aren't completely fair and impartial—it doesn't matter if their niece or nephew has messed up, the judge will do whatever the tribal law says needs to happen. But I think it can be an issue.

The best scenario I can think of is to have an Indian person who is not from that tribe, but understands their cultural values and ways. Then you avoid the potential for conflicts or the appearance of conflicts.

What about the issue of judicial independence? Do you have any feelings about how important it is for tribal court systems to be independent and how they can go about achieving independence?

They absolutely need to be independent. I think that if you want people to believe a system is fair, it needs to be independent. You can't have tribal councils running in and telling the judges what to do on their cases. The judges can't be afraid that they're going to be fired if they make a decision that affects a tribal council member's family member.

It's a two-level issue: first, you have the issue of whether the particular tribe has separation of powers—officially, in the constitution. And second, whether the court is independent in other ways. Independence can be established even in a tribe that doesn't have a formal separation of powers. A lot depends on how the judge works with the appointing authority—be it a tribal council or business committee, or whatever it's called in a particular tribe—to establish a track record of independence.

There may be ways to promote judicial independence through resolutions or judicial codes. If the code has a process in place for removing a judge that includes written notice and certain protections, that goes a long way to help judges feel that they have some safety to do their jobs. It all gets down to relationships. You need to be able to have discussions with the tribal council, and mutual respect needs to be developed and earned on both sides. I'm very proud to say that in the time that I've been a judge, no council member has ever tried to step

in on one of my cases or say, "Hey, you should think about doing this."

Does Leech Lake have a formal separation of powers in the constitution?
No.

Okay, so you've just been able to maintain separation through relationships and understandings?
That's correct.

How important do you think it is for state and tribal courts to develop collaborative relationships and how can they most effectively go about doing that?

I think it is essential and a lot of it is because of fiscal reality. But it's up to each tribe to decide what that relationship will look like, based on local needs. It's something that can be a great tool to strengthen tribal sovereignty in general, by the courts coming together to achieve better results. We say this over and over again about having those common goals. We're all trying to keep kids from being placed away from home and address disproportionate minority contact. We frame our goals a little differently and our codes may get to those results in a little bit different way, but I think that by putting the power of both systems together we can create a better safety net and actually make lasting changes in our communities. It also helps to strengthen tribal systems by helping them build infrastructures incrementally. And then, when tribes are ready to take over and run their courts on their own, they're able to do that.

Could you briefly explain how the idea for the Leech Lake-Cass County Wellness Court[3] came about and what the process was to get that relationship going?

In late 2005, Judge John Smith from the Cass County District Court and Reno Wells, who is the director of probation for Cass County, approached the Leech Lake Tribal Council—the chairman at the time—and wanted to get a DWI court started. At the time Cass County was one of the most deadly counties for drunk-driving fatalities in the state.[4] People were just com-

3. *See id.*

4. *See* Monica Lundquist, *Students share message: Billboards around Remer promote safe driving*, BRAINERD DAILY DISPATCH, Sept. 22, 2004, *available at* http://www.brainerddispatch.com/stories/092204/upn_0922040027.shtml ("State

ing back through that revolving door. A lot of the people who kept coming back were our tribal members. Cass County wasn't having any success addressing their underlying problems. There was a general frustration among tribal members, not only because people were coming back through the system, but because there was a feeling that the state courts weren't helping. The county was looking at starting a drug court, so Judge Smith approached the Band and said, "We're going to do this and we can't be successful unless we have your help. Will you partner with us?"

This was one of those "right time, right place" sort of things, because I happened to be in the Tribal Council offices that day. It was before I took the bench; I was still a tribal attorney. As soon the judge and the probation director left, the question was, "So what do they want to do to us now?" There was huge mistrust of the state system. It all gets down to that lack of understanding. I told the chairman that I thought it was a good idea because the drug court model works and it's a great way for the Leech Lake Band of Ojibwe to start having a say in what happens to tribal members' cases. Minnesota is a Public Law 280 state,[5] and the Band has not yet enacted any criminal codes of its own, so all DWI cases are handled in the state court. Before we started our partnership, the Band had nothing to do with these cases. Basically the Band sat around on the sidelines and looked at bad results and continued to dislike the state system.

After I took the bench, Judge Smith and I went to work on developing policies and procedures and we looked for a joint-jurisdiction model out there that we could follow. We thought surely someone had to be doing this, but it turned out that there

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records released last year showed Cass County is one of the highest counties in the state for drunk driving fatalities.").

5. Enacted in 1953, Public Law 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 28 U.S.C. § 1321-1326 (2006)) mandated the transfer of the federal government's criminal and civil jurisdiction over cases occurring on tribal lands to the state governments in several enumerated states: California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska (upon statehood). The law also allowed other states the option of assuming criminal and civil jurisdiction over cases occurring on tribal lands within their borders. Public Law 280 is the source of much controversy and has greatly complicated questions of criminal jurisdiction and law enforcement responsibility in the affected tribes and states. *See, e.g.*, CAROLE GOLDBERG ET AL., LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 (2007), http://www.tribal-institute.org/download/pl280_study.pdf.

was nobody collaborating to this extent. So we just jumped in. We didn't even have anything in writing for quite a long time, I'd say for probably the first year. We just went forward on a handshake. We did have a Tribal Council resolution in support of forming the joint court. Eventually, we developed a written joint powers agreement between the courts.[6]

That's the most amazing part of the joint jurisdiction experience—that it was just done on a handshake for a while.

Well, we actually put a lot of time into trying to come up with some sort of memorandum of agreement, but we just got tangled up in the legalese. As it turned out, our joint powers agreement ended up being just seven lines. We agreed to exercise our jurisdiction jointly, on the cases where we could, toward a set of common goals.

Some of our readers might think, "Oh that's great, but that would never work where we are." Could you explain the relationship between the tribe and Cass County before all this happened?

The relationships were terrible. There was mistrust. The county attorney's office was always fighting the Band's applications to have land placed into trust. Tribal members did not feel like they were treated fairly in the state court system, and the state court system thought that the tribal court system was a joke and not competent. Judge Smith took the initiative to come to us to ask for help, knowing there was a chance of having the door slammed in his face. But we had a common goal and that's what made it possible to move past historically bad relationships and begin our partnership.

Has this project and this process over the last few years changed the county-tribal relations at all?

Incredibly so. Judge Smith has said that through our collaboration, he came to realize that the tribal courts were "equal, parallel systems of justice to the state and federal systems."

6. The Joint Powers Agreement, which was signed by the judges from Leech Lake and Cass County on July 19, 2007, provides as follows: "Be it known that we the undersigned agree to, where possible, jointly exercise the powers and authorities conferred upon us as judges of our respective jurisdictions in furtherance of the following common goals: (1) Improving access to justice; (2) Administering justice for effective results; and (3) Fostering public trust, accountability, and impartiality." *See* Wahwassuck, *supra* note 2, at 747.

That says a lot. In addition, the Leech Lake Tribal Council and the Cass County Board of Commissioners have joint meetings. To my knowledge, there haven't been any more challenges on fee-to-trust applications. Relationships between the tribal police and area law enforcement agencies have improved. Our Wellness Court is very time-intensive for tribal and state team who are part of it. But when you look at the big picture and how much of a benefit it has had in building relationships, it has been well worth the investment.

I'll give you an example of how far we've come. We're now building on these collaborations to start doing joint jurisdiction work on juvenile delinquency cases and that's going to be the next big step. The new initiative will be development of a multi-jurisdictional juvenile delinquency court involving the Leech Lake Band and the courts in the four counties overlapping the reservation. Cases from the state courts will be transferred to tribal court and probation services will be provided by county probation agents who will report directly to the tribal court. Our collaborative relationships have developed to the point that we're close to becoming operational with Cass County, and will add the other counties after we have the supervision system in place. Although we will develop a more detailed memorandum of agreement for this project since it involves more agencies, we really won't need much more than our seven-line joint powers agreement to get started.

Has this relationship that started with Cass County produced similar efforts in other counties in Minnesota?

It has. In 2007, the Band was invited to join a planning team from the Itasca County Wellness Court and we were able to have a say-so in how the court was developed and its policies and procedures. Now I take the bench alongside Itasca County District Court Judge John Hawkinson every Friday. There are tribal members and non-Indians in both programs [the Leech Lake-Cass County Wellness Court and the Leech Lake-Itasca County Wellness Court]. So it's not an agreement about allocation of jurisdiction; it's both courts exercising jurisdiction together.

It's also spreading to other parts of Minnesota. There's a drug court that's getting started down in the southern part of

the state and the state court plans to work with one of the Dakota tribes whose reservation is nearby. The Minnesota judicial branch has also included developing relationships with tribal courts as part of its new strategic plan.

