

OVER-INCARCERATION OF NATIVE AMERICANS: ROOTS, INEQUITIES, AND SOLUTIONS

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Dr. Fox is an enrolled member of the Confederated Salish and Kootenai Tribes (CSKT) of Montana. She was born and raised on the Flathead Indian Reservation in Arlee, MT. Dr. Fox currently works as the supervisory clinical psychologist in her home community at CSKT Tribal Behavioral Health. She also currently serves as a consultant for the Center for Court Innovation's Tribal Justice Exchange in the development and piloting of a culturally-informed risk-needs tool for use with Native Americans in the criminal justice system. Dr. Fox completed her doctoral training at the University of Montana-Missoula. Her predoctoral internship and postdoctoral fellowship training were both completed at the Puget Sound Veterans Affairs Healthcare System, American Lake Division, in Tacoma, WA. Overall, Dr. Fox's intention is to increase quality, culturally-appropriate services provided to Indigenous populations. In her clinical work, in addition to providing the typical evidence-based treatment approaches, she strives towards identifying and strengthening protective and resiliency factors, and using those factors to meet individual goals. Dr. Fox is particularly passionate about providing these services to individuals marginalized within Indigenous communities, including those involved in the criminal justice system as well as individuals with multiple intersectional marginalized identities. Her research interests are in Indigenous resiliency, historical loss and trauma, and holistic wellness of Indigenous peoples.

Ciara D. Hansen, *Shawnee/Cherokee*

Dr. Hansen is a clinical psychologist in the 'Iliina Counseling Services department at Northern Navajo Medical Center located at the Indian Health Service Hospital in Shiprock, NM. Dr. Hansen earned her Ph.D. from the University of Montana as a member of the Indians into Psychology (INPSYCH) program. She completed her pre-doctoral internship and her post-doc fellowship at Waianae Coast Comprehensive Health Center, located on the leeward coast of Oahu, serving primarily a Native Hawaiian population. Dr. Hansen's clinical work has focused on using evidence-based treatments to meet the psychological needs of underserved minority communities. She uses a cognitive-behavioral theoretical orientation situated within a multicultural/intersectional framework to conceptualize client symptomology and often uses third-wave therapies to address client concerns. Dr. Hansen's research has aligned with her clinical goals to address health disparities and build capacity within American Indian communities. Dr. Hansen's dissertation project focused on identifying unique risk and resiliency factors for Tribal members involved in the justice system in Montana. In her current role, Dr. Hansen has recently collaborated with the Western Interstate Commission for Higher Education and two other rural mental health hospitals/clinics to develop a pre-doctoral internship training consortium focused on providing competent psychological services in rural settings.

Ann M. Miller

Ann Miller has been an attorney with the Tribal Defenders Office of the Confederated Salish and Kootenai Tribes on the Flathead Reservation in Montana for more than twenty-five years and the managing attorney for fifteen. During her tenure, the Defenders Office implemented an innovative in-house service for clients with co-occurring mental illness and chemical dependency and adopted a holistic defense practice with assistance from the Center for Holistic Defense sponsored by the Bronx Defenders Office in New York. In 2015, the Defenders created the Flathead Reservation Reentry Program that provides interdisciplinary, supportive services for tribal members returning to the reservation from incarceration. Ms. Miller continues to expand client services to include mental health client advocates, cultural mentoring, and permanent supportive housing. Ms. Miller served on Montana's Public Defender Commission for six years and Montana's Statewide Reentry Task Force for two years. She currently serves on the Advisory Board for the Justice Center, Council of State Governments and the Missoula Criminal Justice Coordinating Council that seeks criminal justice reform in Missoula, Montana. Ms. Miller is the 2021 recipient of the American Bar Association's Dorsey award that recognizes her exemplary legal services to the indigent.

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EXECUTIVE SUMMARY

Native people are disproportionately incarcerated in the United States. Several factors contribute: a history of federal oppression and efforts to erode Native culture, a series of federal laws that rejected tribal justice systems in place long before European contact, historical trauma that has a lasting impact on the physical and mental well-being of Native people, a complicated jurisdictional structure that pulls Native people further into justice involvement, and a deficiency of representation for the accused in tribal courts. Although people accused of crime in tribal courts are afforded the right to counsel, tribal governments are not constitutionally required to provide appointed counsel for the indigent. As a result, there are uncounseled convictions in tribal courts used against Native people in state and federal systems.

There are 574 federally recognized tribal governments in the United States, each with its own culture, sovereign government, justice system, and historical relationship with the United States government. For this reason, interventions meant to address over-incarceration of Native people should start at the tribal level. Tribes could impact disparity on a national level by providing supportive and restorative services for those involved in their own justice systems. Tribes could impact disparities by providing public defender services, in particular, holistic public defense that employs a restorative approach. A holistic model of public defense addresses the issues that contribute to people's involvement in the criminal justice system and the collateral consequences to criminal charges and convictions. Providing services that address underlying needs results in improved life outcomes that predictably result in less criminal justice involvement. This article highlights the Tribal Defenders Office (TDO) for the Confederated Salish and Kootenai Tribes that has implemented holistic defense in a tribal setting.

Initially modeled after the Bronx Defenders, the Tribal Defenders holistic defense practice aligns with tribal values by going beyond the criminal case to view the accused as a whole person with a range of legal and social support needs that if left unmet will continue to push them back into the criminal justice system. Over the years, the Tribal Defenders' team has worked to integrate into the community, listen to feedback from clients and the community, and refine the program accordingly. Through twelve years of integrated practice, TDO staff learned several lessons that have shaped their success: services come first, invest in culturally relevant research and services, listen to clients and the community, and adhere to cultural safety.

Although the article promotes holistic defense to the indigent as a solution to inequities facing justice-involved Native people, it also highlights other promising practices. Tribal systems have access to national organizations that support their efforts to address criminal justice challenges. There are tribal courts, victim services, probation departments, and reentry programs that have taken traditional, restorative principles and applied them in innovative ways to promote healing, wellness, and community safety.

