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## COMMENTS

# Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities

*You have noticed that everything an Indian does is in a circle, and that is because the Power of the World always works in circles, and everything tries to be round. . . . The Sky is round, and I have heard that the earth is round like a ball, and so are all the stars. The wind, in its greatest power, whirls. Birds make their nests in circles, for theirs is the same religion as ours. . . . Even the seasons form a great circle in their changing, and always come back again to where they were. The life of a man is a circle from childhood to childhood, and so it is in everything where power moves.*<sup>1</sup>

Consistent with this holistic, inclusive perception of the universe, many Native American communities view crime as a problem which cannot be resolved on a purely individual level.<sup>2</sup> Although the mainstream American justice system functions, in some part, with the understanding that crime has an effect on the entire community in which it occurs, the overwhelming majority of the criminal justice system focuses on individual punishment of the wrongdoer without inclusion of the community as a whole.<sup>3</sup> Pressured by the influence of the predominant criminal punishment infrastructure and forcefully imposed court systems based on mainstream American ideals of justice, most tribes remain governed by a justice system that fails to take into account Native American conceptions of justice and the nature of law.<sup>4</sup>

As a result of the efforts of Native American groups to reinstitute cultural traditions, many tribal court systems and private groups began to experiment with more traditional, community inclusive modes of conflict resolution during the 1980s.<sup>5</sup> As the community justice movement grew both within and outside the Native American context, statistical evidence suggested that community or traditional dispute resolution resulted in an increased sense of satisfaction and healing

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1. Black Elk, First People-The Great Circle, <http://www.firstpeople.us/FP-Html-Wisdom/BlackElk.html>. (last visited on October 23, 2007) (web address is case sensitive).

2. John M. Ptacin, Jeremy Worley & Keith Richotte, *The Bethel Therapeutic Court: A Study of How Therapeutic Courts Align With Yup'ik and Community Based Notions of Justice*, 30 AM. INDIAN L. REV. 133 (2005).

3. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 21 (2002).

4. Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 878 (1999).

5. *Id.* at 877.

on the part of the victim.<sup>6</sup> In addition, a majority of offenders also felt satisfaction in the process.<sup>7</sup> This satisfaction is likely to decrease the chance of offender recidivism.<sup>8</sup> The potential success of such programs has prompted many Native American court systems and nonprofit groups across the country to implement traditional dispute resolution programs.<sup>9</sup> While such traditional community dispute resolution processes are most often utilized in the context of less serious offenses, some Native American communities have used a traditional resolution process to foster healing in more serious cases, such as those involving violent crime and sexual assault.<sup>10</sup> The implementation of traditional dispute resolution processes in Native American communities across North America illustrates an increasing desire among American Indians to recreate a culturally relevant system of justice.<sup>11</sup> The reinstitution of traditional methods of dispute resolution, such as the use of peacemaking circles, has also allowed tribal groups to restructure their methods of dealing with crime in a way that promotes healing and empowerment of the victim and the community, as well as rehabilitation and reintegration of the offender.<sup>12</sup>

An examination of Native American cultural definitions of justice illustrates the cultural relevance of traditional dispute resolution processes. Because these alternative processes focus largely on community inclusion and the importance of party healing after a crime, concepts central to Native American worldview, traditional dispute resolution is superior to the mainstream adversarial court system for handling many criminal matters in the Native American context. The successes of traditional dispute resolution processes in Native American communities are also evidence of the potential cross cultural applications of such processes within the mainstream criminal justice system.

## I. THE HISTORICAL INSTITUTION OF AN ADVERSARIAL SYSTEM OF JUSTICE

In his 1893 article, Frederick Jackson Turner described the "Indian frontier" as a threat to American expansion, stating that the presence of Native Americans on the frontier was a "consolidating agent . . . a common danger, demanding united action."<sup>13</sup> In addition to military efforts, the United States government worked to force tribal suppression and assimilation of Native Americans into Western

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6. Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 276 (2005).

7. *Id.*

8. *Id.* at 264.

9. Costello, *supra* note 4, at 900.

10. Christine Sivell-Ferri, *The Victims' Circle: Sexual Assault and Traumatization in an Ojibwa Community*, in ABORIGINAL PEOPLES COLLECTION, THE FOUR CIRCLES OF HOLLOW WATER 90 (1997).

11. Costello, *supra* note 4, at 877.

12. James Coben & Penelope Harley, *Intentional Conversations about Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235, 245 (2004).

13. FREDERICK JACKSON TURNER, *The Significance of the Frontier in American History*, in THE TURNER THESIS: CONCERNING THE ROLE OF THE FRONTIER IN AMERICAN HISTORY (George Rogers Taylor ed., 1956).

society.<sup>14</sup> Settlers of Indian territories forced assimilation through cultural and religious instruction that emphasized the perceived superiority of Western cultural and religious ideals over the traditional Native American belief system.<sup>15</sup> The pervasive view of equality in the Native American conception of government and dispute resolution was particularly foreign to the white colonists, who worked hard to impose systems of hierarchy into tribal societies.<sup>16</sup> An example of the White efforts to squelch the traditional Indian framework of equality lies in the settlers' "solution" for the status of women in Native American society.<sup>17</sup> In most traditional Native American societies, women played a central role in governmental decisions.<sup>18</sup> When a ruling chief died in the Iroquois tribe, for example, it was a delegation of women who chose the candidates for the next ruling chief.<sup>19</sup> White observers of Iroquois society, unaccustomed to such equality, commented that "[w]omen received the honor and respect that no other people gave their women."<sup>20</sup> Settlers who encountered Native American gender roles in practice viewed their own Europeanized, hierarchical society as superior to these Indian notions of equality.<sup>21</sup> This perceived superiority fueled efforts of the U.S. government to teach Native American men and women to adhere to "proper sex roles" that conformed to European notions of gender in society.<sup>22</sup> The "successes" of the U.S. government in redefining the equality that existed in traditional Native American gender roles diminished the status and power of women in American Indian society and created a disparity that still exists today.<sup>23</sup>

The United States government, sparked by the increasing political support for westward expansion, also sought to impose Western ideals of justice on Native American tribes.<sup>24</sup> The U.S. government carried out this goal by instituting adversarial legal systems modeled on the established United States judicial system within Native American communities.<sup>25</sup>

The creation of adversarial justice systems by agents of American jurisprudence illuminated many of the conflicts between Western and Native American

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14. Irene S. Vernon, *Claiming Christ: Native American Post-Colonial Discourses*, 24 MELUS 75, 80 (1999).

15. *Id.*

16. Carla Christofferson, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of The Indian Civil Rights Act*, 101 YALE L.J. 169, 178 (1991) ("One California Indian agent reported that she 'hoped to correct' the Indian woman's practice of retaining her maiden name and passing it on her daughters.").

17. *Id.*

18. *Id.* (citing JUDITH K. BROWN, *Iroquois Women: An Ethnohistoric Note*, in TOWARD AN ANTHOLOGY OF WOMEN 239 (Rayna R. Reiter ed., 1975)).

19. *Id.*

20. *Id.* (citing RICHARD P. BOWLES ET AL., THE INDIAN: ASSIMILATION, INTEGRATION OR SEPARATION? 176-77 (1972)).

21. Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK L. REV. 327, 357-58 (1987).

