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> [T]he police force is a perpetual educator. It is a power entirely independent of the chiefs. It weakens, and will finally destroy, the power of tribes and bands . . . where the Indians themselves are the recognized agents for the enforcement of the law, they will more readily learn to be obedient of its requirements.
>
> —Report of the Commissioner of Indian Affairs (1881)[1]

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1. U.S. DEP'T OF THE INTERIOR, 1881 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR, at xvii–xviii [hereinafter 1881 COMM'R INDIAN AFFS. REP.].

INTRODUCTION

In the wake of the protests calling for police reform, driven by the events surrounding the deaths of George Floyd, Breonna Taylor, Michael Brown, and so many others, including Cecil Lacy (Tulalip Tribes) and Rene Davis (Muckleshoot Indian Tribe), as well as the sexual assault at the hands of the police involving L.B. (Northern Cheyenne Tribe), I began to question the role and history that the police have played in Indian Country as agents of assimilation. While conducting research for this Article, it became apparent that following the enactment of the Indian Civil Rights Act, a lot of work and research was conducted on the status of tribal justice systems. Considering the recent events detailed above, this Article seeks to further that earlier analysis and ask the question: Where are we at with our efforts to

re-indigenize Indian Country policing fifty years later? This Article attempts to begin to answer that question.

The Introduction of this Article provides a roadmap and an overview of the contents to be discussed. Part I examines the origins of Indian police forces. It analyzes these origins through a review of the traditional methods of law enforcement implementation and traditional law enforcement infrastructures, as well as the implementation of the assimilation policy through justice systems and policing. Part II examines the furtherance and indoctrination of the assimilation policy through justice systems and policing. It analyzes the effects of the establishment of the Indian police, the further deterioration of tribal justice systems through the extension of federal and state laws into Indian Country, how the Indian policy system as implemented was not able to establish any legal status under U.S. or tribal law, the effects of the Indian Reorganization Act and the establishment of modern tribal courts, and how the modern tribal law infrastructure supports the perpetuation of historical assimilation policies and interferes with effective law enforcement. Part III examines modern policing and determines whether tribal courts are perpetuating assimilative law enforcement principles or whether tribal courts are implementing traditional law principles. It analyzes tribal law cases involving investigative policing, obtaining evidence, interrogations, proactive policing, and the abuse of power. Part IV examines a path for the return to traditional law principles of justice. It analyzes questions surrounding the application of tribal customary law, the use of traditional law enforcement principles in modern-day tribal court cases, the implementation of policing based upon the principles of justice and fairness, and alternative policing strategies. Finally, I conclude that Tribes need to be included in the national conversation efforts on police reform; Tribes need federal appropriations to rebuild their systems that were outlawed, criminalized, and diminished; Tribes need to revitalize our traditional laws, governance structures, and our kinship and clan systems; and lastly Tribes need to be able to heal.

I. The Origins of the Indian Police

This Part examines the origins of Indian police forces. It analyzes these origins through a review of the traditional methods of law enforcement implementation, traditional law enforcement infrastructures, and the implementation of the assimilation policy through justice systems and policing.

A. Traditional Methods of Law Enforcement Implementation

This Subpart examines the traditional methods of law enforcement implementation in Indian Country. We start with the overarching principle that the goal of the tribal justice system in addressing disputes is "to return the tribe, insofar as it [is] possible, to the original state of

social equilibrium."[2] Tribal justice systems achieved this goal in numerous ways, such as using stories as law and attempting to achieve a "state of harmony" in addressing disputes, through their complex kinship systems, through traditional governance, through utilizing social pressure to conform, and through the various methods of punishment, restitution, and banishment.

1. Stories as Law

For Indigenous people, our traditional stories embody our culture, histories, and spiritual teachings.[3] As a result, "[w]ithin these traditional stories, [Indigenous people] are taught about how we are to interact with the world."[4] As Vine Deloria Jr. and Clifford Lytle explain, "Many tribes preferred to incorporate their political and social precedents in stories and anecdotes that explained proper behavior; they relied upon social pressures, particularly the individual's fear of embarrassing his or her relatives and clan members, as their means of determining the proper social response and penalty for violation of the tribal customs."[5]

In utilizing our stories to teach proper behavior and actions, "[t]he stories frequently described good and bad consequences to teach people, adults as well as children, to make right choices."[6] In this context of shaping social behavior, "[t]raditional law in many Native societies is often based on values, duties, and responsibilities that are closely linked to spiritual beliefs. These spiritual values created the framework for responding to problem behavior. Many of these systems focused on responsibilities of people (e.g., to be respectful, to honor the ancestors) rather than a list of prohibited activities."[7] Through the use of the oral tradition, Indigenous people are able to pass on their history from generation to generation while establishing the confines of social behavior and providing a foundation for tribal customary law.[8]

2. Vine Deloria, Jr. & Clifford M. Lytle, American Indians, American Justice 162 (1983).

3. Kekek Jason Stark, *Anishinaabe Inaakonigewin: Principles for the Intergenerational Preservation of Mino-Bimaadiziwin*, 82 Mont. L. Rev. 293, 297 (2021).

4. *Id.* (citing Gerald Vizenor, The People Named the Chippewa: Narrative Histories (1984)). *See generally* Gerald Vizenor, The People Named the Chippewa: Narrative Histories (1984).

5. Deloria & Lytle, *supra* note 2, at 82.

6. Carrie E. Garrow & Sarah Deer, Tribal Criminal Law and Procedure 14 (2d ed. 2015) ("Often Native stories taught beneficial behavior and actions, making Native laws very positive . . . .").

7. *Id.*

8. *See generally* John Borrows, Drawing Out Law: A Spirit's Guide (2010).

One example of traditional stories shaping the foundation of tribal customary law is the Haudenosaunee Great Law, which

> is based on beliefs about the Creator. Strong spiritual beliefs in the Creator regulate behavior more than written rules about right and wrong. Because the Creator was the source of the law, there was very little crime among the Haudenosaunee people prior to the intermingling with settlers and the introduction of alcohol. The Haudenosaunee people believe in the Great Spirit as their creator, who is the source of earthly blessings and blessings after death. The Great Spirit is given thanks for all things, including the changes in the seasons; the fruits of the earth; and the preservation of their lives, social privileges, and prosperity, and is continually asked for their protection. The Haudenosaunee also believe in the Evil-minded, who created monsters, poisonous reptiles, and poisonous plants. Humans stand between them and, with their free agency, control their own destiny. A life of trusting the Great Spirit gives one shelter against the Evil-minded.[9]

As explained in this example, tribal customary law establishes the confines of our social behavior through our relationships and obligations to all of creation. In this way, it is recognized that "Indian communities view wrongdoing as a misbehavior which requires teaching, or an illness which requires healing."[10]

2. Harmony

Traditional forms of justice utilized stories to shape social behavior in an attempt to ensure harmony and balance within tribal communities. As explained through the Haudenosaunee Great Law excerpt, as Indigenous people we exist as a part of creation. The essence of this existence is to live in harmony.[11] For the Anishinaabe, the concept of achieving harmony in life—to live in balance with all of

9. GARROW & DEER, *supra* note 6, at 15.

10. *Id.* at 23 (quoting RUPERT ROSS, DANCING WITH A GHOST 71 (2006)).

11. Aaron Mills, Karen Drake & Tanya Muthusamipillai, *An Anishinaabe Constitutional Order*, *in* RECONCILIATION IN CANADIAN COURTS: A GUIDE FOR JUDGES TO ABORIGINAL AND INDIGENOUS LAW, CONTEXT, AND PRACTICE 267 (Patrick Smith ed., 2017) ("[A]ll aspects of the natural world are already imbued with law—The Great Laws of Nature—and are ordered. These laws govern all aspects of the natural world, including human life. When these laws are followed, the result is harmony.").

creation—is expressed by the term *mino-bimaadiziwin*.[12] This term "is literally defined as to 'live a good life.'"[13]

12. Cholewka v. Grand Traverse Band of Ottawa & Chippewa Indians Tribal Council, No. 2013-16-AP (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Ct. App. Oct. 14, 2014). A case involving a disenrollment challenge, the Grand Traverse Band of Ottawa and Chippewa Indians Appellate Court upheld the Tribal Council and Membership Department's decision to disenroll the appellants. In its reasoning the court relied upon the principle of *mino-bimaadiziwin* as follows:

> While in this case the Appellants have lost the legal standing to be enrolled members of the Grand Traverse Band, our decision changes nothing regarding their family's history and their real belonging to the tribe and the community. Appellants are not banished from the area, nor are they forbidden from practicing their culture or language; they remain as much a part of the community as they wish. The actions of all parties involved moving forward should embody mino-bimaadiziwin; after all, formal tribal enrollment is only a small part of living as an Anishinaabe.

Id. at 11; *see also* Snowden v. Saginaw Chippewa Indian Tribe of Mich., 32 Indian L. Rep. 6047, 6051 (Saginaw Chippewa Indian Tribe of Mich. App. Ct. 2005). In this case, the Appellate Court of the Saginaw Chippewa Indian Tribe of Michigan addressed whether the Tribal Council's power to disenroll currently enrolled members is limited to the narrow grounds expressly identified in the Tribal Constitution, and if not, what the constitutional boundaries in establishing (substantive) grounds for disenrollment are. The court held that the implied constitutional power to disenroll is limited to matters of fraud and mistake and that due process requires the exercise of such implied power to be established in an appropriate tribal ordinance. The court reasoned:

> Tribal membership involves not only constitutional status, but it also serves as the ultimate indication of cultural belonging. With this in mind, we urge the parties, as we did in the *Chamberlain* case, to place themselves in the heart of Native American jurisprudence by "healing, restoring balance and harmony, accomplishing reconciliation, and making social relations whole again."

Id. at 12–13 (quoting Chamberlain v. Peters, 27 Indian L. Rep. 6085, 6097 (Saginaw Chippewa Indian Tribe of Mich. App. Ct. 2000)).

13. Stark, *supra* note 3, at 304–05. ("This concept stems for the terms; *minw-* which means good, or well and the term *bimaadizi* which means to live. The term *bimaadizi* is further broken down with the following stems: *bim-*, which means along in space or time, *-aad-* which means of being or life, character or nature, and *-izi*, which means s/he is in a state of condition. . . . The concept of *mino-bimaadiziwin* is the central goal of Anishinaabe existence and, as an embodiment of the essence of creation, flows through every aspect of Anishinaabe life.").

The principles embodied in *mino-bimaadiziwin* are utilized to shape social behavior and thereby interpret and develop tribal law.[14] This allows "tribal courts and justice systems the ability to bring the principles of *mino-bimaadiziwin* into the modern era in the context of modern disputes, without creating confusion as to its application."[15] The Nottawseppi Huron Band of Potawatomi Supreme Court acknowledged, "[*Mino-bimaadiziwin*] is not a legal doctrine but forms the implicit basis for much of tribal custom and tradition, and serves as a form of fundamental law."[16] Lawrence Gross reiterated this principle as follows:

> *Bimaadiziwin,* however, does not exist as a definitive body of law. Instead, it is left up to the individual to develop an understanding of *bimaadiziwin* through careful attention to the teaching wherever it can be found. This makes the term quite complex, and it can serve as a religious blessing, moral teaching, value system, and life goal.[17]

The embodiment of the principle of harmony to shape social behavior and thereby interpret and develop tribal law was not unique

14. *In re* Validation of Marriage of Francisco, No. A-CV-15-88, 1989 Navajo Sup. LEXIS 4, *14 (Navajo Aug. 2, 1989). In this case, the Navajo Nation Supreme Court synthesized this principle: "[T]he concept of justice has its source in the fabric of each individual society. The concept of justice, what it means for any group of people, cannot be separated from the total beliefs, ideas, and customs of that group of people." *Id.* (quoting T. TSO, CHIEF JUSTICE'S ANNUAL REPORT, JUDICIAL BRANCH OF THE NAVAJO NATION ANNUAL REPORT 1 (1988)).

15. Stark, *supra* note 3, at 305.

16. Spurr v. Tribal Council, No. 12-005APP, slip op. at 6, 15–16 (Nottawseppi Huron Band of Potawatomi Sup. Ct. Feb. 21, 2012). This case tasked the court with addressing a tribal member's challenge seeking to enjoin an election from being held pursuant to the amendment article of the Tribe's constitution. In addressing the merits, the court utilized the principle of *mino-bimaadiziwin* (*mno-bmadzewn*, as the term is depicted in the Potawatomi language) as follows:

> We hearken back to our consideration of MnoBmadzewen, and we find that the government's boundaries of acceptable conduct in administering an Article IX election are broad, but not unlimited. . . . [S]o long as the government's conduct respects, as we believe it does here, elections as expression of the community's will, we will not intervene.

Id.

17. Lawrence W. Gross, Bimaadiziwin*, or the "Good Life," as a Unifying Concept of Anishinaabe Religion*, 26 AM. INDIAN CULTURE & RSCH. J. 15, 19 (2002).

to the Anishinaabe.[18] Many Tribes embodied this same concept.[19] For example, the Dine' utilize the term *hózhó* to identify a state of harmony.[20] The Navajo Nation Supreme Court explained as follows:

> *Hazhó'ógo* is not a man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals. When discussions become heated, whether in a family setting, in a community meeting or between any people, it's not uncommon for an elderly person to stand and say "*hazhó'ógo, hazhó'ógo sha'áłchíní*" ("*hazhó'ógo*, *hazhó'ógo* my children"). The intent is to remind those involved that they are *Nohookáá Diné'é* (Earth—Surface—People (Human Beings)), dealing with another *Nohookáá Diné'é,* and that therefore patience and respect are due. When faced with important matters, it is inappropriate to rush to conclusion or to push a decision without explanation and consideration to those involved. *Áádóó na'nílę'dii éí dooda (*delicate matters and things of importance must not be approached recklessly, carelessly, or with indifference to consequences). This is *hazhó'ógo*, and we see that this is an underlying principle in everyday dealings with relatives and other individuals, as well as an underlying principle in our governmental institutions. Modern court procedures and our other adopted ways are all intended to be conducted with *hazhó'ógo* in mind.[21]

The principles embodying how we carefully approach each other as individuals, as utilized by the Navajo Nation Supreme Court, help us further understand the Indigenous principle to strive for balance and harmony.

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18. Eriacho v. Ramah Dist. Court, 6 Am. Tribal L. 624, 627 (Navajo 2005) (citing Duncan v. Shiprock Dist. Ct., 5 Am. Tribal L. 458, 466 (Navajo 2004)). In *Duncan*, the Navajo Nation Supreme Court determined,

> > A jury trial in our Navajo legal system is a modern manifestation of consensus-based resolution our people have used throughout our history to bring people in dispute back into harmony. Juries are a part of the fundamental Navajo principle of participatory democracy where people come together to resolve issues by "talking things out." Through this process community members in disharmony are brought back into a state of *hózhó*. . . . The participation of the community in resolving disputes between parties is a deeply-seeded part of our collective identity and central to our ways of government.
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> Duncan, 5 AM. TRIBAL L. at 466 (citations omitted).

19. MICHAEL L. BARKER, POLICING IN INDIAN COUNTRY 3–4 (1998).

20. Navajo Nation v. Rodriguez, 8 NAV. REP. 604, 615–16, 5 Am. Tribal L. 473, 480 (Navajo 2004).

21. *Id.* at 615.

As we apply the principle of harmony to Indigenous justice systems, Matthew L.M. Fletcher reminds us that "[t]he work of healing was more important than the security function. Healing helped to restore harmony . . . ."[22] This is because Indigenous justice systems focused on the rehabilitation of the individual and the restoration of peace and harmony in the community.[23] As we will see in this Article, the criminal justice system introduced by federal administrators destroyed the harmony model of justice and replaced it with the adversarial model.[24]

3. Kinship and Societal Norms

Traditionally, Indigenous people observed the principle of possessing "free will." In this regard, community members were free to act in any manner that they desired. However, this free will was tailored to living in harmony.[25] This state of harmony included internal harmony with oneself as well as external harmony with the community.[26] In this state of being, community members were likewise

22. Matthew L.M. Fletcher, *Erasing the Thin Blue Line: An Indigenous Proposal*, 2021 MICH. ST. L. REV. 1447, 1481 (2021).

23. GARROW & DEER, *supra* note 6, at 21.

24. BARKER, *supra* note 19, at 13.

25. *See supra* Part I.A.2.

26. ELLA DELORIA, *Kinship's Role in Dakota Life*, *in* SPEAKING OF INDIANS 24–25 (1998) ("All peoples who live communally must first find some way to get along together harmoniously and with a measure of decency and order. This is a universal problem. Each people, even the most primitive, has solved it in its own way. And that way, by whatever rules and controls it is achieved, is, for any people, the scheme of life that works. The Dakota people of the past found a way: it was through kinship. Kinship was the all-important matter. Its demands and dictates for all phases of social life were relentless and exact; but, on the other hand, its privileges and honorings and rewarding prestige were not only tolerable but downright pleasant and desirable for all who conformed. By kinship all Dakota people were held together in a great relationship that was theoretically all-inclusive and co-extensive with the Dakota domain. Everyone who was born a Dakota belonged in it; nobody need be left outside."); RUTH LANDES, OJIBWA SOCIOLOGY 5 (1937); Donald J. Auger, The Northern Ojibwe and Their Family Law 118–19 (2001) (J.D. dissertation, York University) (on file with author) ("Living a good life will often be referred to as walking the 'sweet grass road' or the 'red road,' or a variety of other similar terms. All of these are used to describe a central theme in Ojibwe society. This culturally dictated concept is one of the most crucial, if not the only goal, for Ojibwe life and existence. Contained within this concept is a whole set of ideals, moral values and methods of achieving that goal. When one is able to achieve the goal of living a good life he or she is regarded by others as a model to follow. However, while *pimadizewin* may be the goal of all Ojibwe persons, not all are able to achieve the goal, for it takes a concerted effort to achieve this goal and involves acquiring a balance in every aspect of one's life. And achieving the goal is only the beginning—one must continually strive to maintain the ideals implicit

compelled to adhere to kinship and societal norms.[27] This is because the rules of tribal law systems were "embedded in a matrix of social relationships."[28] As Donald Auger explains, "The value of social harmony was instilled in an individual from birth and throughout his life by other members of the community, and in particular by members of his family and kinship group."[29] Therefore, social relationships defined how a person was to act.[30] The Dine' have a saying that embodies this principle: "He acts as if he had no relatives."[31] This is a common phrase used to identify people that acted outside of societal and kinship norms.

The responsibility and obligation to act according to societal and kinship norms was summarized by Vine Deloria Jr. as follows:

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within the goal and to assist others in their efforts to achieve the goal. The goal can only be achieved through one's own personal efforts and with the assistance and cooperation of both human and 'other-than-human' persons that make up the Ojibwe world.").

27. DELORIA, *supra* note 26, at 31–32 ("For the most part, then, everyone had his part to play and played it for the sake of his honor, all kinship duties, obligations, privileges, and honorings being reciprocal. One got as well as gave. Thus kinship had everybody in a fast net of interpersonal responsibility and made everybody like it, because its rewards were pleasant. There were fewer rebels against the system than you might think, since, as I have said, social standing and reputation hinged on it. Only those who kept the rules consistently and gladly, thus honoring all their fellows, were good Dakotas—meaning good citizens of society, meaning persons of integrity and reliability. And that was practically all the government there was. It was what men lived by. Social pressure, always powerful, was particularly strong in such a close-knit group as a camp-circle, where everyone was literally in the public eye. Unless an individual was congenitally perverse or slightly queer he did not care to be aberrant. Indeed, even, such a one was likely to be excused and shielded by his relatives, as though he were under an evil spell and could not help it. It was essential that the relatives hold up their end anyway for their own sakes. The failure of one did not excuse another. 'Ah, yes, he is like that, has always been . . . still and all, he is my relative,' a man might say, and go on playing his own part."); LANDES, *supra* note 26, at 1, 13–14 (1937) ("'Other people' i.e. neighbors would warn parents of the child's wrong doings; then all would join in ridiculing the child until he conformed.").

28. BARKER, *supra* note 19, at 3.

29. Auger, *supra* note 26, at 119.

30. GARROW & DEER, *supra* note 6, at 17 ("One reason that traditional laws were designed to protect the community is that the spiritual beliefs of many tribes instructed individuals about their duties and responsibilities to families, clans, and the tribe.").

31. Arizona Pub. Servs. Co. v. Off. Navajo Lab. Rels., 17 Indian L. Rep. 6105, 6112 (Navajo 1990) ("The reciprocal obligation required of Navajos is summed up in the saying used to describe someone who has misbehaved: 'He acts is if he had no relatives.'").

> [T]here once was a small group in nature . . . and this group recognized the value of relatives. So they said, "We're going to have a society of responsibility. In order to belong to this tribe you have to do certain things. You have to treat your relatives a certain way, you have to treat society at large a certain way. You have to feed the poor, you have to take care of the orphans, [and] provide for the elders.[32]

As described by Deloria, it is important for members of the community to understand the responsibilities and obligations of our societal and kinship systems.

4. Clan Systems

Many Indigenous people are organized around complex clan systems which operate as an extended form of kinship and further the responsibilities and obligations of our societal and kinship systems. For the Dine', the importance of their clan system is explained as follows:

> In those tribes the central institution is the family. Everything hangs upon the family, and back of the family is the mother's clan. Descent is traced through the mother. The customs of marriage and divorce are part of the family institution, part of the clan that is back of the family. It includes responsibility of the young for the care of the aged. It includes responsibility of the clan for the physical care and education of a child left an orphan.[33]

As explained in this excerpt, the entire complex of Dine' social life is tied to the clans. This principle is the same for other Tribes.

For the Iroquois Confederacy, "[c]rime was rare because life revolved around the clans, wrongdoing was contrary to the interest of the clan, and thus wrongdoing was contrary to the interest of the individual. If wrongdoing did occur, clan leaders took responsibility for it."[34] Likewise, for the Osage it is explained: "Historically, some of our earliest known structures identified roles and responsibilities for our clans. Although 'basic knowledge was shared by the twenty-four clan priesthoods, each clan also had exclusive control over parts of this

32. Vine Deloria Jr., Tribal Sovereignty and American Indian Leadership (Oct. 17, 1997) ("You're born into this society and you're the beneficiary of the concerns of everybody who is older than you. As you age and go through that society you have different responsibilities.").

33. *Rsrv. Courts of Indian Offs.: Hearings on H.R. 7826 Before the H. Comm. on Indian Affs.*, 69th Cong. 20 (1926).

34. GARROW & DEER, *supra* note 6, at 19.

knowledge.'"[35] For the Creek, the primacy of their clan system is described from the following story:

> The primacy of Creek Clans . . . could be traced back to an early condition of chaos in which humans and animals were lost in an immensely thick fog. In order to save themselves the people and the animals joined hands and wandered for many days. Finally, as the fog was clearing and open skies could be discerned, they agreed that henceforth the clans would rank in the order in which they had emerged from the dreadful fog.[36]

For the Anishinaabe, the *doodem* (clan) system establishes reciprocal spiritual and kinship obligations.[37] The concept *doodem* is defined as "clan, totem."[38] Literally, the term *doodem* derives from where we get our spiritual sustenance, our spiritual existence.[39] As Anton Treuer explains, "*[D]oodem* (the clan) is the center of spiritual identity. . . . Among the Ojibwe, clans defined the core of one's spiritual essence. Just as *ode'* was the heart of one's physical being, *doodem* was the heart of one's metaphysical being."[40] Through the origin stories of the *doodem* system, the animals created a relationship with the Anishinaabe, and through this relationship they took responsibility for our actions and taught us lessons about the earth and all of creation.[41] The animal Nations committed to teach us how to love and live through them and established a very close relationship between

35. Standing Bear v. Whitehorn, SCO-2015-1, slip op. at 5 (Osage Nation Sup. Ct. 2016) (quoting FRANCES LA FLESCHE, THE OSAGE AND THE INVISIBLE WORLD: FROM THE WORKS OF FRANCES LA FLESCHE 74 (1995)).