INTRODUCTION

Native people¹ have a long history of forced confinement resulting from government policies. Forms of confinement included removal and relocation from home territories, internment in forts and on reservations, forced placement of children in boarding schools and orphanages, commitments to “insane asylums,”² mental hospitals and incarceration in jails and prisons. It is no surprise that the effects of these practices continue to reverberate in the lives of Native people today, contributing to disproportionate incarceration rates and systemic inequities. Those disparities have too often been attributed to moral characteristics of Native people rather than the incongruence between Western and Indigenous ideologies and worldviews, inherent systemic racism, and a legacy of ongoing violence toward Native people. It is for these reasons that current inequities cannot be analyzed outside of the historical context that built them.

Since colonial occupation, the United States dealt with the “Indian problem” in three ways. First, the federal government sought to secure access to Native resources, land in particular. Second, it sought to assimilate Native people into White culture. Third, the federal government implemented a system of political controls over Native people, so the first two objectives could be achieved.³ This resulted in federal laws that rejected tribal justice, complicated criminal jurisdiction over Native people, and created historical trauma and disparities. There are solutions, however, that can address disparities through tribal and strength-based programming. Tribes are in the best position to identify and address the underlying factors that contribute to over-incarceration of Native people.

HISTORICAL CONTEXT

Prior to European contact, most Native people successfully sustained themselves by seasonally-guided, semi-nomadic lifestyles that provided opportunity to seek and follow resources as needed, and allowed for resources to revitalize and flourish for their future use. The places of their cyclical travels were of traditional importance, including creation stories, burial sites of ancestors, and places of ceremonies and celebrations. There was no concept of individual ownership of land, but a relationship with, and responsibility to, the land.

Native people were self-governing with effective justice systems for centuries prior to colonization. These justice systems were largely centered in tribal values and elders’ oral teachings upheld by relational accountability. Indigenous justice systems mediated conflict, restored tribal harmony, and ensured restitution by focusing on restoring balance and relationships rather than ascertaining guilt and exacting punishment.⁴ Describing traditional and communal ways of achieving justice, Tony Incashola, Sr., Salish elder and director of the Séliš-Qlispé Culture Committee said, “There were no jails, there was no need for that.

There were no laws, there was trust and understanding. Led by people who earned their role in the community, people strived to make a better life for the people as a whole, to respect and understand one another, to learn the right and wrong of life.”

In contrast, European laws sought retribution for victims through the establishment of proof, guilt, and the enforcement of punishment. The clashing of these concepts eventually led to attempts to force Native people to subscribe to a Euro-American view of justice, first by means of war and military force and then by legislation that systematically eroded and delegitimized Native justice systems and inherent rights of sovereignty.

Differing justice philosophies drove the U.S. Government’s continuing efforts to “civilize” and assimilate Native people. To undermine Indigenous forms of justice and sovereignty rights, the government used eradication of traditional sources of food and ways of life, military action, legislation, and policy. The extensive trail of legislation that followed included the General Crimes Act, the Assimilative Crimes Act, the Major Crimes Act, the General Allotment Act, and Public Law 280. This legislation slowly chipped away at the ability of sovereign tribal nations to self-govern and address crime on their own, which has resulted in the jurisdictional maze that we have today.⁵

Throughout the years since colonial occupation, with each era of federal Indian policy the U.S. government attempted to deal with “the Indian problem.” These eras do not exist in the isolation of the past, rather they carry direct trauma and indirect impacts that carry forward to the present day in the form of historic trauma, disparities, and resilience.

The eras of federal Indian policy include: Co-Existence, Removal, Assimilation, Reorganization, Termination, and Self-Determination. These eras are not as linear as implied and many formal policies and especially informal practices overlap and backtrack.⁶ Many of these policies represent intentional, systematic attempts to dismantle traditional practices and the symbiotic lifestyle while ostensibly “civilizing” already civilized, thriving Native populations. Further, from the time of European contact, European settlers’ individual, materialistic interests heavily influenced federal policy.

THE CO-EXISTENCE ERA (COLONIAL ARRIVAL TO THE 1830s)

Co-existence inaccurately implies peacefulness. Cooperative contact between European settlers and Native people, particularly in trade, included conflict. The early federal government took steps to establish and maintain boundaries between Native and settler territories during the rapidly expanding invasion West. The government also established and regulated trade and defined state and federal relationships to Native people. The first treaty was signed during this era. Congress instituted Indian Agents who monitored and controlled trade with Native people, settled disputes that arose within trades, and took steps to acculturate and integrate Natives into the European way of being.

THE REMOVAL ERA (1830s TO 1860s)

As it sounds, this era began the forced removal of Native people from their homelands. The Cherokee Nation "Trail of Tears" is the most well-known example of removal with the loss of thousands of Native people during the forced move from their homeland east of the Mississippi River to present day Oklahoma. Less well known is the fact that most tribes were moved from, or restricted access to, their traditional homelands to allow for the encroachment of settlers moving further West. The continued use of treaties, many forged or signed under coercion, rarely translated or explained, filled with false and unfulfilled promises, justified the government's removal of Native people from their traditional homelands.

Next, the government established reservations—territories reserved for Native people who were expected to stay within the bounds of the reserve, regardless of their need to hunt and gather and regardless of their relationship to places of seasonal, ceremonial, or spiritual value. Native people were expected to adopt and follow the European lifestyle, including Christianity and farming, even though much of the reservation lands were not suitable for productive harvests.

During this time, the federal government made massive efforts to kill off bison, a major source of food, clothing, and other survival resources. Decimation of bison paired with removal from places where other foods and medicines were seasonally collected, effectively forced most tribes to rely upon government issued rations for survival. While rations were a part of most treaties, these provisions were frequently insufficient, spoiled, or never provided at all, resulting in starvation and undernourishment of Native people.