22. *Id.*

23. Christofferson, *supra* note 16, at 178.

24. Robert Yazzie, "Life Comes From It:" Navajo Justice Concepts, 24 N.M. L. REV. 175, 177 (1994). The United States government instituted Western legal systems on Native American lands beginning in the late nineteenth century. The Navajo Nation court system, for example, was established by the U.S. government in 1893. *Id.*

25. *Id.*

ideologies about the nature of law.<sup>26</sup> The United States imposed its ideology because of the pervading view that a Western legal system represented the correct way to administer justice, despite any conflicts with native culture that the imposition of such a system might cause.<sup>27</sup> This divergence remained largely unexamined at the end of the nineteenth and early twentieth centuries, when Indian court systems were being formed.<sup>28</sup>

The differences between Native American and mainstream Western justice and concept of law can be explained in terms of the concepts of "horizontal" and "vertical" justice.<sup>29</sup> Under this framework, the adversarial system of mainstream American justice can be classified as a vertical system.<sup>30</sup> In a vertical system, the legal structure is situated upon ascending levels of hierarchies and power.<sup>31</sup> Judges in an adversarial system have the power to determine the outcome of conflict, a decision that results in a win-loss situation for the parties.<sup>32</sup> The parties to a dispute or criminal action, based on their low position on the hierarchical structure, do not have any significant power in determining the outcome of the dispute.<sup>33</sup>

A horizontal system of justice, by contrast, distributes power equally without regard to hierarchy.<sup>34</sup> Under this model, participants within a conflict, whether direct or indirect, form equally important links in the chain of conflict resolution.<sup>35</sup> Robert Yazzie, Chief Justice of the Supreme Court of the Navajo Nation, likens a horizontal justice system to a circle.<sup>36</sup> Yazzie explains that "[i]n a circle, there is no right or left, nor is there a beginning or an end; every point (or person) on the line of a circle looks to the same center as the focus."<sup>37</sup> According to Yazzie, "[t]he circle is the symbol of Navajo justice because it is perfect, unbroken, and a simile of unity and oneness. It conveys the image of people gathering together for discussion."<sup>38</sup>

The vertical, adversarial systems established by the U.S. government failed to account for the cultural importance of the horizontal system of justice, choosing instead to focus on the perceived superiority of the adversarial system as the "right" conception of justice and the law.<sup>39</sup> The imposition of Western style courts alienated tribal societies from the laws which governed them.<sup>40</sup> Recent institutionalization of dispute resolution methods that utilize traditional concepts of justice, such as peacemaking circles, represents a move within Native Ameri-

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26. *Id.*

27. William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 Ohio St. L.J. 1, 32-34 (2005).

28. *Id.*

29. Yazzie, *supra* note 24, at 177.

30. *Id.* (citing MICHAEL BARKUN, *LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY* 16-17 (1968)).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 180.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *See id.*

40. Costello, *supra* note 4, at 878.

can communities to replace the adversarial systems imposed by the United States' colonization efforts with culturally relevant systems of justice.

## II. SUCCESSES OF ADVERSARIAL SYSTEM OF JUSTICE AMONG NATIVE AMERICAN COMMUNITIES

Alternative Dispute Resolution (ADR) processes are particularly necessary for Native American communities as the adversarial criminal justice system has largely failed in the tribal context. Native American communities experience per capita violence that is more than twice the rate of per capita violence for the majority of people within the United States.<sup>41</sup> American Indians are also overrepresented among victims of violent crimes as compared to their share of the general population.<sup>42</sup> Approximately one in twenty-five Native Americans ages eighteen and older are under the jurisdiction of the criminal justice system at any given time, a number that is 2.4 times higher than the per capita rate for white Americans.<sup>43</sup> The comparatively high rate of Native American involvement with the criminal justice system, both as victims and as offenders, reflects the great need for examination and change of the existing structure.

In addition to the greater rate of crime generally, violence against women is a particular problem among Native American populations. "Native American women experience the highest rate of violence of any group within the United States."<sup>44</sup> As the *Seminole Tribune* reported in June 1999, "Sexual assault and domestic violence are so widespread in Indian Country that spousal abuse is occurring in younger and younger couples and it is not uncommon for date rape or date physical abuse to occur among teenagers."<sup>45</sup> Accordingly, large numbers of both victims and perpetrators of domestic violence and sexual assault crimes are in need of services within the criminal justice system in all stages of the process, including law enforcement, adjudication, sentencing, rehabilitation, and reintegration.<sup>46</sup>

Native American women, as compared to white American women, are at a statistically increased risk of being victims of violent crime.<sup>47</sup> Therefore, crimes against women provide a poignant illustration of the mainstream justice system's failure in Native American communities.

In a study about the incidence and effects of sexual assault on Native American women, the American Indian Women's Health Project found that 75 percent of Native American women have experienced some sort of sexual assault in their lifetimes.<sup>48</sup> Despite this staggering number, the researchers found that, when vic-

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41. LAWRENCE A. GREENFELD & STEPHEN K. SMITH, AMERICAN INDIANS AND CRIME, U.S. Department of Justice, Office of Justice Programs, February 1999 at v.

42. *Id.* at 2.

43. *Id.* at iii.

44. Lisa Bhungalia, *Native American Women and Violence*, <http://www.now.org/nnt/spring-2001/nativeamerican.html> (last visited on October 31, 2007).

45. Charon Asetoyer, *SEMINOLE TRIBUNE*, June 17, 1999, Volume XX, Number 41.

46. See Bhungalia, *supra* note 44, at 1.

47. *Id.* While statistics demonstrate this disparity, the extent of the victimization is actually unknown, because research suggests that Native American women often do not report violence against them. *Id.*

48. *Id.*

timized, the majority of Native American women did not report the assault “due to cultural barriers, a high level of mistrust for [W]hite dominated agencies, fear of familial alienation, and a history of inactivity by state and tribal agencies to prosecute crimes committed against them.”<sup>49</sup>

In order to understand the extent to which the existing mainstream method of adjudicating crimes involving violence against women has failed, one must understand the shortcomings of the entire system, beginning with the law enforcement response to these crimes. Of the female victims who choose to report domestic abuse, sexual assault and other crimes to police, many report that police did not provide adequate protection or follow-up services in response to the women’s calls.<sup>50</sup> Common complaints among Native American women are that the police often do not respond in a timely manner to their calls and that, when they do respond, police are often disbelieving and dismissive of women’s stories.<sup>51</sup> The Report on Violence Against Alaskan Women details the story of one woman who called the police after being held hostage and dragged across a lawn by her intimate partner.<sup>52</sup> The police responded by telling the victim that her story was not credible, and, to support her story, she should undress and show them her bruises.<sup>53</sup> After examining her bruises, the responding police officers falsely reported that the woman had been drunk during the attack even though a hospital report stated otherwise.<sup>54</sup>

The frustration and trauma resulting from unsatisfactory police response to domestic violence and other crimes against women often compound as the case moves through the Native American court system. As in all situations of domestic violence and crimes against women, participation in an adversarial trial of the offender poses the risk of inflicting further emotional trauma to the victim.<sup>55</sup> This risk of further trauma to the victim stems in part from the trial’s focus on the wrongdoer,<sup>56</sup> while the victim’s role is very limited.<sup>57</sup> She is allowed to testify against her offender as a trial witness and, later, may give a victim impact statement at the sentencing hearing.<sup>58</sup> While the resulting punishment may benefit some victims, the adversarial court process as a whole provides no meaningful opportunity for healing.<sup>59</sup> Additionally, the victim’s lack of control over the process may result in a further loss of empowerment and a feeling of re-victimization.<sup>60</sup>

In addition to the general negative effects of a trial on victims, Native American victims of domestic violence and crimes against women often suffer particularized disadvantages due to the underdeveloped framework within the tribal con-

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 458 (2006).

56. *Id.* at 459.

57. *Id.* at 458.

58. *Id.*

59. *Id.*

60. *Id.* at 460.

text for dealing with these crimes.<sup>61</sup> Under 18 U.S.C. § 1153, tribes possess exclusive right to prosecute crimes of domestic violence between Indians on Indian territory.<sup>62</sup> Pursuant to this statute, most domestic violence cases are resolved in tribal court.<sup>63</sup> In the event that the perpetrator commits a major crime<sup>64</sup> against the victim of the domestic violence, however, the statute provides that federal courts share jurisdiction to prosecute the offense.<sup>65</sup>

While it seems natural that this concurrent jurisdiction would boost the effectiveness of prosecution and sentencing, both tribal and federal prosecutions of domestic violence in the Native American context have proven largely ineffective.<sup>66</sup> Problems created by the concurrent jurisdiction include the barring of victims from the well developed domestic violence protections that exist in many state courts and an ultimate failure to prosecute by district attorneys with little domestic violence experience.<sup>67</sup> Victims of domestic violence offenses not designated as "major crimes" face similar problems as a result of the minimal sentencing authority available to the tribal court systems.<sup>68</sup> When viewed in conjunction with ineffective and unsympathetic police protection, the adversarial court system's lack of effectiveness in these cases is powerfully detrimental to Native American victims of domestic violence and other crimes against women.