36. DELORIA & LYTLE, *supra* note 2, at 81.

37. BASIL JOHNSTON, OJIBWAY HERITAGE 72–73 (1990).

38. *Doodem-*, THE OJIBWE PEOPLE'S DICTIONARY, https://ojibwe.lib.umn.edu/main-entry/doodem-nad [https://perma.cc/C7LR-7XZ3] (last visited Nov. 27, 2022).

39. JOHNSTON, *supra* note 37, at 61 ("Dodaem may mean 'that from which I draw my purpose, meaning, and being.'").

40. ANTON TREUER, THE ASSASSINATION OF HOLE IN THE DAY 15, 72 (2011) (citations omitted).

41. JOHNSTON, *supra* note 37, at 60–78; Nancy Jones, *Animals*, *in* DIBAAJIMOWINAN: ANISHINAABE STORIES OF CULTURE AND RESPECT 92–99 (H. James St. Arnold & Wesley Ballinger eds., 2013).

the people as our relatives.[42] As such, the *doodem* system was pivotal in structuring "religious, social, and political life."[43]

The *doodem* is a form of kinship relation for the Anishinaabe.[44] *Doodem* identity is passed through the father. Members of the same *doodem*, no matter how many miles apart, are one's brothers and sisters and are expected to extend hospitality, food, and lodging to each other.[45] Since Anishinaabe people belong to a Tribe (Band) and to the Anishinaabe Nation, *doodem* relationships help unite the various Ojibwe Tribes as one nation through recognition of the principle that wherever we travel within *Anishinaabe-akiing* (our traditional territories),[46] there is always a place for us and an attached reciprocal responsibility for all of us through the clan system.[47] As Patricia McGuire explains,

> The clans helped to establish relationships between various bands, enabled inter-community cooperation and political coordination

42. TREUER, *supra* note 40, at 17 ("Clan designation was a birthright that established and reinforced a spiritual connection with an animal, bird, or water creature. . . . The animal-human relationship is further reinforced by the common belief that a clan member assumes many of the attributes of his or her clan."); *see also* JOHNSTON, *supra* note 37, at 59–79; Jones, *supra* note 41, at 92–99.

43. Anton Steven Treuer, The Assassination of Hole in the Day 4 (1997) (Ph.D. thesis, University of Minnesota) (on file with author); *see also* Wright v. Nottawaseppi Huron Band of the Potawatomi, Case No. 21-154 -APP, slip op. at 7 (Nottawaseppi Huron Band of Potawatomi Sup. Ct. June 3, 2022) (citing HEIDI BOHAKER, DOODEM AND COUNCIL FIRE: ANISHINAABE GOVERNANCE THROUGH ALLIANCE 57–61 (2020)) ("At one time, Anishinaabe belonging was rooted in the doodem tradition.").

44. *See* CHRISTOPHER VECSEY, TRADITIONAL OJIBWA RELIGION AND ITS HISTORICAL CHANGES 78 (1983); JOHN TANNER, A NARRATIVE OF THE CAPTIVITY AND ADVENTURES OF JOHN TANNER 313 (1956).

45. JAMES G. E. SMITH, LEADERSHIP AMONG THE SOUTHWESTERN OJIBWA 15 (1973) ("[Totemic clans] provided the basis for long-term integration of neighbouring bands by providing identity, hospitality in more distant areas, cooperation in warfare and the hunt, and the transmission of chieftainship.").

46. GREAT LAKES INDIAN FISH & WILDLIFE COMM'N, GIDAKIIMINAAN (OUR EARTH): AN ANISHINAABE ATLAS OF THE 1836 (UPPER MICHIGAN), 1837, AND 1842 TREATY CEDED TERRITORIES, https://glifwc.org/publications/pdf/Atlas.pdf [https://perma.cc/28ZZ-SHLL] (last visited Jan. 22, 2023); *see also Aki*, THE OJIBWE PEOPLE'S DICTIONARY, https://ojibwe.lib.umn.edu/main-entry/aki-ni [https://perma.cc/W9TF-H8BZ] (last visited Nov. 27, 2022).

47. CHARLES A. BISHOP, THE NORTHERN OJIBWAY AND THE FUR TRADE: AN HISTORICAL AND ECOLOGICAL STUDY 50 (1974); BOHAKER, *supra* note 43, at 59 ("Doodem origin narratives create a sense of both belonging to and responsibility for particular places.").

> as well as the advancement of the leadership. Clans helped regulate societies.
>
> Societal life for the *Anishinaabe* was based upon both the demarcation and connective relationships between clans. This contributed to the overall social organization and governance of the *Anishinaabe*. Clans functioned at the individual and communal levels.[48]

For the Anishinaabe, our traditional governance structure existed through the *doodem* system.[49] The *doodem* system uses various animals as symbols for the clans.[50] The animals' characteristics provide an identity and define roles and responsibilities for members of each *doodem*, including the following functions of traditional Anishinaabe society: leadership, defense, hunting, learning, and medicine.[51] Heidi Bohaker explains that "[t]he doodem tradition shaped self-conception and political actions, law, and governance practices."[52] It is through the *doodem* system that we learned how to live according to societal and kinship norms and achieve *mino-bimaadiziwin* through our traditional governance structure.[53]

5. Governance

For many Indigenous people, traditional governance was implemented as a result of the principles of achieving harmony through kin and clan responsibilities. As explained by Matthew L.M. Fletcher, "Anishinaabe political theory assumes that harmony is the baseline condition. Anishinaabe governance divides powers and responsibilities

48. Patricia D. McGuire, Restorative Dispute Resolution in *Anishinaabe* Communities—Restoring Conceptions of Relationships Based on *Dodem*, Research Paper for the National Centre for First Nations Governance 3 (2008) (citation omitted).

49. *See* Edward Benton-Banai, The Mishomis Book: The Voice of the Ojibway 74–78 (1988); Landes, *supra* note 26, at 31–52; William W. Warren, History of the Ojibway People 89 (2d ed. 2009); Johnston, *supra* note 37, at 59; James Dumont, Anishinabe Izhichigaywin 27–36 (1999); Heidi Bohaker, *Reading Anishinaabe Identities: Meaning and Metaphor in* Nindoodem *Pictographs*, 57 Ethnohistory 11, 13 (2010). *See generally* Heidi Bohaker, "*Nindoodemag": The Significance of Algonquian Kinship Networks in the Eastern Great Lakes Region,* 1600–1701, 63 Wm. & Mary Q. 23 (2006).

50. Johnston, *supra* note 37, at 60.

51. *Id.* at 60–61.

52. Bohaker, *supra* note 43, at 90.

53. 21 Transcript of Proceedings at 2866–67, 2934, Restoule v. Att'y Gen. of Canada, 2018 ONSC 7701 (Can. Ont.) (No. C-3512-14) (Testimony of Elder Fred Kelly, Nov. 1, 2017).

of tribal leaders. There is no winner-take-all, majority rule decision-making."[54] As Vine Deloria Jr. and Clifford Lytle explain,

> Indian tribes . . . had highly complicated forms of government that could be traced far back into precontact days and, according to some tribal traditions, back as far as their creation and migration stories told them intelligible life has existed.
>
> . . . .
>
> Apart from their functions of making war, deciding when and where to move the camp, authorizing the annual buffalo hunt, and ensuring that the annual religious ceremonies were held without incident, the role of the chiefs was to provide for the security and well-being of the people. Although chiefs were each charged with the responsibility of mediating disputes among the people, at times the council itself had to act to settle disputes. This duty was particularly true when a series of disputes had resulted in the killing of a person and the relatives sought revenge or demanded some additional form of compensation above that which had been offered by the slayer's relatives. On these occasions the council of chiefs had to satisfy the people and display the utmost wisdom in ensuring that justice was done and was perceived by everyone as settling the matter. Thus the function of the council was a conciliatory-judicial one rather than an executive function as one might initially perceive.[55]

As evidenced by the excerpt above, dispute resolution was one of the most critical functions of traditional governance.[56]

Michael Barker further explains the importance of dispute resolution as an important role of traditional governance:

> When an offense did occur, the parties involved would generally initiate a negotiation process leading, in most cases, to a successful settlement. When private bargaining failed, a more public and official involvement might be sought to avoid internecine warfare. This involvement, usually of a mediative nature, typically required the intervention of the tribal chief, council members, religious figures, or other important and respected men . . . . Among the Cheyenne, as with many other tribes, mediation by tribal political authorities was particularly important after a homicide, when serious disagreements about restitution typically flared, raising the specter of a blood feud. Immediate action, acceptable to all involved, was needed to

54. Fletcher, *supra* note 22, at 1450.

55. Deloria & Lytle, *supra* note 2, at 81, 85.

56. Barker, *supra* note 19, at 6.

> rechannel the energies of simmering hostility back into productive activities of hunting, food gathering, and military campaigns.[57]

As Indigenous people engage in the principles of achieving traditional governance through forms of dispute resolution, Tribes likewise relied upon social pressures to encourage compliance with social and kinship norms.[58]

6. Social Pressure to Conform

As explained previously, for many Indigenous peoples, tribal law did not focus exclusively on the negative behavior of an induvial; rather, it concentrated on the expected behavior of the community based upon social, kinship, and clan obligations and responsibilities.[59] As a result, "[w]ritten legal codes were non-existent, but strong behavioral norms were enforced and violators sanctioned."[60] Many crimes as we think of them today were nonexistent as a result. For example, property crimes were uncommon as "[p]eople felt free to use other people's property within reason and only a continuous and careless use of property invoked any kind of social sanctions."[61] The idea of careless behavior is further evidenced by the following:

> Many Native languages . . . do not have a word for crime. A trader who lived among the Chickasaw in the 1700s noted that the nearest expression for the word crime is *haksi*, which is used to convey the idea of a person's being criminal, and that although the original meaning was deaf, it came to signify drunken, roguish, wicked, or sinful.[62]

As evidenced by this excerpt, when the conduct of community members was careless and contrary to expected norms, social ridicule was used to restore harmony and ensure compliance with expected norms.[63] This social ridicule could occur through the use of derogatory

57. *Id.* at 5–6 (citations omitted).

58. DELORIA & LYTLE, *supra* note 2, at 82 ("Many tribes preferred to incorporate their political and social precedents in stories and anecdotes that explained proper behavior; they relied upon social pressures, particularly the individual's fear of embarrassing his or her relatives and clan members, as their means of determining the proper social response and penalty for violation of the tribal customs.").

59. GARROW & DEER, *supra* note 6, at 14 ("Many tribal laws did not focus on the bad behavior of a person, but rather on the positive, expected behavior of all people.").

60. BARKER, *supra* note 19, at 3.

61. DELORIA & LYTLE, *supra* note 2, at 162.

62. GARROW & DEER, *supra* note 6, at 13–14.

63. *Id.* at 26 ("In many traditional Native communities, society's ridicule served as a strong element of social control.").

terminology, such as with the use of the Chickasaw term *haksi*, or by diminishing the individual's character.[64]

As also explained previously, Indigenous people observed the principle of possessing "free will."[65] However, this free will was tailored to living in harmony according to kinship, clan, and social norms and was further limited in two very specific circumstances.[66] These circumstances involved the communal hunt or war.[67] During these two specific instances, community members were required to follow the specific rules of the tribal leaders, otherwise devastating effects could bear on the entire community such as death or starvation.[68]

A "military court" was invoked during times of war or when members were engaged in a war party expedition.[69] During these times, free will was diminished as "the war chief and his most distinguished braves . . . exercised unlimited power in time of war and was implicitly obeyed."[70] The duties of the military court were described as follows:

> Among the duties of this court was to determine the limits of each day's march when out upon the campaign, and to regulate the camping places. This was an important function, for the army subsisted off the country and unless the utmost care was exercised

64. DELORIA, *supra* note 26, at 32 ("Social pressure, always powerful, was particularly strong in such a close-knit group as a camp-circle, where everyone was literally in the public eye. Unless an individual was congenitally perverse or slightly queer he did not care to be aberrant. Indeed, even such a one was likely to be excused and shielded by his relatives, as though he were under an evil spell and could not help it. It was essential that the relatives hold up their end anyway for their own sakes. The failure of one did not excuse another. 'Ah, yes, he is like that, has always been . . . still and all, he is my relative,' a man might say, and go on playing his own part."); Arizona Pub. Servs. Co. v. Off. Navajo Lab. Rels., 17 Indian L. Rep. 6105, 6112 (Navajo 1990) ("The reciprocal obligation required of Navajos is summed up in the saying used to describe someone who has misbehaved: 'He acts is if he had no relatives.'"); LANDES, *supra* note 26, at 13–14 ("'Other people' i.e. neighbors would warn parents of the child wrongdoing; then all would join in ridiculing the child until he conformed.").

65. *See supra* Part I.A.3.

66. *See supra* notes 14–21 and accompanying text.

67. *See* Doane Robinson, Sioux Indian Courts: An Address Delivered by Doane Robinson of Pierre, South Dakota, Before the South Dakota Bar Association at Pierre, South Dakota 6–9 (Jan. 21, 1909).

68. *Id.*

69. *Id.* at 6.

70. *Id.*

> "the base of supplies" would be frightened away and the band subjected to starvation.[71]

Likewise, the "hunting court" was "organized for great hunting expeditions and was given absolute control over the general movement" of the band.[72] Doane Robinson provided a detailed explanation of the role of the hunting court from the firsthand experience of General Henry H. Sibley in 1841:

> In 1841, General Henry H. Sibley, of Minnesota, proposed to the Indians residing about his home at Mendota that they go down to the "Neutral Strip" in Northern Iowa for a long hunt. The Sioux were agreeable, and to get the matter in form Sibley made a feast to which all the natives were invited. After eating and smoking several hundred painted sticks were produced and were offered for the acceptance of each grown warrior. It was understood that whoever voluntarily accepted one of these sticks was solemnly bound to be of the hunting party under penalty of punishment by the soldiers if he failed. About one hundred and fifty men accepted. These men then detached themselves from the main body and after consultation selected ten of the bravest and most influential young men to act as members of the hunting court. These justices were called soldiers. Every member bound himself to obey all rules made by the court.[73]

General Sibley told the following story:

> We . . . became subject to the control of the soldiers. At the close of each day the limits of the following day's hunt were announced by the soldiers, designated by a stream, grove, or other natural object. This limit was ordinarily about ten miles ahead of the proposed camping place and soldiers each morning went forward and stationed themselves along the line to detect and punish any who attempted to pass it. The penalty attached to any violation of the rules of the camp was discretionary with the soldiers. In aggravated cases they would thresh the offender unmercifully. Sometimes they would cut the clothing of the man or woman entirely to pieces, slit down the lodge with their knives, break kettles and do other damage. I was made the victim on occasion by venturing near the prohibited boundary. A soldier hid himself in the long grass until I approached sufficiently near when he sprang from his concealment and giving the soldiers' whoop rushed upon me. He seized my fine double barreled gun and raised it into the air . . . . [T]hen snatched my fur cap ordering me back to camp . . . . I had to ride ten miles bareheaded on a cold

71. *Id.* at 7–8.

72. *Id.* at 8.

73. *Id.*

> winter day, but to resist a soldier while in the discharge of duty is considered disgraceful in the extreme.[74]

As Indigenous people used social pressure to restore harmony and ensure compliance with expected norms, those individuals that continued to act carelessly and conduct themselves outside of extended societal, kinship, and clan responsibilities and obligations often found themselves subject to possible punishment.

7. Punishment

For many Indigenous people, the failure to adhere to kinship, clan, and social norms included various forms of possible punishment.[75] As Michael Barker describes, punishment included

> various forms . . . from mild chastisement to death. . . . Formal jails and prisons—indeed, the very idea of incarcerating someone for punishment—did not exist. Restitution and public scorn were . . . the most common punishments, even for relatively serious offences. Other forms of correction included personal ostracism, forced labor for a victim or the tribe and public ridicule/group pressure. . . . Mutilation, execution and banishment, were also dispensed, but these were less common because of the perceived non-utility in restoring harmony among the parties.[76]

In implementing these various forms of punishment, for non-compliance with kinship, clan, and social norms both corporal and non-corporal punishment were used in order to restore harmony to the community. Corporal and non-corporal punishment were used as follows:

> Physical punishment was dispensed in two general situations: (a) when disputing parties sought outside assistance to resolve a conflict serious enough to make a restitution agreement difficult to achieve (e.g., murder); and (b) when individuals committed serious or repeated violations of community standards, such as the making of unnecessary noise sufficient to frighten herds or flocks. These offences, because of seriousness, or time and place of commission . . . were viewed as deserving a physical penalty. The non-corporal punishments which the society meted out included destruction of property (e.g., shelters, rifles and horses) and banishment. Regardless of the type of violation—assault,

74. *Id.* at 8–9.

75. Eileen Luna-Firebaugh, Tribal Police: Asserting Sovereignty, Seeking Justice 28 (2007) ("Ridicule, banishment, whippings, beatings, and even capital punishment of the perpetrator by the kin of the victim were considered acceptable punishment in traditional [tribal] legal systems, but imprisonment was unknown.").

76. Barker, *supra* note 19, at 4.

> murder, adultery or hoarding meat from communal kill—it appears that the policing society was an effective mechanism for social control.[77]

As Indigenous people used social pressure and corporal and non-corporal punishment as methods to restore harmony and ensure compliance with expected norms, the settlement of Indigenous disputes was also often achieved through negotiation with restitution as the desired outcome.

8. Restitution, Payment to a Victim or Heirs

In order to restore harmony in tribal communities, when noncompliance with kinship, clan, and social norms occurred, dispute resolution was the primary goal of traditional governance. In this instance reconciliation was the goal and "disputes were most often settled privately, with restitution the preferred option."[78] The Yurok Tribe embodied the principle of restitution in its traditional governance as "the Yurok believed that every wrongdoing or violation of personal rights could be exactly compensated and every individual privilege could be measured in terms of property."[79] In this regard, the settlement of Indigenous disputes was often achieved through negotiation with restitution in the form of compensation as the desired outcome.[80]

Among the Osage, the chiefs were responsible for restoring harmony in the community as follows:

> If individuals were threatening to kill one another, the chiefs stepped in to try to restore peace. When a tribal member was murdered, peace gifts were given to the victim's family. If the family was not satisfied with the gifts and still wanted to take the murderer's life for compensation, the chiefs would step in and restore peace. If the family was not appeased, the chiefs would expel the murderer from the community, which was the harshest punishment. If the murderer's family refused to offer peace gifts, the community would step in and offer the gifts, and the leader of the murderer's relatives would be expelled from the community.[81]

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77. *Id.* at 8 (citations omitted).

78. *Id.* at 4–5; *see also* Russel Lawrence Barsh & J. Youngblood Henderson, *Tribal Courts, the Model Code, and the Police Idea in American Indian Policy*, 40 L. & CONTEMP. PROBS. 25, 35 (1976) ("Reconciliation was a principal objective of mediation.").

79. GARROW & DEER, *supra* note 6, at 19.

80. *Id.* at 18–19 ("Settlement for any wrongdoing was done through negotiation or compensation, and each side was responsible for pursuing the matter or defending himself or herself.").

81. *Id.* at 19–20.

Similarly, among the Blackfeet, the Men's Societies were charged with the responsibility to maintain harmony and social order, specifically "among the camps, on marches, and on hunting parties."[82] Blackfeet principles of restitution are described as follows: "When an individual was killed, the victim's relatives possessed the authority to avenge the murder by killing the murderer or the first member of the murderer's family whom the victim's family met. Vengeance could be avoided however, with a payment of great value."[83]

In the case of *Ex parte Crow Dog*,[84] the U.S. Supreme Court affirmed Tribal jurisdiction and the ability of the tribal leadership to restore harmony to the community through the principle of restitution.[85] This case still represents a positive acknowledgment of the importance of tribal customary law.[86] The U.S. Supreme Court recognized "that the territorial court had inappropriately measured Lakota standards for punishment 'by the maxims of the white man's morality.'"[87]

In fact, the practice of receiving restitution was so common in tribal communities that it was recognized in modern tribal criminal codes through the early Bureau of Indian Affairs (BIA or "Bureau") Code of Federal Regulations (often referred to as "Law and Order Regulations"). For example, a provision in the 1938 BIA regulations states as follows: "In addition to any other sentence, the [CFR Court] may require an offender who has inflicted injury upon the person or property of any individual to make restitution or to compensate the party injured, through the surrender of property, the payment of money damages, or the performance of any other act for the benefit of the injured party."[88]

In *Stepetin v. Nisqually Indian Community*,[89] the Nisqually Tribal Court of Appeals emphasized the importance of utilizing restitution as a means of restoring harmony by acknowledging that "equitable considerations and procedures allowing flexibility in dispute resolutions

82. *Id.* at 20.

83. *Id.*

84. 109 U.S. 556 (1883).

85. INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES, at xxii (2013) [hereinafter ROADMAP]; *Crow Dog,* 109 U.S. at 571–72.

86. *Crow Dog,* 109 U.S. at 572.

87. ROADMAP, *supra* note 85, at xxii (quoting *Crow Dog,* 109 U.S. at 571).

88. 3 Fed. Reg. 1137 (May 18, 1938).

89. 2 NICS App. 224 (Nisqually Tribal Ct. App. Apr. 1993).

may often be more responsive to the relational needs of the tribal community."[90] The court recognized that

> [t]raditionally, when conduct such as this occurred in the tribal community, it was customary for someone who represented the victim to go the family of the person who caused the loss and demand satisfaction or payment. If the person refused to make some offering of regret or payment, the event would upset relationships between families and risk starting a feud. If no offering was made, the leader of the community or some respected elder or person of standing in the community would frequently step in and try to settle the dispute.
>
> . . . [T]raditional penalties . . . [can include] making an offer of regret to the injured family, shaming, or, in the extreme case, banishment.[91]

Likewise, in *In re Interest of D.P.*,[92] the Crownpoint District Court (Navajo Nation) also addressed the concept of restitution. In this juvenile proceeding, the court discussed the "Navajo traditions . . . [of putting] the victim in the position he or she [enjoyed prior to] the offense," "punish[ing] in a visible way . . . [to show a] wrong was punished," and giving an offender a "means to return to the community by making good [for a] wrong." The court concluded "that not only is restitution permitted under Navajo custom law, but indeed it was so central to Navajo tradition in offenses that it should be presumed to be required in any juvenile disposition."[93]

As Indigenous people used negotiation with restitution in the form of compensation as the desired outcome in the settlement of many disputes, they also utilized banishment as an extreme consequence for those that continued to act carelessly and conduct themselves outside of extended societal, kinship, and clan responsibilities and obligations.

9. Banishment

As a last resort to noncompliance with kinship, clan, and social norms, Indigenous people would resort to banishment as means of restoring harmony.[94] In fact, "[b]anishment is a traditional form of punishment many Indian tribes have resurrected in an attempt to deal

90. *Id.* at 233.

91. *Id.* at 234.

92. 3 Navajo Rptr. 255 (Navajo D. Ct. 1982).

93. *Id.* at 257.

