



NATIONAL AMERICAN INDIAN  
COURT JUDGES ASSOCIATION

REPORT ON  
**Holistic and  
Traditional Justice**  
ROUNDTABLE



NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

# Report on Holistic and Traditional Justice Roundtable

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## Acknowledgements

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**A. Nikki Borchardt Campbell**

*Executive Director*

National American Indian Court Judges Association

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## Purpose and Introduction

*Think not forever of yourselves, O Chiefs, nor of your own generation. Think of continuing generations of our families, think of our grandchildren and of those yet unborn, whose faces are coming from beneath the ground.*

—Peacemaker, Founder of the Iroquois Confederacy, circa 1000 AD

**M**odern tribal courts serve an integral role in maintaining peace and harmony within their respective tribal communities as well as other jurisdictions. The problems tribal courts have been tasked with addressing have evolved over the past decades, and tribal courts have adapted to the changing times while maintaining many of their traditional values and practices. With the Western adversarial system facing mounting concerns regarding its ability to adequately address social problems through an overreliance on punitive measures, the traditional methods of dispute resolution practiced within tribal communities provide valuable strategies and solutions that warrant specific consideration from the U.S. Department of Justice (the Department), Bureau of Justice Assistance (BJA), and the Tribal Civil and Criminal Legal Assistance (TCCLA) Program (see Appendix A). BJA provides funding through the TCCLA Program to regional organizations and not-for-profit corporations with a 501(c)(3) tax status. BJA also provides civil and criminal legal assistance to tribal courts in an effort to build justice system capacity and improve representation and adjudication for tribal members and, where appropriate, non-Indians.

The National American Indian Court Judges Association (NAICJA), the only national association of tribal court judges and court personnel, has a vested interest in supporting and strengthening all tribal justice systems, including adversarial and traditional courts and practices. It also offers training and technical assistance to provide justice and healing to tribal communities. NAICJA is engaged in discussing the topic of traditional justice and traditional courts, which must be balanced against a discussion about adversarial tribal courts. As certain issues plaguing tribal communities continue to persist, addressing the topic of how traditional justice can be used in tribal justice systems becomes an important consideration. Moreover, a holistic or traditional approach can also assist individuals exposed to the tribal justice system repair and preserve relationships not only with other individuals but also with their tribal community.

This publication provides a detailed description of the “Holistic & Traditional Justice Roundtable” held in Albuquerque, New Mexico, on November 13, 2015 (see Appendix B). More than 24 Indian Law experts attended the Roundtable and participated in a full

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day discussion, which yielded considerable insights on holistic and traditional justice. Among the attendees were tribal court judges, tribal supreme court and appellate justices, legal aid attorneys, nonprofit staff attorneys and executive directors, private practice attorneys, a tribal councilwoman, an undergraduate professor, and at least six law school professors. With such a broad group of professionals, each having extensive experience in the field of Indian Law, the discussion was extraordinarily fruitful and limited only by the time allotted.

The discussions were divided into three separate sessions: (1) Defining the “Native Standard” in Restorative Justice Practices, Traditional Justice, and Peacemaking; (2) The Applications of Tribal Justice Systems and Indigenous Law; and (3) Intersections between Restorative Justice, Traditional Justice, Peacemaking, and Adversarial Courts (Including Alternatives to Detention). Each session began with presentations by two or three Indian Law practitioners and concluded with moderated roundtable group discussions involving all of the attendees.

The primary objective of bringing these tribal justice experts together was first and foremost to discuss how traditional and holistic practices intersect within the larger scheme of tribal justice practices and systems—particularly tribal courts based on a Western, adversarial model—and the BJA TCCLA Program. This meeting was also convened with the goal of presenting the information in an electronic publication for BJA. Additionally, NAICJA set out with additional goals and objectives that included discussing the following:

- The importance of custom and tradition to tribal justice systems (i.e., implications of implementing traditional v. Western methods).
- The shortfalls or challenges of the adversarial system in tribal communities (addressing cause v. symptoms, etc.).
- Whether collaborative or holistic approaches benefit individuals appearing before the tribal forum and contribute to the healing or health of tribal communities.
- The aspects of traditional/restorative justice that are being implemented in the adversarial system to address these shortcomings.
- The competing sovereignty/civil rights implications of uncounseled tribal court convictions.
- Whether traditional justice practices should be used as alternatives to detention.
- Whether tribal healing-to-wellness courts address community needs that are otherwise neglected by the adversarial system.

Following are an overview of the presentations provided and a synopsis of the issues and topics discussed.

#### ABOUT THE NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

The National American Indian Court Judges Association (NAICJA) is a 501(c)(3) nonprofit organization comprised of tribal court judges and justice personnel from across the nation devoted to supporting and strengthening tribal justice systems through education, training, information sharing, and advocacy. Its membership is comprised of over 200 judges, justices, peacemakers, and other justice system personnel who serve the tribal justice systems of federally recognized tribes.

NAICJA was established following the enactment of the federal Indian Civil Rights Act (ICRA) of 1968, and it held its first training in 1969. NAICJA is currently a training and technical assistance provider for the Department of Justice, Bureau of Justice Assistance, Tribal Civil and Criminal Legal Assistance Program.

