

Native Americans and Justice

Dr. Joseph H. Hall, IV
Associate Professor- Anthropology
Lynn University
3601 North Military Trail
Boca Raton, Florida 33431

Abstract

Native Americans, as a group, are not a monolithic block of homogeneous cultures, but distinct sovereign domestic nations, which all have unique systems of criminal justice, to include corrections, adjudication and enforcement functions. Through the history of Native American contact with dominant White governments, unique systems of articulation have developed between the two sides. Because of the often chaotic nature of the contact between the two systems as they met along the fluid frontier through time, the policies and practices that evolved to govern the relationship of one to the other were often developed piecemeal, and tended to be crude and unsophisticated. Moving forward in the 21st century, it is hoped that more of the elegant and principled Native systems of justice are called upon to model the form and direction that criminal justice policy will take.

Key Words: Native Americans, Justice Systems, American History, Cross-Cultural Contact

This paper traces systems of Native American Justice, albeit in broad outline, from colonial contacts to the twentieth century. However, as no system exists in a cultural or ecological vacuum, reference will be made to points of comparison, and contrast, with developments in the dominant criminal justice system of colonies, and then of the United States. In many ways, it is quite difficult to compare the two systems of criminal justice. This is because, not only are we talking about conflict and its control within a society, but about concepts of conflict, and the commission of crimes across the boundaries of two very different cultures.

Pivotal to this discussion, at the outset, are the two disparate ideas about what it is to be a human being, held by the dominant White culture, and by Indian societies. It is true, of course, that it is very difficult to generalize about “the Indians”, when, in fact, there are hundreds of separate tribes, or nations, both in the American Past, and today (McNickle, 1973). To begin with, each group considered itself to be the true human beings, while all others, Indian and White, were something else. The Cheyenne, for example, call themselves “Tsistsistas” or “the human beings” (Hoebel, 1960), while the Delaware call themselves “Lenape”, or “original people” (Weslager, 1972). The Europeans came with a Judeo-Christian tradition, that assumes that humans are God-like, and therefore separate from nature, that they are presumed to possess innate rationality, and by extension of both of these premises, that they possess individual culpability (Weber, 1958). The Indians, on the other hand, assume that humans are “born powerless, and acquire individual strengths, and perhaps wisdom, through a lifelong process or cooperative reciprocity with other living things... Man’s responsibilities are shared with others, as is his glory” (French, 1982, pg.2). Because of this, Native American groups fall fairly close to the communitarian end of a continuum between individualistic societies, and communitarian ones. Crimes are seen to be an affront to the entire social group, with a shared “distribution of guilt- a process known as shame” (French, 1982, pg.2).

Because of a communitarian value system, and a shame ethos, Indians are very susceptible to punishments such as Braithwaite’s reintegrative shaming (Braithwaite, 1989). In fact, public ridicule and ostracism are two of the worst punishments that could be afforded a Native American historically (Hoebel, 1960; Strickland, 1975). Aboriginal punishments generally consisted of some combination of shaming and restitution, usually arranged between the kin groups of the offender and the victim. Among the Cheyenne, it was forbidden to execute a murderer. Rather, a combination of real property gifts, usually a specified number of horses, was required to be given to the kin group of the deceased, and a person, usually of the same sex as the deceased, was permanently given by the clan of the offender to the clan of the deceased (Hoebel, 1960).

The Eastern Tribes, on the other hand, more often prescribed blood revenge for murder. Among the Cherokee, for example, the eldest male of the victim’s generation within his/her clan, was responsible for the revenge killing of either the offender, or a substitute from within the clan of the offender (Strickland, 1975). Occasionally, it was possible to substitute a war captive as a gift to the victim’s clan as a form of compensation, although this was not the norm for the Cherokee. Guilt was decided by the person who was designated to carry out the revenge (eg. the ranking male), and generally, the clan of the offender acquiesced, even to the point of delivering the offender themselves. However, if the avenger was somehow mistaken in the eyes of the offender’s clan, then this could ignite a long period, perhaps generations, of clan feuding (Strickland, 1975).

Growing out of the communitarian value system, and its attendant de-emphasis of the individual, the Native Americans display a loose regard for the ownership of private property. Land was never owned by the individual, and the larger polity, such as the clan or tribe, held land, but only in usufruct (Josephy, 1961). Likewise, personal belongings were held by the individual only insofar as he/she had right of use and disposal over them. Accumulation, or hoarding, was universally condemned. Sharing was expected, and generally all a person needed to do was ask for an item, and it was freely given (Hagan, 1966, Hoebel, 1960, Josephy, 1961, Strickland, 1975).