94. Garrow & Deer, *supra* note 6, at 19–20.

with a burgeoning crime problem in their communities."[95] In this regard it is important that Tribes "consider whether traditional punishments are being decided upon for traditional reasons and in the most traditional manner. Historically, banishments were rare and done only in more dire of circumstances. Present day political conflict fuels many of the exclusion and banishment decisions."[96]

As we have established in this Part, Indigenous people are able to pass on their history from generation to generation, using the oral tradition as a foundation for tribal customary law. In this regard, traditional forms of justice utilized stories to shape social behavior to embody the principle of harmony and balance within tribal communities. The process of restoring harmony was healing for tribal communities through the embodiment of the principle of how we carefully approach each other as individuals. In this way we can understand the responsibilities and obligations of our societal, kinship, and clan systems as traditional governance. For many Indigenous people, dispute resolution was one of the most critical functions of traditional governance. Tribal law did not focus exclusively on the negative behavior of an individual; rather, it concentrated on the expected behavior of the community and relied upon social pressures to encourage compliance with social and kinship norms. When the conduct of community members was careless and contrary to expected norms, social ridicule was used to restore harmony and ensure compliance with the expected norms. For those individuals that continued to act carelessly and conduct themselves outside of extended societal, kinship, and clan responsibilities and obligations, they often found themselves subject to various forms of punishment in an attempt to restore harmony to the community. Also, the settlement of Indigenous disputes was often achieved through negotiation with restitution in the form of compensation as the desired outcome. For those that continued to act carelessly and conduct themselves outside of extended societal, kinship, and clan responsibilities and obligations, banishment was utilized as an extreme and dire consequence.

B. Traditional Law Enforcement Infrastructure

Traditional law enforcement infrastructure operated in many tribal communities to achieve a state of harmony in addressing disputes based

95. Mille Lacs Band of Ojibwe Indians v. Williams, Case No. 11-APP 06 (Non-Removable Mille Lacs Band of Ojibwe Indians Ct. App. Jan. 2012) (citing Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Justice Systems*, 37 N.M. L. REV. 85 (2007)).

96. MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 338–39 (2020) (quoting Jill E. Tompkins, *Traditional Tribal Justice Practices, and the Indian Civil Rights Act: The Tension Between Tribal Autonomy and Individual Rights* 18–19, Materials Published as Part of the 16th Annual University of Washington Indian Law Symposium (Sept. 18–19, 2003)).

upon the principles outlined previously, including complex kinship systems, traditional governance, and the utilization of social pressure to conform, as well as through the various methods of punishment, restitution, and banishment. This Part will examine a few examples of how Tribes exercised their traditional law enforcement infrastructure.[97]

1. Akicitas

The *akicitas* are the traditional law enforcers of Lakota, Dakota, and Nakota society. The "*akicita*—also known as warrior societies, policing societies or whip-bearers—had a variety of duties revolving around a general social control theme."[98] Mark Ellis explains the role of the *akicita* as follows:

> The concept of a tribal police force was not new to the Lakotas. Traditional law enforcers, known as *akicitas*, had always policed Lakota society. The *akicitas* came from within the ranks of several men's societies and were appointed to serve for one year by a band's *wakiconze*, or camp administrator. Their duties consisted of policing camp moves, regulating buffalo hunts, and enforcing tribal laws and customs. When dealing with lawbreakers, *akicitas* served as judges, juries, and, if necessary, executioners. Their decisions applied to the entire band, including its leaders. Because the Lakotas had always utilized law enforcers, the idea of Indian policemen on the reservations was one they recognized from their traditional culture.[99]

2. Lighthorse Police

The Lighthorse Police force operated in Indian Territory during the 1800s.[100] Michael Barker explains the origins of the Lighthorse Police as follows:

> [I]n 1808, the Cherokee instituted a system of appointed sheriffs, and a group of quasi-police/militia called the "lighthorse." The "lighthorse" were small companies, consisting of four privates and

97. BARKER, *supra* note 19, at 7 ("Typically, these 'policemen' were 'appointed at the spring re-union of the bands of the tribe by the chief tribal authority, the tribal chief or groups of chiefs or council.' . . . They often acted as an order maintenance force during hunting trips . . . . [T]hey also suppressed unnecessary noise, contained stragglers and those anxious to press ahead, and performed scouting missions to ensure security. . . . In some bands, as part of this general order maintenance function, society warriors acted as detectives, questioning witnesses and interrogating suspects to determine the identity of a perpetrator.").

98. *Id.*

99. Mark R. Ellis, *Reservation* Akicitas*: The Pine Ridge Indian Police, 1879–1885*, 29 S.D. HIST. 185, 189 (1999).

100. Carolyn Thomas Foreman, *The Light-Horse in the Indian Territory*, 34 CHRONS. OF OKLA. 1 (1956).

> two officers apiece, which patrolled an area on horseback. These men enforced the first written legal code promulgated by an Indian tribe. That same year, in response to the overwhelming European presence closing in around them, the Cherokee discarded the clan/family structure of governance and inaugurated a central legislature and tribal courts. One company of lighthorse was then assigned to each district of the tribal "nation."[101]

The primary responsibility of the Lighthorse Police was to apprehend criminals and deliver them to the tribal court for discipline.[102]

The Lighthorse Police operated until 1825, when the Cherokee National Council replaced them with "marshals, sheriffs, and constables."[103] The Cherokee sheriffs were elected by tribal membership, were charged with enforcing Cherokee law, and were responsible for day-to-day law enforcement.[104] The Cherokee constables were also elected and performed such duties as "debt collections, simple arrests, and holding prisoners for trial."[105]

3. Muskrat Dam First Nation

The Muskrat Dam First Nation is an Anishinaabe community located in the Treaty 9 Territory in Ontario, Canada.[106] This case study is an example of modern-day clan governance and policing at work in a traditional manner in the maintenance of community harmony.[107] Key to the community is that "[t]he people of the community view the retention of their self-governing status as an obligation to their Creator."[108]

Muskrat Dam elder Jake Beardy explained the contours of Anishinaabe justice:

> Whereas the Anishinaabe way, you couldn't see it, because it was the way of life. When something happened, we made every effort to find the root of the problem, what caused the turmoil to

101. BARKER, *supra* note 19, at 10 (citations omitted).

102. *Id.* at 10.

103. *Id.* (quoting Bob L. Blackburn, *From Blood Revenge to the Lighthorsemen: Evolution of Law Enforcement Institutions Among the Five Civilized Tribes to 1861*, 8 AM. INDIAN L. REV. 49, 55 (1980)).

104. *Id.*

105. *Id.* (quoting Blackburn, *supra* note 103, at 56).

106. Phil Lancaster, *Omaminomowayak: Anishinaabe Justice in Muskrat Dam First Nation*, 14 WINDSOR Y.B. ACCESS TO JUST. 331, 331–32 (1994).

107. *See id.* at 331, 337.

108. *Id.* at 332.

> take place, and we would make every effort, based on what [we] found, how to help the people or person that was involved.[109]

The justice system in the Muskrat Dam First Nation is an

> elaborate four-part system in which all members of the community [have] both responsibilities and obligations. The system focussed [sic] on healing and retaining persons in the community. The Chief played a central role in the maintenance of community harmony. Other key players were the spiritual leaders, elders, certain persons who played special roles in the community and others.[110]

The primary roles of Anishinaabe justice were carried out by the following: *omaminomowayak* are the "caregivers," and they are furthered distinguished as "*oganawengike*, or the 'keeper[s],' *odibajomoog* or the 'reporters,' and *oganagechecheka* or the 'person who watches.'"[111] The informal nature of Anishinaabe justice is described as follows:

> The Chiefs, headmen, *omaminomowayak* and others maintained a very visible presence in the community, visiting community members and keeping themselves aware of how people were faring. Where they saw needs or other difficulties, they were expected to intervene. In addition, the communal ethic of the community made sure that every member felt some responsibility to all other community members. . . . In a very real sense, everyone was involved in the justice practices just as they were involved in other aspects of governance.
>
> . . . [I]f trouble were to occur in a home, those living close by, often relatives, would usually come to know of it in the earliest stages. It was the responsibility of each member of the winter group to bring any problems of which they became aware to the attention of the leadership and the *omaminomowayak*. Once a matter had come to the attention of [the leadership and] the *omaminomowayak*, it was their duty to respond. Intervention was early with a focus on setting things right and healing those who were experiencing difficulties.[112]

Intervention took many forms depending on the severity of the incident(s), ranging as follows:

109. *Id.* at 338.

110. *Id.* at 339.

111. *Id.* at 339–40.

112. *Id.* at 340 (citations omitted).

> [I]nformal intervention at the person's home by one or more community members; through formal intervention at the home by a group of community members; [or] to being called before a public meeting of community leaders. In [some] cases where these were ineffective, the person would be sent to outside authorities. This fourth form of intervention was used only for the most serious and repeat offenders. In the least serious matters, the *omaminomowayak* would simply visit the person or persons having difficulties and speak with them. The content of these discussions would, of course vary with the nature of the problems being experienced and the effect of the actor's behavior on the community. The intervention could include a discussion about the responsibilities of community members to their community and to their Creator. It would often include some counseling and instruction. Where necessary, support might be offered to a person in difficulty. Frequently, gifts would be given to the person or persons at the end of the visit to indicate to them that they were valued in the community.
>
> More serious matters would require intervention by a number of community leaders. When this was necessary, the leaders, including the *omaminomowayak*, the spiritual leader of the group, elders and any others with special responsibilities would visit those in difficulty in their home. If the home was too small, the gathering would take place in the opening close to [their] home. . . .
>
> The nature of the intervention was similar to less serious matters. Everyone there would speak about the responsibilities of community members and try to show those in difficulty how to lead more effective lives. The spiritual leaders were always last to speak. These meetings always ended with a prayer and often gifts would be given to those in difficulty to indicate that they were still welcome in the community and valued as community members. . . .
>
> . . . .
>
> The most serious matters, where community security was threatened, would be brought to the attention of the Chief and other leaders in the larger gathering place in the summer or at the time of one of the ceremonial gatherings. Such matters might already have been dealt with to some extent at the winter community. The seriousness of the matter would require that the *omaminomowayak* bring the matter to the attention of all the community leaders.
>
> The collected leaders of both winter and summer communities would gather together in a circle and call the persons involved to sit inside the circle. Each person would be asked if he/she had

> done what had been alleged and usually he/she would admit to it. Each of the leaders would then speak to the matter. The leaders were very strict and would speak quite harshly, but they would do so in a caring manner. The purpose would be to prevent the behavior and also to make sure that those involved would know that they were cared for and were always welcome in the community. The last to speak was always the spiritual leader and . . . gifts might be given to bring closure to the matter.[113]

This Part examined how Tribes exercised their traditional law enforcement infrastructures through the examples of *akicitas*, the Lighthorse Police, and the Muskrat Dam First Nation. In the next Part we will see how the of the assimilation policy was implemented through justice systems and policing to eradicate these traditional law enforcement infrastructures.

C. The Implementation of the Assimilation Policy Through Justice Systems and Policing

The assimilation policy was implemented through the establishment of justice systems and policing. It was the desire of the BIA officials to limit the role of the military in Indian affairs and to further the eradication of native religion, thereby severing Indigenous people's connections to their lands and territories. The mechanism utilized to accomplish this endeavor was the establishment of the Peace Policy. As part of this policy, the BIA created the Courts of Indian Offenses as a tool to further the civilization effort. To further this effort, the Indian police force was established to accelerate the acculturation process and exercise control over the Tribes. In spite of these efforts to eradicate traditional law enforcement infrastructure, Indigenous people resisted and continued to exercise their traditional law enforcement mechanisms.

1. Desire to Limit the Role of the Military in Indian Affairs

The BIA was established in 1824 and "administratively housed within the Department of War."[114] This meant that the formation of Indian policy was conducted from a military vantage and the military was often in charge of implementing Indian policy with regard to the Tribes.[115] When the BIA was relocated to the newly formed Department

113. *Id.* at 340–42.

114. Barker, *supra* note 19, at 14.

115. *Id.* ("With traditional Indian methods of social control destroyed, a vacuum had been created amongst the resettled tribes, which nothing existed to fill. Native reservations were now to become wholly dependent on the military and BIA to provide policing services. It quickly became common for the U.S. cavalry to provide policing on those reservations located near military garrisons. . . . This was not a new arrangement:

of Interior in 1849, "[BIA] executives acted quickly to eliminate the policing duties of local garrisons; many BIA employees had long believed that troopers were unnecessarily harsh in the control of Indians and that the presence of drunken soldiery only exacerbated morality problems amongst demoralized and restless warriors."[116]

The U.S. Indian Peace Commission was established in 1867 to respond to the reported deteriorating conditions of the Indian Tribes and their hostility.[117] One of the changes discussed by the Commission was moving the BIA back to the War Department.[118] As part of this discussion, the concept of the Indian police became a central component for those arguing against the use and reliance on the military in the civilization efforts.[119]

For example, Commissioner Francis A. Walker was a proponent for the use of the military in Indian affairs, but many disagreed with this position and did not believe the military should be used to "reform" the Indians.[120] Vincent Colyer, U.S. Special Indian Commissioner, summarized this position:

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army detachments had been supplying police services to Indian country from the formal beginning of resettlement [removal] in the early 1800s.").

116. *Id.*; *see also* WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 2–3 (1966).

117. HAGAN, *supra* note 116, at 1–2.

118. *Id.* at 2 ("The most sweeping change being discussed was the proposed transfer of the Bureau of Indian Affairs from the Interior Department back to the War Department, from which it had been detached in 1849. The army spokesmen vigorously advocated this, as did members of Congress. They maintained that only the bayonet would persuade the red man to leave his war pony for the plow. Indian Service personnel and the reformers were vehemently opposed to the Bureau's return to the War Department, arguing that only peaceful persuasion could truly civilize.").

119. *Id.* at 2–3 ("The debate [over moving the BIA back to the War Department] continued into the 1890s and soured relations between civilians and the military at a time when their utmost cooperation was demanded by the problems on the plains. Probably the military would have carried the day had it not been for the volume of protest from the reformers. And the concept of Indian police forces did give the opponents of the military an alternative to reliance on troops. It is in this perspective that the police policy became so important in the interdepartmental squabbling."); *see also* WILLIAM A.J. SPARKS, TRANSFER OF INDIAN BUREAU, H.R. REP. NO. 44-240 (1876).

120. DAVID ETHERIDGE, DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFS., INDIAN LAW ENFORCEMENT HISTORY 5 (1975) ("There were many persons concerned with Indian Affairs who agreed with Commissioner Walker that Indians should be 'reformed' but did not believe the Army should be used to do it. Walker's successor, Edward P. Smith, also urged the use of the military among the Sioux in his first annual report in 1873. The following year, however, he recommended that deputy U.S. Marshals be used to enforce law among the Indians.").

> As I have said before of the Cheyennes, [the Navajos] need police more than military guardianship; give them a good, simple, and practicable code of laws, and a police force of equal or one-half the number of soldiers they now have, and you will not have any trouble with them.[121]

The establishment of the Indian police was premised upon the desire of the BIA to not only limit the use and influence of the military in Indian affairs but, more importantly, to implement the "Peace Policy."

2. Peace Policy

President Ulysses S. Grant established the Peace Policy giving control of Indian agencies to Christian denominations.[122] Churches under this policy received "an almost exclusive right to proselytize the tribes at the agencies to which they had been assigned" under the semblance of Indian education.[123] As explained by David Wallace Adams, "[F]ederal policy makers attempted to eradicate Native culture and religions in order to separate the people from the intimate relationship that was associated with ancestral lands.[124] The Native way of life was condemned as universally worthless and deserving of extinction.[125]

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121. U.S. DEP'T OF THE INTERIOR, 1869 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 90 [hereinafter 1869 COMM'R INDIAN AFFS. REP.]. Correspondence ensued regarding whether the establishment of Indian police was an adequate substitute for military control at agencies. *See* U.S. DEP'T OF THE INTERIOR, 1875 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 216–17, 220; U.S. DEP'T OF THE INTERIOR, 1876 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 11–12; *see generally* John P. Clum, *The San Carlos Police*, 4 N.M. HIST. REV. 203 (1929).

122. Report of Ulysses S. Grant, *in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 109–10 (James D. Richardson ed., 1898).

123. DELORIA & LYTLE, *supra* note 2, at 101.

124. DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION 7 (2020) ("The policy issue could be reduced to this fact: Indians possessed the land, and whites wanted the land. . . . For the founders of a settler nation a major priority was the creation of a mechanism and rationale for divesting Indians of their lands."); *id.* at 185.

125. *Id.* at 8 ("Basic to all perceptions was the conclusion that because Indian cultural patterns were vastly different from those of whites, they must be inferior. Whether discussing the Indians' worship of pagan gods, their simple tribal organization, or their dependency on wild game for subsistence, white observers found Indian society wanting. Indian life, it was argued, constituted a lower order of human society. In a word, Indians were savages because they lacked the very thing whites possessed—

In 1873, the Commissioner of Indian Affairs in his annual report wrote about the civilization process as follows:

> The first condition of civilization is protection of life and property through the administration of law. As the Indians are taken out of their wild life, they leave behind them the force attaching to the distinctive tribal condition. The chiefs inevitably lose their power . . . until their government becomes, in most cases, a mere form, without power of coercion and restraint. Their authority is founded only on the "consent of the governed."[126]

In 1874, the Commissioner of Indian Affairs argued that the Indians were "lawless" and "needed" law, and subsequently advocated for Congress to allow the Bureau to organize "suitable governments" on reservations including a police force.[127] In 1877, the Commissioner of Indian Affairs requested funds for the Indian police.[128] He believed that "Indians were being asked to exist in conditions white men could not."[129] According to David Wachtel, "[Commissioner] Smith felt that a paradox existed in that Indians obviously were not 'civilized' but still were prohibited from creating a system of law and order that would encourage civilization," and that "[o]ne way to begin civilizing the Indians was to help them establish their own police forces."[130] In adherence to these recommendations, it was reported in 1877 that the

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civilization. And because the law of historical progress and the doctrine of social evolution meant that civilized ways were destined to triumph over savagism, Indians would ultimately confront a fateful choice: civilization or extinction.").

126. U.S. DEP'T OF THE INTERIOR, 1873 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 4–5.

127. U.S. DEP'T OF THE INTERIOR, 1874 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 12–13, 15–16; *see also* U.S. DEP'T INTERIOR, 43D CONG., 2D SESS., 1 REPORT OF THE SECRETARY OF THE INTERIOR; BEING PART OF THE MESSAGES & DOCS. COMMUNICATED TO THE TWO HOUSES OF CONG., at xiv (1874).

128. U.S. DEP'T OF THE INTERIOR, 1877 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 398–99 [hereinafter 1877 COMM'R INDIAN AFFS. REP.]; *see also* David Wachtel, *An Historical Look at BIA Police on the Reservations*, 6 AM. INDIAN J. 13, 14 (1980); U.S. DEP'T INTERIOR, 44TH CONG., 2D SESS., 1 REPORT OF THE SECRETARY OF THE INTERIOR; BEING PART OF THE MESSAGES & DOCS. COMMUNICATED TO THE TWO HOUSES OF CONG. (1876) [hereinafter 1876 SEC'Y INTERIOR REP.].

129. Wachtel, *supra* note 128, at 14 (discussing the Commissioner's opinion from the 1876 SEC'Y INTERIOR REP., *supra* note 128).

130. *Id.* (discussing the Commissioner's opinion from the 1881 COMM'R INDIAN AFFS. REP., *supra* note 1).

Indians would be subject to a special code "based upon the results and the experience of those familiar with Indian life and manners."[131]

In an early draft of an appropriations bill authorizing the Indian police, it was provided that the Indian police should be employed for the purpose of "maintaining order and prohibiting illegal traffic in liquor."[132] This sentiment was emphasized in the 1881 report of the Commissioner of Indian Affairs, which stated:

> The indirect results . . . of this system are even more important than its direct advantages. Well trained and disciplined, the police force is a perpetual educator. It is a power entirely independent of the chiefs. It weakens, and will finally destroy, the power of tribes and bands. It fosters a spirit of personal responsibility. It makes the Indian himself the representative of the power and majesty of the Government of the United States. . . . the Indians need to be taught the supremacy of law, and the necessity for strict obedience thereto . . . where the Indians themselves are the recognized agents for the enforcement of the law, they will more readily learn to be obedient of its requirements.[133]

The most suppressive laws regarding these Indian civilization efforts were the laws promulgated by the BIA, known as the "Regulations of the Indian Department."[134] In promulgating these laws

131. 1877 Comm'r Indian Affs. Rep., *supra* note 128, at 397–98.

132. H.R. Misc. Doc. No. 45-66, at 23, 99 (1878); *see also* 1877 Comm'r Indian Affs. Rep., *supra* note 128, at 399 ("The employment of such a [police] force, properly officered and handled, would, in great measure, relieve the Army from doing police duty on Indian reservations. I am thoroughly satisfied that the saving in life and property by the employment of such a force would be very large, and that it would materially aid in placing the entire Indian population of the country on the road to civilization.").

133. 1881 Comm'r Indian Affs. Rep., *supra* note 1, at xvii–xviii.

134. U.S. Dep't of the Interior, 1892 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior 24 [hereinafter 1892 Comm'r Indian Affs. Rep.] ("[T]he agent is authorized in the 'Regulations of the Indian Department' to prevent Indians from leaving their reservation without a permit for that purpose, and instructed not to allow the practice of bands of Indians of one reservation making or returning visits to other reservations for the purpose of receiving or giving presents, and he has the power to use his Indian police to prevent the infraction of these rules. The final judgments of the courts of Indian offenses are subject to modification and revocation by the Indian agent, who is given appellate jurisdiction. The Indian agent, as shown by the foregoing, now has almost absolute power in the Indian country, and so far as the people over whom he rules are concerned, he has none to contest his power."). *See generally* Dep't of the Interior, Off. Indian Affs., Rules Governing the Court of Indian Offenses 2–3

in 1882, Secretary of the Interior Henry Teller ordered an end to all "heathenish dances and ceremonies" due to their "great hindrance to civilization."[135] In his 1883 Report of the Secretary of the Interior, Teller stated, as explained by the U.S. Supreme Court, that "the court was designed to 'civilize the Indians' by forcing them to 'desist from the savage and barbarous practices . . . calculated to continue them in savagery.'"[136] According to the U.S. Supreme Court, Teller and many of his colleagues believed "that too many Tribes were under 'the influence of medicine men' and 'without law of any kind,' and they thought the Interior Department needed to take a strong hand to impose 'some rule of government on the reservations.'"[137] As a result, according to the U.S. Supreme Court, Teller instructed Commissioner of Indian Affairs Hiram Price "to promulgate 'certain rules' to establish a new 'tribunal' and to define new 'offenses' of which it was to take cognizance.'"[138] In 1883, Hiram Price codified the Department of Interior's Code of Indian Offenses as a means to promote civilization and prohibit Native American traditional activity under the threat of

(1883), https://commons.und.edu/cgi/viewcontent.cgi?article=1167&context=indigenous-gov-docs [https://perma.cc/WAX8-2GJJ] [hereinafter 1883 RULES].

135. 1892 COMM'R INDIAN AFFS. REP., *supra* note 134, at 1 ("I desire to call your attention to what I regard as a great hindrance to the civilization of the Indians, viz, the continuance of the old heathenish dances, such as the sun-dance, scalp-dance, & c. These dances, or feasts, as they are sometimes called, ought, in my judgment, to be discontinued, and if the Indians now supported by the Government are not willing to discontinue them, the agents should be instructed to compel such discontinuance. These feasts or dances are not social gatherings for the amusement of these people, but, on the contrary, are intended and calculated to stimulate the warlike passions of the young warriors of the tribe. At such feasts the warrior recounts his deeds of daring, boasts of his inhumanity in the destruction of his enemies, and his treatment of the female captives, in language that ought to shock even a savage ear. The audience assents approvingly to his boasts of falsehood, deceit, theft, murder, and rape, and the young listener is informed that this and this only is the road to fame and renown. The result is the demoralization of the young, who are incited to emulate the wicked conduct of their elders, without a thought that in so doing they violate any law, but, on the contrary, with the conviction that in so doing they are securing for themselves an enduring and deserved fame among their people. Active measures should be taken to discourage all feasts and dances of the character I have mentioned.").