The ineffectiveness of the adversarial court system in cases of domestic violence and crimes against women illustrates the broader failure of the mainstream criminal justice system in dealing with crime of all types. The overrepresentation of Native Americans in prison reflects this failure.<sup>69</sup> Such evidence of the ineffectiveness of the existing criminal justice system in the Native American context strongly supports widespread establishment of culturally relevant alternatives to the mainstream court process.

### III. COMMUNITY/TRADITIONAL/RESTORATIVE JUSTICE AMONG NATIVE AMERICANS

Although scholars use a variety of terms to describe the non-adversarial approach to criminal conflict resolution traditionally utilized by many Native American groups, many writers categorize these traditional processes as types of restor-

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61. Sumayyah Waheed, *Domestic Violence on the Reservation: Imperfect Laws, Imperfect Solution*, 19 BERKELEY WOMEN'S L.J. 287, 298 (2004).

62. *Id.* at 289 (citing 18 U.S.C. § 1153 (2000)).

63. Waheed, *supra* note 61, at 292.

64. Major crimes include:

murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury . . . an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country. . . .

18 U.S.C. 1153(a) (2003).

65. *Id.* (Statute limits tribal jurisdiction in situations of major crimes).

66. Waheed, *supra* note 61, at 290.

67. *Id.*

68. *Id.*

69. LAWRENCE A. GREENFELD & STEPHEN K. SMITH, AMERICAN INDIANS AND CRIME, U.S. Department of Justice, Office of Justice Programs, February 1999.



ative justice.<sup>70</sup> Although a precise definition is difficult to verbalize because of the many shapes that the process can take, restorative justice often combines, “within a criminal justice framework[,] elements of mediation and reparative justice.”<sup>71</sup> Restorative justice processes work toward “restoring victims, repairing harm, and re-weaving the fabric of human relationships in a community.”<sup>72</sup> Howard Zehr, often called the “‘grandfather’ of restorative justice”<sup>73</sup>, explains the difference between an adversarial process and a restorative process in terms of the questions that each method of resolution seeks to answer.<sup>74</sup> The existing retributive criminal justice seeks to answer the following questions: (1) “What laws have been broken?”; (2) “Who did it?”; and (3) “What do they deserve?”<sup>75</sup> A restorative justice approach, on the other hand, asks: (1) “Who has been hurt?”; (2) “What are their needs?”; and (3) “Whose obligations are these?”<sup>76</sup>

While the goal of the mainstream criminal justice system is to punish, isolate, and perhaps rehabilitate the offender, the ultimate goal of restorative justice is to promote healing in the parties affected by the crime.<sup>77</sup> In accomplishing this, restorative justice “focuses on the impact of the offender’s actions on the victim and a defined community. . . .”<sup>78</sup> This focus differs from that of the criminal justice system, which “abstractly centers on the harm suffered by the state.”<sup>79</sup>

Zehr discussed the surfacing of the restorative process in American law in his 1990 book *CHANGING LENSES*.<sup>80</sup> He suggested that the modern restorative justice movement began in the early 1970s, when a group of Mennonites petitioned a judge to arrange a meeting of victims and offenders in a vandalism case.<sup>81</sup> During the meeting, the Mennonites proposed victims and offenders could work together to negotiate an appropriate amount of restitution.<sup>82</sup> This idea of a joint effort by all parties of a crime became a cornerstone of restorative justice as an alternative to the mainstream criminal justice system. In providing a history of the movement, Zehr also pointed to Native American conceptions of dispute resolution as playing a central role.<sup>83</sup> Modern restorative justice’s reliance on the horizontal, community centered aspects of Native American legal tradition may explain why many tribal groups chose to institute traditional, restorative type resolution processes at the same time as restorative justice gained popularity in the non-Indian context.

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70. Coben & Harley, *supra* note 12, at 240.

71. HOWARD ZEHR, *CHANGING LENSES* 160 (3d. ed. 2005).

72. Coben & Harley, *supra* note 12, at 245.

73. *Id.* at 243 (citing DANIEL VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE* 26 (Anderson Publishing 1997)).

74. ZEHR, *supra* note 3, at 21.

75. *Id.*

76. *Id.*

77. Mills, *supra* note 55, at 463 (citing GERRY JOHNSTONE, *RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES* 69 (2002)).

78. *Id.*

79. *Id.* (citing Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 16-17 (2003)).

80. See generally ZEHR, *supra* note 71.

81. *Id.* at 158-60.

82. *Id.* at 159.

83. ZEHR *supra* note 3, at 62.

Restorative justice processes can be divided into three main categories.<sup>84</sup> The first is victim-offender mediation.<sup>85</sup> During this type of restorative process, a specially trained mediator first meets with both victim and offender separately.<sup>86</sup> In the separate sessions, the mediator discusses the crime with each party and explains the victim-offender process to each party.<sup>87</sup> After the individual sessions, the victim and the offender meet in a joint session.<sup>88</sup> In this joint session, the mediator is responsible for ensuring a safe and comfortable environment.<sup>89</sup> Participation in victim offender mediation is generally restricted to only the victim and the offender, without the presence of other parties.<sup>90</sup>

By meeting face to face with the offender, the victim has an opportunity to tell her story.<sup>91</sup> The victim can fully express the impact of the crime to the offender.<sup>92</sup> The speed and manner in which the victim communicates with the offender is largely determined by the victim.<sup>93</sup> The victim's ability to explain her perspective of the crime on her own terms makes the victim an active part of the process.<sup>94</sup> The victim's increased control and participation in the victim-offender mediation facilitates healing for victims and may prevent the marginalization that many victims feel accompanies participation in a trial.<sup>95</sup> Victim-offender mediation also promotes healing by giving the victim the opportunity to engage in "self-reflection on the crime and the resulting traumatization . . . ."<sup>96</sup> During the mediation, the victim is able to "break[ ] . . . down the elements of the event that could be controlled by the victim or may be controlled to avoid similar victimizations in the future . . . ."<sup>97</sup> "Finally, interacting with [the] offender[] [allows victims] to draw out their perspectives, and possibly [receive] an apology or signs of remorse."<sup>98</sup>

By allowing the victim an affirmative opportunity to participate in the process and a full opportunity to heal, the victim-offender model also decreases the likelihood that the crime victim will become an offender in the future. According to researchers in the area of crime "victimology,"<sup>99</sup> individuals who have been crime victims stand an increased chance of becoming offenders.<sup>100</sup> By creating an environment in which victims can heal from the mental and emotional trauma of a

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84. Coben & Harley, *supra* note 12, at 240.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 241.

91. *Id.* at 240-41.

92. *Id.*

93. *Id.*

94. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse & Apology Into Criminal Procedure*, 114 YALE L.J. 85, 137-39 (2004).

95. *Id.*

96. Mills, *supra* note 55, at 463.

97. *Id.*

98. *Id.*

99. *Id.* at 462.