Notable current day impacts of the Removal Era, include broken ties to culturally significant locations, lost opportunity for wealth accumulation (that typically accompanies Westernized ideas of land ownership and fair market land sales), and loss of symbiotic relationships with the land resulting in the complete depletion of valuable resources. An example of these impacts is evident in the 1948 transfer of land for the Garrison Dam in North Dakota. The federal government pressured the sale of 154,000 acres from the Mandan, Hidatsa and Arikara Nation of North Dakota. Pictured below is George Gillette, chairman of the Fort Berthold Indian Tribal Business Council, during the signing ceremony. He stated "we will sign this contract with a heavy heart. With a few scratches of the pen, we will sell the best part of our reservation. Right now the future doesn't look too good to us."⁷



HHR, George Gillette (left), chairman of the Fort Berthold Indian Tribal Business Council, weeps as Secretary of Interior J.A. Krug signs a contract whereby the tribe sells 155,000 acres of its reservation in North Dakota for the Garrison Dam and Reservoir project, 1948.⁸ Creation of the dam flooded one-quarter of the reservation (154,000 acres of fertile farmland), displacing 80% of the tribal members and destroying tribal headquarters that housed tribal government and the Indian Health Service Hospital.⁹



Portrait of Annie Dawson, Carrie Anderson, and Sarah Walker, upon their arrival and 14 months after at Hampton Normal and Agricultural Institute in 1878. Boarding school administrators often hired photographers and staged Native children in classrooms as evidence of the school's "success" in assimilating Native children to European culture.¹⁶

THE ASSIMILATION ERA (1860s TO 1930s)

The Assimilation Era was marked by the loss of Native homeland and the expansion of policies demanding the education and integration of Native people into the European worldview. In the 1860s, government and private leaders introduced boarding schools as an extension of religious-based schools for Native children. The schools worked to separate Native children from the traditional teachings and ways of life of their people in the name of assimilation. The slogan of the Carlisle Indian school, established in 1879 in Pennsylvania, was "Kill the Indian, Save the Man." The leaders established some schools on reservations, but purposefully developed many more off reservations to ensure students were not able to easily return to their families. The prevailing policies not only separated Native children from their families, denying traditional learning, they also stripped children of their culture. School officials cut children's hair and replaced their traditional clothes with European styles. School staff severely punished children for speaking their own language or engaging in traditional cultural practices. School staff physically, sexually, verbally, and psychologically abused children. Native children died while under the care of the schools, through disease, abuse, neglect, or from exposure to the elements after running away from the school. The children and their families had no recourse. No one held the perpetrators of this abuse accountable.^{10 11 12} The grief resulting from these practices and the attachment trauma passed from one generation to the next is one of the most challenging issues facing many Native families today. Recent research has drawn the link between the direct experience of the traumas that occurred at boarding schools and the erosion of Native family structure and life and the subsequent diminished capacity for secure attachment with their children.^{13 14} Epigenetics researchers have also established a mechanism of intergenerational trauma that offers a potential explanation of how traumatic events permeate our biology and create lasting health effects for future generations.¹⁵

In 1883, the Secretary of Interior approved the Indian Religious Crimes Code, forbidding Native people from practicing their traditional ceremonies, dances, and beliefs. Indian agents were authorized to enforce the ban on traditional practices by force,

imprisonment or withholding of rations. Not until 1978 with the enactment of the American Indian Religious Freedom Act of 1978, did Congress affirm Native people's right to openly practice traditional religious and spiritual ceremonies.¹⁷

One of today's challenges, land fractionalization, grew out of the General Allotment Act of 1887, also known as the Dawes Act. The federal government continued the distribution of Native homeland by assigning, or allotting, plots of reservation land to each Native person to own and farm. Many allotments included 160 acres for each head of household and their family, or 80 acres to single persons over the age of eighteen. The territories reserved for Native people through treaties with the United States government were much larger than the area distributed to Native people as allotted lands. Therefore, new agreements were drawn, with the same deception of the original treaties. Lands that were not allotted to Native people were deemed surplus and sold or given to non-Native people. "Checkerboarding" or the mix of Native owned and non-Native owned lands on reservations resulted. The mix of non-Native owned lands on reservations exists today, contributing to jurisdictional disputes and to date, approximately 20% of American adults can trace their wealth and property ownership back to a single policy of this era, the Homestead Act of 1862. The U.S. government gave away approximately 246 million acres of tribal homeland in 160-acre tracts to White settlers.

The U.S. government held the remaining Native allotted lands in trust. The law restricted allottees from determining how their allotments were to be distributed or handled upon their deaths. This resulted in multiple heirs co-owning allotted lands, which were further divided among heirs through generations. Eventually, many individuals owned small percentages of a designated piece of land. Therefore, a majority of the co-owners must approve any use of the land (i.e., leasing). The number of owners of one original allotment can easily reach into the hundreds. Consequently, many landowners have seen minimal or no economic benefit or physical utilization of these lands. They end up with either very small dividends or idle and unused land that would have otherwise carried value and created generational wealth.¹⁸

REORGANIZATION ERA (1930s TO 1940s)

Once again changing course, in 1934 Congress enacted the Indian Reorganization Act (IRA). The IRA encouraged development of tribal governments through establishment of constitutions, tribal councils, and federal economic support for tribal economic development. Tribes that participated in the IRA also saw the end of allotment, much too late for many Native territories. The IRA purported to shift the relationship between tribes and the federal government to a government-to-government relationship. Yet behind this self-governance paternalism persisted. The U.S. government heavily guided the drafting of tribal constitutions and by-laws and required final approval of tribal documents from the Secretary of Interior. While the IRA resulted in the beginning of the U.S. government's recognition of tribal sovereignty, it also endorsed federal opposition to Native people living their customary values, particularly regarding traditional approaches to authority, tribal leadership, and decision-making.