136. Denezpi v. United States, 142 S. Ct. 1838, 1850 (2022) (quoting U.S. DEP'T OF THE INTERIOR, 48TH CONG., 1ST SESS., 1 REPORT OF THE SECRETARY OF THE INTERIOR; BEING PART OF THE MESSAGES & DOCS. COMMUNICATED TO THE TWO HOUSES OF CONGRESS, at x (1883) [hereinafter 1883 SEC'Y INTERIOR REP.]).

137. *Id.* (quoting 1883 SEC'Y INTERIOR REP., *supra* note 136, at x–xi).

138. *Id.* (quoting 1883 SEC'Y INTERIOR REP., *supra* note 136, at xii).

imprisonment.[139] In his 1883 annual report to the Secretary of the Interior, Price stated:

> On the 10th of April last you [the Secretary of the Interior] gave your official approval to certain rules governing the "court of Indian offenses," prepared in this office in accordance with instructions contained in your letter of December 2 last. These rules prohibit the sun-dance, scalp-dance and war dance, polygamy, theft, &c., and provide for the organization at each agency of a tribunal composed of Indians empowered to try all cases of infraction of the rules. . . . I am of the opinion that the "court of Indian offenses," with some few modifications, could be placed in successful operation at the various agencies, and thereby many of the barbarous customs now existing among the Indians would be entirely abolished.
>
> There is no good reason why an Indian should be permitted to indulge in practices which are alike repugnant to common decency and morality; and the preservation of good order on the reservations demands that some active measures should be taken to discourage and, if possible, put a stop to the demoralizing influence of heathenish rites.[140]

In 1884, the Commissioner of Indian Affairs in his annual report wrote that the newly established Courts of Indian Offenses were: "instrumental in abolishing many of the most barbarous and pernicious customs that have existed among the Indians from time immemorial," specifically including such "heathenish customs" as the sun dance.[141] His report included many agency reports, including a report from the White Earth Agency in Minnesota, in which the agent explained: "The court here has relieved me of many trying cases . . . it is only a question of time and it will become a permanent fixture and recognized as the only way to settle the little differences among [Indians]."[142] He also recommended a congressional appropriation of $50,000 to pay the salaries of Indian court judges and "other necessary expenses," and urged that "it would be a matter of economy to the Government in saving the expense heretofore in which are now included in the jurisdiction of the court of Indian offenses."[143]

139. 1883 Rules, *supra* note 134, at 2–4.

140. 1883 Sec'y Interior Rep., *supra* note 136, at xiv–xv.

141. U.S. Dep't of the Interior, 1884 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, at ix.

142. *Id.* at 104.

143. *Id.* at xi.

In 1885, the Commissioner of Indian Affairs in his annual report wrote that "[u]nder date of April 10, 1883, the then Secretary of the Interior gave his official approval to certain rules in this office for the establishment of a court of Indian offenses at each of the Indian agencies . . . ."[144] He further explained:

> It was found that the longer continuance of certain old heathen and barbarous customs, such as the sun-dance, scalp-dance, war-dance, polygamy, &c., were operating as a serious hindrance to the efforts of the Government for the civilization of the Indians. . . .
>
> There is no special law authorizing the establishment of such a court, but authority is exercised under the general provisions of law giving this Department supervision of the Indians. The policy of the Government for many years past has been to destroy the tribal relations as fast as possible, and to use every endeavor to bring the Indians under the influence of law. To do this the agents have been accustomed to punish for minor offenses, by imprisonment in the guard-house and by withholding rations; but by the present system the Indians themselves, through their judges, decide who are guilty of offenses under the rules, and pass judgment in accordance with the provisions thereof. Neither the section in the last Indian appropriation bill [establishing the Major Crimes Act] . . . nor any other enactment of Congress reaches any of the crimes or offenses provided for in the Department rules, and without such a court many Indian reservations would be without law or order, and the laws of civilized life would be utterly disregarded.
>
> At each agency, where it has been found practicable to establish it, the reports of the Indian agents show that the court has been entirely successful, and in many cases eminently useful in abolishing the old heathenish customs that have been for many years resorted to, by the worst elements on the reservation, to retard the progress and advancement of the Indians to a higher standard of civilization and education.[145]

In 1886, the Commissioner of Indian Affairs in his annual report wrote that the Courts of Indian Offenses were

> [u]nquestionably a great assistance to the Indians in learning habits of self-government and in preparing themselves for citizenship. I am of the opinion that they should be placed upon a legal

144. U.S. Dep't of the Interior, 1885 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, at xxi [hereinafter 1885 Comm'r Indian Affs. Rep.].

145. *Id.* at xxi–xxii.

> basis by an act of Congress authorizing their establishment, under such rules and regulations as the Secretary of the Interior may prescribe. Their duties and jurisdiction could then be definitely determined and greater good accomplished.[146]

In 1888, the Commissioner of Indian Affairs in his annual report wrote, "[T]he jurisdiction of these courts [of Indian offenses] should be defined by law."[147] He enumerated the "offenses" over which the Secretary of Interior had asserted jurisdiction:

> [T]he sun-dance, the scalp-dance, the war-dance (and all other so-called feasts assimilating thereto); plural marriages; the practice of the medicine man; the destruction or theft of property; the payment or offer to pay money or other valuable thing to the friends or relatives of any Indian girl or woman, are declared to be Indian offenses, punishable by withholding of rations, fine, imprisonment, hard work, and in the case of a white man, removal from the reservation.[148]

According to this report, the Commissioner of Indian Affairs asserted that the jurisdiction of the Courts of Indian Offenses included:

> Misdemeanors committed by Indians; civil suits when Indians are parties thereto; cases of intoxication; and violations of the liquor regulations. Their civil jurisdiction is declared to be the same as that of justices of the peace . . . .
>
> If these rules, amended in several essential particulars, were enacted into law, the usefulness of the courts of Indian offenses would thereby be greatly increased, and under the authority exercised by these courts the Indian would be compelled either to obey the law or suffer its penalties . . . ."[149]

In 1892, Thomas J. Morgan reissued these laws with modifications.[150] The supplement redistricted the reservations, breaking them

146. U.S. DEP'T OF THE INTERIOR, 1886 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR, at xxvii.

147. U.S. DEP'T OF THE INTERIOR, 1888 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR, at xxx.

148. *Id.*

149. *Id.*

150. 1892 COMM'R INDIAN AFFS. REP., *supra* note 134, at 28–31. These de facto laws only applied to Indigenous people and the penalties for participating in Indian dances and feasts were withholding food (treaty rations) or imprisonment for up to thirty days. Furthermore, any medicine man who was convicted of encouraging others to follow traditional

into three or more districts and following county lines when possible.[151] The supplement also specified that all "mixed blood[]" members living on the reservation were to be considered Indians.[152] As further illustration of how the Bureau was determined to coerce acculturation through the use of Indian police and the Courts of Indian Offenses, Thomas J. Morgan wrote in this supplement that "if an Indian refuses or neglects to adopt habits of industry, or to engage in civilized pursuits or employments, but habitually spends his time in idleness and loafing, he shall be deemed a vagrant . . . ."[153]

The 1892 supplement also granted the courts power over "any misdemeanor . . . defined in the laws of the State or Territory within which the reservation may be located."[154] In assimilating these misdemeanors this supplement "instructed that sentences for assimilated offenses should match those imposed by state or territorial law."[155] The 1892 supplement also granted the court the right to solemnize marriages (but not to grant divorces) and authorized the fine or imprisonment of any Indian who "refuses or neglects to adopt habits or industry, or to engage in civilized pursuits or employments."[156] The court "was composed of magistrates appointed by the Department who could 'read and write English readily, w[ore] citizens' dress, and engage[d] in civilized pursuits.'"[157] The Rules for Indian Courts were revised again in 1904, but the substance remained essentially the same.[158] The revision focused primarily on improving the procedures of the courts.[159]

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practices was to be confined in the agency prison for not less than ten days or until he could provide evidence that he had abandoned his beliefs. *Id.* at 29.

151. *Id.* at 28.

152. *Id.*

153. *Id.* at 30.

154. *Id.*; *see also* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 190 (1994).

155. Denezpi v. United States, 142 S. Ct. 1838, 1850 (2022) (Gorsuch, J., dissenting).

156. The 1892 Rules for Indian Courts included prohibitions of such Indian practices as ritual dances, practices of medicine men, sexual immorality (prostitution), polygamy, destruction of the property of another Indian, and intoxication or the introduction of intoxicants. 1892 COMM'R INDIAN AFFS. REP., *supra* note 134, at 28–30; *see also* HARRING, *supra* note 154, at 190 & n.49.

157. *Denezpi*, 142 S. Ct. at 1850 (Gorsuch, J., dissenting) (quoting 1892 COMM'R INDIAN AFFS. REP., *supra* note 134, at 28).

158. HARRING, supra note 154, at 191.

159. *Id.*

In 1921, Commissioner of Indian Affairs Charles H. Burke issued Circular 1665 to the agents, which stated:

> The sun-dance, and other similar dances and so-called religious ceremonies are considered "Indian Offences" under existing regulations, and corrective penalties are provided. I regard such restriction as applicable to any [religious] dance which involves . . . the reckless giving away of property . . . frequent ant [sic] or prolong periods of celebration . . . in fact any disorderly or plainly excessive performances that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.[160]

In 1923, Commissioner of Indian Affairs Charles H. Burke supplemented this circular, directing:

1. That the Indian form of gambling and lottery known as the 'ituranpi' (translated 'give away') be prohibited.

2. That the Indian dances be limited to one in each month in the daylight hours of one day in the midweek, and at one center in each district; the months of March and April, June, July and August be excepted.

3. That none take part in the dances or be present who are under 50 years of age.

4. That a careful propaganda be undertaken to educate public opinion against the dance and to provide a healthy substitute.

5. That a determined effort be made by the Government employees in cooperation with the missionaries to persuade the management of fairs and 'round-ups' in the town adjoining the reservations not to commercialize the Indian soliciting his attendance in large numbers for show purposes.

6. That there be close cooperation between the Government employees and the missionaries in those which affect the moral welfare of the Indians.[161]

In 1934, Commissioner of Indian Affairs John Collier issued Circular 2970, which overturned the prohibition of Indian religious practice.[162] The circular was sent to all agencies and stated that "[n]o

160. Dep't of the Interior, Off. Indian Affs., Indian Affairs Circular No. 1665 (1921).

161. Dep't of the Interior, Off. Indian Affs., Supp. to Indian Affairs Circular No. 1665 (1923).

162. Dep't of the Interior, Off. Indian Affs., Indian Affairs Circular No. 2970 (1933).

interference with Indian religious life or ceremonial expression will hereafter be tolerated."[163]

As evidenced in this Part, it is evident that the creation of the Courts of Indian Offenses was clearly used as a tool of civilization. With the establishment of the Indian police, we will see that "[c]riminal law was a tool of colonization. Rather than providing protection from harm it was used to punish Indian people for leaving their reservations and practicing their culture."[164]

3. Establishment of Indian Police

In the implementation of the treaty relationship with the United States, many Indigenous Nations had reserved the right to administer justice within their territories.[165] However, throughout the treaty-making period, this right was also constantly under pressure.[166] This pressure was most evident with the establishment of Indian police.[167] The Treaty of 1856 with the Sioux made at Fort Pierre was the first treaty to incorporate provisions for Indian police. According to Doane Robinson, "This treaty was not ratified because of the large expenditure which would be demanded to uniform and subsist the police force."[168] Robinson opined further that "[a]fterwards we spent in a single year for

163. *Id.*

164. Garrow & Deer, *supra* note 6, at 53.

165. Barker, supra note 19, at 14.

166. *See, e.g.*, Supplemental Treaty Between the United States of America and the Confederated Tribes and Bands of Indians of Middle Oregon, Mar. 28, 1867, 14 Stat. 751. ("Article II. The tribes aforesaid covenant and agree that they will hereafter remain upon said reservation, subject to the laws of the United States, the regulations of the Indian Department, and the control of the officers thereof; and they further stipulate that if any of the members of said tribes do leave, or attempt to leave, said reservation in violation of this treaty, they will assist in pursuing and returning them, when called upon to do so by the superintendent or agent in charge.").

167. *See* Barsh & Henderson, *supra* note 78, at 33–34 ("As early as 1669, the Governor of New York suggested that frontier villages appoint constables among the Indians 'to keep them in ye better order.' . . . Related measures were taken by Massachusetts, which organized Indian townships and appointed Indian officers and judges. The native court system, first established in 1658, provided for a trial before an Indian magistrate, appeal to a panel of Indian magistrates under the supervision of an English judge, and transfer of felony cases to the English courts. Apparently, the business of the native courts was the suppression of drunkenness, which was prohibited throughout the colony. The General Court of the colony soon promulgated regulations to be enforced by the native courts and eventually replaced them altogether with English justices.").

168. Robinson, *supra* note 67, at 10 n.9.

the subjugation of the Sioux sufficient money to subsist the police for a century."[169]

Beginning in 1869, we begin to see the early formation of Indian police forces on Indian reservations. Agent Thomas Lightfoot, who oversaw the Iowa and the Sac and Fox Tribes of Nebraska, "was the first to report the use of Indians as law enforcement officers. He told Commissioner Parker, 'I have appointed a police, whose duty it is to report to me if they know of anything that is wrong.'"[170] By the following year, many reservations began to receive BIA sponsored police.[171] According to Michael Barker,

> The officers in these BIA sponsored forces were Natives of the local tribe hired by the senior BIA official on the reservation. The Indian police function was to provide Anglicized law enforcement and order maintenance services at the discretion of the BIA agent—an individual with almost autocratic control over the reservation and its inhabitants.[172]

In 1872, Agent William F.M. Arny, who oversaw the Navajo reservation "commissioned a Navajo police to guard reservation borders and control cattle rustling and horse thievery."[173] Arny's force consisted of over 130 Navajo mounted police, was led by Chief Manuelito, and was considered to be successful.[174]

In 1873, an Indian police force was created on the San Carlos reservation.[175] The following year, Agent John P. Clum, who oversaw the White Mountain Apache reservation, "decided to replace the [military] battalion with an Indian police force" in an attempt to relieve dependence on the military, as the military presence was "an unsettling

169. *Id.* Although the Treaty of 1856 with the Sioux was not list as a ratified treaty in *Kappler's Indian Affairs: Laws and Treaties*, it is listed in Deloria and Demallie's *Documents of American Indian Diplomacy* as a ratified treaty.

170. Wachtel, supra note 128, at 14 (quoting 1869 Comm'r Indian Affs. Rep., *supra* note 121, at 798).

171. Barker, *supra* note 19, at 16 ("It was felt that a disciplined, efficiently administered police force was needed to address the problems created by an increasingly bold, and often Anglo criminal element predating on reservation inhabitants.").

172. *Id.*

173. *Id.*

174. Wachtel, *supra* note 128, at 14 (quoting U.S. Dep't of the Interior, 1872 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior 302).

175. *Tribal Courts Act of 1991: Hearing on S. 1752 Before the S. Select Comm. on Indian Affs.,* 102nd Cong. 292 (1992).

and disruptive force in day-to-day reservation life."[176] This force would police all inhabitants of the reservation—Apache and non-Apache.[177] This was the first Indian police force to have "congressional approval and funding."[178] With the success of Agent Clum's Indian police force at White Mountain Apache, Commissioner of Indian Affairs Edward P. Smith encouraged all of the Indian agents to create Indian police forces.[179] It was reported that thirty-nine of the sixty-two Indian agents supported the formation of Indian police forces.[180]

In 1876, Commissioner of Indian Affairs John Smith reported that he requested funds for these new law enforcement officers.[181] In this report he stated, "Civilization even amongst white men could not long exist without the guarantees which law alone affords; yet our Indians are remitted by a great civilized government to the control, if control it can be called, of the rude regulations of petty, ignorant tribes."[182] Following this report, several commissioners reemphasized the need for an Indian police force.[183] In May of 1878, the first appropriation for Indian police forces was authorized in an appropriations bill for the Indian Service.[184] The Commissioner's report discussed the appropriations bill, stating:

176. BARKER, *supra* note 19, at 16.

177. Wachtel, *supra* note 128, at 14 ("In 1874, Special Agent John Clum of the San Carlos Apache Reservation added a new dimension to the development of BIA police forces on Indian reservations. His force attempted to control both Apache and non-Apache residents of the reservation. Clum wanted the military to relinquish its control on the reservation and to leave the law enforcement duties to his Indian police, but he soon realized he did not have the authority over the military segment he desired. Instead of arguing with military leaders, he simply ignored their presence and established an initial force of four Apaches which grew to 25 Apache police, under the leadership of a Virginian, Clay Beauford. This force was federally paid, unlike its predecessors. And they established almost instant credibility for Indian police when, in 1877, they captured the war-chief Geronimo and 50 of his followers, without firing a shot.").

178. BARKER, *supra* note 19, at 16.

179. Wachtel, *supra* note 128, at 14.

180. *Id.*

181. BARKER, *supra* note 19, at 17.

182. *Id.* (quoting U.S. DEP'T OF THE INTERIOR, 1878 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR, at ix–x [hereinafter 1878 COMM'R INDIAN AFFS. REP.]).

183. Wachtel, *supra* note 128, at 14.

184. 1878 COMM'R INDIAN AFFS. REP., *supra* note 182, at xlii.

> By act of May 27, passed at the last session of Congress, provision was made for the organization at the various agencies of a system of Indian police . . . .
>
> Too short a time has elapsed to perfect or thoroughly test the workings of the system, but the results of the experiment at the thirty agencies in which it has been tried are entirely satisfactory, and commend it as an effective instrument of civilization. . . .
>
> . . . .
>
> The police organization should be followed up by the adoption of a code of laws for Indians, and peace and good order among them will result.[185]

The appropriations bill "authorized $30,000 for the employment of 430 privates and 50 officers in fiscal year 1879. . . . The following year, Congress appropriated funds for 480 Indian police. The next year monies were provided for 900 policemen."[186] With the establishment of appropriations, Indian police forces were organized at approximately one-third of the agencies by that November.[187] By 1880, the number of Indian police forces doubled and they were present at approximately two-thirds of the agencies.[188] A year later, forty-nine of the sixty-eight agencies had organized some form of Indian police force.[189] By 1883, "Congress had authorized funds for 1,000 privates and 100 officers: this represented the largest number of BIA police ever authorized—before or since."[190] By 1890, Indian police forces had been organized at nearly all of the sixty-eight agencies.[191]

In 1906, the Special Officer force was established. These officers were given the "powers of Indian agents, including the authority to

185. *Id.*; LUNA-FIREBAUGH, *supra* note 75, at 22–23.

186. BARKER, *supra* note 19, at 18 (citing 1877 COMM'R OF INDIAN AFFS. REP., *supra* note 128); Wachtel, *supra* note 128, at 14 (citing 1881 COMM'R INDIAN AFFS. REP., *supra* note 1, at xviii).

187. 1892 COMM'R INDIAN AFFS. REP., *supra* note 134, at iv.

188. *See* U.S. DEP'T OF THE INTERIOR, 1880 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR, at ix [hereinafter 1880 COMM'R INDIAN AFFS. REP.].

189. BARKER, *supra* note 19, at 18 (citing 1881 COMM'R INDIAN AFFS. REP., *supra* note 1, at xvii).

190. *Id.*; Wachtel, *supra* note 128, at 14–15.

191. *See* U.S. DEP'T OF THE INTERIOR, 1890 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR, at xciv tbl. 13 (showing Indian police forces at fifty-nine agencies in 1890).

seize and destroy contraband."[192] In 1913, pursuant to the appropriations act of that year, these "special officers" were given the powers of the U.S. Marshals, which are the "same powers as the sheriff of the jurisdiction in which they were working."[193]

4. Duties of the Indian Police

It was reported that the responsibilities of these Indian police forces included the following:

> As for the duties of these early policing pioneers, they were varied and often mundane. Reservation housekeeping and sundry administrative chores occupied most of the time. In addition to law enforcement, they were responsible for "cleaning out irrigation ditches, killing beef cattle for the meat ration, taking the census, building roads, carrying messages, and performing a dozen other chores" [citation omitted]. They also served as interpreters, translating BIA directives into the Native tongues. The Indian police protected reservation game from white poachers, drove off illegally grazing cattle, fought moonshiners, and tracked livestock rustlers and horse thieves.[194]

Carl Schurz, who was the Secretary of the Interior in the late nineteenth century, described the functions of the Indian police forces as follows:

> Indian Policemen act as guards at annuity payments; render assistance and preserve order during ration issues; protect agency buildings and property; return truant pupils to school; search for and return lost or stolen property, whether belonging to Indians or white men; prevent depredations on timber, and the introduction of whiskey on the reservation; bring whiskey sellers to trial; make arrests for disorderly conduct, drunkenness, wife-beating, theft, and other offenses; serve as couriers and messengers; keep the agent informed as to births and deaths in the tribe, and notify him promptly as to the coming on the reserve of any strangers, white or Indian. Vigilant and observant by nature, and familiar with every foot-path on the reservation, no arrivals or departures, or clandestine councils can escape their notice, and with a well disciplined police-force an agent can keep

192. David Etheridge, BUREAU OF INDIAN AFFS. DIV. OF L. ENF'T SERVS., INDIAN LAW ENFORCEMENT HISTORY 38, 44 (1975) ("William. E. (Pussyfoot) Johnson's first assignment as a Special Officer for the Bureau of Indian Affairs was to keep intoxicating beverages out of the Indian Territory. The agility he showed in pursuing bootleggers won him his nickname and a promotion to become the first Chief Special Officer in 1908.").

193. *Id.* at 44.

194. BARKER, *supra* note 19, at 19.

> himself informed as to every noteworthy occurrence taking place within the entire limit of his jurisdiction.[195]

According to Michael Barker, these early Indian police forces "faced many of the same problems . . . as sheriffs and other law officials in rural, frontier regions, but with the added complication of enforcing white norms—which had, as their ultimate goal, the complete dissolution of tribal culture—on a potentially hostile, traditionalist population."[196] In 1907, Commissioner of Indian Affairs Francis Ellington Leupp "hired two special officers—the first BIA-employed detectives assigned to Indian country." In his 1906 report to Congress, Commissioner Leupp stated, "It is hoped by these means to diminish greatly the sale of intoxicating liquors to Indians."[197]

In 1912, "Congress granted special officers the same authority as the sheriff of the county in which they were operating."[198] With a decline in Prohibition enforcement, William Johnson, as the Chief Special Officer, directed his "deputies [special officers] to begin to enforce laws under the Major Crimes Act and thus we find the roots of the modern force called the BIA [criminal investigators]—a force with 350 employees."[199] A 1939 opinion of the Interior Department Solicitor stated, "special officers and deputies had a broad law enforcement authority not restricted to liquor suppression."[200] Special Officer Johnson and his deputies "began to enforce [federal] laws" pursuant to the Major Crimes Act.[201] These special officers "were the forerunners of today's criminal investigators who provide felony investigative services on reservations."[202]

5. Use of the Police to Exercise Control over the Tribes

As exemplified in previous Parts, the "Indian police and courts were created in large measure for the purpose of controlling the Indian and breaking up tribal leadership and tribal government."[203] The Indian

195. 1880 COMM'R INDIAN AFFS. REP., *supra* note 188, at ix–x.

196. *Id.* at 20.

197. U.S. DEP'T OF THE INTERIOR, 1906 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 41.

198. *Id.* at 22.

199. BARKER, *supra* note 19, at 22 (quoting David Wachtel, *Indian Law Enforcement*, *in* INDIANS AND CRIMINAL JUSTICE 112 (Laurence French ed., 1982)).