Two aspects of the "borrowing" concept of the American Indians need to be addressed, as they relate to the clash of cultural values between Indians and White groups. First, as Josephy discusses in Dutch New York in the seventeenth century, the local Manhattan and Wappinger peoples would wander into a Dutch plot, and begin to pick apples or peaches, viewing these as freely available fruits of the earth, but the Dutch considered that they were "...indolent, insolent, and as thievish as monkeys ..." (Josephy, 1961, pg. 169). Natural use in one culture, viewed as theft in another. Secondly, Hoebel has detailed the case of Wolf-Lies-Down, a Cheyenne whose horse was borrowed, in his absence, by a member of a neighboring band.

The borrower had left his bow and arrow in

Wolf-Lies-Down's lodge as identification and surety, but after a year he had still not returned the horse.

Wolf-Lies-Down put the matter before his military society, the elk soldiers. They sent a messenger off to the band where the borrower was staying, in order to bring him in.

When he did arrive, he was leading the borrowed horse, plus another one. He explained he was sorry he was gone longer than expected, and that he was giving Wolf-Lies-Down the second horse, as well as the one that belonged to him. Wolf-Lies-Down said that was fine, and from now on, he and the other man would be bosom friends (that is, formal "brothers"). The Elk Soldiers then proclaimed that they, too, would stand in the relationship of brothers to the soldier society of the offender. (Hoebel, 1960, pg. 55)

It should be noted that Wolf-Lies-Down was not dealing with an outsider, but with another Cheyenne, who was unknown to him. For a stranger, or a "non-human" in other words, there would have been more severe treatment. The point remains, however, that the Native systems of justice probably approximate that of early English Colonial society in America, with its shaming and reintegration, far more than they resemble the justice system that developed in the crowded, complex, urban world that characterized the dominant society from the 19th to the 21st century. And yet, it was just those systems of the urban East in the 19th century that were overlaid upon the disintegrating Indian cultures. It is the accommodations between the Native American Systems of Justice and those of both the early colonial, and later 19th and 20th century periods that will be analyzed.

1.0 Laws and Cases

There are, of course, a myriad of laws in the dominant White system that relate to the conduct of Native Americans, from the federal level on down. However, there are two major sets of laws, one set from statutes, and one set from case law, that define the position of the Indian in relation to the broader American justice system. It is important to note, that the American Indians stand in a special relationship to the U.S. government. Their tribal groups are recognized as "domestic dependent nations" (Brakel, 1982, pg.147), and so it follows that: (1) they cannot be dealt with under international law, because they are domestic, and; (2) they are not completely free of the control of the U.S. government, because they are dependent. Some of the legislation, and court rulings, that have evolved from these premises, are as follows:

1.1 Statutes

1.1.1 The Indian Trade and Intercourse Acts, 1790-1834. The first of these acts, which was passed in 1790, was actually titled, "the NonIntercourse Act of 1790". This was amended in 1793, 1796, 1799, 1802, and 1834. Basically, these acts were designed to protect the Indians from unscrupulous White traders and land dealers (Deloria and Lytle, 1983; Prucha, 1973). The reason that there were so many acts until 1802 was that Congress would only commit to temporary, three-year bills. The Act of 1802 was viewed as permanent, and changed the original only in restricting the liquor trade among the Indians. The military was often used in the implementation of the acts, and so, in 1834 their role was made explicit. The main thrust of the acts, was to provide that anyone, Indian or White, committing a crime within Indian country, is subject to the same laws as if the offense were committed in the United States. However, Indian on Indian crime was excluded, which lay the legal foundation for internal tribal sovereignty (Deloria and Lytle, 1983; Prucha, 1973).

1.1.2 The Major Crimes Act of 1885. This act followed closely on the heels of Ex Parte Crow Dog (U.S. 1883) (see below), and formed the basis for federal jurisdiction over major criminal offenses in Indian country when the offender is an Indian. The act came with seven offenses listed initially, now amended up to fourteen, which are in the jurisdiction of the federal courts. These offenses include murder, manslaughter, kidnapping, rape, carnal knowledge of a female less than sixteen, arson, burglary, robbery, larceny and finally assault with 4 levels of intensity: a) with intent to rape; b) with a dangerous weapon; c) with intent to murder; d) resulting in serious bodily injury (Deloria and Lytle, 1983; Getchens, et. al., 1979).

1.1.3 Public Law 280 of 1953. In a period known for its philosophy of assimilation of Native Americans, and the elimination of federal control on reservations, called, ominously, "termination", Public Law 280 was passed. This law tore away most of the little that was left of Indian control over Indian criminal justice, by transferring jurisdiction over both civil and criminal cases in Indian country, to the adjacent states and counties. At the same time, no taxing authority was available to the states, and so, law enforcement went unfunded for years. This resulted in a near state of anarchy on some reservations, reversion to tribal law on others, and full control by the states in yet other venues (Deloria and Lytle, 1983).