TERMINATION ERA (1940s-1960s)

Less than ten years after enacting the IRA, the federal government began another pivot, this time to the Termination Era. This era continued congressional efforts to reduce, or terminate, the government's treaty-bound obligations to tribes and assimilate Native people to Westernized culture once and for all. Through the Relocation Acts of 1952 and 1956, Congress moved Native people off reservations to urban cities for job training. Many were forced to agree that in exchange for professional training, they would not return to their reservations.¹⁹

This era was also marked by Native children's adoptions by White families. Between 1958 and 1968 the Bureau of Indian Affairs and Child Welfare League of America enforced the Indian Adoption Project. Under this project, as well as through more expansive individual state efforts, innumerable Native children were adopted by White families, often without notification to Native families or their communities. It was not until the Indian Child Welfare Act was enacted in 1978 that adoption protections were provided for tribes, Native children, and their families.^{20,21}

Federal policies resulting in removal of Native children from their communities systematically and ruthlessly disrupted the transmission of traditional ways and cultural knowledge to children from their elders and communities. These adoptions, combined with the continued implementation of boarding schools carried forward from prior eras, resulted in significant impacts that continue to ripple through Native communities today. Namely, many Native children were raised without a sense of belonging or identity and were not provided sufficient models for healthy caretaking or healing that, in turn, affected their ability to parent, effectively cope, or utilize traditional, cultural ways of healing.^{24,25}

In 1953, Congress enacted Public Law 280. P.L. 280 that transferred legal authority over criminal and civil matters in Indian country from the federal government to the state

in 6 states and allowed the option for the other 44 states to assume criminal and civil jurisdiction. Congress enacted Public Law 280 partly in response to the "lawless Indians" engaging in crimes as perceived by the White inhabitants on and near reservation lands. Currently, some tribes have partially or completely retroceded from P.L. 280, re-assuming all or some criminal and civil jurisdiction, while others remain completely under P.L. 280. For example, the state of Montana engaged in a partial retrocession of P.L. 280 with the Confederated Salish and Kootenai Tribes (CSKT) on the Flathead Reservation. CSKT reassumed exclusive jurisdiction over misdemeanor crimes committed by tribal members within reservation boundaries, while the state retained concurrent jurisdiction over felony crimes committed by tribal members on the reservation.

INDIGENOUS SELF-DETERMINATION (1960s TO 1980s AND BEYOND)

The federal government began another approach in 1960, self-determination. This enhanced tribal nations' ability to exercise their sovereignty and brought shifts in government-to-government relationships between individual tribes and the United States. Federal laws such as the Indian Self-Determination Act, Indian Civil Rights Act, Indian Child Welfare Act, Indian Gaming Regulatory Act, the Indian Land Consolidation Act, the Tribal Law and Order Act, and the Violence Against Women Act began restoring rights to tribes to self-govern and make decisions regarding their people and their resources. This federal legislation allows tribes to expand their criminal sentencing authority.

The Indian Civil Rights Act affords the right to counsel, but only at the accused's own expense. Few can afford to hire counsel and few tribal governments fund public defenders to represent the indigent. The result is uncounseled pleas and convictions in tribal courts on offenses that are used to enhance sentencing or stack against Native people in state and federal systems.

Some interpret these inconsistencies in federal policy as an example of exploitation and colonization. The federal government's regular changing of policies toward Native people connects directly to multifaceted Native trauma. As Luana Ross eloquently states, the "federal government has embraced conflicting policies regarding Native people, shifting from genocide to expulsion, exclusion and confinement, and later to supposed assimilation – the rhetoric was integration, the reality was confinement and domination." few tribal governments fund public defenders to represent the indigent. The result is uncounseled pleas and convictions in tribal courts on offenses that are used to enhance sentencing or stack against Native people in state and federal systems.²⁶

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COMPLICATED CRIMINAL JURISDICTION

Jurisdictional issues contribute significantly to the overrepresentation of Native people in the criminal justice system. It is not unusual for multiple law enforcement agencies to patrol the same reservation lands often causing a single incident to be charged in more than one jurisdiction. It is not unusual for a person to have pending charges in tribal court, state court, or local courts of limited jurisdiction, each with court appearances and multiple release requirements. Often, the accused is confused about those requirements and find themselves incarcerated for failing to follow them. The following chart demonstrates the complexity of criminal jurisdiction in Indian country.²⁸

Offender	Victim	Crime	Location	Jurisdiction
Tribal member	Tribal member	Enumerated/ Felony	Indian Country	Tribal and Federal *except on reservations or states that have been conferred jurisdiction under P.L. 280. In this case the State has jurisdiction.
Tribal member	Non-Tribal member	Misdemeanor	Indian Country	Tribal only
Tribal member	Non-Tribal member	Enumerated/ Felony	Indian Country	Tribal and Federal *except on reservations or states that have been conferred jurisdiction under P.L. 280. In this case the State has jurisdiction.
Tribal member	Tribal member	Misdemeanor	Indian Country	Tribal only
Non-Tribal member	Tribal member	Misdemeanor or Enumerated/ Felony	Indian Country	Federal or State
Non-Tribal member	Non-Tribal member	Misdemeanor or Enumerated/ Felony	Indian Country	Federal or State
Tribal member or non-Tribal member	Tribal member or Non-Tribal member	Misdemeanor or Enumerated/ Felony	Outside Indian Country	State only

S. DJ Offices

HISTORICAL TRAUMA: THE SOUL WOUND OF COLONIAL VIOLENCE

Historical losses contribute to the ongoing “soul wounds” of today, also known as historical trauma.²⁹ Losses of lands and traditional ties to place, food sources, language, connection to family and community directly and indirectly contribute to the disparities experienced by modern day Native people.^{30 31}

Native people continue to experience racism, oppression, discrimination, microaggressions, mockery, and misunderstandings of current day Nativeness.^{32 33} The tandem exoticization and devaluation of Native lives contributes to the epidemic of disappearances and murders of Native people, paired with delayed or poor investigations of these occurrences.

Native people die by police brutality at 3 times the rate of White Americans and 2.6 times higher than Black Americans.³⁴ The initial lack of media coverage and accountability has resulted in Indigenous-led movements such as Native Lives Matter and Missing and Murdered Indigenous Women, Girls, and People.