200. *Id.*

201. Wachtel, *supra* note 128, at 15.

202. BARKER, *supra* note 19, at 23.

203. LUNA-FIREBAUGH, *supra* note 75, at 21 (quoting WILCOMB E. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW: THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN 168 (James Morton Smith ed., 1995)).

police forces accelerated the "acculturation process" by exercising control over the Tribes "by diminishing the authority of the chiefs and discouraging traditional practices deemed uncivilized by the agents. This would lead, it was hoped, to the ultimate dissolution of the tribe and the absorption of its members into the mainstream of American society."[204]

In 1869, Commissioner of Indian Affairs Ely S. Parker emphasized this policy when he stated:

> [B]ecause Treaties have been made with them [Indians], generally for the extinguishment of their supposed absolute title to land inhabited by them, or over which they roam, they have been falsely impressed with the notion of national independence. It is time that this idea should be dispelled, and the government cease the cruel force of thus dealing with its helpless and ignorant wards.[205]

Similarly, in 1881, Commissioner of Indian Affairs Hiram Price stated that the Indian police forces were "a power entirely independent of the chiefs" that "weakens, and will finally destroy, the power of tribes and bands."[206] In 1892, Thomas J. Morgan further exemplified the Department of the Interior's desire to use the Indian police forces to exercise control over the Tribes when he wrote in his Commissioner's report: "[I]f an Indian refuses or neglects to adopt habits of industry, or to engage in civilized pursuits or employments, but habitually spends his time in idleness and loafing, he shall be deemed a vagrant."[207]

6. Resistance to Indian Police

Despite the attempts of Indian police forces to exercise control over the Tribes and diminish their traditional social, kin, clan, and governance structures, "Indians on many reservations continued to resolve serious disputes among themselves outside the Courts of Indian Offenses. Such traditional sanctions as restitution, banishment, payment to a victim or his heirs, and vengeance were common."[208]

As an example, Ruth Landes observed that among the Ojibwe on both sides of the U.S.-Canadian border, they continued to resist the attempts of Indian police forces to exercise control over the Tribe. She explained:

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204. Barker, supra note 19, at 20 (quoting Hagen, *supra* note 116).

205. 1869 Comm'r Indian Affs. Rep., *supra* note 121, at 6.

206. 1881 Comm'r Indian Affs. Rep., *supra* note 1, at xvii–xviii.

207. 1892 Comm'r Indian Affs. Rep., *supra* note 134, at 30.

208. Nat'l Am. Indian Ct. Judges Ass'n, Indian Courts and the Future—Report of the NAICJA Long Range Planning Project 9 (1978).

> There is also a hereditary Government magistrate, called ti ba'konigeweneni [*dibaakonigewiwinini*]; and an Indian mounted policeman called takoniweweneni [*dakoniwinini*] (man who seizes). Both these latter are foreign to the aboriginal Canadians, and the Ojibwa make the prosecution of their duties extremely difficult by a marked lack of cooperation which is often equivalent to ostracism.[209]

This Subpart analyzed the origins of Indian police forces through a review of the traditional methods of law enforcement implementation and traditional law enforcement infrastructures, as well as the implementation of the assimilation policy through justice systems and policing.

II. THE FURTHERANCE AND INDOCTRINATION OF THE ASSIMILATION POLICY THROUGH JUSTICE SYSTEMS AND POLICING

This Part examines the furtherance and indoctrination of the assimilation policy through justice systems and policing. It analyzes the effects of the establishment of the Indian police, the further deterioration of tribal justice systems through the extension of federal and state laws into Indian Country, how the Indian policy system as implemented was not able to establish any legal status under U.S. or tribal law, the effects of the Indian Reorganization Act (IRA)[210] and the establishment of modern tribal courts, and how the modern tribal law infrastructure supports the perpetuation of historical assimilation policies and interferes with effective law enforcement.

A. Effects of the Establishment of the Indian Police

The establishment of Indian police forces had devastating effects on the social, kin, clan, and traditional governance structures of Indigenous people.[211] According to John Collier, "[T]he whim of the superintendent [was] the law."[212] During the hearings before the Committee on Indian Affairs, Dr. C. Hart Merriam exemplified this point when he stated:

> [T]he best men of the tribe are as a rule opposed to the superintendents for the reason that the superintendents . . . tend

209. LANDES, *supra* note 26, at 3.

210. Indian Reorganization Act of 1934, ch. 576, Pub. L. No. 73-383, 48 Stat. 984 (codified at 25 U.S.C. §§ 5101–5144).

211. LUNA-FIREBAUGH, *supra* note 75, at 19 ("[T]he establishment of the Indian Police under the Bureau of Indian Affairs . . . brought the demise of clan and society-based authority.").

212. *Rsrv. Courts of Indian Offs.: Hearings on H.R. 7826 Before the H. Comm. on Indian Affs.*, *supra* note 33, at 18–19 (statement of John Collier, Executive Secretary, Am. Indian Def. Ass'n).

> to become dictatorial and sometimes unjust and tyrannical. They appoint the police and the judges, so they are all practically one, for when the superintendent expresses his wishes they carry out his wishes. To give them power, as has been done so often, to imprison Indians for minor offenses without power of appeal, seems to me a very un-American and a very wicked procedure.[213]

Punishment under the Courts of Indian Offenses included fines, hard labor, withholding vital food and clothing rations, and imprisonment.[214] These common punishments under the Courts of Indian Offenses were unfamiliar to the Tribes, as they were far different from traditional tribal punishments.[215] Furthermore, Indians were often punished for acts that were perceived to be offenses by the agent but were acceptable practices pursuant to tribal customary law. In this regard punishment under the Courts of Indian Offenses failed to restore harmony or achieve balance in tribal communities. Lewis Meriam explained in detail the Courts of Indian Offenses' punishments in the following excerpt from the Meriam Report:

> The sentence of the court is usually imprisonment, although in-frequently a fine is imposed to be paid in property. Imprisonment does not, however, mean actual incarceration, but rather a term of labor about the agency grounds, on the roads, or on the irrigation ditches.
>
> There are jails, but they are ordinarily only places of temporary confinement and are frequently kept unlocked. At some reservations the prisoners are detained in the jail at night, while at others they are permitted to remain in their own homes. A much needed improvement at most agencies is the repair and renovation of the building used for confining prisoners so that it will be at least secure, habitable, and sanitary for the unfortunates who are retained there. The sentences imposed by the courts vary, of course, on different reservations and for different offenses. Sometimes they are as short as a few days, and they have been known to extend to four months. The superintendent has control over the execution of the sentence, and almost invariably liberal allowances are made for good behavior and extra work, so that the longer sentences are greatly shortened. It is also a frequent practice, if the services of the prisoner are needed, to suspend the sentence or even to sentence the offender to perform certain work on his own property or on the property of a relative. Thus, in an

213. *Id.* at 7–8 (statement of Dr. C. Hart Merriam, Research Associate, Smithsonian Inst., Washington D.C.).

214. HAGAN, *supra* note 116, at 120–21.

215. *See supra* Part I.A.7.

> extremely informal way, the practice accords with the work of probation officers and parole boards and with the indeterminate sentence of the state courts. With the establishment of social service work on the reservation and the cooperation of trained workers with court and superintendent, a true probationary system could easily result from the present rough framework of the Indian courts.[216]

This Part emphasized that the establishment of Indian police forces had devastating effects on the social, kin, clan, and traditional governance structures of Indigenous people. This is because Indians were often punished for acts that were perceived to be offenses by the agent but were acceptable practices pursuant to tribal customary law. As a result, punishment under the Courts of Indian Offenses failed to restore harmony or achieve balance in tribal communities. This failure to restore balance pursuant to tribal justice principles was further deteriorated through the extension of federal and state law into Indian Country.

B. Further Deterioration of Tribal Justice Through the Extension of Federal and State Law into Indian Country

The establishment of Indian police forces within Indian Country was one layer that led to the diminishment of traditional tribal governance within Indian Country. The other layer that equally deteriorated tribal justice systems was the extension of federal and state law into tribal territories. Although the United States began the erosion of absolute tribal sovereignty over tribal territories in numerous treaties by inserting clauses to deliver those that committed crimes or depredations against non-Indians over to federal or state authorities, one of the first comprehensive, large-scale diminishment actions of tribal territorial sovereignty was through the enactment of the Trade and Intercourse Acts.

As explained by Michael Barker, the Trade and Intercourse Act of 1817[217] "began the U.S. tradition of legislatively undermining the social control practices of Indian tribes through the restriction of Native authority, and concomitantly, by increasing the powers of federal, state, and territorial criminal justice systems."[218] This was achieved by the extension of "federal enclave law to Indian country" and the grant of criminal jurisdiction over interracial crimes to the "federal and

216. Lewis Meriam, *The Problem of Indian Administration*, *in* PUBLICATIONS OF THE INSTITUTE FOR GOVERNMENT RESEARCH 771–72 (1928).

217. Trade and Intercourse Act of 1817, ch. 92, 3 Stat. 383.

218. BARKER, *supra* note 19, at 32 (referencing the Trade and Intercourse Act of 1817, ch. 92, 3 Stat. 383).

territorial court systems."[219] The Trade and Intercourse Act of 1817 "also granted non-Indian police the authority to move freely in Indian country when pursuing and arresting offenders."[220]

The next piece of legislation that undermined the social control practices of Indian Tribes was the General Crimes Act of 1854.[221] The General Crimes Act "further specif[ied] federal jurisdiction over interracial offenses."[222] The Act "excluded from the federal bailiwick some interracial crimes where the Native American offender had been punished according to tribal tradition, but began a practice of claiming exclusive federal domain over a growing number of offenses."[223]

In 1883, the U.S. Supreme Court decided *Ex parte Crow Dog* and affirmed Tribal jurisdiction, noting that the territorial court had inappropriately measured Lakota standards for punishment "by the maxims of the white man's morality."[224] The Court determined that federal courts did not have jurisdiction to hear cases involving crimes committed by Indians against other Indians on tribal land.[225] In response to the public outcry over this case, Congress passed the Major Crimes Act of 1885.[226] The Act "further enumerated the serious offenses which fell under exclusive federal jurisdiction, even when both suspect and victim were Indian; in these cases, tribal jurisdiction was completely forfeited."[227]

The next piece of legislation that undermined the social control practices of Indian Tribes was the General Allotment Act of 1887,[228]

219. *Id.* at 33. In light of the recent U.S. Supreme Court decision in *Oklahoma v. Castro-Huerta*, we see the additional diminishment of tribal territorial sovereignty by the extension of criminal jurisdiction over interracial crimes to States. 142 S. Ct. 2486, 2491 (2022).

220. BARKER, *supra* note 19, at 52.

221. General Crimes Act of 1854, ch. 26, 10 Stat. 269, 270.

222. BARKER, *supra* note 19, at 33.

223. *Id.* at 52; *see also supra* note 219.

224. ROADMAP, *supra* note 85, at 117 (quoting *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883)).

225. *Crow Dog*, 109 U.S. at 572.

226. Pub. L. No. 83-280, 67 Stat. 588 (1953); BARKER, *supra* note 19, at 35 ("The public outcry in response to [*Crow Dog*] led Congress to eliminate, through the Major Crimes Act, tribal authority to resolve serious crimes by way of traditional mechanisms like restitution and reconciliation.").

227. BARKER, *supra* note 19, at 52; *see also* L. Edward Wells and David N. Falcone, *Tribal Policing on American Indian Reservations*, 32 POLICING: INT'L J. POLICE STRATEGY & MGMT. 648, 650 (2008) ("Because the Major Crime Act is still in effect, it continues to limit the scope of tribal agencies' policing authority and creates a complex, bifurcated jurisdictional context within which all current tribal police must operate.").

228. Indian General Allotment Act of 1887, Pub. L. 49-105, 24 Stat. 388. (codified as amended at 25 U.S.C. §§ 331–358).

which fractionated the tribal land base by dividing reservation parcels into allotments.[229] Pursuant to the Act, "[n]ot only was the collective land mass greatly reduced, but policing and legal jurisdiction on the allotments was transferred to the local, off-reservation, Anglo-American government: tribal authority over huge amounts of Indian land simply disappeared."[230] Next, the Assimilative Crimes Act of 1898[231] was enacted, further undermining the social control practices of Indian Tribes by extending "federal jurisdiction to almost all crimes on reservations when a Native and non-Native were involved."[232] The Act is implemented "on reservations via the General Crimes Act; since the General Crimes Act gives the federal judiciary authority over interracial crimes committed on reservations, the Assimilative Crimes Act likewise applies."[233]

In 1953, Congress enacted Public Law 83-280,[234] which "transferred [some] civil and criminal jurisdiction of reservations in five [later six] states to local and state authorities."[235] Any residual tribal law enforcement activity in these jurisdictions is greatly diminished. This is due to reduced funding opportunities by the BIA in Public Law 83-280 jurisdictions as well as the need for affiliation of the tribal law enforcement agency with the state, county, or local agencies that encompass the reservation.[236] As a result of Public Law 83-280, "any

229. BARKER, *supra* note 19, at 52.

230. *Id.*

231. Assimilative Crimes Act of 1898, ch. 576, 30 Stat. 717 (codified as amended at 18 U.S.C. § 13).

232. BARKER, *supra* note 19, at 52.

233. *Id.* at 40 (citations omitted).

234. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360).

235. BARKER, *supra* note 19, at 52; *see also* Wells & Falcone, *supra* note 227, at 650 ("[P.L. 83-280] immeasurably complicated tribal attempts to create and administer their own tribal justice systems, while magnifying the frequently conflict-prone relationships between tribal and non-Indian communities located in the same geographic areas.").

236. Press Release, U.S. Dep't of the Interior, Indian Affairs Begins Disbursement of $900 Million in American Rescue Plan Funding to Tribes Across Indian Country (Apr. 30, 2021), https://www.bia.gov/news/indian-affairs-begins-disbursement-900-million-american-rescue-plan-funding-tribes-across [https://perma.cc/WNW3-NPX6] ("The BIA's $900 million disbursement plan addresses all of the program activities stipulated by Congress in the [American Rescue Plan, including] . . . $30 million for tribes in Public Law 83-280, also known as P.L. 280, states through the Social Services line. The majority of tribes in these states do not receive law enforcement support from the BIA. To address their unique needs, these funds can be used for tribal safety needs that fall outside of a formal law enforcement program. The tribe can determine whether to reprogram

opportunity for tribes to practice self-policing, whether traditional or otherwise, was completely eliminated . . . P.L. 280, therefore, confused and complicated Indian country criminal jurisdiction by creating an increasing multiformity in how reservations are policed."[237]

According to Michael Barker, "[T]he most enduring legacies of the Termination era have been a net increase in the reliance on off-reservation police forces, a dramatic decrease in the number of tribal groups eligible to operate tribal police, and a profound muddling of Indian country criminal jurisdiction."[238] The acts of Congress discussed in this Part clearly established "the gradual limitation of Indian jurisdiction over offending tribal members—even when guaranteed by treaty or affirmed by previous acts—and a subsequent reliance on Anglo-Saxon policing institutions to handle serious offenses."[239]

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them as necessary to other areas like tribal courts. In addition, tribes can provide funding to BIA regional or agency offices for direct support services, if necessary."); BUREAU OF INDIAN AFFS., OFF. OF JUST. SERVS., SPENDING, STAFFING, AND ESTIMATED FUNDING COSTS FOR PUBLIC SAFETY AND JUSTICE PROGRAMS IN INDIAN COUNTRY, 2020, at 3 (2023), https://www.bia.gov/sites/default/files/media_document/2020_tloa_report_final_transmitted-corrected_version_508a.pdf [https://perma.cc/FB9V-7AKA] ("In 2020, BIA funding obligated for Law Enforcement programs reached $246.3 million. About 38 percent of the funding was allotted to BIA direct-service programs, with the remainder going to Tribally run programs. A small amount of funding for Law Enforcement went toward operations in P.L. 280 States due to historical reasons, or because program administrative offices were located in those States. In mandatory P.L. 280 States, Congress has suspended federal criminal jurisdiction for certain offenses committed by or against Indians in Indian Country, in favor of the relevant State's jurisdiction." (citations omitted)); Administration for Native Americans, *American Indians and Alaska Natives—Public Law 280 Tribes*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-public-law-280-tribes [https://perma.cc/3VAE-HAHG] (last visited Sept. 2, 2023) ("Public Law 280 added to a complex matrix of jurisdictional conflict that defined the prosecution of crimes and civil litigation at the end of the 20th century. In various states, a mix of local police, tribal police, Bureau of Indian Affairs (BIA) police, and the FBI are the arms of a law enforcement system that enforce laws of tribes, states and the federal government.").

237. BARKER, *supra* note 19, at 47; *see also* Wells & Falcone, *supra* note 227, at 650 ("[L]ong-standing federal obligations to many Indian tribes were abandoned and abrogated to state governments.").

238. BARKER, *supra* note 19, at 49.

239. *Id.* at 34.

C. The Indian Police System as Implemented Was Not Able to Establish Any Legal Status Under Either U.S. or Tribal Law

The Indian police system as implemented was not able to establish any legal status under either U.S. or tribal law.[240] In 1885, the Commissioner of Indian Affairs acknowledged this sentiment in his report when he exclaimed:

> There is no special law authorizing the establishment of such a court, but authority is exercised under the general provisions of law giving this Department supervision of the Indians. The policy of the Government for many years past has been to destroy the tribal relations as fast as possible, and to use every endeavor to bring the Indians under the influence of law.[241]

Sidney Harring echoed this sentiment when he exclaimed, "These were 'police' and 'courts' in name only. They could claim no legal status under either U.S. or tribal law. Rather, they were designed to perform important social control functions to force assimilation of the tribes under the authority of the BIA, through its Indian agents."[242]

In *United States v. Clapox*,[243] the U.S. District Court for the District of Oregon examined the legal status of the Courts of Indian Offenses and determined:

> These "courts of Indian offenses" are not the constitutional courts provided for in section 1, art. 3, Const., which congress only has the power to "ordain and establish," but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.[244]

In *Denezpi v. United States*,[245] the U.S. Supreme Court similarly examined the legal status of the Courts of Indian Offenses. In his dissent, Justice Gorsuch explained that "[w]hen instructing agency

240. *See* GARROW & DEER, *supra* note 6, at 37–39.

241. 1885 COMM'R INDIAN AFFS. REP., *supra* note 144, at 21; *see also* NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 208, at 10 ("No specific statutory authority ever has existed for Courts of Indian Offenses.").

242. HARRING, supra note 154, at 175.

243. 35 F. 575 (D. Or. 1888).

244. *Id.* at 577.

245. 142 S. Ct. 1838 (2022).

officials to create the Court of Indian Offenses, neither Secretary Teller nor anyone else pointed to any Act of Congress authorizing the [Act]. On the contrary, from the beginning, federal officials recognized that these 'so-called courts' rested on a 'shaky legal foundation.'"[246]

Lastly, in 1921 Congress enacted the Snyder Act,[247] which "empowered the Commissioner of Indian Affairs to expend money for a variety of services to Indians, including 'the employment of . . . Indian police, Indian judges . . . .' But Congress was inhospitable to later attempts to validate the courts and to clarify their jurisdiction."[248]

D. The Indian Reorganization Act and the Establishment of Modern-Day Tribal Courts

In addition to authorizing the establishment of modern-day tribal governments, the IRA also provided the authority to establish modern-day tribal courts.[249] "The [A]dministration was concerned not only with the lack of tribal influence in the Courts of Indian Offenses, but also the courts' rather blatant disregard for fair procedures and individual rights."[250] In the implementation of the IRA, a draft of the present regulations, the Code of Indian Tribal Offenses[251] was prepared in 1934.[252] The 1934 regulations were prepared to replace earlier

246. *Id.* at 1851 (quoting HAGAN, *supra* note 116, at 110).

247. The Snyder Act of 1921, Pub. L. No. 67-85, 42 Stat. 208 (codified as amended at 25 U.S.C. § 13).

248. NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 208, at 10 (quoting 25 U.S.C. § 13).

249. *Id.* The authority for substitution of "tribal courts" for "court of Indian Offenses" is found at 25 C.F.R. § 11.104 (2020).

250. NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 208, at 10.

251. Code of Indian Tribal Offenses, 3 Fed. Reg. 1137 (May 18, 1938).

252. THEODORE H. HASS, THE INDIAN AND THE LAW 6–7 (1949) ("A draft of the present Regulations was prepared in 1934 and given wide circulation among Indian groups and experts in specialized fields of Indian culture, sociology and law whose comments and criticisms were invited. The present Regulations represent a redraft prepared after careful digestion of the suggestions, recommendations, comments and criticisms of this group. The objectionable features contained in the earlier regulations, including that provision which attempted to control the right of an Indian to leave the reservation without a permit were omitted. The list of offenses was short in comparison to state codes, was written in a style easily understood and easily translated. Indians for the first time in their own courts, enjoyed the right to bail, trial by jury, probation and parole and many other privileges."); *see also* NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 208, at 38 (citing 25 C.F.R. pt. 11 (1977)) ("This code has been revised only once since then.").

regulations.[253] Under the 1934 regulations "Indians for the first time in their own courts, enjoyed the right to bail, trial by jury, probation and parole and many other privileges."[254]

Today, the Code of Federal Regulations (CFR or the "Code"), which is an extension of the early Code of Indian Offenses, still lists many of the same crimes that were created by federal officials and incorporated into the early codes.[255] "The CFR code is very Anglo oriented, makes no provision for inclusion of tribal culture, and is outdated in that it includes many offenses which are no longer crimes in most jurisdictions or which are unenforceable."[256]

With the passage of the Indian Civil Rights Act,[257] the Indian Civil Rights Task Force was tasked with once again establishing a model code for Tribes to consider in the administration of justice.[258] This is because "tribal courts usually follow procedural codes derived from, if not identical to, those governing Courts of Indian Offenses because the

253. Barsh & Henderson, *supra* note 78, at 50–51 ("Pursuant to section 11.1(4) of this model code, a reorganized tribe may substitute its own code of law subject to secretarial approval, which, once again, can be exercised to require near conformity. Coupled with the fact that the Bureau provided little in the way of technical legislative assistance or subsidies, but trained and paid for the police and judges, there was little opportunity or incentive for tribes to expand on the model. Few did to any significant degree.").

254. HASS, *supra* note 252, at 7 ("Following Secretarial approval in 1937, steps were taken to acquaint the various Tribal Councils, agency personnel, Indian Judges and Indian Police with the provisions of these new Regulations. At this same time many tribes, having voted favorably on the Indian Reorganization Act, had adopted constitutions which granted them the privilege of establishing and operating courts of their own which, for the sake of distinguishing them from the Court of Indian Offenses, are called Tribal Courts. To assist the Indians of each reservation to develop a law and order code suited to the customs of their own tribe, representatives of the Indian Service visited one reservation after another explaining the new Regulations to the tribes not under the Indian Reorganization Act and discussing with the organized tribes the structure of their Tribal Court. As was only natural, the Departmental Regulations were used as a basis for discussing the style and structure of the Tribal Courts. With one or two notable exceptions the organized tribes adopted regulations similar or identical to the Departmental Regulations.").

255. BARKER, *supra* note 19, at 45 ("[T]his CRF [sic] code, first promulgated during the 1800s as part of a BIA administered judicial system—consisting of BIA Indian police, courts and criminal codes—was 'designed to break down traditional tribal governmental structures.'"(quoting Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 553 (1976))).

256. NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 208, at 38.

257. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73. (codified at 42 U.S.C. §§ 1981 to 2000h–6).