1.2 Supreme Court Decisions

1.2.1 Cherokee Nation v. Georgia (U.S., 1831) and Worcester v. Georgia (U.S., 1832). These cases, jointly known as "the Cherokee Cases", contain the most succinct statement of Chief Justice John Marshall, about the relationship of the Indian tribes to both the U.S. government, and to the individual states. Deloria and Lytle (1983.pg.33) summarize, "Tribes are under the protection of the federal government, and in this condition, lack sufficient sovereignty to claim political independence; tribes possess, however, sufficient powers of sovereignty, to shield themselves from any intrusion by the states, and it is the federal government's responsibility to ensure that this sovereignty is preserved."

1.2.2 Ex Parte Crow Dog (U.S., 1883). A Sioux named Crow Dog, who was the former head of the tribal police on the Rosebud Reservation in South Dakota, killed the Sioux chief, Spotted Tail on the reservation. Crow Dog's kingroup met with that of Spotted Tail, and Spotted Tail's clan accepted compensation for the death. However, a huge protest led federal authorities to arrest Crow Dog, and to force him to stand trial in the territorial court in Deadwood, South Dakota, at which he was convicted. A writ of habeas corpus was filed, and the U.S. Supreme Court set him free. This emphasized the idea that Indian offenders, who commit crimes in Indian country should be tried by the tribal government involved. This broad privilege lasted only two years, however, until the Major Crimes Act of 1885 (above) overturned it (Deloria and Lytle, 1983).

1.2.3 Williams v Lee (U.S., 1958). "States could extend their jurisdiction over certain matters on the reservation, but only if the laws did not infringe on the exercise of tribal self-government" (Deloria and Lytle, 1983. pg. 205).

1.2.4 McClanahan v. Arizona State Tax Commission (U.S., 1973). In McClanahan, if the federal government has "preempted" an area of inquiry, states may not exercise jurisdiction, or otherwise intrude, into Indian country (Deloria and Lytle, 1983). The sovereignty of the tribes has been preserved from state encroachment. Although federal statutes have eroded tribal criminal justice systems, Indian courts, and Indian police, still function today in some venues.

2.0 Indian Courts and Indian Police

In contrast to those aboriginal systems of justice, which were characterized by communitarian ideals, and restitution with restoration, the Native Americans met with, and were eventually overwhelmed by, alien systems which stressed individual culpability, and retributive punishment. This was not quite so in the very beginning of the English colonial world, where a simple, practical, and small scale society was established, which, like that of the Natives, valued the opinions of the face-to-face community. During the seventeenth century in New England, and in the Middle Atlantic areas, the colonies were still a world of amateur, volunteer law enforcement, and very public punishments, designed to shame the offender in front of peers (Friedman, 1993).

The concept of Indian policing had its origins in the seventeenth century English colonies, just as did the earliest historical forerunners of the professional police in the English colonies. As early as 1669, the Governor of New York wrote that villages on the frontier should appoint Indian constables to help keep order (Barsh and Henderson, 1976). In 1671, the Executive Council of the Province of New York noted that, in advancing English law among the Indians, they must use Such moderation amongst them, that they be not exasperated, but by degrees may be brought to be conformable to ye lawes; to wch End, they are to nominate and appoint constables amongst them who may have staves wth ye Kings Armes upon them, the better to keep their people in Awe, and good ordr... (Barsh and Henderson, 1976, pg.33).

Similarly in Massachusetts, the Native court system was established in 1658, providing for "Trial before an Indian Magistrate, appeal to a panel of Indian Magistrates under the supervision of an English judge, and transfer of felony cases to English courts " (Barsh and Henderson , 1976, pg. 34). Gradually, the Massachusetts General Court became more and more restrictive in the violations that could be heard in Native courts, and eventually, those courts were replaced altogether by English justices (Barsh and Henderson, 1976). Several observations can be made on these very early experiments in Native courts and policing. First, these policies are clearly instruments of acculturation and control, and are not designed in any way to build on existing Native institutions, or to strengthen them. The Indian constables in early New York, were to display the "Kings Armes" as an intimidation, to keep social order, with no appeal to the ancient authority of the chiefdom.

Secondly, the individuals chosen for these new power positions would create new tribal authority figures, beholden to the crown. The more traditional leaders, who would be expected to oppose Anglicized legal changes, would find themselves in contention for influence with rival factions within their bands and tribes. This same motivation continued into the nineteenth century among the Plains and Pueblo groups. The individuals who decided to join with the forces of White culture, or at least to meet it halfway, "recognized where the power now lay, and maneuvered to grasp it" (Hagan, 1966, pg.163). There was power and prestige to be had.