## Defining the “Native Standard” in Tribal Justice Systems

It is imperative to discuss the foundations and background of concepts that inform tribal justice systems and lead to unique, community-oriented traditional and holistic justice practices. This section provides the introduction to these concepts.

#### JOE FLIES-AWAY, CHIEF JUSTICE, HUALAPAI NATION COURT OF APPEALS (RETIRED)

Before discussing several of the functions of modern tribal justice systems, Chief Justice Joe Flies-Away began with an explanation of how indigenous justice systems originated. In the beginning, he explained, indigenous people shared stories with each other to make sense of the heavens and the earth. These shared words, dreams, and thoughts were passed down from each generation to the next, eventually leading to a “Native Standard” for indigenous justice systems that focuses on relationships and connections. He illustrated the importance of the relatedness/disconnection dichotomy to indigenous justice systems with a well-known quote attributed to Justice Robert Yazzie of the Navajo Nation Supreme Court: “(Criminals) act like they have no relatives.” With this mindset, someone who harms another ignores his or her duty as a member of the community and acts as if he or she is not tied to the victim and is not a part of them. When this happens, the offender, and indeed everyone, requires reconnection to the positive and disconnection from the negative in order to heal. By viewing justice in terms of healing, Chief Justice Flies-Away explained, we can begin to understand the importance of indigenous ceremony. Ceremony acts as a community nation builder by

## H O L I S T I C & T R A D I T I O N A L J U S T I C E R O U N D T A B L E

explaining to the people how everything is related and how everyone is connected to one another. In doing so, ceremony is able to foster healing through reconnection to the positive.

Next, Chief Justice Flies-Away defined Therapeutic Jurisprudence (TJ), a practice that focuses on the law's impacts on people's emotional lives and psychological wellbeing. TJ is concerned with how legal procedures and paradigms have therapeutic or anti-therapeutic results for the people involved. A related concept, TJ+, expands upon TJ by incorporating spirituality (the "+") into the concept. In this context, the definition of spirituality incorporates the relatedness and connectedness that human beings share with all creation. Chief Justice Flies-Away explained that a key component of spirituality is the indigenous conception of "law," meaning that which defines relationships and connections, that which is written in codes, constitutions, and common law, and that which is done through customs, culture, and common practices.

Chief Justice Flies-Away next outlined the application of TJ+ to wellness courts. TJ+ requires the wellness court to be mindful not only of the act, crime, or conduct that causes a person to be referred to a court but also to fully consider the sickness or addiction of that individual. In this context, the entire treatment or healing regimen must be prepared to deal with the chemical and physical natures of the participant's addiction and his or her state of mind and emotional situation. After a careful consideration of the mores and culture of the participant's community, this comprehensive and phased treatment approach promotes healing by identifying positive situations and relationships, and it encourages the participant's reconnection with them while disconnecting from negative situations and relationships.

Chief Justice Flies-Away outlined the following 10 key components of successful wellness courts that, he explained, are also applicable to tribal courts:

1. Team and community building.
2. Entry and acceptance into the program.
3. Eligible cases.
4. Healing and treating alcoholism, drug addiction, mental health, or other issues.
5. Supporting and supervising through drug testing and other sanctions and sentencing.
6. Disciplining and encouraging.
7. Respectfully communicating across teams, judges, and participants.

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8. Keeping and telling stories. Keeping and evaluating data in order to keep improving.
9. Encouraging knowledge and experience through continual learning and sharing information.
10. Sustaining the wellness court through grants or otherwise.

Finishing his discussion, Chief Justice Flies-Away shared a conceptual diagram of indigenous law designed to encompass the systems of every human culture. Four axes on a sphere represent the balancing between individual and group, conflict and cooperation, conscious and collective conscious, and written law and customs/contracts/culture. He explained that the responsibility of every human being should be to begin from the center of the sphere and consider the axes' interactions while keeping in mind the primary goal of seeking peace and communicating interpretations to others. Law, he explained, is something that everyone has a conception of and should be shared so that we may all live together well.

### **ADA PECOS MELTON, PRESIDENT, AMERICAN INDIAN DEVELOPMENT ASSOCIATES**

Ms. Ada Melton provided a broad overview of what indigenous justice systems were, are, and should be. She began by explaining that when Europeans began interacting with the original inhabitants of the Americas, indigenous conceptions of law and justice already existed and had proven effective at ensuring justice and maintaining communal safety. This indigenous framework of philosophies, beliefs, processes, approaches, and practices involved all things and all people. It was successfully maintained through families, clans, and societies. Unfortunately, incongruous European methods of dealing with conflict—rooted in a foreign conception of justice based on formality, exclusivity, and punishment—were eventually imposed on these indigenous people and would threaten their traditional systems.

Ms. Melton then provided a detailed description of modern indigenous justice systems that value unconditional love and caring for everyone—including offenders, victims, families, and the community—as primary foundations. Ms. Melton explained that the holistic philosophy employed by these indigenous justice systems could be visualized as a sphere of justice that connects everyone involved with a problem or conflict in a continuum with everyone focused on the same center. The central purpose of this holistic philosophy is to address the underlying problems and issues that need to be resolved in a community. Further, Ms. Melton noted that indigenous justice systems are able to attain peace and communal harmony by focusing on four separate prongs to deal with issues: disclosure, discussion, resolution, and restoration. She stressed the

importance of addressing all four prongs at once, rather than focusing on just one. To emphasize this point, she explained that usage of terms like “restorative justice” should be avoided because it has the potential to create an incomplete conception of indigenous justice systems in the minds of outsiders.