258. *Id.* at tit. II, § 202, 82 Stat. 73, 77.

latter are readily available without developmental costs and are assured of the requisite approval of the Secretary of [the] Interior."[259] The model code continues to perpetuate assimilative policy. It does not further tribal legal traditions and tribal customary law; rather, it codifies Western legal procedure.[260] "An examination of the Model proves that it is nothing more than a redraft of the old Bureau regulations, harmonized with the Indian Bill of Rights largely through borrowings from the American Law Institute's Model Code for Pre-Arraignment Procedure."[261]

E. Modern Tribal Law Enforcement Infrastructure Supports the Perpetuation of Historical Assimilation Policies and Interferes with Effective Law Enforcement

"In both conception and operation the tribal [police] are little more than pale copies of the white system."[262] According to the CFR, "The superintendent of each Indian reservation shall be recognized as commander of the Indian [BIA] police force and will be held responsible for the general efficiency and conduct for the members thereof."[263] The Code requires that

> [s]uch police commissioner shall obey the orders of the superintendent of the reservation where employed and shall see that the orders of the Court of Indian Offenses are properly carried out. The police commissioner shall be responsible to the superintendent for the conduct and efficiency of the Indian [BIA] police under the direction and shall give such instruction and advice to them as may be necessary.[264]

Pursuant to the implementation of the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA),[265] the BIA retained some level of control over the continued implementation of police services in Indian Country.[266] "Specifically, they retained critical contract approval authority: all contracts were required to meet BIA

259. Barsh & Henderson, *supra* note 78, at 25.

260. *Id.* at 26 ("[T]he real significance of the Model Code is that in seeking to cure alleged constitutional errors in the administration of justice it perpetuates errors of a more fundamental nature—historical errors of policy.").

261. *Id.* at 26.

262. BARKER, *supra* note 19, at 45 (quoting S. BRAKEL, AMERICAN INDIAN TRIBAL COURTS 100 (1978)).

263. 25 C.F.R. § 12.100 (1997).

264. *Id.* § 12.101.

265. Indian Self Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 5301–5423).

266. BARKER, *supra* note 19, at 29.

imposed standards in order to be ratified."[267] Tribal police services funded pursuant to the ISDEAA "'may have to meet some federal standards' to be eligible for such funding."[268]

Modern Indian police forces are still controlled by federal assimilative policy specifically because "the BIA police are an arm of the federal government and are guided by federal law enforcement regulations and policies."[269] The BIA-authored report Indian Reservation Criminal Justice Task Force Analysis: 1974–1975 highlights the following problems and deficiencies in tribal policing: lack of training and facilities to deal with substance abuse, absence of police discipline, poor management and supervision, and inadequate compensation, and inadequate police staffing.[270] Even after nearly fifty years since the inception of this report, a number of Tribes have filed suit against the federal government for its failure to "adequately equip a sufficient number of law enforcement officers" on the reservation as well as its failure "to reasonably ensure that the Defendants are providing for competent, timely, and diligent investigation of all violations of federal and tribal law, and for the arrest and punishment of offenders, and for violations of the Indian Self Determination and Education Assistance Act of 1975."[271]

Michael Barker explains that "a vast and intricate—often interwoven—arrangement of legislation, rules, policies and court-made law, promulgated by and derived from Congress, the president, various federal agencies, federal courts, state legislatures, and a whole host of police training and accreditation agencies, constrain what exactly tribal

267. *Id.*

268. *Id.*; *see also* Wells & Falcone, *supra* note 227, 654 ("[T]he BIA retains some minimal oversight over the general structure and operation of tribal police departments (to ensure that the terms of the PL-638 contract are met), but does not provide hands-on administration of the tribal police agency, which is left to the local reservation government.").

269. BARKER, *supra* note 19, at 30 ("Tribal police, as the Indian country equivalent of local police departments, have a theoretically greater leeway in breaking ranks with this movement and providing a brand of policing more attuned to traditional cultural sensibilities. However, as with so many things, this theoretical possibility has not readily translated into practical reality. One major stumbling block to this possibility is the regulations foisted upon tribes through the contracting process—Contract 638—by which the BIA subsidizes local programs.").

270. *Id.* at viii–ix (citing DIV. OF L. ENF'T SERVS., BUREAU OF INDIAN AFFS., INDIAN RESERVATION CRIMINAL JUSTICE: TASK FORCE ANALYSIS 1974–1975, at 66–67 (1975)).

271. First Amended Complaint at 2, Oglala Sioux Tribe v. United States, No. 22-CV-0506 (D.S.D. Oct. 4, 2022); *see also* Plaintiffs' Complaint for Damages at 14, Fort Belknap Indian Cmty. v. United States, No. CV-22-103 (D. Mont. Oct. 25, 2022); Complaint at 2, Northern Cheyenne Tribe v. United States, No. CV-22-75 (D. Mont. July 19, 2022).

police may do."[272] Matthew L.M. Fletcher agrees with this sentiment, stating, "Federal rules require law enforcement officers to be trained and certified either by federal or state policing standards. . . . Even if the federal contracting function did not require that training, state and local governments would require it as a condition of entering into cross-jurisdictional cooperative agreements."[273]

In this regard, the Indian Law Enforcement Reform Act[274] provides the Secretary of the Interior with the authority to enter into and approve cooperative law enforcement agreements.[275] The statute also allows the BIA to enter into "special law enforcement commission agreements" to deputize tribal officers to enforce federal law in Indian Country.[276] According to Michael Barker, "Absent cross-deputization agreements, tribal police have no authority on non-trust parcels—even on reservations—while non-Indian police . . . have no powers over Indians on trust sections."[277]

The Commission of State-Tribal Relations, in a 1981 survey of Indian Country cross-deputization compacts, determined: "Although the practice [cross-deputization] is often undertaken without a formalized agreement, contracts and statutes have been negotiated which authorize cross-deputization. These agreements include qualifications for becoming a law enforcement officer, criteria for training, as well as measures protecting the cross-deputized officers and their respective governments from liability."[278]

Pursuant to a survey of tribal police executives on the advantages of cross-deputization agreements, the following benefits were noted:

> increased levels of crime control, primarily through enhanced patrol coverage and reduced response times; the ability to use support facilities (dispatching centers, electronic equipment, prisoner processing areas, detention centers, and so forth) of cooperating non-Indian agencies; and the closure of jurisdictional

272. BARKER, *supra* note 19, at 122.

273. Fletcher, *supra* note 22, at 1484.

274. Indian Law Enforcement Reform Act of 1990, Pub. L. No. 101–379, 104 Stat. 473 (codified at 25 U.S.C. §§ 2801–2815).

275. *See id.* at §§ 2802, 2804.

276. *See id.* at §§ 2804, 2815. In *United States v. Fowler*, 48 F.4th 1022, 1023–24 (9th Cir. 2022), the Ninth Circuit rejected a Fort Peck Tribal member's challenge to a cross-deputization agreement's validity.

277. BARKER, *supra* note 19, at 55.

278. *Id.* at 74 (quoting EARL S. MACKEY & PHILIP S. DELORIA, COMM'N ON STATE-TRIBAL RELS., *State-Tribal Agreements: A Comprehensive Study* 5 (1981)).

> loopholes which allowed suspects to avoid arrest and prosecution because of racial considerations.[279]

At the same time, some criticize cross-deputization agreements for the following reasons: cross-deputization agreements depend upon "amicable relations between tribal and non-tribal authorities"; the "necessity of tribal officers receiving deputization by non-Indian agencies . . . tends to decrease the legitimacy and sovereignty of tribal government"; and "[a]llowing the tribe to exercise reasonable criminal jurisdiction is consistent with notions of self-determination" and thereby "requiring tribes to draw authority from non-tribal police counterparts smacks of colonialism."[280]

According to Michael Barker, "[C]ertain tribes have felt that non-Native officers are hostile towards Indians and might use tribal deputization inappropriately."[281] Additional ramifications associated with the use of cross-deputization agreements include the perception that tribal officers need to prove themselves and therefore emulate their state and federal counterparts. Barker further explains, "[T]ribal police are clearly struggling for the chance to prove themselves—to demonstrate that they are professionals of the same brand as the organizations which they have been forced to emulate."[282] In this regard, "it appears that cross-deputization agreements will only further encourage a crime control, professional model of policing on the part of tribal agencies."[283]

To further this point, "[t]ribal police officers, who by virtue of a cross-deputization agreement have been commissioned to act as deputies, highway patrolmen, or fish and game officers, must retain that authority by exercising it in ways deemed appropriate by the authorizing agency."[284] These cross-deputization agreements do not allow tribal police officers the ability to be "Tribal" in character.

To further exacerbate the disconnect between tribal police officers and their Indian identity, "there is a belief that the tribal police are not legitimately 'Indian'; that somehow they are really mere representatives—or even extensions—of the federal government."[285] Clarice Feinman expressed this sentiment with regard to the Navajo police:

279. *Id.* at 76.

280. *Id.* at 76–77.

281. *Id.* at 77.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 114.

> The Navajo police as a group are viewed with suspicion and receive little respect and cooperation from the Navajo people. Historically, Indian police officers were tools of the U.S. [A]rmy or the BIA, an Anglo invention following Anglo values and laws used to control and punish Indians and deny them their sovereignty. These attitudes impede law enforcement on reservations. Police officers claim that often Navajo people will not come forth with information, will hide offenders, and will not go to the police for help.[286]

One study established tribal police officers' reluctance to utilize traditional values in exercising their duties:

> He [Navajo Nation officer] has accepted the modern occupation of law enforcement officer while not totally rejecting his roots by still living on the reservation. . . . That is, they supported the traditional values. However, they rejected the application of these values to their occupation.[287]

This study concluded that "traditional Native sentiments have little—and perhaps no—influence in current-day tribal policing."[288]

Matthew L.M. Fletcher clearly refutes this sentiment as follows: "All it would take is federal government acquiescence allowing tribes to train and certify their police officers in accordance with tribal policing philosophies, rather than the military-style policing model imposed upon tribes now."[289] The questions that this Article possesses are clear. If modern Indian police forces have their foundations grounded in the assimilative policy, then how are these Indian police forces able to break away from these assimilative principles? How do Tribes discard or overturn the established body of policing practices founded in assimilative policies? The answer is to return to traditional law principles. Today, many Tribes are revitalizing their legal traditions, and customary law no longer needs to sit as a "hidden" parallel to

286. *Id.* at 116 (quoting Clarice Feinman, *Police Problems on the Navajo Reservation*, 9 POLICE STUD. 194, 197 (1986)).

287. *Id.* at 117 (quoting David Wachtel, *The Navajo Police Officer: An Analysis of Their Traditionality and Assimilation*, 11 Q. J. IDEOLOGY 71, 80–81 (1987)).

288. *Id.* at 118.

289. Fletcher, *supra* note 22, at 1485 ("Modern tribes have already shown they can manage and conserve natural resources, regulate polluters, educate and house their citizens, and provide health care and social services with greater success rates than the states and federal government ever did. Those successes can be exported. States and local courts have been borrowing from tribal courts for decades. Peacemaking, circle sentencing, juvenile justice services, Indian child welfare services, drug courts—many of the leading advances in these areas originated with Indian Tribes.").

American law.[290] Today, Tribes can bring their customary law to the forefront of their legal systems and policing responsibilities.[291]

This Part examined the furtherance and indoctrination of the assimilation policy through justice systems and policing. It analyzed how the establishment of the Indian police failed to restore harmony or achieve balance in tribal communities and showed that tribal justice systems were further deteriorated through the extension of federal and state laws into Indian Country. It also established that the Indian policy system as implemented was not able to establish any legal status under U.S. or tribal law. It emphasized the effects of the IRA and the establishment of modern tribal courts in the furtherance and indoctrination of the assimilation policy and how the modern tribal law infrastructure supports the perpetuation of historical assimilation policies and interferes with effective law enforcement.

III. Modern Indian Policing— Are Tribal Courts Perpetuating Assimilative Law Enforcement Principles or Implementing Traditional Law Principles?

During hearings on the enactment of the Indian Civil Rights Act, testimony was heard as follows:

> [W]itnesses testified that the civil rights provided for by the U.S. Constitution were frequently violated or denied by tribal police and other reservation criminal justice actors. . . .
>
> Upon passage of the act, suspects arrested by tribal police, and who faced charges in tribal courts, were suddenly granted many of the same protections enjoyed by defendants in non-Indian tribunals. The Bill included protections against unreasonable search and seizures, cruel and unusual punishment, double jeopardy, and excessive bail. It also provides guarantees of a speedy trial and public trial, the right to confront and cross examine witnesses, the right to retain counsel at defendant's expense, privilege against self-incrimination, and a guaranteed liberty to file for *habeas corpus* relief in the federal judiciary.[292]

In spite of the extension of these civil rights to Indian Country, many still felt that the "Act was another thinly veiled attempt to pulverize tribal self-regulation and further stamp the Indian Policing

290. Barker, *supra* note 19, at 80–81.

291. *Id.*

292. *Id.* at 50; *see* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified at 42 U.S.C. §§ 1981 to 2000h–6).

and criminal justice systems."[293] This is because the Act "further restricted the ability of tribal police forces to adopt principles other than those flowing from the rationalist/crime-control philosophy."[294]

What is clear is that federal regulations authorize the ability of tribal courts in their sovereign capacity to recognize tribal customary law "not prohibited by federal law" as the basis for their decisions.[295] This Part examines modern policing and determines whether tribal courts are perpetuating assimilative law enforcement principles or whether tribal courts are implementing traditional law principles. In answering this question, it analyzes tribal law cases involving investigative policing, obtaining evidence, interrogations, proactive policing, and the abuse of power.

A. Investigative Policing

In *Swinomish Indian Tribal Community v. Seward*,[296] the Swinomish Tribal Court denied the defendant's motion to suppress a video and audio recording of a witness statement to police investigators. The Swinomish police had responded to a call at a residence within the boundaries of the reservation on a reported domestic dispute. The residence was the home of the defendant's grandmother, who reported to the responding police that the defendant assaulted her. The grandmother's statements to the investigating officers were video and audio recorded by equipment carried by the police. The defendant claimed that the witness's rights were violated by the police recording the witness interviews.[297] The tribal court determined that

> [i]t is a long-standing rule of law in federal, state, and tribal courts that a Defendant may not seek the suppression of evidence by asserting a violation of the rights of another. Simply stated, the Defendant lacks standing to object to the admission of evidence allegedly obtained in violation of the rights of a third-party.[298]

The court concluded that

293. BARKER, *supra* note 19, at 51.

294. *Id.* (giving additional reasons for dissatisfaction with the Act, including "resentment of government restrictions imposed upon the jurisdiction, procedures, and the general development of community justice processes, a wide divergence in views as to what processes should be seeking to achieve, and how they can best go about achieving these goals, inflexibility in responding to developing needs and particular problems, distrust and antagonism born of long frustration and the experience of outright obstruction by federal government officials" (internal quotations omitted)).

295. 25 C.F.R. § 11.500(a)(3) (2021).

296. 15 Am. Tribal Law 373 (2014).

297. *Id.* at 374.

298. *Id.* at 374–75.

> [e]ven if the court were inclined to fashion a right of privacy, or find that the witness' privacy rights were violated, the Defendant simply has no standing to assert these arguments here. She may not seek suppression of the witness statements based upon an asserted violation of the witness' rights.[299]

In *Martin v. Colville Confederated Tribes*,[300] the Colville Tribal Court of Appeals examined the use of an erroneous police report in the sentencing of a defendant who had plead guilty to battery against her child.[301] The defendant claimed that she did not know that the tribal court received a copy of the police report and would consider it in her sentencing.[302] The Colville Tribal Court of Appeals held that

> the appellant failed to meet her obligation of determining whether the Trial Court received a copy of the police report, though she had approximately thirty days in which to do so prior to sentencing. Therefore, the appellant cannot now claim it is a violation of her constitutional rights to deny her an additional evidentiary hearing, claiming she has been denied the ability to completely prepare for the sentencing hearing.[303]

The Colville Tribal Court of Appeals held that the tribal court was not required to hold an additional evidentiary hearing regarding the police report.[304] In doing so, the Colville Tribal Court of Appeals reasoned that "custom and tradition do not appear in the applicable law section of the Tribal code pertaining to rules of Court" and therefore did not need to be considered.[305]

The overarching theme of these cases is that the modern tribal law enforcement infrastructure encompassing the perpetuation of non-tribal law enforcement principles as an extension of the historical assimilative policies interferes with effective law enforcement in addressing modern-day crime.

B. Obtaining Testimony

1. Due Process

In *Begay v. Navajo Nation*,[306] the Navajo Nation Supreme Court addressed the due process challenge of a defendant involving the

299. *Id.* at 375.

300. 4 CCAR 32, 1997 WL 34719456 (Colville Tribal Ct. App. 1997).

301. *Martin*, 1997 WL 34719456, at *1.

302. *Id.*

303. *Id.* at *4.

304. *Id.*

305. *Id.* at *35.

306. Begay v. Navajo Nation, 15 ILR 6032 (Navajo 1988).

forfeiture of an automobile used in the illegal delivery of liquor on the reservation.[307] In this case, the Navajo police stopped the defendant as he was driving on the Navajo reservation.[308] The police found "six (6) unopened cases of intoxicating liquor (Thunderbird Wine) in the trunk" of the defendant's automobile.[309] The defendant was arrested and charged with delivery of liquor in violation of Navajo law, and the police seized and impounded the defendant's automobile.[310] A jury convicted the defendant of illegal delivery of liquor, and subsequently the Navajo Nation filed multiple motions for forfeiture of the defendant's vehicle.[311] The district court granted the Nation's motion for forfeiture without a hearing.[312] The Navajo Nation Supreme Court held:

> The totality of the Navajo Criminal Code and the devastation that alcohol causes on the Navajo Nation authorizes the Navajo courts to order a forfeiture of an automobile used for the illegal delivery of liquor. The uniqueness of an automobile and its availability for illegal purposes, combined with the effect of alcohol on the Navajo Nation, requires us to limit this decision to the forfeiture of an automobile used for the illegal delivery of liquor.
>
> Illegal delivery of liquor is a serious offense, because liquor has caused farreaching [sic] devastation on the Navajo Nation. As such, the Navajo courts have the power and the duty to 'protect the public interest of the Navajo Nation' from people who engage in such illegal activity.[313]

The court concluded:

> We hold only that the forfeiture of an automobile demands notice and a hearing. Navajo court proceedings must comply with the Navajo Nation Bill of Rights and the Indian Civil Rights Act, and as such, we must ensure compliance with procedural and substantive due process before someone is deprived of their private property. This Court has previously emphasized that "[p]rocedural due process requires that one be given adequate notice and an opportunity to be heard before one can be deprived of life, liberty, or property." Therefore, we hold that a civil forfeiture proceeding must provide due process as set forth in the

307. *Id.* at 6033.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 6034 (quoting Navajo Nation Code Ann. tit. 17, § 202(D)).

> Navajo Nation Bill of Rights, the Indian Civil Rights Act, and Navajo common law.
>
> . . . .
>
> The concept of due process was not brought to the Navajo Nation by the Indian Civil Rights Act, or the Navajo Nation Bill of Rights. The Navajo people have an established custom of notifying all involved parties in a controversy and allowing them, and even other interested parties, an opportunity to present and defend their positions. This custom is still followed today by the Navajo people in the resolution of disputes.
>
> When conflicts arise, involved parties will go to an elder statesman, a medicine man, or a well-respected member of the community for advice on the problem and to ask that person to speak with the one they see as the cause of the conflict. The advisor will warn the accused of the action being contemplated and give notice of the upcoming group gathering. At the gathering, all parties directly or indirectly involved will be allowed to speak, after which a collective decision will be made. This is Navajo customary due process and it is carried out with fairness and respect. The heart of Navajo due process, thus, is notice and an opportunity to present and defend a position. Applying these concepts, we hold that the Tuba City District Court violated Mr. Begay's due process rights by granting the "Motion for Forfeiture" without notice to Mr. Begay or without allowing him an opportunity to be heard.[314]

The Navajo Nation Supreme Court concluded that "the district court denied Mr. Begay due process by granting the 'Motion for Forfeiture' without giving Mr. Begay notice of the November 2, 1987, motion or an opportunity to be heard on the motion."[315]

In *Davisson v. Colville Confederated Tribes*,[316] the Colville Tribal Court of Appeals determined that the right not to be compelled to testify against oneself is a fundamental right; thus, the court reviewed the due process challenge under the strict scrutiny standard.[317] The Colville Tribal Court of Appeals held that

> being part of an Indian community alone would often compel Indian persons who had committed acts against the community to confess those acts before any form of healing could begin. Even today, Indian criminal suspects confess to crimes at higher rates

314. *Id.* (citations omitted) (quoting Keeswood v. Navajo Tribe, 2 Navajo Rptr. 46, 50 (Navajo 1979)).

315. *Id.* at 21.

316. 10 Am. Tribal Law 403 (Colville Tribal Ct. App. 2012).

317. *Id.* at 409.

> than other people, even presupposing that there is no such thing as the right to be silent.[318]

The overarching theme of these cases is that Tribes are utilizing traditional law enforcement infrastructure principles as they maintain societal norms in addressing modern-day crime.[319]

2. *Miranda*

In *Navajo Nation v. Rodriguez*,[320] the Navajo Nation Supreme Court examined the principle of individual freedom to reject coercion.[321] The court determined that any degree of coercion is in violation of the Navajo Bill of Rights and the individual's right to remain silent.[322] The court explained:

> A person cannot give information for his or her own punishment unless there is a "knowing and voluntary decision to do so." We interpreted the English words in our Bill of Rights in light of the Navajo principle rejecting coercion. We said that "others may 'talk' about a Navajo, but that does not mean coercion can be used to make that person admit guilt or the facts leading to a conclusion of guilt."
>
> We reiterate these principles today. Our Navajo Bill of Rights, as informed by the Navajo value of individual freedom, prohibits coerced confessions.
>
> . . . .
>
> . . . In our Navajo way of thinking we must communicate clearly and concisely to each other so that we may understand the meaning of our words and the effect of our actions based on those words. The responsibility of the government is even stronger when a fundamental right, such as the right against self-incrimination, is involved.
>
> . . . .
>
> . . . *Hazhó'ógo* is not a man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals. When discussions become heated, whether in a family setting, in a community meeting or between any people, it's not uncommon for an elderly person to stand and say "*hazhó'ógo, hazhó'ógo sha'ałchíní*." The intent is to remind those

318. Fletcher, *supra* note 96, at 388.

319. *See supra* Part I.B.

320. 5 Am. Tribal Law 473 (Navajo 2004).

321. *Id.* at 475.

322. *Id.* at 477.

> involved that they are *Nohookáá Diné'é*, dealing with another *Nohookáá Diné'é*, and that therefore patience and respect are due. When faced with important matters, it is inappropriate to rush to conclusion or to push a decision without explanation and consideration to those involved. *Áádóó na'níle'dii éí dooda.* This is hazhó'ógo, and we see that this is an underlying principle in everyday dealings with relatives and other individuals, as well as an underlying principle in our governmental institutions. Modern court procedures and our other adopted ways are all intended to be conducted with hazhó'ógo in mind.[323]

The court emphasized: "The right against coerced self-incrimination attached not when the defendant first appeared before the district court, but when he was placed in police custody. . . . Either the police coerced the defendant, or it did not. . . . [A]ny degree of coercion is in violation of the Navajo Bill of Rights."[324]

In *Eriacho v. Ramah District Court*,[325] the Navajo Nation Supreme Court addressed a petition for a writ of mandamus seeking to compel a request for a jury trial in a criminal case. The Navajo Nation Supreme Court reasoned that "a jury trial is a fundamental right in the Navajo Nation. A jury is a modern manifestation of the Navajo principle of participatory democracy in which the community talks out disputes and makes a collective decision."[326] The court continued by stating:

> *Hozho'go* requires meaningful notice and explanation of a right before a waiver of that right is effective, it requires, at a bare minimum, that the Nation give notice that the right to a jury trial may be waived by inaction. For notice to be meaningful, and therefore a waiver to be effective, the Navajo government must explain to the defendant that the jury trial right is not absolute,

323. *Id.* at 477, 479–80 (citations omitted) (quoting Navajo Nation v. McDonald, 7 Navajo Rptr. 1, 13 (Navajo 1992)).