I know a lot of tribes feel very strongly that everything should be handled in their tribal court rather than working with state courts. That's something that's very important to keep in mind—that we do have the inherent authority to handle all types of cases, including criminal cases. But many of us, like the Leech Lake tribal court, were established fairly recently and need to build infrastructure and gain experience and training for our people to take over these cases at some point. This is a good intermediate step.

In other places the joint model can be adapted to fit local needs. The Prairie Band Potawatomi down in Mayetta, Kansas, recently entered into a memorandum of agreement between the tribal prosecutor and the county prosecutor to keep tribal members from being prosecuted by both jurisdictions for the same offense. That's another example of overcoming mistrust. The state court did not trust the tribal court to be able to handle these cases. But the Prairie Band Potawatomi have been building their judicial system and have demonstrated their competence. Confidence in the tribal court has grown tremendously as a result, and the systems are looking at other ways to collaborate.

How important do you think tribal courts are to the maintenance and restoration of tribal cultures?

I think they're very important. Tribal courts can be a way to help culture regenerate and help teach people who they are. Let me give you an example: a lot of times someone will come into court and argue that "culture and tradition" apply to their case. And I ask, "Which tradition? Let's talk about this." Unfortunately a lot of people don't know their own ways. The tribal court has the ability to order juveniles and others to spend some time with their elders, spend some time with their *nokomis*[7] and learn about their old ways. You generally don't see that in the state system. The tribal courts can be a key in helping people reconnect and helping people learn about their

7. In the Ojibwe language, *nokomis* means "grandmother."

culture and tradition and restore relationships. It can be a healing and learning experience for everyone involved.

Given your experience working with joint jurisdiction courts, what do you think that state courts can learn about justice from tribal courts?

I think that they can learn some easy ways to be compassionate in their own work. I've heard some state court judges say, "You know, I can't possibly give people individual attention because I have 60 cases on my docket and it's a madhouse and we've got people waiting in the hall." How much more time does it take to look a defendant in the eye instead of acting like they don't exist and saying, "Counselor, what's your client going to do?" It doesn't take a lot of extra time to look him or her in the eye and acknowledge that they're there. I think that's one thing—the human factor—that state court systems can learn. I think too many judges think, "That's great! I know restorative justice works, but I can't do it statutorily, we don't have time on the docket." The state system can learn that even looking someone in the eye and acknowledging their presence is restorative justice. It restores people's confidence in the justice system and gives people a little hope.

Do you know of any examples of programs in state courts that you feel are either derived from tribal court practices or embody tribal court values?

I think there are some things that state courts are currently doing, especially where they are collaborating with tribal courts. Many of the best practices that are being adopted by state courts are derived from indigenous notions of restorative justice. State systems need to realize how they can use existing tools and practices to achieve better results. For instance, a presentence investigation is often used to gather information about a defendant and determine his or her risk level and whether the person should go to prison and for how long. But this same information could be used in more restorative way, to begin formulating a solid treatment or re-entry program for the offender. A lot of very helpful information can be gleaned from tools like this, depending upon how you put them to use.

In tribal court systems, how common is the idea of innovation and how do you mesh the idea of innovation with the idea of tradition and keeping traditional practices alive?

I would say that we innovate every day, partly out of necessity, and partly because it's just our way to figure out how we can make the changes that need to be made in people's lives. Tribal traditions do tend to evolve and change over time, so the court system can evolve right along with them.

I think communication fosters innovation. Getting to know people, getting to know each other, is such a key in this. The innovation will come from that once the conversation starts. It's a local thing—what are our needs, what are our goals? You can look at it from two different ends of the spectrum. You can look at it from the perspective of what are our common goals or, on the other end of it, what are our common problems? Start the conversation there. I think that's where the innovation is. Innovation is not in a program, it's about action, it's about taking that first step. Tradition and culture vary from tribe to tribe, but each can use their judicial systems in innovative ways to foster healing and teach about the old ways.

How well do you think the new ideas being used in the state courts such as the drug court model, the DWI court model, restorative justice practices, therapeutic jurisprudence, would mesh with tribal court systems?

I think a lot of them like restorative justice are already there. I think that's where they came from—they're originally indigenous practices.

There are other things that tribal courts can use. Whether or not a tribal court adopts something wholesale from state systems, they can take bits and pieces that are going to help them achieve the results that they want. Tribal systems can learn so they can understand what the state court system is doing. So they'll be familiar with the practices being tried in state court; that in and of itself may be something that opens up some dialogue. Tribal systems need to remain distinct from state systems, to do things in their own way. But we can always learn, and take what works and incorporate it into our own systems.

How well do you think ideas are being shared among tribes so everyone can learn from each other?

I think there's an effort but again it gets down to resources. Judges and court staff who are lucky enough to be able to go to trainings and conferences learn about them that way. Unfortunately, too many tribal courts don't have the resources or time to put good ideas into practice when they get home. Instead, they're just trying to get through the day and stay on top of their dockets. I think there should be a way to bring concepts to people through use of technology like interactive video-conferencing or webcasts. It's always better to be there in person, but if you can't be, at least you can see each other. That's something we've been able to use to get fairly large groups of people together to talk about ideas without incurring travel costs. I think there needs to be more done to get the information out to tribes that can't travel to conferences or to other places to see their programs in action.

Do you have any final thoughts before we wrap it up?

Systems don't collaborate; people do. We as individuals make up "the system," be it tribal or state. It's not about whether or where we went to school or the degrees that are hanging on our walls, but about who we are inside. You may be a judge or a lawyer or all those things, but it's who we are as *Anishinabe*[8] or as we say, *Nishnabek*, that counts most.[9] That must come first. I'm *Sibikwe*[10] and I'm Fish Clan. Having that center is so important to making all these things come together for the benefit of future generations.

I'm so thankful for all the things that are happening with the joint jurisdiction work up here, and the fact that other juris-

8. *Anishinabe* and *Ojibwe* are Algonguin words meaning "the people" and refer to the Algonquin-speaking peoples originating in the region of the Great Lakes and southern Canada. Today, the terms *Anishinabe* and *Ojibwe* encompass hundreds of separate Indian bands throughout these regions. These terms are generally considered to be synonymous with *Chippewa*, a term first used by French explorers and later by the government of the United States.

9. In the Potawatomi dialect, the term *Anishinabe* is rendered as *Nishnabek*. The Potawatomi were once part of a large confederacy of tribes, which also included the *Ojibwe* people. Today, there are several Potawatomi bands located throughout the Great Lakes region.

10. *Sibikwe*, meaning "River Woman," is Judge Wahwassuck's Potawatomi name.

dictions are adapting the concept to fit their local needs. I think it's really going to change the lives of our little ones when they get to be our age. And that's what it's all about.

Book Review

Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory

Christian W. McMillen
Yale University Press 2007
304 pages

*Reviewed by Aaron Arnold**

> *Unquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy . . . .*
>
> Supreme Court Justice William O. Douglas
> *United States v. Santa Fe Pacific Railroad Co.*[1]
> December 8, 1941

In 1941, the United States Supreme Court decided the landmark case of *United States v. Santa Fe Pacific Railroad Co.*,[2] which confirmed the right of the Hualapai Indian Tribe to maintain possession of its reservation land.[3] Writing for a unanimous Court, Justice William O. Douglas deftly summarized 80 years of complex history, affirmed the doctrine of "Indian title," and laid the legal foundation for a generation of

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1. 314 U.S. 339, 345 (1941) (quoting Cramer v. United States, 261 U.S. 219, 227 (1923)).
2. 314 U.S. 339 (1941).
3. *Id.* at 353-54.

Indian land claims to come.[4] And yet, his curious assertion that federal policy "from the beginning" has been to "respect the Indian right of occupancy" woefully misrepresented the experience of the Hualapai leaders who fought for decades to win control of their ancestral homeland. This struggle is the subject of Christian W. McMillen's book, *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory*.

The Hualapai reservation was set aside by order of the U.S. military in 1881 and approved by executive order of President Chester A. Arthur two year later.[5] Even before the reservation was created, the Hualapai were contending with encroachment upon their ancestral lands by the railroad and white ranchers.[6] Army records from the time include the following assessment:

> They [the Hualapai] say that in the country, over which they used to roam free, the white men have appropriated all the water; that large number of cattle have been introduced. . . . They say that the railroad is now coming which will require more water, and will bring more men who will take up all the small springs remaining.[7]

By the early 1900s, the railroad claimed ownership of Peach Springs, an important source of water in the heart of the reservation.[8] The Peach Springs dispute eventually enveloped the entire reservation, as Hualapai leaders insisted that the tribe be permitted to control its own land.