Ms. Melton went on to note the importance of helping outsiders understand the functions of indigenous justice systems by becoming culturally informed. Though she admitted that it is difficult for an outsider to gain a comprehensive conception of indigenous justice systems without fluency in a Native American language, she detailed some points that may help build cultural competence. According to Ms. Melton, outsiders first need to understand that “law” in indigenous systems is a living concept and a way of life that one comes to know and understand through experience. It is given life through customs, traditions, and practices that are passed down orally from one generation to the next.

Next, Ms. Melton highlighted the importance of explaining restorative, reparative, and distributive principles to outsiders. In indigenous systems, restorative principles refer to the mending process necessary for the renewal of damaged personal and communal relationships. When employing restorative principles, she explained, the focal point of the procedure is the victim and his or her physical, emotional, mental, and spiritual healing. It necessarily involves deliberate acts by the offender designed to regain dignity and trust. Reparative principles refer to the process of making things right. In order to repair relationships, the offender must make amends through apologizing, asking forgiveness, making restitution, and engaging in acts that demonstrate his or her sincere intent to make things right. Distributive principles build upon the strengths of family and community by distributing blame and guilt beyond the offender to his or her family members and relatives. In this way, the offender’s family and relatives are held responsible for allowing the misconduct to occur, and they are required to assist in the restoration and reparation process.

Wrapping up, Ms. Melton explained that the systems she discussed are currently widely used throughout Indian Country. Unfortunately, however, these methods have not been evaluated in the manner and extent necessary to gain recognition as evidence-based practices. This, Ms. Melton urged, was the challenge for indigenous justice system practitioners: when visiting and working in indigenous communities, practitioners need to gain access to cultural information through any and all available resources, including cultural experts, oral traditions, written histories, elders’ knowledge and wisdom, and examples from other tribes. Once practitioners have accessed the information, it is their duty to document it.

## Applications of Tribal Justice Systems and Indigenous Law

This section provides an overview of the various practices employed by tribal justice systems. Topics included traditional peacemaking, peace circles, community-based collaborative approaches, healing-to-wellness courts, and the use of Native American languages.

**CHRISTINE ZUNI CRUZ, DICKASON PROFESSOR, ASSOCIATE DEAN FOR THE INDIAN LAW PROGRAM, UNIVERSITY OF NEW MEXICO SCHOOL OF LAW**

Professor Christine Zuni Cruz provided an overview of the different types of legal traditions and their interrelationships. According to Professor Zuni Cruz, there are two separate legal traditions that are in operation within indigenous communities: the indigenous legal tradition and the common law (Western) legal tradition. She noted that the indigenous legal tradition is the oldest system, and the other Western system came about in rejection of it. Given the incongruous, competing interests of the two systems, problems and tension arise when indigenous communities try to apply the Western model or try to blend it with the indigenous legal tradition. One outgrowth of this tension is that courts are not seen as a source of help for indigenous people. Rather than viewing courts as a positive forum for the resolution of disputes, she explained, people are inclined to avoid them at all costs. Because of this, it is necessary to re-conceptualize the functions of the legal traditions that are applied to indigenous communities.

She further explained that the extent to which blending and incorporating may occur is dependent upon gaining a complete understanding of the needs of a community by inquiring into its distinct set of legal problems and the forces that bring them to bear. By taking this contextual view of a community, with an understanding of its history, culture, customs, and traditions, practitioners can begin to understand the proper application of legal traditions. This contextual understanding is an aspect of what has been called “community lawyering.”

Though the word “law” is used in each of the competing systems, Professor Zuni Cruz explained, it is a completely different paradigm in the indigenous system. As such, it is critical to understand exactly what is the indigenous legal tradition. Customary law, traditional law, and other related concepts refer to the same legal framework in the indigenous legal tradition, and “law” does not exist in the past; it is a living law.

Community members are socialized to it even though it is invisible to some extent and some people cannot see it. It sits within the frame of indigenous knowledge and is tied to the land and the ecosystem; it is rooted in language and is specific to tribal communities. The indigenous legal tradition is law that is performed within ceremonies and within relationships, Professor Zuni Cruz explained. “Law” exists in songs, stories, and interactions. It is everywhere; it is beautiful; and it is an integral component in the process of understanding indigenous selves.

Finishing her presentation, Professor Zuni Cruz emphasized that teaching indigenous law starts in indigenous communities at birth, but it should also be taught in the formal educational system all the way through law school. In doing so, future practitioners will be prepared to go into, or return to, indigenous communities and encounter living law. Likewise, they will have the ability to explain and practice the indigenous tradition in judicial settings outside of the tribal context.

**CHERYL FAIRBANKS, JUSTICE, INTER-TRIBAL COURT OF APPEALS FOR NEVADA, PROFESSOR, UNIVERSITY OF NEW MEXICO SCHOOL OF LAW**

Judge Cheryl Fairbanks presented information about peacemaking models and discussed the universal Native principals she has observed in her time working in Indian Country. These core values include the following beliefs and actions: keeping Native languages; respecting self, elders, and others; practicing kindness, patience, prayer, and spirituality; taking pride in children, elders, family, and traditions through love, caring, and giving; being strong in mind, body, and spirit; practicing Indian humor; holding up and supporting Native people; listening well with respect; speaking with care and respect; respecting the land, earth, and universe; showing reverence for the Creator; living in peace and harmony; and being strong, having courage, and practicing humility.