324. *Id.* at 477.

325. 6 Am. Tribal Law 624 (Navajo 2005).

326. *Id.* at 628 (citing Duncan v. Shiprock Dist. Ct., 5 Am. Tribal Law 458, 466 (Navajo 2004)). In *Duncan*, the Navajo Nation Supreme Court determined:

> > A jury trial in our Navajo legal system is a modern manifestation of consensus-based resolution our people have used throughout our history to bring people in dispute back into harmony. Juries are a part of the fundamental Navajo principle of participatory democracy where people come together to resolve issues by 'talking things out.' Through this process community members in disharmony are brought back into a state of *hózhó*. The participation of the community in resolving disputes between parties is a deeply-seeded part of our collective identity and central to our ways of government.
>
> *Duncan*, 5 Am. Tribal Law at 466 (citations omitted).

> as it may be waived by doing nothing within a certain time. Absent this explanation, the information received by a defendant is incomplete, as it appears the right is automatic and perpetual, like the federal constitutional right. Without this information, the waiver by inaction is not truly knowing and intelligent, and would violate the defendant's right to due process.[327]

The Navajo Nation Supreme Court held that a defendant who was never informed that she would waive, by inaction, her fundamental right to request a jury did not provide a "knowing and intelligent" waiver of the right.[328]

In *Gaddy v. Hopi Tribe*,[329] the Appellate Court of the Hopi Tribe examined a tribal court conviction of driving under the influence of intoxicating liquor.[330] The court addressed whether a defendant's right against self-incrimination was violated when he was questioned prior to hearing the *Miranda* warning upon his arrest. The court reasoned:

> Hopi law has not delineated the scope of the Miranda warning, therefore we look to foreign law for guidance. It is well-established law that the duty of an officer to provide the Miranda warning is triggered when custodial interrogation begins, where such interrogation is defined as any questioning initiated by a law enforcement officer after a person has been taken into custody or otherwise deprived of his freedom of action in a significant way. It is also clearly established law that roadside questioning of a motorist detained pursuant to a traffic stop is not custodial interrogation. . . . [A] single police officer asked defendant here "a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest [giving rise to the duty to provide the Miranda warning]."[331]

The court concluded, "[W]e find nothing in the record that indicates that Defendant should have been given Miranda warnings at any point prior to the time the Officer placed him under arrest."[332]

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327. *Eriacho*, 6 Am. Tribal Law at 630.

328. *Id.* at 630–31.

329. 5 Am. Tribal Law 214 (Hopi Tribe App. Ct. 2004).

330. *Id.* at 215.

331. *Id.* at 217–18 (citations omitted) (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).

332. *Id.* at 218.

In *Numenka v. Fort McDermitt Paiute Shoshone Tribe*,[333] the Inter-Tribal Court of Appeals of Nevada examined a conviction of abduction and contributing to the delinquency of a minor.[334] It was argued that the arresting police officer admitted on the record that the appellant was not given his *Miranda* rights at the time of his arrest. The court held:

> These assertions, if true, would have a material impact on this Court's decision on appeal. Without a transcript this Court is unable to conduct a thorough and complete review of this Appeal. The Tribal Court has the obligation to file a transcript when a matter is appealed to this Court. This matter is therefore, remanded to the Tribal Court to file a transcript of the proceedings. Such transcript must be filed with this Court within thirty days of the date of this Order. Failure to file a transcript within thirty days of the date of this Order will leave this Court no choice but to reverse the conviction of Appellant for Abduction and Contributing to the Delinquency of a Minor.[335]

In *Swinomish Indian Tribal Community v. George*,[336] the Swinomish Tribal Court addressed a motion to suppress statements made by a defendant after he was placed in the patrol car but before he was read his rights, as required by the Swinomish Tribal Code.[337] The court reasoned:

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333. No. ITCN/AC CR–05–020, 2006 WL 6358351 (Nev. Inter-Tribal Ct. App. Mar. 21, 2006).

334. *Id.* at *1.

335. *Id.* at *2.

336. No. CRCO–2005–0015, 2006 WL 7128881 (Swinomish Tribal Ct. Apr. 13, 2006).

337. *Id.* at *1. The court highlighted the following facts:

> After investigating an automobile accident, Officer Douglas informed the Defendant he was being "detained for investigation of Obstructing a Law Enforcement officer and DUI" and placed Defendant in the back of a locked patrol vehicle. After about 15 minutes, the Defendant got Officer Douglas' attention and Officer Douglas went to the car. The Defendant asked if the Officer would not take him to jail if he told the truth about who was driving the vehicle in question. Officer Douglas told him that he "would most likely not be taking him to jail." Following this exchange the Defendant made the statement at issue in this motion, "O.K. I was driving, you knew that anyway, I was trying to call home on my cell phone and hit the ditch." After this statement, Officer Douglas advised the Defendant of his rights as stated in Swinomish Tribal Code 3–03–130.
>
> *Id.*

> [W]hile the Swinomish Tribal Code clearly establishes an "advisement of rights" how to interpret the application of that requirement and fashion a remedy for the violation of that requirement is left to the development of case law. In that regard, the court holds that the advisement of rights must be given before custodial interrogations by agents of the tribe; otherwise, the statements obtained are presumed to be involuntary and must be suppressed. For the court to grant the relief requested, it must find that the Defendant was "in custody" at the time he made the admission, and that the statement was the result of police "interrogation."[338]

The court held that the defendant's "statement in this matter was voluntary and not the result of custodial interrogation, therefore it is

338. *Id.* at *1–2 ("A person is 'in custody' for purposes of the requirement to advise them of their right against self-incrimination when, the defendant has been formally placed under arrest or his freedom of action or movement has been curtailed to a degree associated with forma! [sic] arrest. This determination is made based upon how a reasonable person under the same circumstances would perceive the situation. In this case, while outside the police vehicle and generally free to leave the scene, the Defendant [was] asked by the police if Defendant knew who was driving the vehicle and what he was doing on the scene. After telling the police he was not the driver and identifying the person he thought was driving the police gave him 'one more opportunity to be honest.' When the Defendant reiterated his original version of events he was 'advised . . . that he was going to be detained for investigation of Obstructing a Law Enforcement Officer and DUI' and placed in the back of the locked police vehicle. Clearly the officer did not believe the defendant's story and believed the Defendant was the driver and was intoxicated. Advising the Defendant of this fact and placing him in the locked vehicle, in this context it is clear the Defendant believed he was under arrest and under the circumstances, this appears to be a reasonable perception of events. The Court finds that the Defendant was 'in custody' at the time the admission in question was uttered. The second question is whether or not the admission came as the result of police interrogation. The parties agree that 'interrogation' means direct and express questioning and any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. It is undisputed that the statement at issue came after the Defendant initiated contact with the police officer and the Defendant informed the police that he wanted to talk to them. There is no evidence that the officer engaged in any direct questioning of the defendant at this time. While the Defendants [sic] admission can be seen as an answer to the questions posed earlier by the police, his statement was made in an apparent effort to clarify or correct the earlier answers. There is no question that the earlier question was noncustodial and did not require any type of advisement of rights. Following the analysis provided in *State v. Godsey,* 131 Wn. App. 278 (2006), the court holds that the Defendants [sic] statement in this matter was voluntary and not the result of custodial interrogation, therefore it is admissible even though it was given without the benefit of an advisement of the Defendant's right to remain silent.").

admissible even though it was given without the benefit of an advisement of the Defendant's right to remain silent."[339]

The overarching theme of these cases is that Tribes are utilizing traditional law enforcement infrastructure principles as they push back against the perpetuation of non-tribal law enforcement principles as an extension of the historical assimilative policies in addressing modern-day crime.[340]

C. Interrogations

In *Fort Peck v. Bighorn*,[341] the Fort Peck Court of Appeals addressed whether the self-incriminatory statements of a defendant made at the time of a traffic stop were rightfully admitted into evidence.[342] The court reasoned:

> Voluntary statements made by an individual to a police officer outside of a custody interrogation, are admissible and do not violate the suspects [sic] right to protection from self-incrimination given by the 5th Amendment [of the U.S. Constitution] and the Indian Civil Rights Act of 1968. . . .
>
> . . . In order to guarantee the 5th Amendment rights and the Indian Civil Rights Act provisions against self incrimination, tribal police officers must upon arrest, and taking a person into

339. *Id.* at *2.

340. *See supra* Part I.C.

341. 1 Am. Tribal Law 121 (Fort Peck Ct. App. 1997).

342. *Id.* at 122 ("The facts of this case indicate that on March 9, 1997, Officer Elizabeth Grey Bear of the Fort Peck Tribal Police, observed James Bighorn driving east on the Indian Highway South of Poplar, Montana. Officer Grey Bear followed Mr. Bighorn for about a mile from the point of her first view of the suspect, while following Mr. Bighorn, she activated her emergency lights, siren and horn in order to stop him. Apparently, Mr. Bighorn was traveling at a high rate of speed and swerving over the center line. Officer Grey Bear testified that, after stopping Mr. Bighorn and talking with him, that it appeared to her Mr. Bighorn had been drinking, but [was] not drunk. His condition was not obvious. After the stop, Officer Grey Bear asked Mr. Bighorn whether he had been drinking. He said that he had 'a couple'. Officer Grey Bear then took his drivers license and went back to her patrol car and called dispatch for an officer that could assist her with a field sobriety test. Shortly thereafter, Officer Jose Figueroa arrived on the scene and performed some field sobriety tests on Mr. Bighorn. Officer Grey Bear observed the tests. She testified that the defendant refused to complete the test and that he said he couldn't do it because he was 'too drunk'. At that point, Jose Figueroa determined that the defendant had failed the sobriety test and advised him of his Tribal Rights. (Which are consistent with the Miranda Warnings).").

> custody, give that person notice of his Tribal Rights, which includes [sic] his right to protection against self-incrimination.[343]

The court held that admission of the defendant's statements to tribal police officers prior to his custody and arrest, that he had been drinking and that he was drunk, did not violate his right against self-incrimination.[344]

The overarching theme of this case is that the Tribe is utilizing modern tribal law enforcement infrastructure encompassing the perpetuation of non-tribal law enforcement principles as an extension of historical assimilative policies. It appears that law enforcement in this circumstance is not interacting with the individual pursuant to kinship norms in an attempt to restore harmony through the embodiment of the principle of how we carefully approach each other as individuals in addressing modern-day crime.[345]

D. Proactive Policing: Search Warrants and Probable Cause

In *Nevayaktewa v. Hopi Tribe*,[346] the Appellate Court of the Hopi Tribe reviewed convictions for the possession of sixteen marijuana plants.[347] In examining whether inconsistencies in the police report created a situation in which there was insufficient evidence to support the convictions, the court reasoned that the trial court was free to weigh the evidence before it and give more credibility to other evidence.[348] The court determined, "This court is in no position to second guess the trial court in its factual findings unless no trier of fact could come to that conclusion on the evidence."[349]

The court also examined whether the evidence was obtained in violation of the defendants' rights to be free of unreasonable searches and seizures.[350] The court acknowledged that Hopi law allows the suppression of unlawfully obtained evidence; however, since the police obtained a warrant, the defendants bore "the burden of production and

343. *Id.* at 122–23 (quoting California v. Beheler, 463 U.S. 1121 (1983)) ("The Supreme Court of the United States set forth the rule of law that Miranda Warnings are not required unless the suspect is placed in custody and under interrogation. The *Beheler* court stated, quoting *Miranda v. Arizona*, 'by custodial interrogation, we mean questioning *initiated* by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom or action in any significant way.'").

344. *Id.* at 123.

345. *See supra* Parts I.B, II.E.

346. 1 Am. Tribal Law 306 (Hopi Tribe App. Ct. 1998).

347. *Id.* at 309.

348. *Id.* at 311–12.

349. *Id.* at 312.

350. *Id.* at 315–18.

the burden of persuading the court by a preponderance of the evidence that evidence obtained pursuant to a warrant nonetheless was illegally obtained."[351] In refuting the defendants' assertion that the search warrant was invalid and the evidence was illegally seized, the court determined that: (1) it was irrelevant that the judge did not personally sign the search warrant because tribal law allows for the issuance of a telephonic search warrant;[352] (2) presenting the search warrant to the defendants, rather than the owner of the trailer, served the purposes of the notice requirement specifically since the defendants were in control of the trailer;[353] and (3) the search warrant's lack of specific description of the places to be searched was permitted.[354]

The court also examined whether the defendants' substantive due process rights to a fundamentally fair trial were violated by police misconduct.[355] The defendants alleged that "the evidence confiscated was willfully altered" by the police sergeant and that the admission of this altered evidence violated the principle of fundamental fairness.[356] The court established that

> under Hopi custom and tradition, a general concept of fairness is required in legal proceedings . . . at a minimum, fundamental fairness required notice and an opportunity to be heard. Because

351. *Id.* at 316.

352. *Id.* at 316–317 ("The defendants protest because Judge Leslie issued a telephonic search warrant and allowed Sergeant Chatter to sign the judge's name. The defendants ignore the fact that the term 'signed' is broadly defined in Hopi Ordinance 21. More importantly, the defendants are attempting to circumvent the holding in *Hopi Tribe v. Miguel,* 93 CR001527 (1993) that telephonic search warrants are permitted in Hopi courts.").

353. *Id.* at 317 ("[T]he notice requirement serves to decrease the potential for violence because there will be no unannounced breaking and entering into the house, protects privacy interests because it minimizes the chances that the wrong premises will be searched, and prevents the physical destruction of property because no breaking and entering will be necessary.").

354. *Id.* at 317–18 ("[W]hen police have probable cause to believe that contraband is contained within a home or trailer, it is appropriate to allow the police to search anywhere in the trailer or home where the contraband may be contained. If this search were not permitted, defendants could move the contraband when the police arrived and render it outside the scope of the warrant. This is an absurd result that would incredibly reduce the effectiveness of law enforcement without any corresponding benefit to legitimate privacy interests because the police already have probable cause to believe that contraband is on the premises.").

355. *Id.* at 320.

356. *Id.*

> of its basis in Hopi custom and tradition, fundamental fairness must always be determined within the context of Hopi values.[357]

The court held that "the trial was not devoid of fundamental fairness" because the defendants failed to allege and prove the necessary facts to validate their claim.[358]

In *Metlakatla Indian Community v. Williams*,[359] the Metlakatla Tribal Court of Appeals reviewed the validity of a search warrant obtained by Metlakatla police officers for the search of a residence for alcoholic beverages, drugs, and concealed contraband.[360] The challenged search warrant lacked a number of specifics, including failure to list the specific address of the house to be searched and the area of the residence to be searched.[361] The warrant authorized the search of the "'blue house' on Haines street" without any other specifics except "Gloria William's residence."[362] The court determined that contrary to the government's position "that 'everyone knows where everyone else lives' in the community," having knowledge of the community does not excuse the failure to "'particularly describe' the property and the portion of the property to be searched" as well as the specific time frame to conduct the search.[363] The court also criticized the information incorporated in the supporting affidavit, as it noted that "the supporting affidavit contains no facts which would lead a reasonable person to believe that any crime had been or was being committed on the property in question."[364] The court concluded that search warrant did not contain the necessary information as required by the tribal code's due process requirements.[365]

In *Clark v. Fort Peck Tribes*,[366] the Fort Peck Court of Appeals held that a tribal statue criminalizing the refusal to submit a blood draw by the police violated the Indian Civil Rights Act.[367] The court reasoned that because "less intrusive options exist," such as breathalyzers and urinalysis, "the personal privacy interests outweigh

357. *Id.* at 320 (citation omitted) (citing Johnson v. Belgarde, 25 Indian L. Rep. 6183, 6184 (Hopi Tribe App. Ct. 1996)); *see also* Day v. Hopi Election Bd., 16 Indian L. Rep. 6057, 6058 (Hopi Tribal Ct. 1988).

358. *Nevayaktewa*, 1 Am. Tribal Law at 320.

359. 4 NICS App. 91 (Metlakatla Tribal Ct. App. 1996).

360. *Id.* at 91–92.

361. *Id.* at 92.

362. *Id.*

363. *Id.*

364. *Id.* at 93.

365. *Id.*

366. 15 Am. Tribal Law 203 (Fort Peck Ct. App. 2018).

367. *Id.* at 204.

the governmental need for blood tests, making a warrantless blood draw impermissible under the requirements of the Indian Civil Rights Act."[368]

In *Rosebud Sioux Tribe v. Luxon*,[369] the Rosebud Sioux Tribe Supreme Court addressed whether an amendment to the tribal constitution required more stringent protections for accused tribal court defendants than was required by the *Miranda* standard, as set forth in *Miranda v. Arizona*.[370] The court noted that there were slight differences between the text of the *Miranda* standard and the tribal constitutional amendment; however, there was no evidence presented that justified the tribal constitutional amendment to extend beyond the principles established in *Miranda*.[371] As a result, the court held that it was "reasonable to conclude that Tribal intent was to adopt *Miranda* as its constitutional standard."[372]

If we compare *Rodriguez*,[373] *High Elk v. Veit*,[374] and *Bank of Hoven (Plains Commerce Bank) v. Long Family Land and Cattle Co.*[375] with

368. *Id.* at 206 ("[A] blood draw is an invasive test which requires a person to go to a medical facility and have their skin pierced by a needle and blood withdrawn from their body. . . . It is extremely invasive in light of availability of alternates such as breathalyzers and urinalysis." (citing Birchfield v. North Dakota, 136 S. Ct. 2160, 2184–85 (2016))).

369. Rosebud Sioux Tribe v. Luxon (Rosebud Sioux Sup. Ct. Oct. 30, 2009).

370. *Id.* at 2; Miranda v. Arizona, 384 U.S. 436 (1966).

371. *Luxon*, slip op. at 8–9.

372. *Id.* at 9.

373. Navajo Nation v. Rodriguez, 5 Am. Tribal Law 473, 479–80 (Navajo 2004).

374. 6 Am. Tribal Law 73, 77–80 (Cheyenne River Sioux Tribal Ct. App. 2006). The Cheyenne River Sioux Tribal Court of Appeals addressed the due process rights of a former lessee involving grazing rights payments. The court vacated the garnishment order at issue in this case as the order "constituted a departure from Lakota traditions of respect and honor, was contrary to law, and violated the guarantees of due process of law . . . ." The court reasoned:

> Lakota tradition requires the respectful listening to the position of all interested persons on any important issue, the legal requirement of due process of law requires that all persons interested in a matter receive adequate written notice of any proceeding that would implicate their personal interests, including their property or, as here, rent payments contractually owed to them, that they be made parties to any ease [sic] or judgment that would affect those interests, and that they have a full and fair opportunity to participate as a party in any hearing on such issues.

Id. at 78.

375. 32 Indian L. Rep. 6001, 6003 (Cheyenne River Sioux Tribal Ct. App. 2004). The Cheyenne River Sioux Tribal Court of Appeals addressed the issue of a claim of discrimination against an off-reservation bank. In addressing the issue of discrimination, the court explained as follows:

Luxon, we see that the Rosebud Sioux Tribe Supreme Court had the opportunity to infuse Lakota customary law into its decision but declined to do so. In *Rodriguez*, the Navajo court determined that tribal customary law, which values individual freedom, extended criminal procedural rights beyond what is required by federal or state law.[376] In *High Elk* and *Bank of Hoven*, the Cheyenne River Sioux Tribal Court of Appeals utilized traditional Lakota principles of justice, fair play, and decency to others along with the Lakota custom of fairness and respect for individual dignity to provide culturally appropriate protections to disputes. In *Luxon*, the Rosebud Sioux Tribe Supreme Court had the ability to utilize these decisions as persuasive authority to justify that the tribal court amendment extended more stringent protections, pursuant to Lakota customary law principles, for accused tribal court defendants than *Miranda* required.

In *Crow Tribe v. Big Man*,[377] the Crow Court of Appeals reviewed whether the Tribal Court erred in not dismissing the charges of driving under the influence of alcohol when the arresting officer failed to read the defendant his *Miranda* rights.[378] In interpreting the tribal code, the court determined that the adversarial criminal prosecution process, including the *Miranda* warning, is "not grounded in tribal custom or tradition."[379] The court determined that "the Tribal Council intended to provide Crow Tribal members and non-member Indians who may be subject to Tribal criminal prosecution with the same *Miranda* rights enjoyed by all other Americans, as recognized and developed in the Supreme Court's decisions."[380] The court held that "no violation of the arrest procedures specified in Rule 8 [of the Crow Rules of Criminal Procedure] occurred in this case, when the Defendant was given his rights and transported to the Crow jail by an officer who was present

> [T]here is basis for a discrimination claim that arises directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom. Such a potential claim arises from the existence of Lakota customs and norms such as the "traditional Lakota sense of justice, fair play and decency to others," and "the Lakota custom of fairness and respect for individual dignity." . . . Therefore a tribally based cause of action grounded in an assertion of discrimination may proceed as a "tort" claim as defined in the Cheyenne River Sioux Tribal Code, as derived from Tribal tradition and custom . . . .

Id. (citations omitted).

376. *Rodriguez*, 5 Am. Tribal Law at 477–79.

377. 2000 Crow 7 (Crow Ct. App. 2000).

378. *Id.* at ¶ 1.

379. *Id.* at ¶ 27.

380. *Id.* at ¶ 33.

at the scene of the arrest."[381] The court further emphasized that the defendant's conviction was not based on testimonial evidence, and as a result, the defendant "was not entitled to dismissal of the charge against him merely because the arresting officer failed to inform him of [his] *Miranda* rights."[382]

In *Maho v. Hopi Tribe*,[383] the Appellate Court of the Hopi Tribe addressed whether a search warrant is required for police to conduct a drug sweep of a school and whether any evidence obtained should be suppressed or excluded.[384] The court recognized that under the administrative search standard, public school officials only need reasonable suspicion to conduct a search of a school, and neither a search warrant nor probable cause is necessary.[385] The court differentiated public school officials from police officials, explaining that police are required to have probable cause and obtain a search warrant in order to conduct a search of a school pursuant to Hopi tribal law, "otherwise the search is illegal and the evidence gathered from it is inadmissible."[386] The court rejected the argument that the police were "acting under the cloak of school officials (since they were allegedly conducting the search at the principal's request)," and that the administrative search standard applied. The court held that the search was "a police action" that did not comport with any of the warrantless search exceptions, and therefore a search warrant was required.[387]

In *Swinomish Indian Tribal Community v. Reid*,[388] the Swinomish Tribal Court addressed the sufficiency of an affidavit supporting the request for a search warrant and, as a result, whether the evidence seized because of the execution of the warrant should be suppressed.[389] In addressing the merits of this case, the court determined that the

381. *Id.* at ¶ 36.

382. *Id.* at ¶ 59.

383. 1 Am. Tribal Law 278 (Hopi Tribe App. Ct. 1997).

384. *Id.* at 279.

385. *Id.* at 280 (explaining that "[t]he exception is justified by the 'special needs' encountered in maintaining order and a safe school environment" (quoting New Jersey v. T.L.O., 469 U.S. 325, 332 (1985))).

386. *Id.*

387. *Id.* at 280–81 ("Since the police did not obtain a warrant the prosecutor must show that the search conducted by the police was a legal exception to the warrant requirement. This must be done by showing that there is a preponderance of evidence supporting the applicability of the exception. During the Suppression Hearing, the prosecutor failed to show that the search conducted by the police fell within the warrantless search exceptions." (citation omitted)).