100. *Id.* at 465 (citing Miriam K. Ehrensaft et al., *Intergenerational Transmission of Partner Violence: A 20-Year Prospective Study*, 71 J. CONSULTING & CLINICAL PSYCHOL. 741 (2003)).

crime, victim-offender mediation offsets the risk that participating victims will fall into a destructive cycle of criminal behavior.<sup>101</sup>

Victim-offender mediation also benefits offender rehabilitation. By participating in the process, the victim and offender are able to view one another as individuals, rather than in the impersonal roles of a trial.<sup>102</sup> Due to the highly personal nature of the process, offenders are more likely to be affected by the impact of their actions on the victim.<sup>103</sup> The ideal result is that the offender, after hearing the victim speak of the crime's impact, will experience a positive motivation to reform.<sup>104</sup> The potential for successful reformation is increased when the offender leaves the mediation with a feeling that society is ready to offer acceptance in return for the offender's positive actions.<sup>105</sup> A decreased chance of recidivism based on this resulting motivation to reform benefits both the individual offender and the community in which he lives. Participation in the victim-offender model of restorative justice has "the potential to change an offender's perspective—to make them fully appreciate the human side of the harm they have done—which can change their behavior when an opportunity for crime arises in the future."<sup>106</sup>

As discussed above, offenders have often been victims of crimes themselves. An opportunity to heal from the situations of victimizations that may have contributed to a pattern of criminal behavior is an important element of rehabilitation.<sup>107</sup> A restorative justice process allows the "offender to express her feelings of rage about those in her life who have harmed her in an egalitarian setting that requires her also to acknowledge how she has perpetuated that abuse by her crime, and thus discourages its repetition in the future."<sup>108</sup>

The second primary category of restorative justice is family, or group, conferencing.<sup>109</sup> As in victim-offender mediation, family conferencing brings the victim and the perpetrator of a crime together to promote healing.<sup>110</sup> In a family conference, however, participation in the process is open to the families of both the victim and the offender.<sup>111</sup> Family members provide support for both parties during the process. The goals of family conferencing are largely future focused.<sup>112</sup> The mediator "encourages exploration by all parties of how the offender can be supported with a view to keeping out of trouble in the future."<sup>113</sup>

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101. *Id.* at 465.

102. Coben & Harley, *supra* note 12, at 241.

103. *Id.*

104. *Id.*

105. *Id.*

106. Paul H. Robinson, *The Virtues of Restorative Processes, The Vices of "Restorative Justice,"* 2003 UTAH L. REV. 375, 375 (2003).

107. Marie A. Failing, *Lessons Unlearned: Women Offenders, The Ethics of Care, and the Promise of Restorative Justice*, 33 FORDHAM URB. L.J. 487, 523 (2006) (citing Olga Botcharova, *Implementation of Track Two Diplomacy*, in FORGIVENESS AND RECONCILIATION: RELIGION, PUBLIC POLICY, & CONFLICT TRANSFORMATION 281-83 (Raymond G. Helmick & Rodney L. Petersen eds., 2001)).

108. *Id.*

109. Coben & Harley, *supra* note 12, at 241.

110. *Id.* at 241.

111. *Id.*

112. *Id.* at 242.

113. *Id.*

The third type of restorative justice, and the type most widely utilized in Native American communities is the peacemaking circle.<sup>114</sup> Participants in the circle process, as in the family conferencing model, include the victim, the offender and their families.<sup>115</sup> The circle model differs in that members of the community are also invited to participate in the peacemaking process.<sup>116</sup> The ideology behind the modern peacemaking circle draws heavily from Native American philosophies of justice and dispute resolution.<sup>117</sup> Inclusion of community, for example, is based on the Native American idea that "a criminal offence represents a breach of the relationship between the offender and the victim as well as the offender and the community."<sup>118</sup> Consistent with Native American conceptions of justice, the peacemaking circle does not treat the criminal act as an isolated incident that demands merely retributive action.<sup>119</sup> Rather, any resolution must take an inclusive approach, considering the impact of the crime and possible redress on all parties and the community as a whole.<sup>120</sup> According to both traditional Native American philosophies and proponents of the modern circle movement, members of the community are in the best position to address the social causes of the crime.<sup>121</sup> Thus, their participation in the process is integral to meaningful resolution.<sup>122</sup>

The peacemaking circle process combines these traditional Native American philosophies of justice with modern alternate dispute resolution methods.<sup>123</sup> A peacemaking circle process incorporates components of interest-based negotiation, mediation, and consensus building.<sup>124</sup> The end product that results from this combination of Western ADR concepts and Native American philosophies is "neither wholly western, nor Aboriginal, but combine[s] principles and practices from both in creating a community-based process to respond to conflict in a manner that advances the well-being of individuals, families, and the community."<sup>125</sup>

The underlying themes of restoration of relationships and community participation that pervade the peacemaking circle process have proven particularly appealing to Native American governmental bodies and organizations. The goals of the peacemaking circle, much like the goals of restorative justice are "to restore dignity, to bring peace to the parties involved, and to sustain community health by repairing relationships damaged in conflicts."<sup>126</sup> Unlike a criminal trial, the cen-

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114. *Id.*

115. *Id.* at 242.

116. *Id.*

117. Janelle Smith, *Peacemaking Circles: The "Original" Dispute Resolution of Aboriginal People Emerges as the "New" Alternative Dispute Resolution Process*, 24 HAMLINE J. PUB. L. & POL'Y 329, 345 (2003).

118. *Id.* at 344 (quoting Heino Lillo, *Circle Sentencing: Part of the Restorative Justice Continuum*, International Institute for Restorative Justice Practices, in "Dreaming of a New Reality," THIRD INTERNATIONAL CONFERENCE ON CONFERENCING CIRCLES AND OTHER RESTORATIVE PRACTICES 1, 2 (2002)).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 346.

123. *Id.* at 345 (citing BARRY STUART, BUILDING COMMUNITY JUSTICE PARTNERSHIPS: COMMUNITY PEACEMAKING CIRCLES, Department of Justice Canada, 4 (DOJ Canada 1997)).

124. *Id.* at 344-45.

125. *Id.* (quoting STUART, *supra* note 123, at 4).

126. Costello, *supra* note 4, at 878 (citing Diane LeResche, *Editor's Notes*, 4 MEDIATION Q. 321, 321 (1993)).

tral aim of the peacemaking circle is conciliation rather than punishment.<sup>127</sup> As one scholar notes, "Unlike the Anglo-European legal system, traditional Indian peacemaking focuses not on the guilt of the wrongdoer, but on solving the problems the dispute presents."<sup>128</sup>

#### IV. CASE STUDIES OF RESTORATIVE JUSTICE IN PRACTICE

Although there are common components to Native American restorative justice processes, cultural and institutional differences have resulted in great variation in practical application of restorative justice processes among different tribes.<sup>129</sup> An examination of the varying processes utilized by different tribes illustrates how these different groups have applied the community or restorative justice model to their own unique circumstances. Three examples that are particularly helpful in illustrating the diversity of the model's application are the restorative justice techniques utilized by the Navajo people of the Southwest United States, the Ottawa and Chippewa tribes of Michigan, and the Ojibwa people of northern Manitoba, Canada.

##### A. *Peacemaking Among the Navajo: The Hozhooji Naat'aanii*

The Navajo Nation lies in the Southwest United States, occupying approximately 25,000 square miles in Arizona, New Mexico, and Utah.<sup>130</sup> It is a sovereign Indian nation with established executive, legislative, and judicial branches of government. The population of the Navajo Nation is approximately 220,000 people.<sup>131</sup>

In 1982, the government of the Navajo Nation formed the "Navajo Common Law Project" to research traditional values and methods used by the Navajo people in order to resolve disputes.<sup>132</sup> Researchers participating in the Navajo Common Law Project learned of traditional Navajo peacemaking practices that incorporated traditional wisdom and cultural values as a means of resolving disputes.<sup>133</sup> After studying these practices, the researchers conveyed what they had learned about these traditional dispute resolution processes to the Navajo Judicial Conference.<sup>134</sup>

Excited to adopt a traditional dispute resolution process that could act as an alternative to a mainstream American adversarial approach, the Navajo Judicial Conference used the findings of the Navajo Common Law Project to create the

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127. *Id.*

128. *Id.* at 879-80 (citing Tom Tso, *Moral Principles, Traditions and Fairness in the Navajo Nation Code of Judicial Conduct*, 76 *Judicature*, June-July 1992, at 15, 17).