The healthcare system also demonstrates disregard for Native lives by creating additional barriers to accessing care in the state system, which places a higher burden on the Indian Health System (IHS) that is already chronically underfunded and understaffed. In fact, it was not until 2010 that Congress reauthorized and made permanent the Indian Health Care Improvement Act that funds IHS. Originally passed in 1976, the Act expired in 2000 and was not reauthorized until 2010. However, current appropriations remain inadequate and significantly lower than other federal health care programs. A recent report by the National Congress of American Indians highlighted the discrepancy in funding: In fiscal year 2017, the IHS per capita expenditures for patient health services were just \$3,332, compared to \$9,207 per person for health care spending nationally.³⁵

DISPARITIES WITHIN THE CRIMINAL JUSTICE SYSTEM

Native people are disproportionately represented in state and federal criminal justice systems. However, there are challenges to collecting accurate data. How Native people are named creates confusion in data collection. They may be classified as Indian—a legal term referring to political status, American Indian and Alaska Native—grouped together and referring to federally recognized tribes, Native American, or they are grouped in an “other” racial category thus excluded from statistical analysis. The data that does exist is fractionated but provides a glimpse into an underreported and overlooked crisis in Indian country. Lack of robust data is also attributed to states and counties not tracking by race, lack of access to other justice system databases, and lack of data software or technology in tribal systems. Despite unclear and incomplete data, information suggests that once Native people enter the justice system, it becomes much more difficult for them to get out.

One of the most comprehensive reports on Native people in the justice system, American Indians and Crime, found that American Indians and Alaska Natives (AI/AN) were incarcerated at a rate 38% higher than the national average and were overrepresented in the prison population in 19 states compared to any other race and ethnicity.³⁶ The National Prisoner Statistics series of 2016 reported 22,744 Natives were incarcerated in state and federal facilities,³⁷ and represented 2.1 to 3.7% of the federal offender population during 2019,³⁸ despite only accounting for 1.7% of the United States population.³⁹

In states with higher Native populations such as North Dakota, incarceration rates are up to 7 times that of their White counterparts.⁴⁰ Another example of disproportionate incarceration is in Montana where Native people make up approximately 7% of the population⁴¹ but are 20 to 34% of the Montana State Prison population.⁴² This racial disparity in Montana’s incarceration rates has remained relatively stable since 1997.⁴³

A study analyzing federal sentencing data found that AI/AN are sentenced more harshly than White, African American, and Hispanic offenders. In fact, further analysis showed that young AI/AN males receive the most punitive sentences, surpassing punishment imposed upon young, African American or Hispanic males.⁴⁴ For example, 2008 sentencing data showed that AI/AN in South Dakota who were prosecuted for aggravated assault in federal court received sentences that were 62% longer than those prosecuted in state court for the same offense.⁴⁵

In public committee hearings held to discuss expansion of tribal authority to incarcerate under the Tribal Law and Order Act, tribal leaders called for culturally congruent alternatives to

incarceration that focus on treating the root causes of criminal behavior. However, the number of jails in Indian country has increased from 68 in 2000 to 84 in 2018, which has, unsurprisingly, led to filling them with more people charged with petty crimes for longer periods of time. The 2020 Bureau of Justice Statistics report showed tribal jail incarceration rates increased by 2% from 2017 as part of a steady 60% rise since 2000.⁴⁶ The most recent report from the Bureau of Justice Statistics, however, has shown a significant reduction of incarceration in tribal jails during the COVID-19 pandemic. From June 2019 to June 2020, there was a 30% decrease in tribal jail populations attributed to a reduction in admissions to jails and expedited releases.⁴⁷ This is in line with local jails which also showed a 25% reduction in jail population from June 2019 to June 2020.⁴⁸ It remains unclear if these trends will continue as the world continues to grapple with the public health implications of incarcerating people during a deadly pandemic.

According to the Bureau of Justice Statistics, 45% of people incarcerated in tribal jails were being held pretrial and pretrial detention rose by 80% from 1999 to 2018. The average length of stay doubled from 2002 to 2018.⁴⁹ Additionally, the most serious offense for 16% of people held in tribal jails was public intoxication and 15% were held for drug related or DUI charges. In response to this finding, the Indian Law and Order Commission stated, "In nearly every committee hearing on public safety related matters, the committee received testimony that drug and alcohol abuse were contributing factors in most nearly every crime committed in Indian communities." This information combined with data from the Office of Juvenile Justice and Delinquency Prevention that indicated Native youth are more likely to face conviction in adult court, especially for drug-related crimes, led the Commission to conclude that any successful measures to reduce recidivism among Native people will require significant efforts to address drug and alcohol use.⁵⁰ It is equally important to understand the factors that contribute to high rates of substance use including poverty and disproportionate rates of trauma. The Bureau of Justice Statistics reported that Native people experience violence at rates that are more than twice the national average and well above those of other racial or ethnic groups in the U.S. These rates were consistent across age groups, housing locations, and by gender. Additionally, Native people were more likely than people of other races to experience violence at the hands of someone of a different race, and the perpetrator was more likely to have consumed alcohol preceding the offense.⁵¹

Addressing problems that stem from inequality by using criminal justice systems and jails instead of social resources is not exclusive to Native people. Yet, Native communities that have already been subject to centuries of systemic violence and economic inequity face additional and unique challenges. As a byproduct of disproportionately incarcerating Native people, there is an influx of tribal members returning to their communities with new challenges. Tribes are best suited to address the cycle of incarceration among their members, restoring principles of justice that make sense for Native people. If adequately funded, tribes could provide representation to the indigent accused in their tribal courts, impacting those offenses that lead to further justice involvement in state and federal

systems. One method of public defense that addresses those issues that drive people into the criminal justice system and fits well with traditional, tribal principles is holistic defense.

ONE SOLUTION: HOLISTIC DEFENSE IN A TRIBAL SYSTEM

Developed in 1997 by the Bronx Defenders in New York, Holistic Defense is a replicable model of public defense that incorporates client-centered and interdisciplinary best practices. At its core are four basic pillars:

1. Seamless access to services that meet legal and social support needs. Holistic defense begins with a commitment to addressing clients' most pressing legal and social support needs.
2. Dynamic interdisciplinary communication. It is not the

interdisciplinary team alone that drives success, but a culture of open, frequent, and meaningful communication that centers on the client.