388. 11 Am. Tribal Law 182 (Swinomish Tribal Ct. 2012).

389. *Id.* at 184.

"totality of the circumstances test" from *Illinois v. Gates*[390] "offers the proper balance protecting both the important citizen rights against unreasonable search and seizure while still allowing the important governmental responsibility of investigating, prosecuting and preventing criminal activity."[391] The court recognized that although "deficiencies in the affidavit existed" and the reviewing magistrate should have required "more specificity in some of the statements offered by the affiant," in viewing the totality of the circumstances of the information presented, "the reviewing magistrate could make a practical and common-sense finding that there was probable cause to believe illegal contraband would be found in the residence to be searched."[392] The court then proceed to address the exclusionary rule from *U.S. v. Leon*[393] as persuasive authority and determined "[i]t is well settled that the exclusionary rule should not bar the use of evidence that was obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, even if a subsequent review finds that the warrant should not have been issued."[394] The court held that evidence seized as a result of the search warrant should not be suppressed as an exception to the exclusionary rule.[395]

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390. 462 U.S. 213 (1983).

391. *Reid*, 11 Am. Tribal Law 182, 184–85 ("A magistrate of the Swinomish Tribal Court asked to issue a warrant for the search of a person or property, should 'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983))).

392. *Id.* at 186.

393. 468 U.S. 897 (1984).

394. *Reid*, 11 Am. Tribal Law at 186 ("The purpose of the exclusionary rule is to deter unlawful and over zealous police conduct. The courts have accepted that it is proper to balance the costs and benefits of excluding evi[de]nce between the intended deterrent effect and the possibility of impeding the criminal justice system. Where the police operate in good faith on a warrant signed by a neutral and detached magistrate, there is very little deterrent effect to be gained by excluding evidence seized as the result of a warrant that is later determined to be supported by a deficient affidavit. Application of the exclusionary rule must continue, however, where the violation was substantial and deliberate, as when a police either intentionally or recklessly misleads or misinforms the reviewing magistrate so as to wrongfully obtain a warrant.").

395. *Id.* ("Even if the reviewing magistrate in this case should have demanded a greater level of specificity to the facts supporting the police request for the subject warrant, there is no suggestion that the police intentionally withheld or manipulated the information presented so as to mislead the

The overarching theme of these cases is that Tribes are implementing traditional law principles when they treat community members as relatives with respect, dignity, and fairness pursuant to their kinship responsibilities and obligations.[396]

E. Preventing Crimes: Stops

In *Fort McDowell Yavapai Nation v. Shenah*,[397] the Fort McDowell Yavapai Nation Supreme Court examined whether evidence of intoxication was admissible when the stop that produced the evidence was not for a traffic offense.[398] In addressing the merits, the court reasoned:

> The relevant question is not why the stop was made but whether the stop was lawful and made by the police in good faith. Evidence should ordinarily be excluded when it is obtained as the result of police misconduct. When no police misconduct has occurred, no purpose is served by excluding evidence that shows that an offense has occurred. If sufficient cause existed in this case for police to stop appellee for his alleged on-reservation disorderly conduct, the evidence of appellee's intoxication obtained as a result of that stop should not be excluded merely because the stop was not for a "traffic" violation.[399]

The court held that the evidence of intoxication was admissible.[400]

In *Randolph v. Hopi Tribe*,[401] the Appellate Court of the Hopi Tribe reviewed a charge of possession of marijuana and alcohol resulting from a traffic stop.[402] In balancing the "public's privacy interest with the necessity for efficient and effective law enforcement" the court reviewed proper police conduct in obtaining evidence without a search warrant.[403] The court held that when the police do not obtain a search warrant,

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> magistrate into issuing a warrant. The police therefore acted reasonably in executing the warrant upon their good-faith belief that they had taken all the steps necessary to obtain the warrant, and that they were acting upon a properly issued warrant. Suppressing the evidence seized in such reliance does not serve the purposes of the exclusionary rule and has been rejected [b]y many other courts that have reviewed this same question. The court finds the reasoning of these courts to be sound and accepts this exception to the exclusionary rule.").

396. *See supra* Part I.A.

397. 6 Am. Tribal Law 144 (Fort McDowell Yavapai Nation Sup. Ct. 2005).

398. *Id.* at 146.

399. *Id.*

400. *Id.*

401. 1 Am. Tribal Law 281 (Hopi Tribe App. Ct. 1997).

402. *Id.* at 284.

403. *Id.* at 289.

both the burdens of production and persuasion are allocated to the prosecutor, who must prove by a preponderance of the evidence that the police had sufficient justification to make the stop and that the police satisfied an exception to the warrant requirement before conducting the search.[404]

The overarching theme of these cases is that Tribes are utilizing traditional law enforcement infrastructure principles as they maintain societal norms in addressing modern-day crime.[405]

F. Abuse of Power: Use of Force

In *Beillo v. Eastern Band of Cherokee Indians*,[406] the Cherokee Court of the Eastern Band of Cherokee Indians addressed a wrongful death action involving a police shooting.[407] The court held that the police officers were entitled to qualified immunity in the wrongful death action and that the officer who shot the victim had substantial grounds to use deadly force.[408] The court acknowledged that "[a] reasonable officer in officer Pheasant's position could have reached the same conclusion [to use deadly force during this encounter]."[409] The court also held that the police chief was not entitled to qualified immunity in the wrongful death action because "a reasonable Chief of Police and a reasonable police department would have understood that the failure to develop a policy and conduct training of line officers with regard to encounters with emotionally disturbed people would lead to unreasonable seizures [wrongful death]."[410] The court held, however, that the police chief was entitled to public officer immunity and was not liable in his individual capacity since "there is no genuine issue as to any material fact as to whether Chief Wolfe acted corruptly or maliciously."[411] The court allowed the matter to proceed as there was

> a genuine issue of material fact as to whether the Defendants Wolfe, CIPD and EBCI failed, either by deliberate indifference or by reckless disregard, to develop any policy or have any training

404. *Id.* at 289–90 ("In terms of fairness, it is unreasonable to expect the defendant to be able to produce evidence regarding the validity of the stop. The reasons for the stop and other information are more readily available to the police officers and the prosecutor. Moreover, in terms of policy, it is preferable for police officers to obtain a warrant whenever practical.").

405. *See supra* Part I.B.

406. 3 Cher. Rep. 47 (Cherokee Ct. of N.C. 2003).

407. *Id.* at 49.

408. *Id.* at 52.

409. *Id.*

410. *Id.* at 53.

411. *Id.* at 54.

> for Cherokee law enforcement officers to deal with emotionally disturbed people, and that this failure to have policies or training caused the escalation of the scene at Ms. Bustos' home into an unreasonable seizure, which resulted in the death of Charlie.[412]

The question to be answered is how are officers being trained. Are officers adequately being trained in tribal customary principles? It does not appear so. The overarching theme of this case is that the modern tribal law enforcement infrastructure encompassing the lack of adequate resources and training perpetuates the historical assimilative policies and interferes with effective law enforcement in addressing modern-day crime.[413]

IV. A Path for the Return to Traditional Law Principles of Justice

This Part examines a path for the return to traditional law principles of justice. It analyzes questions surrounding the application of tribal customary law, the use of traditional law enforcement principles in modern-day tribal court cases, and the implementation of policing based upon the principles of justice and fairness, as well as alternative policing strategies.

A. Questions of Tribal Customary Law Application

As Tribes embark on the path toward the return to traditional law principles of justice, they need to "talk things out" and engage with the community to determine what justice means. How is justice defined? What does it look like? Justice for whom?—The victim? The offender? The relative? The judge? The police officer? The tribal chairman? The child born seven generations from now? All these constituencies and more need to be considered as Tribes continue to apply—or in some cases begin to apply—their customary law principles. Most importantly, they must consider justice from an Indian lens, not a Western legal view.

To make matters more complicated, Tribes need to determine how they are going to respond to modern-day crime. Is customary law appropriately situated to address issues related to modern-day crime? Is the concept of "free will" still relevant in our communities today? What are the social norms today that affect this concept? When are we in a state of harmony? When does the user of controlled substances disrupt harmony? At the point of consumption? Or is harmony disrupted when his actions interfere with another, such as in an impaired driving accident?

412. *Id.*

413. *See supra* Part II.E.

Should we have strict enforcement of laws for serious crimes or for the distribution of controlled substances, like how Tribes enforced the "hunting court" or the "war court"? Does an individual that engages in this conduct choose to relinquish their "free will" once they engage in the conduct? These are questions that tribal community constituencies need to answer.

The easy response to these questions is that Tribes are resilient.[414] Tribal customary law can help address these issues if we approach them from a perspective of restoring harmony. The difficult answer is to do it—to have the difficult conversations, to engage the tribal constituencies, and to implement traditional law enforcement principles in a modern-day context.

B. Traditional Law Enforcement Principles Implemented in a Modern-Day Context

This Part provides an overview of some of the tribal court cases that are implementing traditional law enforcement principles in a modern-day context.

In *Stepetin v. Nisqually Indian Community*,[415] the Nisqually Tribal Court of Appeals addressed the reckless driving charge of a tribal member for speeding on the Nisqually Indian reservation, endangering the lives of community members, and striking and killing a dog. The Nisqually Tribal Court of Appeals determined:

> Rigid rules, fashioned as precedent for adjudications but ignoring the internal dynamics of the tribal community, may not serve justice at all. In contrast, equitable considerations and procedures allowing flexibility in dispute resolutions may often be more responsive to the relational needs of the tribal community.
>
> . . . .
>
> . . . Traditionally, when conduct such as this occurred in the tribal community, it was customary for someone who represented the victim to go the family of the person who had caused the loss and demand satisfaction or payment. If the person refused to make some offering of regret or payment, the event would upset relationships between families and risk starting a feud. If no offering was made, the leader of the community or some respected elder or person of standing in the community would frequently step in and try to settle the dispute.[416]

414. *See supra* Part I.C.6.

415. 2 Nisqually Tribal Ct. App. 224 (1993).

416. *Id.* at 233–34.

Traditional penalties can include "making an offering of regret to the injured family, shaming, or, in the extreme case, banishment."[417] Further, the court stated that it

> would hold, however, that none of these evolutionary changes have overturned or supplanted traditional law where it is practiced and has not been clearly and specifically changed by the Tribe.
>
> . . . .
>
> . . . The courts have also taken over some of the functions originally performed by the tribal elders in providing a forum to resolve disputes in the community and in sanctioning members for conduct the community will not tolerate. In performing any of these functions the court must be fundamentally fair and evenly address the needs of the tribal community in order to maintain legitimacy and respect.[418]

As implemented in this case, it is evident that traditional law is still viable in addressing modern-day dispute resolution. As part of this viability, flexibility coupled with compassion and fairness is integral in the exercise of traditional law enforcement infrastructure.[419]

In *Mille Lacs Band of Ojibwe Indians v. Williams*,[420] the Non-Removable Mille Lacs Band of Ojibwe Indians Court of Appeals addressed the constitutionality of the Band's Exclusion and Removal Ordinance as it applies to a Band member under the Band and Minnesota Chippewa Tribe Constitution as well as whether the ordinance was valid under the Indian Civil Rights Act.[421] The court, utilizing the importance of maintaining relationships rationale, held that a heightened standard of removal for Band members applies "because they possess unique interests in remaining on the Mille Lacs reservation that non-members may not possess."[422] The court remanded the matter back to the lower court to stay the removal petition at issue in the case until a revised Exclusion and Removal Ordinance could be enacted that addressed the issues raised in this matter.[423] The court emphasized that

417. *Id.* at 234.

418. *Id.* at 232–33.

419. *See supra* Part I.A.

420. No. 11-APP 06 (Non-Removable Mille Lacs Band of Ojibwe Indians Ct. App. Jan. 2012).

421. *Id.* at 4, 7.

422. *Id.* at 15–16.

423. *Id.* at 17.

> it could certainly impair a Band member's rights to participate in the exercise of his "religion" if he was desirous of learning the traditional ways of the Anishinabe [sic] and his access to the patrimony necessary for practicing these ways was defeated by his inability to come on to the reservation. The Court also believes that the right of a person to live with his child and raise his child is that type of intimate relationship that many Courts have recognized as being within that core group of persons whom a person has a [F]irst [A]mendment right to live with and associate with. . . .[424]

As utilized in this case, the process of maintaining kinship and community relationships in furtherance of traditional methods of law enforcement implementation is exemplified. As the Band member was able to learn the principles of harmony through the engagement of his responsibilities and obligations of our societal, kinship, and clan systems as traditional governance, the court was able to address the negative behavior of the individual while specifically concentrating on the expected behavior of the community.

In *Navajo Nation v. Blake*,[425] the Navajo Nation Supreme Court examined the legitimacy of a sentence requiring imprisonment and restitution after a defendant pled guilty to the crimes of criminal damage and criminal entry.[426] The court reasoned that

> [o]ur modern criminal law, as it is found in the Navajo Nation Criminal Code, is foreign to traditional Navajo society. Navajos, traditionally, did not charge offenders with crimes in the name of the state or on behalf of the people. What are charged as offenses today were treated as personal injury or property damage matters, and of practical concern only to the parties, their relatives, and, if necessary, the clan matriarchs and patriarchs. These "offenses'" were resolved using the traditional Navajo civil process of "talking things out." *Nalyeeh* (restitution) was often the preferred method to foster healing and conciliation among the parties and their relatives. The ultimate goal being to restore the parties and their families to *hozho* (harmony).[427]

In reversing the district court and remanding the case for a new hearing, the court concluded that the trial court "should warn the defendant that it may disregard the agreement and impose the full sentence allowed by law before accepting the plea. If the defendant still

424. *Id.* at 5.

425. No. SC-CR-04-95, 1996 Navajo Sup. LEXIS 5 (Navajo Nov. 5, 1996).

426. *Id.* at *1–2.

427. *Id.* at *4–5.

wishes to enter a guilty plea, the court should proceed to sentence."[428] In this case, the importance of talking things out was emphasized through the embodiment of the principle of how we carefully approach each other as individuals. In this way we can understand that dispute resolution, in an attempt to restore harmony to the community, is one of the most critical functions of traditional governance.[429]

In *In re D. P.*,[430] the Crownpoint District Court (Navajo Nation) addressed the concept of restitution in a juvenile proceeding. The court discussed the "central ideas of punishment" under the Navajo tradition, which "were to put the victim in the position he or she was before the offense by a money payment, punish in a visible way by requiring extra payments to the victim or the victim's family," and give the offender "the means to return to the community by making good his or her wrong." The court concluded that "not only is restitution permitted under Navajo custom law, but indeed it was so central to Navajo tradition in offenses that it should be presumed to be required in any juvenile disposition."[431]

In this case, the settlement of the dispute was achieved through restitution as the desired outcome in the exercise of Traditional law enforcement infrastructure.[432]

C. Implement Policing Based upon the Principles of Justice and Fairness

In *Brian Scott Casey v. Muscogee (Creek) Nation*,[433] the Supreme Court of the Muscogee (Creek) Nation examined the principles pertaining to a speedy trial and determined that any test adopted must be consistent with the principles of justice and fairness.[434]

As evidenced by this case, it is important in the revitalization of traditional law principles that the Indian police adequately implement the principles of justice and fairness in law enforcement practice. "Part of the process of healing the community, even the perpetrator, was to talk it out. Denial of guilt injured the community and perpetrator."[435]

428. *Id.* at *8.

429. *See supra* Part I.A.

430. 3 Navajo Rptr. 255 (Navajo D. Ct. 1982).

431. *Id.* at 257.

432. *See supra* Part I.A.8.

433. Case No. SC-2021-11 (Muscogee (Creek) Nation Sup. Ct. 2022).

434. *Id.* at 8–9.

435. FLETCHER, *supra* note 96, at 355–56; *see also* Green Tree Servicing, LLC v. Duncan, 7 Am. Tribal Law 633, 640–42 (Navajo 2008). In *Green Tree*, the Navajo Nation Supreme Court addressed the issue of a binding arbitration clause involving the foreclosure of a tribal member's home. In declining to enforce the binding arbitration clause, the court reasoned as follows:

> The question is whether such an agreement [a binding arbitration clause] is enforceable under Navajo law. Green Tree submits that under Navajo law words are sacred. This Court has upheld contracts if the language is clear and the parties voluntarily entered into the agreement. However, despite the clarity of language, the Court has also stricken agreements if they violate Navajo public policy expressed in our statutory law or in *Diné bi beenahaz'áanii.*
>
> . . . .
>
> There are also Fundamental Law principles that inform Navajo public policy on arbitration agreements in mobile home contracts. The Navajo maxim of *házhó'ógó* mandates "more than the mere provision of an English form stating certain rights . . . and requires a patient, respectful discussion . . . before a waiver is effective. *Házhó'ógó* requires a meaningful notice and explanation of a right before a waiver of that right is effective." *Házhó'ógó* is not man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals. It is "an underlying principle in everyday dealings with relatives and other individuals." . . .
>
> Several other principles are relevant. In a recent case, the Court discussed the Navajo concept of *nábináheezlágo be t'áá lahjį algha' deet'ą,* which is, finality is established when all participants agree that all of the concerns or issues have been comprehensively resolved in the agreement. It is also said that in the process of "talking things out," or meeting the Navajo common law procedural requirement that everything must be talked over, there is a requirement of *ííshjání ádooniił*, that is, making something clear or obvious. . . . Navajo decision-making is practical and pragmatic, and the result of "talking things out" is a clear plan. When faced with important matters, it is inappropriate to rush to conclusion or to push a decision without explanation and consideration to those involved. *Áádóó na'nile'dii éi dooda*, that is, delicate matters and things of importance must not be approached recklessly, carelessly, or with indifference to consequences. This is *házhó'ógó*. If things are not done *házhó'ógó*, it is said that it is done *t'aa bizaka.*
>
> An arbitration clause must be set in the manner of *házhó'ógó* (standard of care), so as to make a clause *ííshjání ádooniił* (clear and obvious), therefore it will not be made *t'aa na'nile'dii* (not recklessly, carelessly or with indifference to consequences) resulting in making the arbitration clause *nábináheezlágo be t'áá lahjį algha' deet'ą* (comprehensive agreement). . . . [T]his Court [has] rejected "any rule that conditions the respectful explanation of rights under Navajo due process on subjective assumption concerning the defendant. This right exists for all defendants in our system."
>
> Finally, these principles must be applied in the context of the importance of a home in Navajo thought. This Court has noted that a home is not just a dwelling, but a place at the center of Navajo life. Based on this principle, the Court scrutinizes

As a result, compassion is a traditional value that needs to be rekindled and exercised by tribal police.[436]

D. Alternative Policing Strategies/Tribal Community Policing Models Coupled with the Utilization of Tribal Customary Law Principles

In the 140 years since the inception of the Indian police force, "detention and imprisonment have risen in prominence as responses to crime in Indian country, and Tribal governments have struggled to reassert their views about the value of reparation, restoration, and rehabilitation."[437] Vine Deloria Jr. suggested that

> in order to achieve a return to a traditional style leadership . . . Indian people must begin by taking families and responsibilities seriously. Indian people need to feel responsible for each other in all of their actions. They need to work for each other outside of formalized structures and government agencies, as was the common practice before IRA tribal governments.[438]

Deloria further advocated for a return to traditional ways, stating, "Everyone in the community knows what their responsibilities are going through the life change process . . . they learn by observing and participating."[439] Deloria closed, "You've got to build up the moral character, but the way you do that is the way we've always done it, by having a community that knows who it is, practices traditions, and everybody looks out for each other."[440]

Tribes need to invest in alternatives to incarceration.[441] This can be accomplished "[b]y addressing the core problems that lead offenders to

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> procedures to make sure they protect a homeowner's ability to maintain a healthy home and family.

Green Tree, 7 Am. Tribal Law at 640–42 (citations omitted).

436. NAT'L AM. INDIAN CT. JUDGES ASS'N, *supra* note 208, at 44 ("Indian Courts appear and act much as their Anglo counterparts, and tribal tradition dominates nowhere that could be discerned. The largest remnant of tradition that exists seems to rest in the discretion of the tribal judges. Many people said the informality and compassion that a judge exhibits to an individual defendant is a traditional way in which problems are resolved in the tribe.").

437. ROADMAP, *supra* note 85, at xxii.

438. Deloria, *supra* note 32.

439. *Id.*

440. *Id.*

441. ROADMAP, *supra* note 85, at xxii ("In recent years, the [Tribal Law and Order Act] and [Violence Against Women Act Reauthorization] have allowed Tribal governments to regain significant authority over criminal sentencing. But more could be done. By investing in alternatives to incarceration, the Commission also is hopeful that significant cost savings in Federal and State resources can be realized.").

crime (which may include substance abuse, mental health problems, and limited job market skills) and by helping them develop new behaviors that support the choice to not commit crimes."[442]

Tribes need to establish culturally appropriate services "to develop and enhance drug courts, wellness courts, residential treatment programs, combined substance abuse treatment–mental health care programs, electronic monitoring programs, veterans' courts, clean and sober housing facilities, halfway houses, and other diversion and reentry options, and to develop data that further inform the prioritization of alternatives to detention."[443] As Jim Harding explained,

> "[P]olicing issues have lesser significance if social problems are dealt with by methods other than the criminal justice system." What is needed in most Aboriginal communities is more help to local people, and not criminalization of the underlying social, economic, and political problems. Mediation is much more crucial than prosecution.[444]

Tribes also need to develop and implement culturally appropriate "alternative policing strategies such as community-oriented policing [consisting of] de-emphasis on the chain-of-command, decentralization of authority, foot patrol, reorientation of traditional patrolling strategies, neighborhood police stations, problem solving training for officers, or formal policy statements indicating an adherence to such an alternative philosophy."[445]

Lastly, Tribes need to develop more community policing. To implement this principle "trust and mutual respect between police and the communities they serve is core."[446] The "Coffee with a Cop" model implemented by the Pima-Maricopa Indian Community is one way to build trust and learn about the community's needs.[447]

442. *Id.* at xxiii.

443. *Id.* at xxiv.

444. Jim Harding, *Policing and Aboriginal Justice*, 33 CAN. J. CRIMINOLOGY 363, 372 (1991) (quoting PAUL HAVEMANN, KEITH COUSE, LORI FOSTER & RAE MATONOVICH, LAW AND ORDER FOR CANADA'S INDIGENOUS PEOPLE 45 (1985)).

445. BARKER, *supra* note 19, at 125.

446. DEP'T OF JUST. CMTY. ORIENTED POLICING SERV., PROMISING PRACTICES IN TRIBAL COMMUNITY POLICING 1 (2016).

447. *Id.* at 12.

CONCLUSION

In the implementation of police reform in Indian Country, Tribes need to be included in the national conversation efforts on police reform.[448] This is extremely important because as shown in this Article, the bureaucratic system of oppression needs to be amended to release Tribes from the burdens of assimilative policy. In addition, federal appropriations are needed to rebuild the traditional tribal justice systems that were outlawed, criminalized, and diminished. To revitalize our traditional laws, governance structures, and our kinship and clan systems we need to support our warriors that preserved our languages, cultures, and traditions. We also need to be patient and support our governments, courts, and law enforcement personnel as they reengage with our traditional laws and structures. As Matthew L.M. Fletcher opined, "The work of healing was more important than the security function. Healing helped to restore harmony." He asks us to "[i]magine a police department that heals as well as it protects and serves."[449] Only then will Indian police forces be able to shed the designation of being "agents of assimilation" and truly become "agents of healing."

448. Fletcher, *supra* note 22, at 1449 ("But successful reform must go further than slogans and powerful emotions. It may even require a reconsideration of basic theoretical principles of government that many Americans accept implicitly.").

449. *Id.* at 1481, 1451.