129. See generally Smith, *supra* note 117.

130. See Robert Yazzie, *Hozho Nahasdlíi – We Are Now in Good Relations: Navajo Restorative Justice*, 9 *ST. THOMAS L. REV.* 117, 118 & n.13 (1996).

131. *Id.* at 118.

132. James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 *AM. INDIAN L. REV.* 89, 92-93 (1983). The phrase "Navajo Common Law Project" comes from an article by Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 *AM. INDIAN L. REV.* 297, 301 (2000).

133. Zion, *supra* note 132, at 92-93 (citation omitted).

134. *Id.* at 97-99.

Peacemaker Court, now known as the Peacemaker Division.<sup>135</sup> Incorporating principles of traditional dispute resolution unearthed by the researchers, the judicial conference also created a set of rules for the newly established Peacemaker Division.<sup>136</sup>

The Peacemaker Court rules and the Peacemaker Division are based largely on the traditional Navajo process of *hozhooji naat'aanii*, or peacemaking.<sup>137</sup> *Hozhooji naat'aanii* is the process by which a *naat'aanii*, or peacemaker, facilitates discussion between parties to a dispute and members of the broader community in order to reach a fair and just resolution.<sup>138</sup> The purpose of the *hozhooji naat'aanii* process is to restore both disputants and community to the state of harmony, or *hozho*, through resolution of the conflict.<sup>139</sup> As in most Native American restorative justice processes, *hozhooji naat'aanii* does not focus on punishment of wrongdoing.

Within the Navajo system, parties to a dispute may choose to have the Peacemaker Division appoint a *naat'aanii* to their case.<sup>140</sup> In order to be eligible to serve as a court-appointed *naat'aanii*, a person must have "the respect of the community of her residence, an ability to work with chapter members, and a reputation for integrity, honesty, humanity and an ability to resolve local problems. . . ."<sup>141</sup> The parties to the dispute may also elect to choose their own *naat'aanii* as long as all parties agree to the peacemaker chosen.<sup>142</sup>

The role of the *naat'aanii* during the peacemaking process is largely that of a conciliator.<sup>143</sup> Under the Peacemaker Court Rules, a *naat'aanii* is "authorized to 'use traditional and customary Navajo methods and other accepted nonjudgmental methods to mediate disputes and obtain the resolution of problems through agreement.'"<sup>144</sup> Throughout the peacemaking, the *naat'aanii* works to steer parties and community participants toward *hozho*.<sup>145</sup>

Although the exact process varies, the majority of *naat'aanii* utilize traditional Navajo values and customs in their facilitation of the peacemaking process.<sup>146</sup> As a result of the continuity of traditional elements within the peacemaking, *hozhooji naat'aanii* sessions tend to follow a similar pattern.<sup>147</sup> A peacemaking session generally begins with a traditional Navajo prayer during which the *naat'aanii* calls upon the spirits to assist in the peacemaking session.<sup>148</sup> Parties then typically sit in a circle or around a table and "talk things out," explaining their various in-

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135. Brown, *supra* note 132, at 301.

136. *Id.* (citing JAMES W. ZION & NELSON J. MCCABE, NAVAJO PEACEMAKER COURT MANUAL 7, 110, Rule 7.2 (1982)) [hereinafter NAVAJO PEACEMAKER COURT MANUAL].

137. Brown, *supra* note 132, at 301.

138. *Id.*

139. *Id.* at 302.

140. *Id.* at 301-02.

141. *Id.* at 303 (citing NAVAJO PEACEMAKER COURT MANUAL, *supra* note 136, at 106, Rule 2.1(a)).

142. *Id.*

143. *Id.* at 305.

144. *Id.* at 303 (quoting NAVAJO PEACEMAKER COURT MANUAL, *supra* note 136, at 103, Rule 2.2(b), 2.3).

145. *Id.* at 304.

146. *Id.*

147. *Id.*

148. *Id.*

terests.<sup>149</sup> Members of the parties' community and family play an active role during the exchange, providing input and support to disputants during the peacemaking process.<sup>150</sup> The *Naat'aanii* often facilitates the peacemaking by offering traditional stories in an attempt to promote *hozho* between peacemaking parties.<sup>151</sup> The *naat'aanii* often relates the Navajo creation story to disputants, in which "the Hero Twins engaged in a lengthy odyssey of trial, assistance-seeking and education before they slew the world's *nayee*, or monsters."<sup>152</sup> Relation of this story conveys the cultural importance of dispute resolution processes to disputants and support participants, and builds the confidence of parties to the process. Working through a culturally and religiously relevant lens, the *naat'aanii* helps the participants in the peacemaking circle to reach a result that promotes *hozho* for the victim, the community, and the offender.

### B. Peacemaking in the "Grand Traverse Band" of the Ottawa and Chippewa Tribes

Inspired by the successes of the Navajo peacemaking system, the Grand Traverse Band, a group which includes Chippewa and Ottawa tribes of Michigan, became the first Indian tribe in Michigan to establish a formal "Peacemaker Court" in 1996.<sup>153</sup> Literally translated, *mnaweejeendiwin*, the Ottawa term for the peacemaking process, means "walking together in a good way."<sup>154</sup> The Ottawa language does not contain a word that is the literal equivalent of the English word "peacemaking" because, according to the Peacemaker Coordinator for the Grand Traverse Band, there was no need in traditional culture for such a word.<sup>155</sup> Within the traditional value structure of the Ottawa, "[s]triving to live together in harmony and solidarity was a concept simply inherent to Ottawa culture."<sup>156</sup>

The *mnaweejeendiwin* of the Grand Traverse Band usually receives cases through a referral by a tribal court judge, a tribal law enforcement officer, a tribal social worker, or the tribal prosecutor's office.<sup>157</sup> The bulk of the cases that the Peacemaker Court handles are juvenile misdemeanor cases, including "minors in possession of alcohol and drugs, truancy, shoplifting, auto thefts, property damage, vandalism, and assault and battery charges."<sup>158</sup> Once the Peacemaker Court receives a referral, the case is assigned to a tribal peacemaker.<sup>159</sup> Peacemakers in the Grand Traverse band are chosen based on their respect among the local community.<sup>160</sup> Maintaining the respect of the community is a crucial element contributing to the integrity of the peacemaker and, by extension, the peacemaking

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149. *Id.*

150. *Id.* at 304-05.

151. *Id.*

152. *Id.* at 305 (citing James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, B.C. INT'L & COMP. L. REV. 55, 79 (1997)).

153. Costello, *supra* note 4, at 877.

154. *Id.* at 876.

155. *Id.*

156. *Id.*

157. *Id.* at 881.

158. *Id.* at 882.

159. *Id.* at 881.

160. *Id.* at 886.

process. Therefore, peacemakers who engage in culturally unacceptable behavior are asked to step down from their positions.<sup>161</sup> After being chosen for their respect within the community and wisdom in resolving disputes, peacemakers supplement their knowledge by attending instruction in mediation, counseling, and nonviolence training taught by professionals in those fields.<sup>162</sup> Peacemakers also receive some training designed to aid them in detecting child abuse, neglect, substance abuse, and domestic violence.<sup>163</sup>

After a case is assigned to a peacemaker, she seeks the input of the community in choosing a location for the session.<sup>164</sup> The peacemaking process can occur in a neutral institutional setting or in any other less formal location that is mutually acceptable to the parties.<sup>165</sup> Participants in the *mnaweejeendiwin* include the disputants in the conflict at issue, as well as family members, friends, or other members of the community.<sup>166</sup>

The *mnaweejeendiwin* generally begins with a traditional opening ceremony in which participants pause for prayer<sup>167</sup> and observe other ritual practices, such as the burning of sage or sweetgrass.<sup>168</sup> The disputants and other participants are then encouraged to speak freely, working toward a common understanding of the problem at hand and building a sense of community within the peacemaking circle.<sup>169</sup> The peacemaker does not limit the duration of the session, allowing the participants to continue over the course of several sessions if necessary.<sup>170</sup> In explaining the importance of allowing participants in the *mnaweejeendiwin* to take as much time as is necessary, Michael Petoskey, Chief Judge of the Grand Traverse Band explains that “[t]here is an Indian saying, that the watch is the white man’s handcuff.”<sup>171</sup> Proceeding with the *mnaweejeendiwin* without the constraints of time is an important aspect of the success of the process.<sup>172</sup> When the session comes to an end and when a resolution is reached, participants enter into a contract memorializing the agreement created during the *mnaweejeendiwin*.<sup>173</sup> In the fairly rare circumstance that a resolution cannot be reached, the peacemaker can refer the case back to the tribal court for adjudication.<sup>174</sup>

### *C. The Use of Peacemaking Circles in Cases of Sexual Molestation and Assault: Hollow Water*

The traditional dispute resolution processes utilized by Ojibwa people of the Hollow Water community in Canada are particularly fascinating because of their

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161. *Id.*

162. *Id.* at 887.