3. Advocates with an interdisciplinary skillset. A holistic defender must have an enhanced set of skills beyond legal advocacy to understand the underlying issues driving their clients into the criminal justice system and solutions that will have long-lasting positive outcomes.
4. A robust understanding of, and connection to, the community served. Most important in a tribal system, advocates are better able to relate to their clients in the context of their families and their community.⁵²

Holistic defense is restorative in nature by addressing the issues that bring people into the criminal justice system and the collateral consequences to criminal charges and convictions. It focuses on the person in the context of their community. These concepts fit well in tribal systems. The following chart highlights the parallels drawn between tribal restorative practices and holistic defense.

Parallels	Traditional Tribal Holistic Justice Model ⁵³	Holistic Defense Model ⁵⁴
Holistic Philosophy	Traditional tribal justice systems are “based on a holistic philosophy...This is a holistic system with law and justice being a part of the whole society. Law is learned as a way of life.”	Holistic defense views the client as a whole person. “At its core, holistic defense recognizes that clients have a range of legal and nonlegal social support needs that, if left unresolved, will continue to push them back into the criminal justice system.”
Resolving Underlying Problems and Collateral Consequences	Traditional tribal justice systems are “based on a holistic philosophy...This is a holistic system with law and justice being a part of the whole society. Law is learned as a way of life.”	Holistic defense views the client as a whole person. “At its core, holistic defense recognizes that clients have a range of legal and nonlegal social support needs that, if left unresolved, will continue to push them back into the criminal justice system.”
Dynamic Communication	Traditional tribal justice systems are “based on a holistic philosophy...This is a holistic system with law and justice being a part of the whole society. Law is learned as a way of life.”	Holistic defense views the client as a whole person. “At its core, holistic defense recognizes that clients have a range of legal and nonlegal social support needs that, if left unresolved, will continue to push them back into the criminal justice system.”
Community	Traditional tribal justice systems are “based on a holistic philosophy...This is a holistic system with law and justice being a part of the whole society. Law is learned as a way of life.”	Holistic defense views the client as a whole person. “At its core, holistic defense recognizes that clients have a range of legal and nonlegal social support needs that, if left unresolved, will continue to push them back into the criminal justice system.”

Consistent with traditional, restorative practices that address underlying mental health, substance use, poverty, and other factors that marginalize the accused, the Tribal Defender's Office (TDO) for the CSKT developed a holistic defense practice with technical assistance from the Center for Holistic Defense at the Bronx Defenders.

TDO started its holistic practice by redefining roles of existing staff to best meet the needs of their clients. Since then, the practice developed into an interdisciplinary team of attorneys, advocates, case managers, a licensed addiction counselor, and psychologists whose efforts center on services according to needs identified by their clients. Integrating grant funded programming with the core mission to represent the accused in tribal court, TDO staff methodically look for ways to fill gaps in services and assist clients to have better life outcomes. As a result, TDO services have grown and adapted to meet the needs of the tribal community in the following ways.

COLLABORATIONS.

Holistic defense is supported by collaborations that promote innovation and seamless access to services. TDO's collaborative partners include: CSKT Tribal Health, the CSKT Department of Human Resource Development, Salish Kootenai College, Salish Kootenai Housing Authority, the Tribal Police, the University of Montana, the Montana Department of Corrections, the Montana Board of Crime Control, the Missoula County Sheriff, the Lake County Sheriff, Partners for Justice, the Montana Mental Health Trust, Providence Health Care, and the Bail Project.

THE JUSTICE AND MENTAL HEALTH COLLABORATION PROGRAM.

Two years before implementing holistic defense, TDO began its interdisciplinary approach with federal funding to provide psychological and case management services in-house. Addressing the need to provide more accessible services to TDO clients, this program is sustained with funding from CSKT Tribal Health. Rather than waiting up to two months for mental health care, TDO clients can be seen within days of making a request. TDO's clinical psychology doctoral students provide assessment, group and individual therapy, and psycho-education in the TDO office and the tribal jail

THE FLATHEAD RESERVATION REENTRY PROGRAM

In 2015, TDO was awarded Second Chance Act funding to provide supportive services to tribal members returning to the Flathead Reservation from incarceration.⁵⁵ Integrated into TDO's holistic defense practice, the Flathead Reservation Reentry Program (FRRP) offers case management and legal consultation beginning when clients are still incarcerated in tribal, county, and state facilities. Clients are connected to financial assistance, educational and vocational resources, behavioral health services, and primary health care providers. Clients receive assistance with parole planning, advocacy at parole hearings, and legal advice regarding civil matters, expungement, and offender registration requirements. In addition, TDO clinical psychology



An incarcerated participant in the Anger and Irritability group facilitated by TDO psychologists in collaboration with Tribal Behavioral Health, is allowed temporary release to engage remotely from the Tribal Defenders Office.

trainees developed the Reentry Intake and Assessment Tool (RIAT). Case managers use the RIAT to create a reentry plan that is identified by the client and assign a level of risk for recidivism that guides the intensity of services offered.

The RIAT is composed of a demographic intake questionnaire, the Level of Service Inventory-Revised (LSI-R),⁵⁶ the Historical Loss Scale, the Historical Loss Associated Symptoms Scale,⁵⁷ and the Cultural Connectedness Scale.⁵⁸ The LSI-R, an evidence-based tool used by some state corrections programs to predict risk of recidivism, was never intended to continue as the measure of recidivism for the Native population served by the FRRP. Rather, it was intended to collect data and outcomes, take the factors panned out through TDO psychologists' research analysis, and restructure the RIAT to its own evidence-based tool with the hypothesis of eliminating the mainstream factors contained in the LSI-R.

Approximately one year into FRRP, the reentry staff incorporated an additional self-report measure into the RIAT, the Posttraumatic Stress Disorder Checklist for the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. This measure was added after a number of reentry clients reported traumatic events in their lives that were still affecting them and to determine whether significant exposure to traumatic events may be a factor in risk for recidivism. Using the RIAT interview as a guide, FRRP services are open-ended, client-driven and consistent with the holistic defense model.

DRIVER'S LICENSE RESTORATION

The Flathead Reservation stretches across four counties in Montana and 1900 square miles. People must drive to work, to connect to others, and to receive services. Seeing many clients caught in a cycle of driving with suspended licenses, TDO offers assistance to help people determine why their licenses are suspended and how to restore their privilege to drive. Since 2011, more than 250 TDO clients have become valid drivers.