Judge Fairbanks explained that many of these principals matched the dispute resolution model she had observed within her own family as she grew up. Her grandmother provided guidance and a forum for individuals to air grievances in their tribal language. Such meetings began and ended with prayer, a deep discussion of the issues, and provided everyone an opportunity to speak while others remained silent. This mutually respectful setting allowed the participants to build consensus on the way to an agreement.

Judge Fairbanks also discussed the following five principles that guide her own thoughts toward strengthening tribal sovereignty:

1. Tribal people have been facing the wrong way. Many tribes have attempted to model their court systems after Western/Anglo courts. It is time to begin drawing upon tribal values, traditions, and law in a contemporary context to guide tribal judicial systems.
2. It is important to acknowledge and understand the impact that ill-conceived federal assimilation policies have had on Native America. Many Native American people are currently before the courts as a direct result of these termination/assimilation policies, so why would tribes want to continue replicating court systems that perpetuate these failed policies?
3. It is important to understand the role that oral traditions and Native American languages play in creating and maintaining the common law of the various tribes. Since Native American languages and oral traditions reflect the unique cultural viewpoint of each tribe, they have been the glue that has kept Native American people together in the face of severe federal policies. As such, oral tradition has been instrumental in the creation of the distinct and unique common law systems of the tribes, and its use is essential for the cultural survival of Native American people and nations.
4. Re-educate the educated. Education has always been valued in Indian Country; however, the Western model used education in a way designed to deliberately destroy indigenous concepts as tribes were terminated and assimilated. Because of this, tribes should pause to rethink the Western principles of education. Elders are the keepers of Native American wisdom, and this wisdom should be recognized as a key component of an education designed to protect and strengthen tribal sovereignty.
5. In order to strengthen tribal infrastructure, tribes should consider the concepts of consensus, cooperation, comity, and unity. Tribes and individuals must learn how to respectfully disagree with each other without participating in behavior that is damaging to internal relations and serves to place tribes in vulnerable positions when dealing with outside matters.

**SHAWN WATTS, LECTURER IN LAW AND ASSOCIATE DIRECTOR, EDSON QUEIROZ FOUNDATION  
MEDIATION PROGRAM, COLUMBIA LAW SCHOOL**

Professor Shawn Watts briefly discussed his current work writing about the legal aspects of historical trauma, which covers three phases. First, trauma is inflicted by a dominant class, race, or society. Next, the symptoms of historical trauma are manifested through reduced life spans, depression, alcohol and substance abuse, violent behaviors, the loss of traditional governmental abilities, and the loss of legal agency. Third, these symptoms are transferred through generations, and the outcomes from this group differ markedly from other groups that have not dealt with historical trauma.

In order to address the effects of historical trauma, Professor Watts stressed the need for a more holistic approach by traditional justice systems. This approach attempts to identify the needs of the tribe and the needs of the person being sentenced. If the needs can be identified, the best possible scenario for both parties is to match these needs in unique sentencing arrangements. For example, a tribe may operate an expensive bus system. Instead of sentencing a mechanically inclined offender to a menial community service task such as roadside trash collection, why, Professor Watts asked, can't the offender be assigned to provide a set number of hours servicing the transportation fleet? This type of arrangement would not only be useful for the tribe (in defraying the costs of maintenance), but it would also be beneficial for the offender's sense of self-worth and would cement his or her value as a contributing member to the community. Such a unique arrangement, which matches skills and needs, would give offenders the ability to shine and would strengthen the community as a whole.

## **Intersections Between Native Concepts and Adversarial Courts**

**T**he final panels and corresponding discussions were of primary importance because they addressed the way traditional justice methods and adversarial courts intersect and interact. Included were discussions explaining the shortfalls of the adversarial methods in indigenous communities, problems surrounding the right to counsel, holistic defense models, and “peacemaking from the bench.”

**ANN SHERWOOD, MANAGING ATTORNEY, TRIBAL DEFENDERS OFFICE, CONFEDERATED  
SALISH AND KOOTENAI TRIBES**

Ms. Ann Sherwood provided a description of the holistic defense model adopted by the Confederated Salish and Kootenai (CSKT) Tribal Defenders Office (TDO) in 2011. The model was implemented with technical assistance from the Center for Holistic Defense as a means to reduce recidivism and, according to Ms. Sherwood, has proven effective in a variety of ways. Ms. Sherwood explained that the model is based on the following “Four Pillars”: (1) seamless access to services that meet legal and social support needs; (2) dynamic, interdisciplinary communication; (3) advocates with interdisciplinary skill sets; and (4) a robust understanding of, and connection to, the community served. The model correlates holistic defense with traditional methods of justice in that they deal with the whole person in order to address social ills.