163. *Id.*

164. *Id.* at 881.

165. *Id.*

166. *Id.* at 881-82, 888.

167. *Id.* at 881.

168. *Id.* at 875.

169. *Id.* at 887-88.

170. *Id.* at 883.

171. *Id.* at 876.

172. *Id.*

173. *Id.* at 883.

174. *Id.*



extensive application of traditional peacemaking processes to sex crimes. In 1994, the Hollow Water Community Holistic Circle Healing (CHCH) team estimated that three out of four members of the Hollow Water community had been victims of sexual abuse and that one in three members of the community had been an abuser.<sup>175</sup> In response to the immense problem of sexual abuse and its negative impacts on the community's members generally, and Ojibwa children in particular, the community developed a program using traditional peacemaking circles to promote conciliation and healing in cases of sexual molestation.<sup>176</sup> The use of restorative justice in the context of sexual crimes among the Ojibwa people is an illuminating example of traditional Native American conflict resolution applied in a contemporary situation.

Before exploring the process and results of the Hollow Water peacemaking program, it is important to note that incest and other forms of familial molestation are not traditionally accepted cultural norms among the Ojibwa people.<sup>177</sup> In fact, anthropological studies have shown a strong taboo for sexual relationships between "avoidance relatives," which include all members of the immediate family.<sup>178</sup> Although the cause of the startlingly high incidence of sexual abuse in Hollow Water is unknown, possible contributing factors include the introduction of alcoholism and alcohol abuse within the community, and the erosion of cultural cohesion that occurred as a result of colonialism of Ojibwa territory.<sup>179</sup>

The process that the CHCH developed to address the large numbers of victims and offenders of sexual abuse in the Hollow Water community centered around the seven sacred teachings of the Ojibwa people: "honesty, strength, respect, caring, sharing, wisdom, and humility."<sup>180</sup> The process begins after the offender pleads guilty before a judge.<sup>181</sup> The offender is then given the choice between being sentenced by the judge or participating in a peacemaking circle for sentencing.<sup>182</sup> If the offender chooses to participate in the circle, CHCH asks the court for four months, during which the offender will participate in the circles.<sup>183</sup> At the end of the process, CHCH recommends a sentence for the offender based on the progress made during the circle sessions.<sup>184</sup> When the process begins, a varying number of "initial circles" are held separately for the victim and the offender.<sup>185</sup> As the healing and acceptance process progresses within the initial circles, the victim and the offender prepare for the "key circles" in which both parties and their families come together.<sup>186</sup>

Although the exact process varies from case to case, the offender typically meets with the CHCH team assigned to his particular case at the first initial cir-

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175. Christine Sivell-Ferri, *The Victims' Circle: Sexual Assault and Traumatization in an Ojibwa Community*, in ABORIGINAL PEOPLES COLLECTION, THE FOUR CIRCLES OF HOLLOW WATER 90 (1997), available at [http://ww2.ps-sp.gc.ca/publications/abor\\_corrections/199703\\_e.pdf](http://ww2.ps-sp.gc.ca/publications/abor_corrections/199703_e.pdf).

176. *Id.*

177. *Id.* at 25.

178. *Id.*

179. *Id.* at 48.

180. *Id.* at 159.

181. *Id.* at 149.

182. *Id.*

183. *Id.*

184. *Id.* at 153.

185. *Id.* at 149.

186. *Id.* at 149-51.

cle.<sup>187</sup> During this initial circle, there are generally two caseworkers and a prior sexual offender who has completed the peacemaking circle process in attendance.<sup>188</sup> The team members speak with the offender, urging him to accept responsibility for his actions.<sup>189</sup> During the second initial circle, the offender meets with his family to discuss the molestation and acknowledge his wrongdoing.<sup>190</sup> The offender must admit what he has done to his family in order to facilitate acceptance of responsibility for the impact of the molestation by both the offender and the offender's family.<sup>191</sup>

After the offender has accepted responsibility for his actions and admitted the act to himself, the team, and his family, the next circle includes the victim.<sup>192</sup> During this circle, the victim guides the pace and is given the opportunity to say anything that she desires.<sup>193</sup> During this circle, the offender must sit quietly and listen. The purpose of the circle with the victim is to provide the victim an opportunity to express the effect that the molestation or sexual assault has had on or her life.<sup>194</sup> The final circle (or series of circles) includes the families of both the victim and the offender.<sup>195</sup> This acts for the victim as a source of support, and acts for the offender, as a way of including his entire family in his acceptance of responsibility for his acts.

If these circles are completed successfully, the CHCH team informs the court that the parties are ready for the final sentencing circle.<sup>196</sup> Two weeks prior to the final sentencing circle, the CHCH issues a comprehensive report to the court detailing the progress that has been made during all of the circles.<sup>197</sup> According to a CHCH coordinator, these reports are very extensive because "we look at the four parts of the person."<sup>198</sup> "Through circles we can assess where the person is at emotionally, mentally, physically and spiritually."<sup>199</sup> The final sentencing circle includes a party from the court, the victim, the offender, and any person that either party chooses to bring for support.<sup>200</sup> The final sentencing circle is also open to any community member who wishes to attend.<sup>201</sup> Throughout the final sentencing circles and all of the circles, Ojibwa customs such as the passing of an eagle feather and a pipe ceremony are observed.<sup>202</sup> During the last circle, recommendations are given to the judge for sentencing of the offender which, after review by the court, are entered as court orders.<sup>203</sup>

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187. *Id.* at 149.

188. *Id.*

189. *See id.*

190. *See id.*

191. *Id.*

192. *Id.* at 150.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 151.

197. *Id.* at 152-53.

198. *Id.*

199. *Id.* at 153.

200. *Id.*

201. *Id.* at 153.

202. *Id.* at 152.

203. *Id.* at 152-53.

Over a two year period sixty-five offenders completed the CHCH peacemaking circle program.<sup>204</sup> A study by the Native Counseling Service of Alberta found that only two of these offenders (approximately 2%) were subsequently charged with sexual offenses.<sup>205</sup> According to the study, this represents a decreased rate of recidivism from the average rate for sex offenders.<sup>206</sup> On average, 'recidivism rates for sex offenses is approximately 13% and for any form of recidivism the figure rises to approximately 36%.<sup>207</sup>

Follow-up studies of the Hollow Water program also reveal a high rate of victim satisfaction.<sup>208</sup> Participants in the peacemaking stated that the benefits of the circle process included "[h]aving a voice and a stake in justice outcomes, mutual respect, and renewed community and cultural pride. . . ."<sup>209</sup> Some of the negative aspects of the circle process, according to CHCH participants, included a "lack of privacy, difficulty of working with family and close friends, embarrassment, un-professionalism, and religious conflict. . . ."<sup>210</sup>

Because of the highly delicate nature of the situation that surrounds crimes of a sexual nature, in particular cases of child molestation, the use of traditional resolution processes seems especially vulnerable to criticism. In examining the use of traditional dispute resolution processes for sexual crimes, it is interesting to note that the traditional ideals underlying the Hollow Water peacemaking circles are not entirely unique in their approach to the treatment of sex offenders.<sup>211</sup> Predominant theory on the treatment of sex offenders suggests that acknowledgment and acceptance of wrongdoing on the part of the sex offender is crucial to treatment.<sup>212</sup> The peacemaking circle used in Hollow Water encourages direct acceptance of responsibility, both inwardly and publicly, by requiring the offender to admit the wrongdoing to himself, his family, the victim, and when the final sentencing circle is held, the general public.<sup>213</sup> Treatment programs for sex offenders also emphasize the importance of creating empathy for the victim in the mind of the offender.<sup>214</sup> The peacemaking circle accomplishes this goal by bringing the

204. Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 288 (2005) (citing Stephen A. Matthews & Gayle Larkin, *Guide to Community-Based Alternatives for Low-Risk Juvenile Offenders* 65-68 (1999)).