To demonstrate their historic right of occupancy, the Hualapai had to overcome the dominant view among government and legal authorities that Indian tribes, especially those in the forbidding landscape of the desert Southwest, were itinerant bands of wandering nomads who were not entitled to claim possession of any specific area of land.[9] The Hualapai, who had no written language, could not counter this narrative with written records and legal documents, the usual currency of the

4. *Id.* at 343-44, 347, 353-56.

5. CHRISTIAN W. MCMILLEN, MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY 9 (2007).

6. *Id.* at 10.

7. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 356 (quoting Walapai Papers, S. REP. NO. 74-273, at 134-35 (1936)). The Walapai Papers were a Congressional report that compiled historical reports and documents related to the "Walapai Indians of Arizona."

8. *See* MCMILLEN, *supra* note 5, at 12.

9. *See id.* at 162.

American judicial system.[10] Rather, tribal leaders began a painstaking process of gathering the oral histories of the Hualapai and neighboring tribes and conducting field explorations for physical evidence.[11] Using this "ethnographic" approach, the Hualapai hoped to prove that the tribe had occupied the disputed territory since time immemorial, long before the land was claimed by the railroad, white ranchers, or anyone else.[12]

The central figure in this effort, and in McMillen's account, is Fred Mahone, a Hualapai Indian born on the reservation in 1888.[13] Like many Indians of his generation, Mahone was educated in segregated, white-operated "Indian schools," where he learned English and was exposed to the culture and values of the dominant society.[14] In 1917, Mahone volunteered for the U.S. military and served overseas in France.[15] Upon his return to the United States and the Hualapai reservation, Mahone quickly became active in "radical" Indian groups that demanded Indian sovereignty, self-government, and land repatriation.[16] In 1921, Mahone started his own activist organization, immediately drawing the attention and ire of federal authorities, who felt that Mahone was leading a "possible insurgency."[17]

As McMillen tells it, Mahone had an uneasy relationship with his tribe.[18] Although he fought for goals that most Hualapai supported, "he never became a sanctioned Hualapai leader."[19] Mahone, a young upstart, took it upon himself to lead the tribe's struggle to oust the railroad and gain control of the reservation.[20] He sometimes overstepped his authority and alienated tribal elders.[21] For his efforts, Mahone earned both the "scorn" and "admiration" of other Hualapai.[22] Ultimately, though, Mahone was largely responsible for the success of the

10. *See id.* at 13.
11. *See id.* at 40.
12. *Id.* at 61.
13. *Id.* at 18.
14. *Id.*
15. *Id.* at 17.
16. *Id.* at 23.
17. *Id.* at 28.
18. *Id.* at 18.
19. *Id.*
20. *Id.* (noting that Mahone gave Hualapai concerns a "new urgency").
21. *See id.*
22. *Id.*

Hualapai's land claim. His efforts to document the tribe's oral history, record interviews with tribal elders, locate physical evidence of the tribe's ancient occupancy, and continually push federal officials to fulfill their obligations to the tribe succeeded in securing the tribe's right to control its land.

Much of McMillen's account is devoted to describing the convoluted path that the Hualapai case followed, first through the halls of government and later through the court system. McMillen succeeds in revealing the federal government's pernicious ambivalence toward the Hualapai's cause. Throughout the book, McMillen illustrates how the two federal departments most responsible for helping the Hualapai protect their land, the U.S. Departments of Interior and Justice, repeatedly undermined each other's efforts, sometimes purposely, and failed to develop a consistent and coordinated approach to the case. In early 1925, for example, the Department of Justice ordered the U.S. Attorney for Arizona to file suit on behalf of the Hualapai against the railroad for control of Peach Springs while, at the same time, the Department of the Interior was pushing Congress for legislation to divide the Hualapai reservation in two, with half to the tribe and half (including Peach Springs) to the railroad.[23]

The government's lack of commitment to the Hualapai case was trumped only by its active collusion with the railroad. McMillen describes a succession of treacherous federal officials, including the government attorneys responsible for preparing the Hualapai's case and representing the tribe in court, who passed confidential information to the railroad, colluded with the railroad to delay litigation, and met with railroad officials to plot an end to the litigation in the railroad's favor.[24] Throughout the case, Arizona Senator Carl Hayden advocated for the railroad and, while stoking Arizonans' irrational fear of a complete Indian takeover of the state, worked behind the scenes with government officials to secure victory for the railroad.[25]

The Hualapai case received new life with the election of Franklin Delano Roosevelt as President in 1932 and the subse-

23. *See id.* at 45-46.
24. *Id.* at 52.
25. *See id.* at 156.

quent appointment of John Collier as Commissioner of Indian Affairs. Collier had been a prominent activist for Indian policy reform — McMillen calls him "the single most important and prominent 'friend of the Indian.'"[26] With the BIA under Collier's lead, "any semblance of a conciliatory attitude toward the railroad vanished."[27] Collier turned the Hualapai case over to a team of three lawyers that included Nathan Margold (the solicitor of the Department of the Interior), Richard Hanna (a private attorney specially appointed by Interior to oversee the Hualapai case), and Felix Cohen (a newly-hired assistant solicitor who would soon become the undisputed leader in the field of federal Indian law).[28]

Margold, Hanna, and Cohen seized control of the Hualapai case and, basing their arguments on the ethnographic research and fieldwork of Fred Mahone and others, maneuvered the case before the Supreme Court.[29] It was there that Justice Douglas reaffirmed the validity of "Indian title," the doctrine that Indian tribes can have cognizable and enforceable property rights by virtue of their exclusive occupancy of a defined area of land from time immemorial, regardless of whether the tribe's rights are set forth in any treaty or statute.[30] Moreover, the court recognized the legitimacy of anthropological research, oral history, and tribal tradition as evidence of aboriginal possession. As McMillen explains, this decision would later influence the litigation of Indian land claims in the United States, as well as in Canada and Australia.[31]

Making Indian Law is not without flaws. It occasionally looses momentum as it traces the case through the federal bureaucracy in excruciating detail, introducing a seemingly endless succession of government officials whose importance to the case is not always clear. More important, its discussion of how the case impacted the newly-developing field of ethnohistory could have been more fully developed. Ultimately, though, the book is a captivating and compelling account of an important

26. *Id.* at 106.
27. *Id.* at 115.
28. *Id.* at 125.
29. *See id.* at 169.
30. *See* United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345-47 (1941).
31. *See, e.g.*, MCMILLEN, *supra* note 5, at 266.

episode in the development of federal Indian law (and American history). McMillen's treatment of the Hualapai land case succeeds in illuminating a critical period in U.S.-tribal relations, and it reveals that the federal government's "policy" toward "the Indian right of occupancy" has been far messier than Justice Douglas would have us believe.

Book Review

Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement

James L. Nolan, Jr.
Princeton University Press 2009
264 pages

*Reviewed by Ben Ullmann**

"If you give me another positive urinalysis test, I'll kick you out on the ass,"[1] said the judge. You might expect these words to have come from a drug court in the United States or perhaps a Hollywood film, but they were spoken by an English judge in a West London courtroom. The judge, who presides over one of the few dedicated drug courts, also said: "I've got no problem, if someone's done well, whether it's a woman or a man, in giving them a hug and a kiss."[2] What is going on here? Whatever happened to powdered wigs, judicial reserve and the stiff upper lip?

Both quotations are from James L. Nolan, Jr.'s latest foray into the world of problem-solving justice, *Legal Accents, Legal Borrowing: The International Problem-Solving Movement*, which

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1. James L. Nolan, Jr., Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement 57 (2009).
2. *Id.*

describes 20 years of development of what he calls the "international problem-solving court movement."[3] The judge who said them, Judge Justin Philips, presides over the West London dedicated drug court and is one of many judges all over the world who have been influenced by the international problem-solving movement.[4] His colorful language and bright yellow shirt (emblazoned with "Hugs not Drugs")[5] are a far cry from the traditional haughtiness and black robes of a district judge. Although Judge Philips' eccentricities are still an anomaly on the court circuit, the problem-solving approach has already gained international traction.

In his latest book, Nolan offers a detailed overview and comparative analysis of the international problem-solving court movement. Although the book is critical, it is not polemical. Nolan acknowledges the positive aspects of the problem-solving movement and considers it an "important legal innovation."[6] The approach of the book is more a plea to pause for thought, rather than an outright rejection of the problem-solving movement.