By embracing the “Four Pillars” philosophy and looking at the legal and social needs of the client first, the TDO has been able to implement an array of services that clients take advantage of voluntarily and repeatedly. Ms. Sherwood explained that if clients’ basic needs are met, they will have much greater success rates in dealing with their legal issues; for example, the TDO pays attention and provides assistance to its clients by offering them food, providing a place for them to make calls or just spend time, making reminder phone calls to them the day before court, and providing them with loaner clothing for court appearances. This open door policy helps clients to feel at ease while dealing with their legal issues, familiarizes them with the TDO, and promotes awareness of the availability of further services.

When a client comes to the TDO for assistance, he or she is guided through an intake process to assess his or her needs and is directed to the appropriate department or employee within the TDO. Importantly, Ms. Sherwood explained, the staff members within each department have gained interdisciplinary skill sets that frequently lie outside of what would be expected of their job title. For example, the TDO’s Civil Unit handles civil matters and offers a walk-in clinic providing pro se clients with access to standardized forms, computers to draft pleadings, and advocates and attorneys who assist with information referral, answer questions, and provide procedural guidance. The Civil Unit is also tasked with helping clients deal with the collateral consequences associated with being charged with a crime. The Criminal Advocate, in addition to dealing with criminal matters, helps clients with drivers’ licensing matters, administers a cultural mentoring program connecting clients with the tribal community, and will be responsible for administering the TDO’s reentry program when it becomes operational. Other departments within the TDO include the Criminal Defense, Juvenile Defense and Appeals Department, and the Psychology and Social Work Department.

Ms. Sherwood explained that the TDO collaborates with a variety of partners to make services available to clients. These collaborations involve individuals and groups from CSKT (Tribal Behavioral Health, Police, Human Resources Development, tribal elders), Montana (Montana Public Defender, University of Montana School of Law, School of Social Work, and Department of Psychology), and out of state (Bronx Defenders). Through these collaborations, the TDO is able to help clients with issues related to child protection, eviction, licensing, registration, employment, reentry, and financial assistance eligibility. Additionally, these collaborations help the TDO provide mental health screenings, diversion programs, and community outreach trainings.

According to Ms. Sherwood, the answers to an overloaded criminal justice system are more complicated than punishment can cure. By paying attention to the needs of clients, creating programs that fit the community, making services readily available, and adapting to change, the TDO's programs have yielded encouraging outcomes that cannot be reflected merely through reductions in recidivism rates. Nonetheless, between 2009 and 2012, of 67 clients served through the TDO's mental health collaboration program, 80.5 percent had 3 or fewer subsequent offenses and 48 percent had zero recidivism. Between 2011 and 2014, of 54 clients served through the TDO's cultural mentoring program, 35 have not reoffended. Further, in 2014, of 186 clients who had been charged with driving while intoxicated or had their drivers' licenses revoked, 32 had re-obtained valid licenses through the TDO's license restoration assistance program.

**BARBARA CREEL, PROFESSOR OF LAW, DIRECTOR, SOUTHWEST INDIAN LAW CLINIC,  
UNIVERSITY OF NEW MEXICO SCHOOL OF LAW**

Professor Barbara Creel discussed the incompatibilities of adversarial and traditional criminal justice systems within indigenous communities. In her view, these two distinct systems do not mix. Contrasting the two is not a matter of apples and oranges, she explained; it is water and fire; one dampens or changes the other. Because of this incongruity, the imposition of the adversarial system (and concepts such as incarceration) on tribes by a dominant society (without any forethought of how this foreign system fits with existing Native systems) has resulted in an ill-fitting and inadequate approach to addressing problems within indigenous communities.

Professor Creel's perspective on the incompatibilities of differing justice systems in the tribal context was informed and enhanced by her experience as a tribal defender. As a tribal defender, she explained, she had the opportunity to work with a non-law-trained tribal advocate who understood the inner workings of the tribal community, knew the

back story of the parties involved in cases, and knew how to access tribal resources. Being informed of the nature and background of many of these cases, Professor Creel realized that a “vigorous defense” often didn’t make sense in that it did not adequately address the real needs of the parties and the community. Unfortunately, in trying to create novel solutions that better addressed these concerns, she was met with resistance from prosecutors who were reluctant to “mix” traditional solutions with the adversarial system.

Professor Creel explained that she is a strong advocate for the right to counsel in tribal courts, state courts, and federal courts; however, the right to counsel under the U.S. Constitution does not apply to tribal governments. This is problematic because the essence of the adversarial system is challenge and parity. In order to have a strong, fair justice system that works for everybody, you have to have the same access to, and implementation of, resources on both sides. In short, when tribes adopt the adversarial system, they must go all the way by allowing jury trials and guaranteeing access to defenders with the same resources as the prosecutors. Without such protections, when defendants’ cases get to the federal system, the resources are stacked against them. In many instances, they have already been to tribal court and confessed without counsel. At this point, everything that we hold dear with the Constitution has been obliterated, and a defender can only attempt to ameliorate the damage of the sentence. Meanwhile, the tribal community is forced to address issues associated with the offender’s eventual reentry.

Because of the demonstrated inadequacy of the adversarial system in resolving issues within tribal communities, Professor Creel urges tribes to either institute a fully assimilated defense or go down a completely different route. This alternate route would involve a decision made at the community level to engage in dispute resolution outside of the court system that could be ordered without a tribal prosecutor’s objection— analogized in Western legal terms to “civil restorative justice.” This model would involve a separate, voluntary (victim-endorsed) track outside of the court system that, if unsuccessful, could allow the case to be resolved later in a formal criminal proceeding. By choosing to operate this system as a community (and separating it from orders of detention), the results of the dispute resolution could be characterized as “cultural decisions” and, as such, might not be subject to ICRA.