Finally, the New York Council blatantly stated, that it wanted to bring the Indians under English laws "by degrees". Likewise, in Massachusetts, there is some early use of Native courts, but these were gradually restricted, and circumscribed, until they were absorbed completely by the English courts. In both of these early cases, the policy of gradual reduction of native institutions, in favor of colonial jurisdiction, lays the foundation of a phenomenon in American government known as "incrementalism". Lindblom argues that policy change in America is always pursued in increments, with a genuine abhorrence of sudden, radical change (Lindblom, 1964). If this is so, and it would seem that it is, the roots of this procedure of gradual policy introduction in the criminal justice system, can be seen at least as early as the 1650's.

Although the motivation to participate with the Whites in criminal justice functions may have been the same from the 1650's until the twentieth century, it cannot be said that there is a clear line of descent in Native American law enforcement and courts, from 1658 onwards. The Native populations of the Eastern seaboard, as in the New York and Massachusetts cases cited above, were decimated during the eighteenth century, through warfare and disease, and either died out, or were forced out (Josephy, 1961; McNickle, 1973). An intermediate step in the development of tribal courts and police, can be found among the so-called "Five Civilized Tribes" in the late eighteenth, and early nineteenth centuries. These included the Cherokee, Chickasaw, Choctaw, Creek, and Seminole (Underhill, 1973).

As an example, by 1800, the Cherokee had adopted looms, wagons, and farming with plows, even rising to Planter status in Western North Carolina, with large individual landholdings, and even slave ownership. With the accumulation of real property, "they became interested in adopting legal practices to safeguard their newfound wealth"(Hagan, 1966, pg.20). The Cherokee had a written script, developed by Sequoyah (Strickland, 1975), and with it, they produced their first printed law. By a vote of the tribal council in 1808, the Cherokee adopted a statute which provided one hundred lashes for horse theft (Hagan, 1966).

In 1798, ten years prior to their first written law, the Cherokee established an early form of a tribal police force, consisting of warriors appointed by the tribal council, to help the chief enforce the legal codes, primarily those about horse stealing. These warrior/police were known among the Cherokee as "Lighthorse", paid from U.S. government annuities, and bound to deliver those in custody to informal tribal courts (Norgren, 1996; Strickland, 1975). There was no jail in which to house the accused, and so, often the Lighthorse themselves had to function as jailer by watching the offender until trial. They then sometimes functioned as judges and jurors as well (Hagan, 1966).

In the territory west of the Appalachians and in the area set aside as Indian country, there was great difficulty in enforcing any law at all, and even Indian police would have been welcomed. Racism was rampant, with Whites killing Indians for sport without fear of reprisal (Prucha, 1973). In 1789, Washington ordered his Secretary of War to enforce treaties which were being broken wholesale across the frontier by Whites (Peak, 1989). This led to the Indian Trade and Intercourse Acts of 1790-1834, under which crimes by Indians, against Indians, were to be handled by the Indians themselves. However, in cases of murder, larceny, robbery, or trespass by a White against an Indian, in Indian country (section 4), or by an Indian against a White off the reservation (section 14), the Territorial courts were the venue in which trial would take place (Getches, et al, 1979; Price and Clinton, 1973; Prucha, 1973; Wunder, 1994).

Having passed the Trade and Intercourse Acts, however, the question of how to apprehend an offender, and how to deliver him to court, was an entirely different matter. The main actors in law enforcement in Indian country, in the early nineteenth century, were: 1) the Indian agents, appointed by the president, and 2) the U.S. Army. The position of Indian agent was an outgrowth of the British Colonial Indian Superintendent, which was carried over by the Continental Congress. In the new United States, Indian agents were provided for in the Trade and Intercourse Acts. If no one willing and/or qualified could be found, the Territorial Governor, or more often, the local Army post commander, performed the duties of Indian agent (Prucha, 1973).

The Indian agent, who generally had a fairly good network of informants among the Indians in his charge, would hear of a crime committed, and would attempt to bring the offender to trial at the nearest territorial court. However, the agent had no power to back his authority, except for the U.S. troops (Prucha, 1967). Under the Trade and Intercourse Acts, a White offender committing a crime in Indian country, could be fined one hundred dollars, imprisoned for twelve months, and was required to pay the Indian victim twice the value of the property taken or destroyed (Prucha, 1973). Furthermore, the amendments to the Acts in 1802, provided that the president could direct the military to search, and seize, stores suspected of containing trade goods, or liquor, introduced into Indian country (Prucha, 1967). While this sounded fine on paper, it was impossible to enforce on the ground. Both Indian agents, and commanding officers, found themselves arrested and sued by the whiskey traders themselves (Prucha, 1967).

Because of the vagueness of the language in the Acts, a loophole was perceived, that the president had to sign off personally on each search and seizure. For example, in 1829, Major David Twiggs, and the Indian agent at Prairie du Chien, arrested a Green Bay trader, Daniel Whitney, for logging and making shingles in Winnebago Indian country. Twiggs and the agent were then themselves arrested by the Territorial Country Sheriff, for trespass on Whitney's land. Twiggs had to pay \$1,600 bail, a large sum at the time, and the case against Whitney was dropped. The same fate befell Major Stephen Kearny in 1829, and in 1832, Captain William R. Jouett seized sixteen barrels of whiskey from a trader in Indian country, and was sued. Kearny paid \$642 in fees and expenses, while the trader went free (Prucha, 1967. pg.66).