Nolan has written previously on the problem-solving court movement. In 2001, he published a critique of the drug court movement, *Reinventing Justice: The American Drug Court Movement*, where he provides a potted history of judicial theories and practices in America since the eighteenth century, and the context and development of drug courts since 1989—when the first drug court in Dade County, Florida was established.[7] He characterizes the drug court movement as "court-as-theater" where the court doubles as the stage with the judge, lawyers, and court staff being the players.[8] Nolan suggests that redefining the courtroom roles to emphasize therapy for the "client" could cause serious implications for the conventional frames of justice.[9]

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3. *See id.* at 22-23.
4. *Id.* at 46.
5. *Id.* at 58-59.
6. *Id.* at 23.
7. JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 39 (2001).
8. *Id.* at 70.
9. *See id.* at 37.

In his latest book, ten years in the making, James Nolan contrasts how other countries (specifically England, Wales, Scotland, Ireland, Australia, and Canada) have imported a number of problem-solving courts from the United States and attempted to adapt them to their own legal cultures.[10] Through this comparative analysis Nolan argues that "while importers often see themselves as adapting the American courts to suit local conditions, they may actually be taking in more aspects of American law and culture than they realize or desire. In the countries that adopt them, problem-solving courts may in fact fundamentally challenge traditional ideas about justice."

Nolan considers this book a natural sequel to his previous work on drug courts, he turns to the problem-solving movement as a whole. He documents the evolution of the drug court model to other types of problem-solving courts in the United States and how they have been imported to other countries.[11] In almost all cases, the non-U.S. countries that have set up problem-solving courts have looked to the United States for their initial inspiration (particularly the Red Hook Community Justice Center and other Center for Court Innovation initiatives).[12] However, Nolan's critique of the international problem-solving court movement is not based on efficacy. He does not attempt to make a judgment about whether problem-solving courts *work*. His concern is primarily the consequences, intended and unintended, of transplanting a culturally-influenced legal apparatus (in this case the problem-solving court) from one country to another.

In some cases, Nolan argues that the change in process or delivery (e.g., hugs in court) will not be appropriate for the importing country since it will have been influenced by a cultural phenomenon specific to the United States.[13] In fact, the attitude toward this kind of therapeutic theater is a lot more reserved in the non-U.S. jurisdictions. A comparison, says Nolan, of the development process of problem-solving courts in the United States, England, Wales, Scotland, Ireland, Canada, and Australia reveals an important difference between an American dispo-

10. *See* NOLAN, *supra* note 1, at 43-135.
11. *Id.* at 251.
12. *Id.* at 84-85.
13. *See id.* at 157-78.

sition characterized by enthusiasm, boldness, and pragmatism, and the contrasting penchant of other countries toward moderation, deliberation, and restraint.[14]

In Scotland, for example, one court practitioner noted that self-help groups such as Alcoholics and Narcotics Anonymous, common in the United States, simply do not work in Scottish culture.[15] With a healthy dose of irony she says:

> We don't like speaking up, particularly in front of groups. I mean, I'd have to be drunk to stand up in a group and say I'm an alcoholic. I could only do it if I was drunk. If I was sober, nothing on earth would induce me to stand up among a crowd of strangers and talk about myself.[16]

Nolan's basic analytical assumption is that law and culture are integrally related and that any kind of international transference of a legal innovation such as problem-solving courts will have some intended and unintended consequences. One of his main concerns is that in the countries that adopt them, problem-solving courts may in fact fundamentally challenge traditional ideas about justice. He uses the image of Lady Justice to describe this fundamental shift:

> The image of Lady Justice . . . . represents several themes central to classical understandings of justice. Her scales convey notions of fairness and proportionality; her sword, the power of the court to impose a punishment and act decisively; and her blindfold, the ideas of neutrality and impartiality and the absence of prejudice and bias.[17]

One participant, at an exchange between American and British officials on the topic of community courts in 2004, defined community justice as "removing the blindfolds from Lady Justice."[18] Nolan considers this an apt description, and one that is potentially problematic for international legal traditions.[19]

Professionals involved in problem-solving courts in Canada and Australia are, in general, more disposed to critical reflection and restraint than their American counter-parts. One practitioner in Australia says, "In the excitement to 'progress' the practice of therapeutic jurisprudence in our courts . . . . at-

14. *See id.* at 136-56.
15. *See id.* at 133-35.
16. *Id.* at 133.
17. *Id.* at 194.
18. *Id.*
19. *See id.*

tention must be paid to basic principles of justice to ensure the rights of court participants are not eroded."[20]

Nolan suggests that "[o]nly time will tell whether and to what extent these cultural infiltrations—be they welcomed or regretted—will result in further homogenization" of legal cultures.[21] He says that "importing countries wishing to maintain such qualities as deliberation, moderation, and restraint in their local legal cultures [should] recognize the difficulty of disentangling law from its cultural roots."[22] Such an understanding might lead those countries to return to Lady Justice and "more firmly affix her blindfold."[23]

20. *Id.* at 91.
21. *Id.* at 196.
22. *Id.*
23. *Id.*

Book Review

American Juries: The Verdict

Neil Vidmar & Valerie P. Hans
Prometheus Books 2007
428 pages

*Reviewed by David F. Eisenberg**

"Over the past several decades, American criminal and civil juries have been criticized for incompetence and irresponsibility."[1] This public outcry has been a direct result of highly-publicized cases such as O.J. Simpson's murder acquittal, three million dollars being awarded to a woman who spilled McDonald's coffee on herself, and convicted defendants subsequently exonerated by DNA evidence.[2] In response to these "failed" cases and increased distrust with the American jury system, Neil Vidmar and Valerie P. Hans re-evaluate the American jury's role and dispel myths on the jury's "poor performance" by examining new research and case studies conducted since the authors' initial analysis into this forum in *Judging the Jury*.[3]

To accomplish this, Vidmar and Hans systematically explore every facet of the American jury and its central role in the justice system. The authors begin this process with a brief his-

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1. Neil Vidmar & Valerie P. Hans, American Juries: The Verdict 15 (2007).
2. *See id.*
3. Valerie P. Hans & Neil Vidmar, Judging the Jury (2001).

torical timeline describing the evolution of the jury system from its primitive roots to the highly-structured system that sits at the backbone of the American democracy.[4] The authors introduce this modern American system by exploring the jury's function, the selection process, the broad spectrum of judicial controversies, and the jury's performance in considering these controversies. Then, after all the evidence is analyzed and all the facts are considered, the authors are very persuasive in silencing the critics and convincing the reader that they too should be "strongly in favor of the American jury."[5]

To reach this conclusion the authors begin by describing the jury's functions. According to Vidmar and Hans, juries are more than mere fact-finders; they serve additional critical functions such as representing "the various views of the community, serving as a political body, and, through rendering fair and just verdicts, providing legitimacy for the legal system."[6] In order for these functions to most effectively be carried out, a "representative jury" is necessary.[7] The authors describe this representative jury as a group of "people with a wide range of backgrounds, life experiences, and world knowledge," suggesting that such a group will promote accurate fact-finding.[8] This argument is premised on the belief that the more diverse the group, the more likely the group will have varying perspectives on the evidence, which in turn encourages more thorough debate and consideration of the facts.[9] The authors reveal, however, that although there has been considerable progress over the past half century, consistently recreating truly representative juries is a difficult task.[10]

Vidmar and Hans point to three specific reasons why representative juries are difficult to recreate. The first reason proposed by the authors is that most potential jurors are selected from voting source lists, and these lists tend to under-represent racial minorities and the indigent as a result of lower voter re-

4. *See* VIDMAR & HANS, *supra* note 1, at 21-41.
5. *Id.* at 346.
6. *Id.* at 66.
7. *Id.*
8. *Id.* at 74.
9. *See id*.
10. *See id.* at 76.

gistration rates within these groups.[11] The second reason proposed by the authors is the large non-response rate to juror summonses, with some studies estimating that in large urban areas less than 20 percent of the citizens summoned ever serve on juries.[12] Lastly, the authors identify disqualifications, exemptions, and excuses as dismissing a large and important portion of the community.[13] For example, "[o]ne estimate is that about 30 percent of African-American men are permanently barred from serving as jurors because they have felony convictions."[14] To counter these obstacles, the authors suggest that jurisdictions create broader source lists and reduce the number of exemptions and excused absences currently being permitted in many jurisdictions.[15]

Following this initial assessment of the jury's functions, the authors briefly explore the jury selection process and its customarily accepted inadequacies. Jury selection, the process of questioning prospective witnesses through *voir dire*, is conducted to weed out and dispose of those jurors whose biases could taint their ability to impartially consider the facts.[16] According to Vidmar and Hans, this process "is not so much about jury selection as it is about juror de-selection,"[17] and this necessary de-selection process is consistently undermined by two primary factors: time and money.[18] In a perfect judicial system, each juror would be individually and privately questioned to ascertain whether any personal biases existed.[19] Unfortunately, the justice system is burdened by both time constraints and financial resources, and simply cannot conduct this level of questioning. Although the authors realistically recognize these seemingly insurmountable obstacles, they pose two practical techniques for improvement: (1) have the lawyers, not the judge, ask more questions; research shows that "jurors may be more willing to self-disclose personal information to lawyers

11. *See id.*
12. *See id.* at 77-79.
13. *See id* at 79.
14. *Id.* at 80.
15. *See id.* at 81.
16. *See id.* at 87.
17. *Id.*
18. *See id*. at 93.
19. *See id.* at 92.

than judges,"[20] and (2) provide jurors with written questionnaires prior to *voir dire*; questionnaires require a greater level of concentration and self-disclosure than orally answered questions in a courtroom.[21]

With this foundation in place, Vidmar and Hans successfully undertake the daunting task of establishing how juries evaluate trial evidence and expert witness testimony, and then the jury's overall performance in these tasks.