This community dispute resolution model allows tribes to contour their reaction to social problems in culturally specific ways that are better suited for the community than the adversarial model’s black-and-white reaction to “crime.” As explained by Professor Creel, these so-called “crimes” are merely an outgrowth of the ills in indigenous

communities. Lack of housing, transportation, and education, no income development or assistance with child care, high suicide rates, mental and physical health issues—these are the types of issues that lead to problem behaviors and can and should be addressed distinctly from the criminal justice system.

In her role as Director of the Southwest Indian Law Clinic (SILC) at the University of New Mexico (UNM) School of Law, Professor Creel has been able to experiment with at least one such creative solution to a problem that could not be adequately resolved in the adversarial system. This case involved two long-time teenage friends who had gotten into a fight with each other. Their criminal case had concluded, and their upcoming civil case would have likely resulted in a restraining order. Because the two Pueblo youth, and their families, had been friends for so long, a restraining order preventing them from speaking to each other or attending social gatherings or ceremonies at the same time made no sense in terms of adequately addressing the real needs of the parties or the community. Fortunately, the court sought the assistance of SILC and, by court order, the case was removed so that SILC could guide the parties through a process that led to resolution. The “peace-giving resolution” created by SILC allowed for discussions, mediations, and restorative justice methods that successfully addressed the issues and resolved the case for everyone involved.

### **DAVID EISENBERG, JUDGE, PUEBLO OF TAOS TRIBAL COURT**

Judge David Eisenberg spoke about his experience at Taos Pueblo Tribal Court and his judicial strategy, which can be summarized as “peacemaking from the bench.” Judge Eisenberg explained that he decides cases based on an underlying philosophy of kindness, and, because of this, he does not believe in sentencing offenders to jail time. In his view, if you send someone to jail, he or she will eventually come back to the community, but will do so with a broken heart and a shattered life.

Judge Eisenberg explained that in the Taos Pueblo Tribal Court, there are no public defenders and the arresting officers in criminal cases are responsible for prosecuting their own cases. Often, in criminal cases, defendants have the desire to admit guilt at the arraignment and immediately begin the process of making amends even though they do not fully understand the repercussions of such a plea. However, after his own analysis of a case, Judge Eisenberg frequently chooses to deny the guilty plea, enters a not guilty plea on behalf of the defendant, frees him or her on his or her own recognizance, and sets the subsequent pre-trial conference several months down the line. In doing so, Judge Eisenberg explained, the parties have time to cool off, talk with each other about the charges and potential pleas, and, oftentimes, come up with a fair

resolution. Judge Eisenberg believes that other judges, especially those in tribal courts that do not have public defenders, should also think twice about accepting guilty pleas because of the collateral consequences associated with uncounseled pleas, especially at the federal level.

In Judge Eisenberg's view, if you do not heal the person, there will be long-lasting consequences for the community. With this in mind, when defendants decide to enter guilty pleas, and Judge Eisenberg is certain that they are aware of the implications, he frequently sends them to Taos Pueblo's holistic wellness court to heal their bodies, minds, and spirits. Taos Pueblo's wellness court is innovative in that it utilizes a wide range of treatments including the temporary use of Secure Continuous Remote Alcohol Monitor (SCRAM) units, vitamin therapy, acupuncture, spa memberships, and neurotherapy with brain mapping and electrode therapy. These various treatment methods are paid for through the Affordable Care Act and have proven quite effective. Judge Eisenberg explained that news of the wellness court's successes has spread so much so that the tribal court recently drafted a memorandum of agreement with the New Mexico Magistrate Court that allows offenders in the state system to enter into the wellness court as a condition of their probation and allows Judge Eisenberg to impose sanctions on these offenders.

Judge Eisenberg finished his presentation by describing several highly beneficial aspects of his courtroom that are distinct from many other adversarial courts. Judge Eisenberg allows family and community members to attend sentencing hearings so they are provided with an opportunity to admonish the offender. In doing so, he has witnessed the powerful effect their words have had when offenders finally come to realize the impact their behaviors have had on loved ones and the community. Judge Eisenberg further mentioned that he uses all opportunities to counsel Pueblo people in their Native language, which allows him to preside over the court with their precise community values in mind. Finally, Judge Eisenberg described the importance of forcing opposing parties to sit down and talk out their problems prior to hearings. Nine out of ten times when they do so, he explained, they are able to come up with their own solution to the issue that brought them to court in the first place.

## Discussion and Conclusion

**T**hroughout the day, several major themes emerged. One theme repeatedly visited by the attendees was the incompatibility of adversarial systems and their lack of resources and understanding of tribal communities' needs. The Western adversarial model is viewed as an incomplete "half law" that is overly reliant upon punitive methods, neglectful of the causes of social problems, and seemingly oblivious to the processes that allow victims, offenders, and communities to heal. The attendees shared many experiences that highlighted the incongruous nature of the adversarial model in relation to tribal communities, which leaves destructive results in its wake.