The racism and inefficiency of the Territorial county courts was apparent when Indians were involved. Colonel Francis Lee arrested several Chippewa Indians for the murder of several Sioux at Fort Ridgely, in July, 1854. Under the Acts, he was required to deliver them for trial within five days. By September, however, the Territorial justices, wanting nothing to do with the case, had not yet acted to take custody of them, or to make any arrangements for trial. Tired of feeding them, and holding them in the stockade, Lee released them (Prucha, 1967).

The judges appointed in the counties in the vicinity of Indian country, were not lawyers, but were selected from among "those who were capable of reading and writing" (Prucha, 1967. pg.84). One such justice, judge Reaume of Green Bay, sentenced guilty parties to work in his personal garden plot. Of course, it should be borne in mind that the Territorial justices had to live in the area, among the same Whites whom they were expected to judge equitably (Prucha, 1967). Prucha has noted that, "the typical frontier community could not be brought to convict a man who injured or murdered an Indian"(Prucha, 1973, pg. 199).

These situations would merely be laughable, except that they illustrate the complete chaos in Indian law enforcement in the first half of the nineteenth century. The high degree of racism among the civil authorities, is revealed by the fact that no case of reservation trespass, or of whiskey sales to the Indians, was prosecuted in this period (Prucha, 1967). Although the first conviction for the murder of an Indian by Whites, was handed down in Indiana in 1824(Prucha, 1973), Indiana Governor William Henry Harrison stated that, "Experience shows that there is a wide difference in the execution of those laws. The Indian always suffers, and the white man, never" (Prucha, 1973. pg. 201).

It is interesting that the U.S. government, with its own system of justice completely ineffective in Indian matters, fell back on some of the original Indian methods of handling crime. Payment of compensation by the offender, and the taking of hostages, is two examples. For instance, in 1820, several Winnebago Indians murdered two soldiers. Colonel Henry Leavenworth took four Winnebago Chiefs hostage, and held them until the tribe released the offenders (Prucha, 1967). Similarly, we have already noted that compensation was the penalty for Whites taking Indian property, specified in the Trade and Intercourse Acts. If an Indian were the offender, the Acts required that a fair replacement sum be paid to the White victim, and if it were not paid, then the sum would be garnered from the Indian's governmental annuity (Prucha, 1973).

In fact, even where there was a murder of an Indian by a White, restitution or compensation became the normal method of disposing of the case. A sum of between one and two hundred dollars was the amount generally offered by the U.S. government, from 1803 onwards (Prucha, 1973). Governor William Henry Harrison had a case of an Indian murdered by a White at Vincennes, Indiana, in 1806, but he was unable to obtain a conviction. Harrison immediately sent \$70 worth of goods, as a present, to the family of the victim (Prucha, 1973). These set values are interesting with regard to cases of horse theft between Whites and Indians. As early as 1798, the Cherokees and the U.S. government, agreed that each horse stolen by either side, and not returned within three months, was to be compensated at a value of \$60 (Prucha, 1973, pg.206), or within ten dollars of the price for a human life.

It is in this chaos that the concept of Indian Police emerged. The major criminal problems outlined above: trespass, whiskey sales, horse theft, and murder were being handled by the U.S. Army. They were not trained for this work, and did not enjoy doing it (Prucha, 1967). When any crime occurred on a reservation between Indians, it was left to the Indians to handle. As Prucha states, "up to the middle of the Nineteenth Century, indeed, there were no laws or treaty provisions which limited the powers of self-government of the tribes with respect to internal affairs" (Prucha, 1973, pg.211).

The Cherokee Lighthorse, alluded to above, lasted from 1798 to about 1840. They were briefly revived after the Civil War, and the first prison to be established and run by Native Americans, was built by the Cherokee in 1874, at Tahlequah, Oklahoma (Hagan, 1966). They also had established a courthouse as early as 1827 at New Echota, Georgia, and were hearing cases concerning all internal, that is Indian against Indian, disputes (Strickland, 1975). Certainly the Lighthorse were not called "police" upon their founding, and no native police organization, strictly defined and so named, existed until after the Civil War. In 1869, secretary of the Board of Indian Commissioners, Vincent Colyer, toured Indian country, and saw that the soldiers of the Army garrisons had become a drunken part of the criminal justice problem. He himself was assaulted by drunken troops (Hagan, 1966). Yet, Colyer knew that, without the military, there was no law enforcement in Indian Territory. This prompted him to conceive of the idea of creating Indian police to enforce the law in Indian country.