205. *Id.* (citing Native Counseling Services of Alt., *A Cost-Benefit Analysis of Hollow Water's Community Holistic Circle Healing Process* 10 (2001)).

206. *Id.*

207. *Id.*

208. *Id.* at 276 (citing Therese Lajeunesse & Assocs. Ltd., *Evaluation of Community Holistic Circle Healing*, Hollow Water First Nation, Apr. 2, 1996, at 106-07).

209. *Id.*

210. *Id.*

211. See generally Daniel G. Saunders & Sandra T. Azar, *Treatment Programs for Family Violence*, 11 CRIME AND JUSTICE 481 (1989).

212. W. L. MARSHALL & Y. M. FERNANDEZ, *TREATMENT OF SEXUAL OFFENDERS: CURRENT APPROACHES WITH NON-ABORIGINALS AND THEIR RELEVANCE FOR ABORIGINAL OFFENDERS* 74 (1997).

213. Christine Sivell-Ferri, *The Victims' Circle: Sexual Assault and Traumatization in an Ojibwa Community*, in *ABORIGINAL PEOPLES COLLECTION, THE FOUR CIRCLES OF HOLLOW WATER* 90 (1997), available at [http://ww2.ps-sp.gc.ca/publications/abor\\_corrections/199703\\_e.pdf](http://ww2.ps-sp.gc.ca/publications/abor_corrections/199703_e.pdf).

214. W. L. MARSHALL & Y. M. FERNANDEZ, *TREATMENT OF SEXUAL OFFENDERS: CURRENT APPROACHES WITH NON-ABORIGINALS AND THEIR RELEVANCE FOR ABORIGINAL OFFENDERS* 74 (1997).

victim to a safe environment and allowing or her to voice the impact of the sexual abuse on her life without interruption. As she tells her story, the victim is supported by family and community. During the circle process, the offender hears first hand about the pain and suffering that his conduct has caused.

The ability of the victim to freely communicate and guide the healing process makes the peacemaking process superior to an adversarial court setting for the victim in many situations. According to trauma scholar Judith Herman, “[a]n adversarial legal system is of necessity a hostile environment; it is organized as a battlefield in which strategies of aggressive argument and psychological attack replace those of physical force.”<sup>215</sup> Unlike a trial, the peacemaking circle allows the victim to express herself and become an active participant with power to influence the offender’s punishment.

Many of the dangers posed by including both the victim and the sex offender in a peacemaking circle mirror the dangers that exist in a mediation with a substantial power imbalance.<sup>216</sup> Just as victims of domestic abuse are often intimidated, and thus disadvantaged, by their abuser in a divorce mediation, a victim of a sexual offense often finds the prospect of confronting her victimizer so intimidating that the circle is an ineffective means of healing.<sup>217</sup> Even though victim in a sentencing trial is often required to testify before her accuser in open court, meeting in the closer quarters of a circle environment is likely to cause greater anxiety. On the other hand, a victim may find the environment of a circle less intimidating because of the traditional customs observed during the circle ceremony and the expressed support of family and community members present at the circle. Another benefit is the greater emphasis that the circle process places on the victim, as opposed to the almost exclusive focus on punishment that exists in a sentencing trial. Because one of the most lingering and painful aspects of sexual assault and abuse is the feeling of powerlessness it creates in a victim, the opportunity that a peacemaking circle provides for the victim to tell her story and garner the support of the community may provide healing through empowerment of the victim.

Commentators on the use of traditional resolution processes in cases of a sexual nature have emphasized the great care that the facilitator must take in this situation.<sup>218</sup> Just as a mediator who chooses to mediate in a situation in which there is a considerable power imbalance must be cautious about ensuring that the process is fair to all parties, an elder in a peacemaking circle must ensure that the victim is able to express her interests in a protected environment. By requiring offenders to admit wrongdoing and accept responsibility for their actions before they ever meet with a victim, CHCH ensures that the victim will not be re-victimized during the circle by denial or minimization by the offender. Presence of support persons for the victim and team members and elders trained in the effects of sexual abuse on the lives of victims also acts as a protection against re-victimization.

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215. JUDITH LEWIS HERMAN, *TRAUMA & RECOVERY* 72 (1992).

216. See generally *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 BRIT. J. CRIMINOLOGY 334 (2006).

217. *Id.*

218. See generally LEWIS HERMAN, *supra* note 217.

The use of peacemaking circles in cases of sexual assault and abuse by the Hollow Water community illustrates the great potential breadth of application of restorative justice, particularly among Native American communities whose cultural ideals conflict with the adversarial court system. Involving the community in the sentencing of a sexual offender not only empowers the victim by giving her an active role in the process but also fosters greater social accountability in the offender. Providing both parties with a role in the outcome is a characteristic of restorative justice that separates it from the sterile, third party imposed decisions handed down in a court setting. While restorative justice should be studied more extensively and applied carefully to situations of sexual assault and abuse, its use by the Hollow Water community serves as an example of the potential success of using restorative justice in Native American communities as an alternative to the adversarial court process.

#### V. IMPOSITION OF TRADITIONAL SENTENCING IN THE CONTEXT OF SENTENCING CIRCLES

The use of peacemaking circles for offender sentencing provides a unique opportunity for victims to play an active role in determining appropriate punishment. In this way, sentencing circles promote healing through victim empowerment. Sentencing circles also promote community inclusion by allowing community participants to suggest culturally relevant solutions to crime. Increasingly, peacemaking circles created for purposes of sentencing Native American offenders are choosing to impose sentences rooted in traditional culture, creating a situation in which tradition and Native American culture pervade both the process of sentencing and the actual sentence imposed.<sup>219</sup> Several tribal judges in the United States and Canada have gained attention in the past decade by utilizing traditional remedial beliefs in imposing criminal sentences with restorative justice elements.<sup>220</sup> Recent commentators on the criminal justice system have criticized the American sentencing system by saying "that any method of correction that is based in punishment . . . is just another form of violence."<sup>221</sup> Proponents of reform of the retributive nature of the criminal justice system assert that utilizing restorative justice in criminal sentencing responds to "violence and social deviance in personal ways, such as by addressing the suffering and misery of victims harmed by offenders, and allowing the perpetrators an opportunity to face the direct consequences of their crimes."<sup>222</sup> Supporters of alternative sentencing among Native American communities, particularly with juvenile offenders, believe that incorporation of traditional elements into sentencing will produce results that "meet tribal juvenile offenders' cultural needs while also aiding tribes as a whole."<sup>223</sup>

219. See Clare E. Lyon, Comment, *Alternative Methods for Sentencing Youthful Offenders: Using Traditional Tribal Methods as a Model*, 4 Ave Maria L. Rev. 211 (2006).

220. *Id.* at 221-23, 236.

221. *Id.* at 224 (citing Dennis Sullivan & Larry Tift, *Restorative Justice: Healing the Foundations of Our Everyday Lives* vii (2001)).

222. *Id.* (citing Dennis Sullivan & Larry Tift, *Restorative Justice: Healing the Foundations of Our Everyday Lives* viii (2001)).

223. *Id.* at 230.