The American jury system is a unique organism in which a diverse group of strangers are assembled to consider evidence and testimony presented on an enormous array of potential subject matters. To help explain how such a diverse group constructs their opinions and analyzes the evidence, Vidmar and Hans look to social psychologists Nancy Pennington and Reid Hastie's series of simulated juror studies. According to these studies, "jurors listen to the evidence at trial, and use their knowledge about analogous information and events, as well as generic expectations about what makes a complete story to construct plausible, more or less coherent narratives explaining what occurred."[22] In addition, the study determined that when facts seemed to be missing from the story, "jurors filled in the gaps by surmising the facts necessary to develop a complete narrative."[23]

Although these studies illustrate that jurors are capable of drawing upon their own knowledge to analyze evidence being presented by the average witness, there is continuous debate on the juries' overall ability to understand expert testimony.[24] This issue is especially important given the frequency with which experts testify. One study has estimated that experts testify in over half of criminal trials,[25] with several other studies estimating that "the average number of experts in civil cases ranged between 3.7 and 4.1 experts per trial."[26] These witnesses are typically comprised of experts in the fields of medicine, mental

20. *Id.*
21. *See id.* at 93.
22. *Id.* at 134.
23. *Id*.
24. *See id.* at 169.
25. *See id*. at 173.
26. *Id.* at 174.

health, business, engineering, and safety matters.[27] However, in spite of the technical nature of expert witness testimony, Vidmar and Hans, referring to the research of Anthony Chapagne and Daniel Shuman, show that there is no "white coat syndrome"[28]—the automatic acceptance of testimony as being accurate. Instead, it was discovered that jurors are diligent and skeptical in evaluating expert testimony, making conclusions based on a rational set of considerations.[29] There is little doubt though that cases involving complex statistical or medical evidence pose difficulties for the average juror but also for the average judge, who, like the jury, does not have specialized training in these areas.[30] To combat these complexities, Vidmar and Hans suggest that jurors be allowed to take notes during expert testimony, ask the experts questions, and be supervised by more alert trial judges who can assist the jury in grasping complicated concepts.[31]

So far Vidmar and Hans have portrayed the American jury as being competent and capable of analyzing even complex expert testimony. However, the crucial consideration in evaluating the jury's competence is in examining their performance. To accomplish this, the authors first consider the research of Harry Kalven and Hans Zeisel. Kalven and Zeisel, professors at the University of Chicago Law School, conducted a study which asked trial judges "how they would have decided each case that they and the jury just heard."[32] The judges participating in this study were asked to fill out questionnaires while the jury was deliberating, indicating their "hypothetical" verdict.[33] This allowed the researchers to compare the judge's "hypothetical verdict with the jury's verdict," yielding results that were uninfluenced by the judge's knowledge of the outcome of the case.[34]

For this study, Kalven and Zeisel recruited over 500 judges from around the country, generating questionnaires on 3,576

27. *See id*.
28. *Id.* at 178.
29. *See id.* at 179.
30. *See id.* at 188.
31. *See id.* at 189.
32. *Id.* at 148.
33. *Id.*
34. *Id.*

criminal trials and roughly 4,000 civil trials.[35] Based on the results from these criminal trials it was discovered that the judge and the jury agreed that the defendant was guilty 64 percent of the time and should be acquitted 14 percent of the time; rendering an overall agreement rate of 78 percent.[36] This study then revealed that within the remaining 22 percent of cases in which the judge and jury disagreed, in 19 percent of those cases the jury acquitted the defendant when the judge would have convicted, leaving only 3 percent of cases in which the jury convicted when the judge would have acquitted.[37] Therefore, in roughly four out of five criminal cases the judge agreed with the jury's verdict, and in cases in which they did not agree, the judge was six times more likely than the jury to convict the defendant.[38]

This study yielded similar results in civil jury trials. According to the study, "in 47% of the cases, judge and jury both found in favor of the plaintiff, and in 31% they both found for the defendant."[39] The 22 percent disagreement rate in civil trials was, however, more balanced than in criminal trials.[40] In these cases, the judge favored the plaintiff 10 percent of the time when the jury found for the defendant, and the jury favored the plaintiff 12 percent of the time when the judge found for the defendant.[41]

Drawing on these studies, Vidmar and Hans strongly support the jury's overall performance. The authors support their conclusion by citing the largely consistent agreement rates between the jury's verdicts and the judge's "hypothetical" verdicts.[42] Furthermore, even when the judge's decision would have been inconsistent with the jury's, at least in criminal trials, juries were much more likely than judges to acquit the defendant.[43] Therefore, based on these findings and its far-reaching implications, it becomes evident why many consider Kalven

35. *See id.*
36. *See id*.
37. *See id*.
38. *See id.*
39. *Id.* at 149.
40. *See id.*
41. *See id*.
42. *Id.* at 148-49.
43. *See id.*

and Zeisel's research to be "the most famous and most important single study of juries" ever conducted.[44]

Following this study, Vidmar and Hans continue to analyze the jury's performance by taking a closer look at civil liability, specifically the amount of damages awarded to plaintiffs. Opponents of modern civil juries have been relentlessly critical, accusing juries of making uneducated calculations about damages as well as being consistently pro-plaintiff, often being referred to as a contemporary Robin Hood.[45] Furthermore, the American Tort Reform Association has identified what it calls "judicial hellholes," jurisdictions believed to award unwarranted damages to plaintiffs.[46] Similar to these "hellholes" are what some studies refer to as the "Bronx effect," the assertion that some counties are more prone than others to hand out larger damage awards.[47] The authors, however, counter these speculations by considering several studies which have explored compensatory and punitive damages awarded by juries.

When computing compensatory damages, "some lawyers and academics have speculated that jurors do not concern themselves with the details of the damages but instead search for a single amount that seems right."[48] However, there is solid evidence that juries do not merely estimate damages, but rather take their task "very seriously, often to the extent of calculating and arguing down to the last dollar."[49] Although there is no precise way to measure a jury's performance in calculating compensatory damages, one California study determined that "the magnitudes of the awards were positively related to the size" of the plaintiff's losses.[50] In addition, several subsequent studies revealed that "the more serious the injury the larger the award."[51] These studies therefore illustrate a direct correlation between the size and seriousness of a plaintiff's injury and the amount of compensatory damages the plaintiff is awarded.

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44. *Id.* at 148.
45. *See id.* at 270.
46. *See id.* at 267.
47. *Id*. at 286.
48. *Id*. at 294.
49. *Id*. at 299.
50. *Id.*
51. *Id*.

In addition to compensatory damages, juries are also asked to ascertain whether punitive damages are appropriate and, if so, how much should be awarded. George Priest, a professor at Yale Law School, openly contends that "juries are capricious and unreliable when rendering punitive awards."[52] As a result of such contentions and highly publicized cases in which juries have awarded substantial punitive damages, civil juries have been widely criticized.[53] However, according to the Bureau of Justice Statistics and the National Center for State Courts, punitive damages are rarely ever given, being awarded in less than one percent of all civil cases in state courts.[54] In addition to the relative infrequency with which punitive damages are awarded, judges maintain the power to, and frequently do, reduce awards that appear to be founded on "passion or prejudice" or that "shock the conscience."[55] As a result of the rarity of punitive damages and the ability of judges to decrease the amounts awarded by the jury, the authors seemingly contend that the criticism towards juries is unjustified and alleged without any substantive basis.