Apparently, independent of Colyer's brainstorming, Indian Agent Benjamin Lushbaugh organized a group of twenty-four respected warriors in 1862, six from each of four bands, and put them in uniform to help counter the rampant horse theft against neighboring tribes such as the Delaware (Hagan, 1966). John Clum, the Indian agent for the San Carlos Apache, had a good record with his force of Indian police, which was founded in 1873. The highlight of Clum's police came with the capture of Geronimo, and his delivery to stand trial in 1877 (Wachtel, 1982). These, and other independent "experiments" in Indian policing, prompted it to be an official policy of the U.S. government in 1878. By 1880, two thirds of the Indian agencies had their own, Native police (Hagan, 1966, pg. 42).

However, with government funding inadequate as always, there were constant complaints about salary, uniforms, arms, etc. The uniforms were not tailored, and so were ill-fitting. The guns were outdated, many did not work, and ammunition was scarce. The salary for police officers was only \$8 per month, and for privates, \$5. This was at a time in which \$15 was a common monthly wage for reservation labor. This led to corruption, as agents paid the police from the fines of those they brought in or made salaries of the proceeds of the sales of confiscated property (Hagan, 1966).

Despite the "Keystone Cops" aspect of these sometimes ill-clothed, and poorly armed Indian police, most served selflessly and bravely, with many being killed in the line of duty (Hagan, 1966). The question is, were they appointed by the agent, or were they elected or appointed from within the tribe? Barsh and Henderson feel that those operating by appointment of the Indian agent, were there as armed enforcers of assimilation (Barsh and Henderson, 1976). It is probably true, that the Indian police were agents of change within their groups. This often led to conflict between their tribal members and the police. However, Hagan notes that members of the Indian police force were still Indians culturally (Hagan, 1966). It was difficult, for example, to persuade them to arrest a medicine man, or someone known to be a witch, for fear of their own lives. It can be noted, as well, that such a quintessential Indian as Crow Dog, had been, at one time, captain of the Rosebud Agency police.

Deloria and Lytle have analyzed the origin of Indian police, and have noted that a critical time probably came in 1849, when the Bureau of Indian Affairs, and all its agents, were transferred from the War Department to the newly formed Department of the Interior (Deloria and Lytle, 1983). The Army troops, and their commanders, now became, administratively, more and more isolated from the agents. By about 1862, the date of the innovations described above, some new system was needed, and the Indian police filled this role. Basically, the Indian police operated independently from any central control, being formed by their particular agent, for their particular reservation. It wasn't until 1908, that some form of coordination of law enforcement efforts was instituted, and by that time, the Indian police were declining (Hagan, 1966). As the territories became more organized, and as states formed around the reservations, the criminal justice systems among the Indians fell more into line with the country as a whole. As the head of the Union Agency, Dew M. Wilson put it in 1897, "as Marshals multiply, policemen disappear" (Hagan, 1966, pg. 142).

There was a move in the late nineteenth century, to institute Courts of Indian Offenses, handled by the Indian police themselves, with the Indian agent always acting as overseer. These courts were approved by the Secretary of the Interior in 1883, but they were not funded until 1888 (Hagan, 1966). From the start, they were always seen to be on shaky legal ground, drawing sole authority from the Department of the Interior. The Indian police also served as justices, and sometimes there was a salary paid from the fines. They handled liquor violations, prostitution, general misdemeanors, and civil suits to which Indians were party (Hagan, 1966).

There were two basic aspects of the Courts of Indian Offenses which deserve comment. The first is, that the informality, and the flexibility, of these courts, allowed for some accommodation of existing Native cultural values. For instance, some rape cases were settled by payment of a horse by the offender, with the agreement of both parties, and fines could also be payable in rifles or revolvers (Hagan, 1966).

Secondly, after 1892, the Courts specified certain penalties, such as five day's imprisonment for failure to complete assigned roadwork. Furthermore, Hagan states that the Courts "provided that if an Indian refuses, or neglects, to adopt habits of industry... he shall be deemed a vagrant"(Hagan, 1966, pg.120), noting that this situation was similar to the Black Codes of the Reconstruction Period, designed to force ex-slaves into employment. In the twentieth century, the Courts of Indian Offenses gradually changed, until they only registered vital statistics, and held preliminary hearings to weed out which tribal cases were to be sent on to outside courts (Hagan, 1966). The Indian Reorganization Act of 1934 finally brought an end to the Courts of Indian Offenses (Deloria and Lytle, 1983). Modern Tribal Courts have replaced them, with the main difference being, that the Indian agents are not involved at all with the selection of judges, or in the adjudication process. The Tribal Court consists of three associate judges, and one Chief Judge, each elected by a two-thirds vote of the Tribal Council (Deloria and Lytle, 1983). This panel of judges preserves some of the collective, and communitarian, aspects of decision making that are so familiar to Native American cultures.