CULTURAL MENTORING

Although the Reservation is rife with societal ills, it is also rich in culture and tribal values that can be utilized to bring the CSKT community together to help those who are challenged. The Flathead Reservation is home to tribal elders, culture committees, innovative and educated thinkers, and strong family ties. By collaborating with the Séliš-Qlispé and Kootenai culture committees, TDO recruits volunteers in the community to provide cultural mentoring. Mentoring may involve individual counseling with mentors, mediations with persons wronged, or meeting with the tribal elders.

MEDIATION

In addition to cultural mentoring, civil litigants may mediate their cases through a collaboration with the Alexander Blewett III School of Law, Mediation Clinic offered at TDO.

PRO SE CLINIC

Litigants receive help drafting pleadings to file in tribal court.

WALK-IN SERVICES.

TDO is a community clinic offering tribal members information and referral. People may receive assistance to address housing eviction, public assistance, consumer issues, or other civil matters.

COMMUNITY OUTREACH

TDO educates clients, stakeholders, and the community on topics from Know Your Rights, How Not to Get Arrested, to Consumer Education and How to Navigate the Department of Corrections. TDO organizes an annual warrants court that allows clients to clear failure to appear and failure to pay fines warrants along with a community service day. TDO staff and clients work together to clean up the CSKT campground, Blue Bay.

CONNECTIVITY IN THE PANDEMIC

In an effort to maintain client contact while practicing covid safety protocols, TDO obtained funding from the Montana Board of Crime Control to provide cell phones and data cards to clients to assist them to keep in contact with their attorneys, the court, their probation officers, and service providers. TDO was also able to purchase equipment to set up Zoom access at TDO so clients can make court appearances and access behavioral health providers remotely.

MENTAL HEALTH CLIENT ADVOCATES

Seeing a rising need for mental health services in the CSKT jail, TDO applied for funding from the Montana Mental Health Trust to hire mental health client advocates. Through a collaboration with Partners for Justice who offer training and support, client advocates screen all newly arrested people in the tribal jail for mental health needs. The advocates offer follow up case management services and help build a network of services, including TDO attorneys and advocates, to address client needs.

PERMANENT SUPPORTIVE HOUSING

TDO is the lead services provider for CSKT's first permanent supportive housing project that houses 14 adult individuals at the Morning Star Apartments. Part of the TDO team, a Services Coordinator and Caretaker located at the Morning Star, offer supportive services for TDO clients who were homeless due to criminal records and mental health or substance use issues. TDO collaborates with other service providers to offer on-site services to Morning Star residents. Serving as a pilot project for a trauma-informed, harm reduction approach to house people otherwise unable to access public housing, the Morning Star will be a model for other permanent supportive housing projects on the Flathead Reservation.

LESSONS LEARNED IN HOLISTIC DEFENSE

SERVICES FIRST

TDO learned early that services should not be driven by court dispositions. If TDO staff can meet the needs of clients, as identified by clients, they will have more successful life outcomes. Often, courts impose conditions that identify specific levels or types of treatment without the benefit of a clinical needs assessment. Or conditions may include paternalistic blanket recommendations for education or employment that do not account for the client's own goals, motivations, or values. Allowing the client to identify their own goals will result in better engagement and better outcomes.

INVEST IN CULTURALLY RELEVANT RESEARCH AND SERVICES

Funding sources often require use of "evidence-based" measurement tools. As defined by the American Psychological Association evidence-based practice is the "integration of the best available research with clinical expertise in the context of patient characteristics, culture, and preferences."⁵⁹ However, the baseline requirements considered evidence-based are rarely met for Native populations. Because the tools are not tested within Native populations, their efficacy and norms are not established specifically for Native people, thereby limiting the quality of services that can be provided. This requirement for use of evidence-based tools already in existence also hampers new tool development tailored for use in Native populations.

In general, Native populations have been left out of the norm samples that have informed the validity of recidivism risk assessment measures. This perpetuates the assumption that Native people have the same criminogenic needs (i.e., predictive factors of recidivism) as non-Native populations. In fact, studies have shown low to moderate predictive ability for many of the most commonly used risk assessment measures, including the LSI-R that is embedded in the RIAT. Analysis of TDO's data supports previous findings that suggest mainstream risk measures perform poorly in Native American justice-involved populations and fail to capture or assess culturally unique risk and resiliency factors that subsequently inform conditions of release and treatment plan. The LSI-R was statistically significant in the model for prediction of recidivism outcomes, but still performed at an overall poor level (65.8% accuracy rate) and showed poor internal reliability (Cronbach's alpha = .48).

Culturally specific factors are important yet are largely overlooked in determining risk for recidivism. TDO's psychologists' studies showed overall, high levels of self-reported cultural connectedness were associated with a decrease in likelihood for recidivism. Interestingly, frequent thoughts about historical losses were associated with reduced likelihood of recidivism, while increased anger and avoidance in response to those thoughts appeared to be a risk factor for recidivism. However, as the level of anger and avoidance

symptoms increased, the protective effect of frequent thoughts about historical losses on recidivism decreased.⁶⁰

Including strengths-based factors, such as culturally specific factors in risk assessment could result in more accurate, relevant, and meaningful treatment recommendations which could impact life outcome and ultimately, recidivism. Justice-involved Native people have unique criminogenic needs that require the development of a risk assessment tool specific to their needs. Assessment tools should facilitate holistic assessment of risk, resiliency, and strengths that allow justice-involved Native people to participate in their plan for reentry. The Center for Court Innovation has identified the need for risk-need responsibility tools for tribal justice systems and is working to develop and validate such tools with Native populations.⁶¹

LISTEN TO CLIENTS AND LISTEN TO THE COMMUNITY

TDO continues to utilize client surveys and focus groups to identify needs and offer services accordingly. Services are culturally vetted by the culture committees on the Reservation to ensure services are culturally relevant. Community events that include clients and justice stakeholders build bridges among them and promote solutions that highlight a strength-based approach. If holistic practitioners listen to their clients in the context of their communities and they will more likely provide resources that are meaningful.