Following an examination of these studies, Vidmar and Hans conclude their foray into the American jury by recounting the strengths and signs of vulnerability of the jury system. Overall, however, the authors express a profound confidence in the American jury as decision-makers in both the criminal and civil contexts. This confidence is further demonstrated when the authors reveal that "over fifty countries around the world have jury systems modeled in varying degrees after the English common law jury."[56] Vidmar and Hans convey that the American jury system works and should continue to be a cornerstone of democracy in this country and the world in the future.

52. *Id*. at 304.
53. *See id.*
54. *Id.* at 308 (citing Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263 (2006)).
55. VIDMAR & HANS, *supra* note 1, at 314.
56. *Id.* at 345.

Book Review

The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System

Jon B. Gould
New York University Press 2008
345 pages

*Reviewed by Jeffrey D. Stewart**

The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System is not strictly about potential redemption for convicts since the advent of criminal DNA testing. As author Jon B. Gould explains throughout his book, DNA testing can solve only some of the problems concerning wrongful convictions. Indeed, DNA testing does not apply to crimes which do not involve biological evidence, e.g. bank robberies. However, many of the wrongful convictions Gould and the Innocence Commission for Virginia (ICVA) explored involved rape or murder charges, for which DNA testing was of paramount importance.

The ICVA is not the first of its kind; Gould provides extensive background information regarding the concept of innocence projects. Initiatives from the United Kingdom, Canada, and North Carolina all preceded the ICVA. The United King-

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dom established the Criminal Cases Review Commission (CCRC) in 1997, which independently reviewed cases with "wide-ranging investigative powers."[1] The British example began long ago, however, as "[m]ore than a century ago Canada created royal commissions of inquiry . . . 'regarding the . . . fair administration of justice.' "[2]

Such commissions had a later start in the United States, though. Gould refers to various articles and books exploring criminal justice reform from the late twentieth century.[3] Of particular influence to Gould was *Actual Innocence* by Barry Scheck and Peter Neufeld, which recommended federal and state bodies of review that were similar to the CCRC in the UK.[4] After publication of their book, Scheck and Neufeld continued to call for domestic innocence projects.[5] Only two states, Illinois and North Carolina, heeded that call.[6] In the case of Illinois, such action was long warranted. Gould cites an Illinois death row statistic revealing more defendants were later exonerated than actually executed.[7] In 2000, Northwestern University, led by Professor David Protess' journalism class, and the *Chicago Tribune* continued the investigation into the state's homicide prosecutions, finding gross prosecutorial and systemic errors.[8] This environment prompted Illinois' Governor George Ryan to establish the Commission on Capital Punishment "to study the system of capital investigations and prosecutions in Illinois."[9] The Ryan Commission's report induced the governor to purge

1. JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 35 (2008).

2. *Id*. at 35 (quoting Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of* "*Innocence Commissions*" *in America*, 86 JUDICATURE 98, 100 (2002)).

3. *See id*. at 36.

4. *See id*. (citing BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 351-57 (2001)).

5. *See* GOULD, *supra* note 1, at 36-37.

6. *Id*. at 38.

7. *Id*. at 39 ("Between 1977 and 1999, of the more than 250 murder cases in which a defendant was sentenced to death in Illinois, fewer persons were actually executed (12) than were later released from prison upon questions of their guilt (13).").

8. *Id*. Recently, prosecutors in the Cook County (Illinois) state attorney's office began an investigation into the methods used by Professor Protess' students to question witnesses. *See* Monica Davey, *Prosecutors Turn Tables on Student Journalists*, N.Y. TIMES, Oct. 24, 2009, *available at* http://www.nytimes.com/2009//10/25/us/25innocence.html.

9. *See* GOULD, *supra* note 1, at 39.

the state's death row until the system underwent systematic change to something less "arbitrary and capricious."[10]

Gould recognizes the importance of the Ryan Commission, but distinguishes it as "a one-time inquiry."[11] He places more emphasis on North Carolina's Actual Innocence Commission (NCAIC), which the state's Chief Justice I. Beverly Lake initiated in 2002 with a personal appeal for a roundtable discussion of convictions and exonerations.[12] Gould refers to Chief Justice Lake's aims with approval, but points out that the commission "does not investigate individual cases. Rather, it considers the general sources of erroneous convictions and issues reports and best practices to prevent such errors."[13] North Carolina's example has some success, as the state implemented some of the NCAIC's recommendations for eyewitness identification procedures.[14]

It was in this context that Gould and his cohort began the formation of the Innocence Commission for Virginia. The ICVA was formed as a result of long-developing and concurrent social, political, and legislative processes in Virginia. Gould explains in great detail the underlying origins and motivations for the ICVA.[15] As an undergraduate professor, Gould encountered a student who challenged the conventional wisdom regarding post-conviction rights of incarcerated criminals.[16] In 2001, Gould responded by creating a death penalty course clinic, which would examine case documents and study pending capital cases.[17] Gould mentions that such a clinic was not a novel idea, as various undergraduate and law schools provide similar clinics that allow students to help represent indigent defendants.[18] Where the states and agencies either could not or would not help those who needed it, students and professors were able substitutes. Expounding a recurring theme, Gould subtly chastises the states for foregoing their institutional re-

10. *Id*. at 40.
11. *Id*.
12. *Id*.
13. *Id*. at 41.
14. *Id*.
15. As Gould puts it, "[t]o understand where we should be going, it is crucial to appreciate how we have gotten here." *Id.*
16. *Id*. at 42.
17. *Id*. at 44.
18. *Id*. at 43.

sponsibility to provide the same assistance: "In some instances, academics have mobilized to fill this breach."[19] After the students submitted their report in 2002, Gould involved himself with the Innocence Project for the National Capital Region (IPNCR), "an offshoot of the Innocence Project created by Scheck and Neufeld."[20]

The IPNCR won the case of Marvin Anderson,[21] a defendant wrongfully convicted in 1982.[22] The Anderson case revealed multiple problems within Virginia's criminal justice system.[23] In 2003, the ICVA formed to address these problems and any others uncovered in the cases it explored.[24]

Much of the narrative in *The Innocence Commission* involves Gould gently justifying the ICVA's cause to the reader. Gould often speaks directly to the reader, providing the reasoning and motivation for particular directions the commission chose to take. A prime example is how he places the ICVA into a sociological context: "[T]his description is intended to locate the ICVA's development in the collective action and social movement literature."[25] In this light, Gould emphasizes the agency-opportunity model of John Kingdon and the resource mobilization theory of John McCarthy and Mayer Zald as vehicles for advancing social change.[26] Gould describes the agency-opportunity model as actors with "a sense of self-confidence in their abilities and resources" advancing "proposals for policy change, trying to take advantage of a window of opportunity in political debate to accomplish their goals."[27] McCarthy's and Zald's resource mobilization theory, on the other hand, depicts a world

19. *Id*.

20. *Id*. at 46. The IPNCR is now the Mid Atlantic Innocence Project. *Id.*

21. *Id*. at 46-47.

22. *Id.* at 46.

23. *Id*. Gould and the ICVA repeatedly returned to the Anderson case to discover misconduct and derive possible solutions for problems in the criminal prosecution process.

24. *Id*. at 63. Gould does not provide an exact date for the formation of the ICVA. He does refer to a desire to begin research in the summer of 2003. Additionally, the meetings with IPNCR members occurred after 2002.

25. *Id*. at 51.

26. *Id*. at 49. Both models stress the importance of resources, opportunity, and motivated actors being necessary for successful change. Kingdon's model, however, does not emphasize resources to the same extent as McCarthy and Zald's.

27. *Id*.

where "actors cultivate a variety of resources to create a central movement organization and then organize others for change."[28] These models appear to have guided Gould and the ICVA members in finding the proper method of academic justification for the commission: "We each had considerable experience in the justice system; we believed that changes were necessary to improve the way that criminal cases were handled; and we felt compelled to do more than simply get together and complain about the status quo."[29]

Gould is especially sensitive to explaining why the ICVA fit into burgeoning social mores, but perhaps the best justification was that it was just the right time. However, during Gould's discussion of the ICVA's formation, he devotes the least amount of pages to the "window of opportunity," as opposed to the other tenets from the two models described above.[30] The foundation of the ICVA occurred in the recent shadow of the North Carolina Actual Innocence Commission and the Ryan Commission in Illinois. Furthermore, "the political climate was more hospitable to reform at that time than any of us could remember" in Virginia.[31] Gould attributes this climate to three factors: (1) Virginia just experienced two recent high-profile exonerations; (2) willingness to enact reform increased through piecemeal legislation; and (3) calls for reform came from the American Bar Association (ABA) and the American Civil Liberties Union (ACLU), as well as newspaper editorials.[32]

Part of the reason for Gould's caution came from the original uncertainty as to the ICVA's mission: "We knew we wanted to do something to improve the system of criminal justice [in Virginia], an effort that might help reduce wrongful convictions, but we did not start with a clear vision of what that work

28. *Id*. at 51.