3.0 Corrections and Juvenile Justice

Hoebel observed among the Cheyenne, a notorious juvenile delinquent and troublemaker named Pawnee, who proceeded to steal some horses in direct disobedience to the rules (Hoebel, 1960, pg.56). One of the soldier societies, the Bowstring Soldiers, "tracked him down three days out on the trail. They beat him unmercifully, destroyed his clothing and saddle, ruined his gun... alone on the prairie, he was preparing to die, when High-Backed-Wolf found and rehabilitated him." After a strict lecture on proper Cheyenne behavior, High-Backed-Wolf gave him a new horse, gun, and clothes.

American Indians traditionally handled delinquent youth, as with all children, in the close-knit, extended kin structure, where they received education and socialization, by observing and assisting the elders (Bond-Maupin, 1996). However, it is the contention of Bond-Maupin, et al, that the reservation boarding school system broke down this familial enculturation system, and so the "familial rights and responsibilities were usurped by external authorities, and agents of social control"(Bond-Maupin et al, 1995, pg. 10). The result of this is, that Indian parents today tend to look more to external methods of social control, such as the tribal police, and tribal juvenile facilities, to handle problem youth.

This phenomenon may help explain some trends in juvenile treatment observed among modern, reservation Indians. For instance, nationally, the detention rate among juvenile offenders is about 25%, while among Indian youth, it is near 100%. This indicates that the home is viewed as having a negative impact on the youth, and that there is a procedure among the tribal police, of automatically remanding juveniles to the Juvenile Justice Center (Bond-Maupin, et al, 1995).

The tribal Juvenile Justice Center studied by Bond-Maupin is really designed for serious adult offenders (Bond-Maupin, 1996). The Bureau of Indian Affairs apparently had only one model available, which was built across the country in the 1980s. The Indian juveniles are locked down twenty three hours per day, even though 74% of them are incarcerated for minor delinquency and status offenses. There is yet hope that something of the best of the old, tribal system may be revived by community members, such as restitution and restoration programs (Bond-Maupin, et al, 1995), that might help to tie together juvenile offenders, victims, and their families, in the best tradition of High-Backed-Wolf.

There also has been some attempt made, among adult Indian inmates, to provide treatment programs in a more traditional Native way. With great hopes, the Swift Bird correctional project was opened on the Cheyenne River Sioux Reservation, in South Dakota, in 1979, with a mandate to serve offenders from the five states of North and South Dakota, Nebraska, Minnesota, and Montana (French, 1980). This was a minimum security prison, designed with teepee-shaped wooden housing modules, that ran on the assumption that, a good deal of the problems experienced by Native Americans, stem from their marginality, that is, from their being caught between the dominant White world, and the traditional Indian world. The goal of the Swift Bird project was rehabilitation through Native American cultural and spiritual treatment (French, 1980). Unfortunately, even though Swift Bird opened with a \$1.4 million federal grant, it closed in less than two years due to mismanagement, personality clashes, and lack of funds (Peak, 1989).

The one program remaining for adult, Indian prisoners, is the Indian Prison Survival Schools. These resulted from a successful law suit, brought by the Native American Rights Fund against the Nebraska Correctional Services Department (French, 1980). The resulting court order, in 1978, mandated the use of medicine men and sweat lodges for religious services, allowed Indian inmates to wear their hair long, and decreed accredited courses, and treatments, be provided which are relevant to Indian culture. Thus, job training is provided, but also "Indianism" is encouraged by teaching Native customs, rituals, and languages. Finally, with enhanced self-awareness, the Indian inmate is taught coping strategies, for survival in the dominant culture (French, 1980).

4.0 The 21st Century

Given the long and complex nature of the relationship between, first, different tribes and different European explorers and colonists, and then the piecemeal development of legal jurisdictions across North America in the eighteenth and nineteenth centuries in the form of national claims among the Mexican, French, Spanish, English, Russian, and United States governments, it is not at all surprising that the current criminal justice situation for Native Americans is a bewildering mix of spheres of influence here in the United States of America. There is, first of all, a distinction between Alaskan natives, and Native Americans in the lower forty-eight states in the administrative unit used for contact with the outside, dominant, White culture. For Alaskan Natives, with a much more dispersed settlement system, the village is the primary administrative unit, while for the Native Americans in the lower forty-eight states, the reservation is the usual point of contact and analysis (Perry, 2015).