ADHERE TO CULTURAL SAFETY

Cultural competence is held as a standard for working with minority populations. The term cultural competence suggests one can develop expertise in a culture that is not one's own. The problem with this is two-fold. First, expertise in another culture is not the goal. Those of that culture are already the experts, let them speak for themselves. Second, it is not possible to develop competence in all cultures. There are innumerable cultures and intersections of identities related to race, ethnicity, national origin, ability status, gender identity, and sexual orientation. Further, each of the hundreds of tribal communities in the United States has a system of belief, traditions, practices, languages, historical experiences and losses, and resiliencies that differ from one another. To believe anyone could develop true competence in all cultures encountered is reductionist and offensive.

Necessary, instead, is cultural humility and cultural safety. Cultural humility acknowledges the impossibility of expertise in another's culture. Cultural humility reframes the goal to one of learning, listening, and recognizing one's biases and lack of knowledge. Cultural safety allows others to carry their identity and experiences, without judgment, assumption, or imposition. Cultural safety provides safety at all levels—physical, emotional, psychological, and spiritual. The other individual does not have to be any particular way or perform, educate, mask, or protect, they can simply be who they are in that moment.

Examining one's own biases and acknowledging the existence of implicit, or hidden, biases in all of us can help in the practice of cultural safety. It provides insight into ways we may not be allowing for the safety of another.

MORE PROMISING PRACTICES SUPPORTING NATIVE PEOPLE

TDO created a holistic practice from the perspective of public defense in a tribal community. However, there are several tribal systems across the country using restorative principles to provide innovative, alternative approaches in criminal justice within their tribal systems, and for those Native people caught up in state courts.⁶² There are also national organizations that assist tribes to address criminal justice challenges.

VICTIM ASSISTANCE TO SUPPORT TRIBES

A program of the National Center for Victims of Crime, the Victim Assistance to Support Tribes program provide technical assistance and training to tribal victim service agencies.

THE CENTER FOR COURT INNOVATION

The Center for Court Innovation tribal justice team developed a Tribal Access to Justice Innovation website that help tribal justice practitioners learn about promising practices in Indian Country. It is creating a package of informational materials for Native child victims and witnesses. The Center is also developing a tribal-specific risk-need-responsivity assessment tool.

THE NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

NAICJA provides training and resources for tribal courts, including tribal court advocacy training and holistic approaches to civil and criminal legal assistance in tribal justice systems.

KENAITZE INDIAN TRIBE, ALASKA

The Henu Community Wellness Court is a joint-jurisdictional court in the Kenaitze Tribal Court and Alaska State Court systems. Henu is the Dena'ina word for hard work, job, or task. The court serves adults with underlying substance use issues and incorporates treatment, social services, housing, and cultural practices.

LITTLE RIVER BAND OF OTTAWA INDIANS, MICHIGAN

Sponsored by the Little River Band of Ottawa Indians Tribal Court, Peacemaking Probation Department, youth participants are immersed in a four-day wilderness camp that teaches traditional Native cultural and spiritual values through crafts, educational presentations, and wilderness living.

YUROC TRIBE, CALIFORNIA

The Yurok Wellness Court provides an interdisciplinary approach and cultural intervention to tribal members in adult, family, and juvenile court proceedings. As a result of overlapping jurisdictions with Humboldt and Del Norte Counties, the Yurok often exercise concurrent jurisdiction over substance related offenses involving tribal members.

MUSCOGEE (CREEK) NATION, OKLAHOMA

The Muscogee Creek Reintegration Program provides intensive case management to tribal members who were incarcerated. Services begin pre-release and address all aspects of reentry including financial assistance, housing assistance, career development, culturally relevant programming, supervision, and legal counsel. Muscogee Creek is considered one of the leading reentry programs in the nation.

SAINT REGIS MOHAWK TRIBE, NEW YORK

Uses cultural traditions to rehabilitate and heal individuals participating in its Healing to Wellness Court. The court collaborates with non-tribal agencies including the U.S. Attorney's Office, state courts, city courts, federal and state probation officers to divert tribal members with criminal charges.

EASTERN BAND OF CHEROKEE INDIANS, NORTH CAROLINA

The Heart-to-Heart Child Advocacy Center provides comprehensive evaluation and supportive services to abused children on the Cherokee Reservation. Through investigation, legal proceedings, and the healing process, Heart-to-Heart works collaboratively with a multi-disciplinary team ensuring that their work is trauma-informed, culturally competent, and child-focused.

PORT GAMBLE S'KLALLAM TRIBE, WASHINGTON

The Welcome Home Program utilizes restorative principles to serve both Native and non-Native people in the Kitsap County jail, assigning success coaches who develop individualized service plans including the Wheel of Wellness that focuses on physical, spiritual, emotional, and mental needs.

CONCLUSION

A discussion of the over-incarceration of Native people begins with the historical context of how Native people have survived the taking of lands and federal efforts to undermine Native culture. Historical trauma and the soul wounds that result, contribute to disparities that exist today not only in the over-representation of Native people in the criminal justice system but also in economic development, health care, and how Native victims of crime are treated. Federal laws and policies that addressed the sovereign, dependent nature of tribal governments have resulted in complicated criminal jurisdiction that results in more exposure to criminal prosecution for Native People. That, coupled with a lack of indigent defense in tribal courts contributes to tribal criminal records used against Native people in state and federal systems.

Tribal justice systems are better positioned to intervene with its justice involved members by offering services that are culturally relevant, restorative, and fair. Tribes can change the trajectory before, or even after, Native people are pulled into state and federal systems as demonstrated by TDO and other tribal programs that address the underlying issues that bring people into the criminal justice system and the collateral consequences that pull them back in. If Tribes have the funding and inclination to appoint counsel to the indigent, tribally-based public defender offices applying a model of holistic defense would be the most effective to support positive change and the most congruent with traditional, restorative practices. In order to elicit sustainable change, tribal public defenders could work with their clients in the context of their community—their families, their elders, their values, and their definitions of success.

ENDNOTES

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