Another frequently discussed theme revolved around the nature and substance of tribal justice systems. Time and time again, attendees' descriptions of individual tribal systems reflected a focus on holistic methods, communication, and healing. For the most part, tribal communities are small, maintain close social connections, and have well-established (traditional) methods of dealing with wrongdoing. Tribal justice systems reflect an understanding that problems cannot be adequately addressed through incarceration; there is opportunity to better deal with these problems in a comprehensive manner that views social ills from all angles and focuses on healing every person affected.

Many times, the attendees brought up the problems associated with outsiders' incomplete understanding of tribal justice systems. Clearly, the methods employed by tribes differ from the Western adversarial model in many ways. These differences are exemplified by the unwritten, culture-based tribal law traditions that have been passed down orally from generation to generation. Unfortunately, outsiders view these practices as inferior because they do not line up with Western methods in an easily comprehensible, searchable, and accessible way. Attendees repeatedly referenced how this line of thinking continually threatens tribal sovereignty, especially when employed by the U.S. Supreme Court as justification for divesting tribal courts of authority.

Further topics explored by the attendees included the right to counsel, peacemaking from the bench, the importance of maintaining and utilizing Native languages, community lawyering, peace circles, and wellness courts.

At the conclusion of the day, the attendees voiced their appreciation of the roundtable exercise and their desire to have the topics of discussion memorialized in a publication. In addition, the participants called for an action plan and follow-up to topics discussed

during the day. They requested to continue the dialogue and that next steps include tribal and tribal leader participation. Last, all the participants discussed the forthcoming development of the NAICJA Holistic and Traditional Justice Roundtable publication and requested they each receive a copy of the discussion and dialogue that occurred during the roundtable event.

## Appendix A: Overview of the Tribal Civil and Criminal Legal Assistance Program

The Tribal Civil and Criminal Legal Assistance (TCCLA) Program is authorized by 25 U.S.C. 3651, et seq. (Public Law 106–559) to strengthen and improve the representation of indigent defendants in criminal cases and indigent respondents in civil causes of action under the jurisdiction of Indian tribes, with the ultimate goal of enhancing the operations of tribal justice systems and improving access to those systems by tribal citizens. TCCLA also funds training and technical assistance (TTA) partners to collaborate with the Bureau of Justice Assistance (BJA), U.S. Department of Justice (the Department) to develop and enhance justice system personnel and practices within tribal justice systems. The program’s objectives include: providing procedural justice in tribal civil and criminal legal procedures, legal infrastructure enhancements, public education, and TTA for the development and enhancement of tribal justice systems. TCCLA resources have been appropriated since Fiscal Year 2010. BJA funding is made consistent with the following three categories:

**Category 1. Tribal Civil Legal Assistance Grants** – Funding is available to § 501(c)(3) public charities to provide direct civil legal assistance services for members of federally recognized Indian tribes pursuant to federal poverty guidelines, federally recognized Indian tribes or tribal justice systems. These resources may be utilized to support legal assistance services for Indian tribes, members of Indian tribes, and tribal justice systems, including guardian ad-litem appointments, court-appointed special advocates pursuant to the federal poverty guidelines, and development and enhancement of tribal court policies, procedures, and code.

**Category 2. Tribal Criminal Legal Assistance Grants** – Funding is available to § 501(c)(3) public charities to provide direct criminal legal assistance services for all individuals pursuant to federal poverty guidelines, federally recognized Indian tribes, or tribal justice systems pursuant to federal poverty guidelines. Criminal legal assistance services may include adult criminal actions, juvenile delinquency actions, guardian ad-litem appointments arising out of criminal delinquency acts, or development and enhancement of tribal court policies, procedures, and code.

**Category 3. Tribal Justice Training and Technical Assistance (TTA) Grants** – Funding is available to national or regional membership organizations and associations whose membership or a membership section consists of judicial system personnel within tribal justice systems. The funding supports regional TTA to tribal justice system

professionals across the United States. This TTA can include tools such as a distance-learning module for tribal judicial personnel, online tools, and printed information for public education, code development, and the dissemination of training information to help build capacity in tribal justice systems.

BJA coordinates the scope based on current TCCLA TTA partner projects as well as other TTA projects in the BJA portfolio and those of its federal partners. To access more information about the BJA TCCLA Program, visit the [TCCLA website](#). For the entire Department portfolio of tribal justice TTA resources, visit the Department's [TTA website](#).

# Appendix B: Holistic & Traditional Justice Roundtable

## AGENDA



## Holistic & Traditional Justice Roundtable November 13, 2015 | Albuquerque, NM

### Agenda | November 13, 2015

**Location:** UNM School of Law | **Room:** King Reading Room

The goal of this invite-only Roundtable will be to draw from the experience of the participants in forming answers to specific queries relating to holistic and traditional justice practices. A written document will be produced to better inform the Bureau of Justice Assistance, Department of Justice about traditional tribal justice systems and its intersections with the goals of the Tribal Civil and Criminal Legal Assistance Program.