There is a very specific set of criteria for establishing who exactly is in charge in: (1) the investigation and enforcement of criminal cases; (2) the judicial determination of guilt; and (3) the place and nature of corrections. The United States Government term for lands in Native American jurisdiction is "Indian Country," defined as "all lands within an Indian Reservation, dependent Indian Communities, and Indian trust allotments" (Minton, 2014, pg. 8). Tribal authority to imprison Native American offenders was originally limited to a one-year sentence, a \$5,000 fine, or both. This was changed on July 29th, 2010, and now allows a prison sentence of up to three years in an Indian Country correction facility (Minton, 2014). In fact, the majority of incarcerations in Indian Country are in only the five- to six- day length (Minton, 2014), which amount to, essentially, containment while awaiting a court hearing, rather than any meaningful long- term rehabilitation prison sentence, such as provided by the Swift Bird facility (above). In 2002, 23% of the tribes provided their own detention functions, and 68% used the detention facilities of a local county government (Perry, 2005, pg.43).

Generally, since June 2000 , the number of inmates held in Indian Country jails for violent offences has held steady at about three in ten, down from a four in ten high peak in 2007 (Minton, 2015, pg. 4). Of that roughly 33%, 12% had engaged in domestic violence, while 9% were convicted of aggravated or simple assault. They probably remained there for the term of their sentence, because there was no other place to put them. This, of course, is a double-edged sword, because, true, it keeps them locally near their homes, families and their reservation life, which allows for the possibility of positive visitations and interaction. On the other hand, it puts the non-violent majority, the other 66% of the inmate population, in touch with these violent inmates on a daily basis. In fact, a new questionnaire instrument was created by the Bureau of Justice Statistics (BJS) in 2013 which revealed that a full 23% of the inmate population was in for just three violations: public intoxication (20%), burglary (2%), and larceny-theft (1%) (Minton, 2015, pg. 4). In 2002, 60% of all the tribes had some form of a tribal justice system (Perry, 2005, pg. 19)

In the area of law enforcement, federal jurisdiction was established in Title 18 U.S. Code 1152 and 1153, referred to as the Indian Country Crimes Act, and the Indian Country Major Crimes Act respectively (Perry, 2005, 2015). Certain states have been afforded more involvement in the native populations adjacent to, or within, their boundaries, than have other states. Where this applies, the jurisdiction of those states supplants federal jurisdiction there. Public Law 280 gave criminal jurisdiction over tribal lands to six states: California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), Wisconsin, and Alaska. In these, state control is mandatory. Public Law 280 (amended) expanded state jurisdiction over crimes in Indian Country, optionally, to nine other states: Nevada, Idaho, Iowa, Washington, South Dakota, North Dakota, Montana, Arizona, and Utah (Perry, 2005, pg.2). In 2001, half of the tribes employed at least one full-time sworn officer with general arrest powers (Perry, 2005, pg. 5).

These changes appear to be heading in the right direction. It is thought that the more authority that is given to states and counties in direct contact with Native populations in Indian country, the better and more reasonable will be the understanding between parties in the areas of justice, enforcement and corrections. These communities share the environment, the ecology, the history, and the knowledge of one another that officials in Washington cannot readily comprehend. Having said that, we do need to bear in mind that, at times, it has been only the federal government that stands between Native Americans and their White neighbors, when misunderstandings and hostilities appear. That position, hopefully, will rarely be necessary for the federal government to take. The best role, it would seem, as a policy position, would be analogous to the position of the federal government in Education. The teaching and educational rules and decisions are carried out at the local level, with the federal government participating in the funding, and as arbiter of last resort. The same model, with modifications, should work for the Native American justice system as well.

5.0 Conclusion

In looking over the data on both Native American, and dominant White American, systems of justice, some points of similarity occur. The early colonies had a volunteer system of law enforcement, in the watches and the constables, and certainly the use of Indian constables in seventeenth century New York is a like situation. Along with the gradual professionalism in the U.S. in the nineteenth century, we see the federal marshals gradually assume the duties of the tribal police. Throughout the nineteenth century, the constant pressure to remove whisky from the Indians, is another form of repressive control. The trend is similar to that practiced, at the same time, by the temperance moralists in the big cities of the Eastern United States, in which the campaign was for political control of European minority immigrants. Certainly lack of funding is a trend that is fairly constant for any programs designated for the Native Americans. We note that the Courts of Indian Offenses were mandated in 1883, but not funded until 1888, and then only at one tenth the amount requested (Hagan, 1966). With this background, the failure of the Swift Bird correctional facility, in 1980, due at least in part to lack of funding, comes as no surprise. It is hoped that, as a policy point, the federal government concentrates more future effort on funding justice projects, and less effort in trying to run the systems and facilities day to day, which is better left to entities with more intimate knowledge of conditions on the ground.

Finally, the clear racism in the relationship between the dominant culture, and the systems of justice of the Native Americans, is, of course, deplorable. Perhaps, in the long run, the worst loss is ours. The disappearance of the great, and humane, tradition of restitution and reintegration such as that practiced by the Cheyenne, is tragic. It is now almost completely supplanted by the winner-take-all, adversarial adjudication of the dominant culture. If we had only learned as much from the Native Americans as we took from them, American criminal justice, in the early twenty-first century, would be much better for it.

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