21st Century Indians: The Dilemma of Healing

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

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

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always possessed an irrevocable arrogance toward divergent philosophical views.

So let us begin.

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

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

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

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

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

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

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

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

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

6. *See* 25 U.S.C. § 336 (2006).

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

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

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

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

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

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

11. *See id.*

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

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

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

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

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

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

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

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

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

18. *See* 25 C.F.R. §§ 11.400-11.454.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28. 25 U.S.C. §§ 461-480 (2006).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

35. *See id.*

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

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

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

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

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

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

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

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

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

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

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

So our tour requires a moment of reflection.

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

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

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

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

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

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

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

51. *See id.* at 24.

52. *See id.* at 35.

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

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

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

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

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

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

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

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

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

59. Most notably, the cactus-sacrament Peyote.

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

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

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