8:30 AM Registration

9:00 AM Invocation: Hon. David Eisenberg, Chief Judge from Taos  
Welcome by the UNM School of Law Deans  
Welcome & Introduction by NAICJA – A. Nikki Borchardt Campbell, Executive Director

9:30 AM Overview & Purpose of Roundtable  
Participant Introduction

Issue 1: Defining the “Native Standard” in Restorative Justice Practices, Traditional Justice, and Peacemaking

10:00 AM Presenters:  
Joe Flies-Away  
Ada Pecos Melton

Moderated by Brett Shelton

After a brief overview of the Native Standard, restorative justice, and traditional justice systems, participants will gather in groups of individuals in similar practice areas (e.g. Peacemaking, Legal Services, Academia, Wellness Courts) to discuss the developments and work that they have done related to this section.

12:00 PM Lunch Provided by UNM School of Law

Issue 2: Applications of Tribal Justice Systems and Indigenous Law.

1:00 PM Presenters:  
Cheryl Fairbanks  
Christine Zuni Cruz  
Shawn Watts

Discussion Moderated by Michael Petoskey and BJ Jones

We will seek to frame an overview of tribal justice systems and traditional practices in application, and how tribes are using tradition as both stand-alone tribal justice systems and as elements within adversarial-style tribal courts. Group format will facilitate participation.

2:30 PM

**Stretch Break**

**Issue 3: Intersections between Restorative Justice, Traditional Justice, and Peacemaking and Adversarial Courts—including Uses as Alternatives to Detention**

**Presenter:**

Ann Sherwood  
Barbara Creel

**Facilitator: David Eisenberg and Jerry Gardner**

2:45 PM

Following the break-out discussion, the group will come together to discuss how traditional justice practices can work to provide enhanced representation to tribal individuals coming through the court system. Among questions that will be asked are: 1) How do we reconcile the concept of group v. individual rights and adequately explain that to federal agencies while protecting due process rights of individuals? 2) What are the benefits that communities are experiencing while using these methods? 3) How do we best explain “tribal justice system” in a way that doesn’t automatically refer or assume that the justice system is a tribal court? Topics for discussion may include grouping various examples into subsections:

- Pre-incarceration uses of holistic practices/tradition/culture.
- Use of traditional or restorative justice during the adversarial court processes or during incarceration.
- Reentry or post-incarceration uses of holistic or traditional culture/ cultural justice.

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4:15 PM

**Closing and Recommendations**

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5:00 PM

**Adjourn**

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## Appendix C: Additional Resources

### **Tribal Law and Order Act (TLOA)**

BJA Tribal Law and Order Act: [http://www.bja.gov/ProgramDetails.aspx?Program\\_ID=88](http://www.bja.gov/ProgramDetails.aspx?Program_ID=88)

Bureau of Indian Affairs, Office of Justice Services:

<http://www.bia.gov/WhoWeAre/BIA/OJS/index.htm>

Tribal Justice and Safety at the Department of Justice: <http://www.justice.gov/tribal/>

TLOA Resource Center: <http://tloa.ncai.org/>

Indian Law and Order Commission: <http://www.aisc.ucla.edu/iloc/>

### **Violence Against Women Act (VAWA)**

Office on Violence Against Women: <http://www.justice.gov/ovw>

Tribal Implementation of VAWA: <http://www.ncai.org/tribal-vawa>

Tribal Protection Orders: <http://tribalprotectionorder.org/>

### **Funding**

Office of Justice Programs (OJP): <http://www.ojp.usdoj.gov/funding/funding.htm>

Community Oriented Policing Services (COPS):

<http://www.cops.usdoj.gov/Default.asp?Item=46>.

Office on Violence Against Women (OVW): <http://www.ovw.usdoj.gov/ovwgrantprograms.htm>

Administration for Native Americans (ANA): <http://www.acf.hhs.gov/programs/ana/grants>

Project Team: <http://www.ohsu.edu/xd/research/centers-institutes/evidence-based-policy-center/stakeholder-engagement/project-team.cfm>

Grants.Gov: <http://www.grants.gov/>

### **Other Resources**

NAICJA: <http://www.naicja.org/>

Tribal Law and Policy Institute, Walking on Common Ground:

<https://www.walkingoncommonground.org/>

Tribal Law and Policy Institute, Healing to Wellness Courts: <http://www.wellnesscourts.org/>

National Criminal Justice Association: <http://www.ncja.org/>

National Institute of Justice: Tribal Crime and Justice: <http://www.nij.gov/topics/tribal-justice/>

Tribal Justice Exchange: <http://www.courtinnovation.org/topic/tribal-justice>

National Indian Law Library (NILL via NARF): <http://www.narf.org/nill/resources/tloa.html>

BJA National Training and Technical Assistance Center: <http://bjatraining.org/>

CrimeSolutions.gov: <http://www.crimesolutions.gov/>

The National Reentry Resource Center (NRRC):

<http://csgjusticecenter.org/jc/category/reentry/nrrc/>

NRRC Tribal Affairs: <https://csgjusticecenter.org/reentry/issue-areas/tribal-affairs/>

The National Parole Resource Center (NPRC): <http://nationalparoleresourcecenter.org/>

Resource Center for the Elimination of Prison Rape (PREA Resource Center):

<http://www.prearesourcecenter.org/>

Development of PREA Related Products for Indian Country: <http://www.appa->

[net.org/eweb/Dynamicpage.aspx?webcode=IV\\_ProjectDetail&wps\\_key=386afa46-0796-4e80-8aa6-73afdee32923](http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IV_ProjectDetail&wps_key=386afa46-0796-4e80-8aa6-73afdee32923)