One of the primary ways in which tribal judges have employed traditional justice techniques in sentencing juvenile offenders is through the use of the traditional concept of banishment.<sup>224</sup> Banishment in the Native American context is a sentence by which an individual is sent out of the community and forced to live for a prescribed period of time away from the society of which she is a member, often in an area of complete or partial isolation from any human contact.<sup>225</sup> For centuries, in many tribes across North America, banishment was the prescribed sentence for serious crimes.<sup>226</sup> The Cheyenne Law of Killing, the traditional body of criminal law of the Cheyenne tribe, for example, cites banishment as the proper punishment for murder.<sup>227</sup>

As more and more cases involving members of tribal groups in the United States and Canada are referred to community sentencing circles, criminal sentences rooted in traditional Native American ideals of justice are increasing in frequency.<sup>228</sup> In recent years, Native American groups in Canada have gained media attention by employing banishment as a sentence for serious crimes. In one such case, *R. v. Taylor*, the defendant, a Lac La Ronge Indian man, was found guilty of sexual assault.<sup>229</sup> The defendant chose, in lieu of a judicial or jury imposed sentence, to receive sentencing from a sentencing circle of his peers within the Lac La Ronge tribe.<sup>230</sup> After considering the situation, the sentencing circle came to the consensus that the defender should be sentenced to "banishment to a remote island in northern Saskatchewan for one year, followed by probation for three years."<sup>231</sup> In a similar case, a Native American sentencing circle in Yukon banished a sexual offender to a remote "bush settlement" for a period of twelve months.<sup>232</sup>

In 1994, banishment was utilized as a criminal sentence in the United States for the first time in modern history.<sup>233</sup> The case involved two Native American adolescents from the Tlingit tribe in Alaska.<sup>234</sup> The two boys were accused of attacking a pizza delivery driver with a baseball bat, which they used to strike him in the back of the head.<sup>235</sup> As the delivery driver lay unconscious, the two boys took the money that he was carrying and fled the crime scene.<sup>236</sup> The boys were convicted in Alaska state court of assault with a deadly weapon.<sup>237</sup> The court then released the boys to the Kuye'di Kuiu Kwaan Tribal Court ("Tlingit TPM court") for sentencing.<sup>238</sup> After holding a sentencing circle, the Tlingit court determined

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224. *Id.* at 221-23.

225. *Id.* at 221-22.

226. Colin Miller, *Banishment from Within and Without: Analyzing Indigenous Sentencing Under International Human Rights Standards*, 80 N. D. L. REV. 253, 255 (2004).

227. *Id.*

228. *Id.*

229. *Id.* at 255-56 (citing *R. v. Lucas*, [1995] 56 B.C.A.C. 141, 92 W.A.C. 141 (Can.)).

230. *Id.* at 256.

231. *Id.*

232. *Id.* at 256-57.

233. *Id.* (citing John Balzar, *Two Alaska Indian Youths Banished to Islands for Robbery*, L.A. TIMES, July 15, 1994, at A3).

234. *Id.*

235. *Id.* & n. 19.

236. *Id.*

237. *Id.* at 256-57.

238. *Id.*

that the boys should receive a “sentence of a year-long banishment to make Guthrie and Roberts ruminate on their crime, purify their spirits, and make restitution to [the victim].”<sup>239</sup> Following imposition of the sentence, the boys ‘were taken to a fishing boat for transport to . . . unidentified islands’ off the Alaskan coast . . .’<sup>240</sup> The tribe provided each boy with an initial food supply and “primitive” tools for hunting and fishing, which they used to procure food once the initial food supply was exhausted.<sup>241</sup> Tribal elders accompanied the boys to the site to make a shelter. The boys then spent twelve months each in isolation.<sup>242</sup>

Proponents of imposition of traditional sentences by sentencing circles assert that traditional sentences like banishment benefit both the individual offender and the tribe as a whole.<sup>243</sup> After returning from banishment, Roberts, one of the Tlingit teenagers sentenced to spend a year in the Alaskan wilderness, stated that the period of banishment was “a time for self-respect, introspection, purification. It helped me get back to my roots.”<sup>244</sup> This statement reflects the traditional goals of banishment in many Native American societies.<sup>245</sup> Banishment functions as rehabilitation for the offender who, as Roberts describes, is required to remain apart from society for a prescribed period of time and must build great self sufficiency in order to survive. Another important goal of banishment is restoration of the victim to her original position in the society and eventual reintegration of the offender back into the community through aid in obtaining work and reestablishing a social support system once the offender completes the banishment.<sup>246</sup> The Cheyenne Law of Killing describes banishment as “a technique of multiple excellence.”<sup>247</sup> According to proponents, banishment under this traditional law “lessened provocation to revenge [by removing the criminal from the community]; it disciplined the offender; allowance was made for the return of the culprit; but only when dangers of social disruption were over.”<sup>248</sup>

Traditional Native American sentences such as banishment are relevant to a discussion of traditional justice techniques in modern tribal communities because they illustrate the desire and experimentation of many tribal groups in utilizing traditional concepts of justice. Just as use of a peacemaking circle to resolve disputes or decide on the sentence of a criminal offender facilitates a personalization and cultural relevance in the method of dispute resolution, the imposition by these circles of traditional, community based sentences as opposed to sentences more common to the mainstream American justice system illustrates the desire of tribal groups to tailor the carriage of justice within their communities to culturally relevant ideals.

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239. *Id.* (quoting William C. Bradford, *Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution*, 76 N.D. L. REV. 551, 591 (2000)).

240. *Id.* at 259 (quoting *Experiment in Tribal Justice: 2 Youths are Banished*, N.Y. TIMES, Sept. 3, 1994, §1, at 6).

241. *Id.*

242. *Id.*

243. *Id.* at 260.

244. *Id.* (quoting Debera Carlton Harrell, *Tlingit Man Says He's Transformed After Year Alone: The Lessons of Banishment*, SEATTLE POST-INTELLIGENCER, Jan. 15, 1998, at A1).

245. *Id.*

246. *Id.* (citing RENNARD STRICKLAND, *FIRE AND THE SPIRITS* 168-74 (1975)).

247. *Id.*

248. *Id.*

## VI. CONCLUSION

Through the implementation of traditional resolution alternatives to the mainstream criminal court process, Native Americans are reclaiming ownership of the administration of justice within their communities. These traditional processes draw heavily from core principals of Native American philosophy such as egalitarianism and the importance of community inclusion, making them culturally relevant to the communities they serve. Developing peacemaking circle programs also benefit from the growing alternate dispute resolution and restorative justice movements in western legal context. Due to the increasing scholarship in these areas, the historically rooted intolerance of non-adversarial methods continues to erode. This surge of support for alternative forms of resolution has created an environment in which Native American peacemaking programs can flourish. The successes of traditional processes among tribes such as the Navajo, the Chippewa, and the Ojibwa demonstrate the superiority of culturally relevant systems of resolution in many criminal cases. The high level of victim satisfaction and decreased level of offender recidivism among Native Americans who have participated in these programs also supports application of the circle process in the non-Indian context.

Within the peacemaking circle, parties connect with the aid of a conciliator to remedy a wrong. The absence of hierarchy, the presence of family support and the inclusion of the community contribute to an atmosphere of collaboration. Focus is not fixated upon retribution or punishment of the offender. Crime, in this framework, is not an individual problem, but a force that affects the entire community and must be addressed by everyone. Even the shape of the peacemaking circle acknowledges the interconnectedness essential to the process and is illustrative of the inclusive Native American conceptions of justice. Black Elk Oglala described the importance of this interconnectedness to healing by explaining, "The first peace, which is the most important, is that which comes within the souls of people when they realize their relationship, their oneness, with the universe . . . and that this center is really everywhere, it is within each of us."<sup>249</sup> Traditional resolution processes nurture the relationships of parties to a crime to their community, creating a network of support through which healing can take place.

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249. Black Elk, First People-The True Peace, <http://www.firstpeople.us/FP-HTML-Wisdom/BlackElk.html> (last visited Oct. 30, 2007).



