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## Survey of Tribal Court Effectiveness Studies

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Alaska Native tribes have used sentencing circles and other cultural traditions to address problems involving tribal members for centuries. This way of dealing with disputes in a restorative and reparative manner eventually gave way to an adversarial process when Alaska was purchased by the United States. Alaska Natives have always had a unique relationship with the federal government; there is currently only one reservation in Alaska and limited other forms of Indian country in the state. In 1971 the Alaska Native Claims Settlement Act (ANCSA) was signed into law, extinguishing all unsettled Alaska Native claims to land by placing title to land in the control of Alaska Native corporations. Subsequent cases have determined that land transferred to Alaska Native corporations via ANCSA cannot be considered Indian country for the purpose of establishing tribal court jurisdiction. (See “Key Acts and Cases for Alaska Tribal Court Jurisdiction,” p. 12.)

However, in its landmark 1999 ruling in *John v. Baker* (982 P.2d 783), the Alaska Supreme Court determined that despite the lack of Indian country jurisdiction over ANCSA lands, Alaska Native tribes possess jurisdiction over *members* of the tribe through their rights of inherent sovereignty.

Alaska tribal courts today primarily hear cases involving family law and child custody and protection matters, including cases related to adoptions, child protection, Indian Child Welfare Act (ICWA) intervention, marriages/divorces, and domestic violence. Some tribes also hear cases involving contract disputes, employment disputes, probate/inheritance, animal control, environmental regulation, and natural resource management. A few tribes initiate civil proceedings in cases that are commonly criminal matters, including driving under the influence, assault/disorderly conduct, juvenile delinquency, vandalism, misuse of firearms, trespassing, and drug and alcohol regulation. The state and various tribes are working towards an agreement to refer additional case types to tribal courts for resolution. (See “Current Issues Regarding Alaska Tribal Court Jurisdiction,” p. 14.)

The need for increased court and law enforcement presence in rural Alaska was recently highlighted by a 2013 report by the Indian Law & Order Commission on crime and safety issues in Native American and Alaska Native communities, *A Roadmap for Making Native America Safer: Report to the President and Congress of the United States*. The report authors devoted an entire chapter to problems in Alaska, the only

state to be singled out for such attention. Among the difficulties for Alaska Natives identified by the report are that: (1) Alaska Native women are overrepresented in the statewide domestic violence statistics by 250 percent—they comprise 19 percent of the statewide population, but 47 percent of reported rape victims; in Alaska villages, domestic violence rates are up to 10 times higher than the national average, and physical assault rates up to 12 times higher; (2) at least 75 communities lacked any law enforcement presence; and (3) although alcohol was involved in more than 95 percent of all crimes in rural Alaska, there were few available treatment facilities in these areas. (All statistics are taken from the report and have not been independently verified.) Tribal courts could potentially help address many of these issues.

This, though, raises the question of the effectiveness of tribal courts in addressing and resolving disputes involving its members. Although there is limited data related to tribal courts, some studies support the hypothesis that tribal courts are more effective than traditional Western courts within American Indian and Alaska Native communities.

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### Tribal Courts in Alaska

This issue of the *Alaska Justice Forum* is devoted primarily to issues related to tribal courts in Alaska, including how they function, measures of their effectiveness, and past and future issues regarding tribal court jurisdiction.

“Survey of Tribal Court Effectiveness Studies” (p. 1) examines empirical studies that have been conducted on the effectiveness of tribal courts, both in terms of reductions in recidivism and participant attitudes. The article also looks at some of the challenges to implementing a tribal court effectiveness study in Alaska.

Professor Jeff D. May of the University of Alaska Fairbanks offers two articles on the theory and implementation of the restorative justice principles frequently used in tribal courts. The first, “Restorative Justice: Theory, Processes, and Application in Rural Alaska” (p. 2), explores the principles behind using

restorative justice as an alternate form of sentencing in criminal cases. The article focuses particularly on how restorative justice might be of benefit in rural Alaska. The second article, “Community Justice Initiatives in the Galena District Court” (p. 6) examines a community outreach program in rural Alaska whereby an Alaska Court System judge uses restorative justice principles in village sentencing hearings.

This issue also includes two surveys of tribal court jurisdiction—“Key Acts and Cases for Alaska Tribal Court Jurisdiction” (p. 12) and “Current Issues Regarding Alaska Tribal Court Jurisdiction” (p. 14). These surveys trace the development of tribal court jurisdiction in Alaska and federal case law and statutes, and examine some of the unresolved issues that will shape this jurisdiction in the years to come.

## Tribal court studies (continued from page 1)

### Alaska at a Glance

Tribal courts play an important role in contemporary Alaska life. According to U.S. Census population estimates, of the over 735,000 people residing in Alaska in 2013, 14.7 percent of those persons identify as American Indian or Alaska Native only. In stark contrast, only 1.2 percent of the over 316 millions persons in the United States identifies as American Indian or Alaska Native only.