29. *Id*.

30. Gould did not delineate a section for motivating actors, but the description of his own background and inspiration, as well as that of the involvement of IPNCR members, is more extensive than the section discussing opportunity.

31. *Id*. at 52.

32. *Id*. The cases were of Earl Washington and Marvin Anderson; legislation addressed post-conviction DNA testing; editorials criticized Virginia's 21-day rule, *see infra* text accompanying notes 66-71; and the ABA and ACLU criticized Virginia's indigent defense system. *See* GOULD, *supra* note 1, at 53.

would entail."[33] Many commissions and inquiries focused on the wrongful result, but Gould and the ICVA were more concerned with "what was being done to prevent these errors in the first place."[34]

To accomplish this goal, the ICVA wanted to incorporate many of the facets from its predecessors. Gould mentioned the commissions in Canada and the UK, Scheck and Neufeld's article, and most influentially, NCAIC.[35] The ICVA approved of NCAIC's "hybrid" structure, but ultimately the ICVA's goal was "to bring a series of recommendations to light, and as much as we may have expected particular issues to arise, we were committed to conducting a serious, thorough review of the cases in order to understand what mistakes had occurred and why."[36]

Gould continues to justify the ICVA's course of action, though. Much of this justification originated from the ICVA's status as a non-governmental, and therefore private, institution. As stated previously, Gould is especially sensitive to outside attitudes and how they could affect the impact of the commission's findings. One passage is particularly illustrative of this point:

> Criminal justice reform may be a difficult case to sell, but protecting the innocent — both current defendants and future victims — is an easier argument to advance. That said, I did insist on one tweak to our project's name. It was the Innocence Commission *for* Virginia, not *of* Virginia. Not only did I want to avoid any misconceptions about our private status, but I also could not help using another reminder (admittedly oblique) that this should have been the state's responsibility.[37]

Moreover, Gould refers to a fear of "alienat[ing] policymakers and criminal justice officials."[38] Such language reveals the balancing act of the ICVA: it wanted to be a serious institution, but it had to mind the potential image of a private organization "imposing" recommendations on the public at large.[39] This sen-

33. *Id*.
34. *Id*. at 54.
35. *Id*. at 54-55.
36. *Id*. at 55.
37. *Id*. at 56.
38. *Id*. at 57.
39. *Id*. at 67. Gould describes these two considerations in terms of what kind of approach was best to effectuate the public attention and eventual change that was the ICVA's mission.

sitivity to public image is a result of public perception of exonerating defendants as inherently "liberal," with the underlying fact that such a word can be a pejorative, whether that characterization is fair or not. As Gould states, however, such issues would be irrelevant had Virginia begun the effort by its own accord: "I deeply believe that it is the state's responsibility to provide oversight of the punitive system it employs."[40]

On behalf of the ICVA in *The Innocence Commission*, Gould makes sure to extend appreciation to the various law firms who provided assistance to the ICVA.[41] This portion of the book relates to both the commission's private status and the resource mobilization theory. As a private entity, the commission was responsible for raising its own funds.[42] Accordingly, the pro bono work of some of Virginia's most prestigious law firms was instrumental, in Gould's view, to maintaining independence from special governmental interests.[43] Additionally, acquiring the time of scores of attorneys, clerks, and interns represented a significant portion of the resources required to successfully advance the change desired by the ICVA.[44]

The ICVA considered three specific criteria for its case studies. These cases were not exclusively capital Virginian cases, but the ICVA did decide to study only rape and murder cases with wrongfully convicted defendants.[45] According to Gould, "Although wrongful convictions are likely in many kinds of cases, the stakes are highest for serious crimes, and we believed that these would receive the most attention if investigated."[46] Next, the ICVA limited its cases to defendants wrongfully convicted after 1980: "Because available case information dissipates over time . . . we were concerned about the reliability of the data if we were to push the investigation much further into the past."[47] Lastly, the commission studied only "cases in which a defendant's conviction was later overturned by a gov-

40. *Id*. at 56.
41. *Id*. at 59.
42. *See id.* at 56 ("In many ways, the ICVA's private nature hamstrung us as much as it aided [us].").
43. *Id*. at 58 ("We had few resources to support the ICVA and were not interested in taking time to write grant applications . . . .").
44. *See id.* at 59 (listing contributing law firms).
45. *Id.* at 60.
46. *Id*.
47. *Id*. at 60-61.

ernor's pardon or a court's order, or when prosecutors conceded that the wrong person had been convicted."[48] This last criterion represented a desire to elicit public attention through "factual exonerations," rather than risk the public ignoring the ICVA's study of "legal technicalities."[49] Again, both Gould and the ICVA were conscious of the public's perception of their work, or else the effort would be for naught:

> In general, we erred on the side of caution and conservatism, trying to temper any inflammatory rhetoric or unnecessarily provocative conclusions . . . to ensure that our report and recommendations would have the greatest chance to reach legislators and justice officials in Virginia.[50]

The ICVA published its final report on March 30, 2005.[51] It included descriptions of the 11 chosen cases, statistics, recommendations, and answers to confidential surveys of prosecutors, lawyers, and investigative agencies in Virginia.[52]

For the first two chapters, Gould provides a free-flowing explication of the history and motivations for changing the criminal justice system, particularly for indigent defendants and capital crimes. However, after this point Gould delves into the details of the defendants, cases, and procedures that he believes should be followed. As such, Gould begins the third chapter of *The Innocence Commission* briefly explaining the types of problems that led to the wrongful convictions, followed by a summary of the ICVA's findings.[53] For the remainder of the chapter, Gould provides (for each case) a summary of the facts, procedural history, identification of the main questions with the conviction, details of the problem(s) that led to the conviction, and problems with evidentiary issues and procedure. In Table 3.2, Gould presents each defendant and the corresponding categories (identified by the ICVA) that apply to each case.[54] These factors include eyewitness identification, interrogation methods, forensic science, defense counsel, discovery, tunnel vision,

48. *Id*. at 61.
49. *Id*.
50. *Id*. at 67.
51. *Id*. at 66.
52. *Id*. at 65.
53. *Id*. at 75-76.
54. *Id*. at 127.

and post-conviction.[55] Interestingly, each case had more than one factor that contributed to the wrongful conviction.

In the fourth chapter, Gould addresses the lack of standards or upgrades to procedures and policies that led to the wrongful convictions. This section deviates slightly from Gould's introductory promise not to simply restate the findings of the ICVA's final report. While Gould does make sure to explain the findings in a form that is readable for a broad cross-section of readers, the material is almost all duplicative. Of course, such a result is difficult to avoid, and Gould breaks down much of the data into presentable and easily readable subsections. Furthermore, each explanation of the ICVA's identified problem contains subsections describing the problem generally, the applicable law, recommendations, and lastly how those recommendations could potentially have altered the applicable cases in which the problem was found.

First, Gould explores eyewitness identification. Based on many of the ICVA's case studies, Gould and the ICVA believe sequential, double-blind eyewitness identification is the proper procedure to identify suspects.[56] This practice involves presenting a witness with uniform pictures of similar-looking individuals, sequentially, by an officer who is separate from the case.[57] Such a procedure would eliminate much of the eyewitness error in picking out suspects. First, the uniform pictures or lineup members would reduce artificial differences among potential suspects, e.g. a color photograph among black-and-whites or at least one figure in a police lineup without facial hair.[58] Next, double-blind procedures would shield the witness "from the suspicions of investigating officers."[59] The ICVA also recommended eliminating "show-up" identifications, which occur when a witness "shows up" to view the suspected perpetrator outside of an official police lineup, and almost always without counsel for the purported suspect present.[60] Additionally, the ICVA recommended electronic recording of the identification

55. *Id*.
56. *Id*. at 139.
57. *Id*.
58. *Id.* at 136, 139.
59. *Id*. at 141.
60. *Id*.

procedure; while video recording would be best, the ICVA's report acknowledged that "even audiotape is an improvement over a written transcript."[61]

Next, Gould addresses interrogation procedures. According to Gould, "[o]f the eleven cases investigated by the ICVA, two (or 18 percent) involved false confessions, but several more reflected problematic interrogation techniques."[62] These false confessions involved suspects of questionable intelligence or mental capacity.[63] To safeguard potential victims of pressured false confessions, the ICVA recommended videotaped interrogations[64] for the same reasons as those regarding eyewitness identification. The final report recognized the prior technological or financial constraints of having videotaping equipment present, but those issues are no longer a factor, given modern technological improvements.[65] Police departments can no longer convincingly claim that videotaping interrogations is impractical; costs "can be offset by reductions in frivolous challenges to police conduct and by the greater speed with which defendants who confess to a crime are likely to plead guilty."[66] Moreover, such recording ought to commence "as soon as the police begin questioning . . . and before the police first advise suspects of their *Miranda* rights."[67]

Post-conviction remedies were a somewhat different problem identified by the ICVA, as the Virginia General Assembly already partially amended the infamous "21-day rule" at the time of the commission's final report.[68] The "21-day rule" formerly allowed only 21 days after conviction for a defendant to come forward with alternate physical evidence to the Virginia Supreme Court.[69] In 2001, the assembly amended the rule to allow defendants to petition for a writ of actual innocence any time after conviction.[70] This amendment improved a convicted

61. *Id*. at 142.
62. *Id*. at 155.
63. *See id.* at 155-59.
64. *Id*. at 149.
65. *Id.* at 152.
66. *Id*. at 152-53.
67. *Id*. at 153.
68. *Id.* at 31-32.
69. *Id*. at 30. *See also* VA. SUP. CT. R. 3A:15.
70. *See* GOULD, *supra* note 1, at 30. *See also* VA. CODE ANN. § 19.2-327.1 (West 2010).

defendant's options, but it still had one caveat: the petition had to involve the presentation of biological evidence only.[71] Additionally, defendants who pleaded guilty or were paroled are not eligible to petition for the writ.[72] Accordingly, the ICVA believed further expansion of the amendments was necessary.[73]

With regard to criminal defense, the ICVA largely deferred to Virginia's Rules of Professional Conduct[74] and the Sixth Amendment.[75] However, indigent defense continued to be a lingering problem beyond the cases studied by the ICVA. The commission echoed the recommendations of the ABA's 2004 Spangenberg Report,[76] which called for: state funding for indigent defense services, a commission on indigent defense, uniform standards for indigent defense, and a system to collect data on indigent criminal services in Virginia.[77]

The ICVA paid particular attention to scientific evidence, specifically DNA testing.[78] But DNA testing was not as widespread or refined at the time of many of the ICVA's cases. Thus other "junk sciences," involving hair matching and blood type comparison prevailed for some wrongfully convicted defendants.[79] The commission's report also recognized the inherent limitations of DNA testing, including degradation of the evidence, costs, preservation problems, and non-biological crimes.[80] Like many of the ICVA's other recommendations, funding is paramount; indeed, the commission found it imperative to "allocate enough resources to public defenders and court-appointed counsel for indigent defendants so that necessary defense experts can be retained in appropriate cases."[81]

According to Gould, the ICVA's recommendation for "open files discovery" between prosecution and defense was

71. *See* GOULD, *supra* note 1, at 30.
72. *Id*. at 163.
73. *Id*.
74. *Id.* at 166-67 (citing VA. MODEL RULES OF PROF'L CONDUCT R. 1.7).
75. GOULD, *supra* note 1, at 166-67 (citing U.S. CONST. amend. VI).
76. Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, A Comprehensive Review of Indigent Defense in Virginia (2004), *available at* http://abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf.
77. *See generally id. See also* GOULD, *supra* note 1, at 172.
78. GOULD, *supra* note 1, at 175.
79. *Id*. at 175-76.
80. *Id*. at 177.
81. *Id*. at 183.

one of the most controversial.[82] Gould repeatedly cites the U.S. Supreme Court case, *Brady v. Maryland*,[83] which obliges Virginia prosecutors to "provide to the defense any exculpatory evidence in their possession or in the possession of others acting on the commonwealth's behalf, including the police."[84] However, the results of the ICVA's prosecutorial surveys revealed that half of all jurisdictions surveyed provide only the minimum required by law.[85] The explicatory responses to the surveys revealed that open files policies were "both fair and practical in day-to-day cases."[86] Yet many of those surveyed also said defense counsel did not always request or look at the available files.[87] Gould approves of the other half of responding Virginia jurisdictions who go beyond the law in their discovery standards; but the "challenge is to bring the rest of the state into conformity . . ."[88] To effectuate this change, the ICVA recommended full disclosure and sharing between prosecution and defense, except "confidential and privileged information . . . that, if disclosed, could endanger witnesses or otherwise substantially threaten public safety."[89]

Tunnel vision was a recurring problem in the ICVA cases. According to Gould, tunnel vision is "the unwanted focus by police or prosecutors on a single suspect."[90] This problem is especially dangerous for the wrong suspect, as a narrowed prosecutorial focus eliminates other possibilities by making them appear less likely. The ICVA identified tunnel vision as a problem in eight of the 11 cases it studied.[91] To combat tunnel vision, the ICVA endorsed the recommendations of other lead-

82. *Id*. at 184, 192.

83. 373 U.S. 83 (1963).

84. *Id*. at 185. *See also Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). The *Brady* Court applied this constitutional rule to the states via the 14th Amendment of the U.S. Constitution. *Id.* at 86.

85. *See* GOULD, *supra* note 1, at 186.

86. *Id*. at 187.

87. *Id*.

88. *Id*. at 190.

89. *Id*.

90. *Id*. at 193.

91. *Id*. at 194-97.

ing studies, which suggested continuing police training and refresher training for prosecutors.[92]

Finally, the ICVA recommended reform in the Virginia court system. Gould wonders how the courts can be willing to intervene in school funding but seemingly ignore the problems of indigent defense funding.[93] Specifically, Gould believes Virginia's caps on indigent defense attorneys' fees to be "a violation of the Sixth Amendment."[94] But he is careful to soften the blow, explaining:

> When I criticize the courts (and bar) for failing to stand up to fee caps and other inadequacies of indigent defense, it is not because I think they are wrong to weigh the political costs of dramatic action against potential success. It is because I think their calculus is off. Criminal justice reform must account for political pressures, for public opinion, for costs and interests that resonate outside "the usual suspects" in the reform community.[95]

Again, Gould gently chastises the system, ever-mindful of the delicate balancing act required when a group advocates for broad, systemic change.

The final chapter in *The Innocence Commission* is aptly titled "Putting it All Together."[96] Here, Gould summarizes the effects of the ICVA report on Virginia's criminal justice system going forward. In addition, he describes the efforts of other states to reform their indigent defense systems, including Wisconsin and California.[97] Lastly, Gould takes one final look at the process of reform, and how it performs in the criminal justice system.

Conspicuously absent until now, Gould's opinion on death penalty reform is relegated to a three-page synopsis near the end of the book.[98] Yet perhaps such a complex topic was necessarily distinguished from both Gould's and the ICVA's analysis. Gould describes a scenario where abolitionists of the death penalty can no longer claim such a high margin of error, while proponents simultaneously point to the diminished error as even more reason to go forward with capital punishment.[99] The

92. *Id*. at 198.
93. *Id.* at 201.
94. *Id*. at 201.
95. *Id*. at 203.
96. *Id*. at 204.
97. *Id*. at 222, 225.
98. *Id.* at 241-43.
99. *Id*. at 241-42.

pervasive differences between the two sides might explain why Gould chose to largely avoid the issue. Almost wearily, Gould calls for the separation of criminal justice reform from the death penalty, because "the *real* problem is that many cases below capital prosecutions do not get the attention they deserve to prevent and rectify error."[100]

The irony of Gould's statement is that one of the stated purposes of the ICVA was to focus on factual innocence, to essentially avoid boring the public. Throughout *The Innocence Commission*, Gould refers to the need to grab the public's attention, to effectively promote the desired change to Virginia's criminal justice system. Moreover, the ICVA consciously, and perhaps necessarily, avoided lesser cases in order to receive the greatest amount of attention. For this reason, Gould's final lament regarding the treatment of lesser cases rings a bit hollow.

But it is not a total loss; Gould mentions that Virginia eventually "created the [Virginia] Indigent Defense Commission (VAIDC) in 2004 to provide oversight and certification of attorneys who represent indigent defendants in the commonwealth."[101] Such a development was one of the central recommendations of the ICVA. Regardless of its extent, the creation of a statewide commission, with direct links to the ICVA report, represents a success. Looking further inward, it represents a success of the sociological models to which Gould so carefully ascribed. Therefore, if Gould truly wants to address those lesser cases, he should build on the example the ICVA set with higher profile cases. After all, much of the challenge is "to get the ball rolling."[102]

100. *Id*. at 242.
101. *Id*. at 221.
102. *Id*. at 68.