There are 230 federally recognized tribes within Alaska; however, it is difficult to estimate the current number of active

tribal courts. A Bureau of Justice Statistics technical report in 2014 identified 426 tribal courts across the U.S. and 152 tribal courts in Alaska, though it is not clear if all of the identified tribal courts are currently active. There may also be new tribal courts in the process of being developed in Native villages across the state.

A snapshot of tribal courts in the Lower 48 and Alaska can be seen in a survey conducted in 1999 by the American Indian Law Center for the Bureau of Indian Affairs, *Survey of Tribal Justice Systems & Courts of Indian Offenses: Final Report*. Surveys were sent to all federally recognized tribes, pueblos, and Alaska Native villages administering tribal courts or other types of justice systems. Of the 246 tribes identified who

administer tribal court or other systems, 84 returned completed surveys. Of the responding tribes, the survey found that 55.6 percent had constitutions containing a Bill of Rights and 39.8 percent did not. All but 4.6 percent of responding tribes had constitutions. The survey further found that 78 percent of tribes had written codes, of which 71.8 percent were modern, Western-style codes, 8.5 percent were customary law, and 19.7 percent a combination of the two. The average number of cases filed during 1998 in tribal courts participating in the survey was 786.2, the average number of cases closed in 1998 was 483.1, and the average number of cases pending at the end of 1998 was 213.4.

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**Tribal court studies**  
(continued from page 15)

A Bureau of Justice Statistics (BJS) survey of tribal courts was conducted in 2002, but Alaska tribal courts were not sent the survey instrument. BJS is currently undertaking the first tribal courts survey since 2002.

**Studies of Effectiveness of Tribal Courts**

There are many ways in which the effectiveness of tribal courts may be defined, with corresponding differences in the measures employed. Effectiveness may be measured, for example, in terms of recidivism rates of participants, judicial satisfaction with the tribal court process, defendant/litigant satisfaction with the tribal court process, and victim and community-wide satisfaction with the tribal court process. This section will discuss different studies of the effectiveness of tribal courts and the different ways the measure of effectiveness has been defined.

*Studies Conducted Throughout the Contiguous United States*

Research on the effectiveness of tribal courts is limited. (See “Tribal Court References,” p. 15, for a list of studies to be discussed here.) The most extensive quantitative study of tribal court effectiveness in the U.S. is found in a 2001 report titled *An Evaluation/Assessment of Navajo Peacemaking*. This study compares the effectiveness of Navajo Peacemaking in resolving domestic violence cases with a more Western-style Navajo Family Court. (Both types of court are part of the Navajo judicial system.) It identifies Navajo Peacemaking as a type of *restorative justice* aimed at resolving conflict through the healing of relations between individuals in conflict. The role of the Peacemaking process is not one of justice delivery, but rather “a service to communities and families needing a minimally-formal, accessible, and affordable form of conflict dispute services.” As such, Navajo

Peacemaking does not focus primarily on victim-offender reconciliation, although agreements specifying restitution and/or reparations to a victim are not uncommon.

Several variables are used in the study to evaluate a participant’s perception of fairness and *hózhó* as an outcome or measure of effectiveness. *Hózhó* is defined as a dynamic process of finding a sense of solidarity, balance, and harmony within one’s self, family, clan, tribe, and the living world. Similar domestic violence cases in Family Court and in Peacemaking Court were selected for comparison. A survey was distributed to the parties in these two groups, all of whom were full-blooded Navajos living in the Navajo Nation. The control group was composed of complainants and respondents who participated in the Navajo Family Court which uses a Western approach to interpersonal domestic conflict. The second group included petitioners and respondents who participated in Navajo Peacemaking, which uses restorative justice techniques.

The Navajo Peacemaking study revealed dramatically different perceptions between Peacemaking participants and Family Court participants. Most notably, two key responses were observed between the two groups: perception of hearing fairness and perception of *hózhó*. Of the Peacemaking participants, 80.7 percent either agreed or strongly agreed that their hearing was fair, while 78.9 percent of participants expressed experiencing *hózhó* as a result of the proceedings. Among the Family Court participants, these numbers were 50.0 percent and 63.9 percent respectively. Additionally, Peacemaking cases were significantly more likely to result in case settlement (78.6 percent agreed or strongly agreed) than Family Court cases (51.4 percent agreed or strongly agreed). Finally, a significant difference between participant perceptions was noted in the opportunity provided to the participants by the different courts to express one’s feelings: 86.0 percent of Peacemaking partici-

to Peacemaking or Family Court. Additionally, these results, while informative, may not be generalizable due to the small sample size of the groups (57 participants in Peacemaking and 37 participants in Family Court). However, the results are suggestive of significantly higher satisfaction among participants in Navajo Peacemaking compared to participants in a Western approach to conflict as utilized in Family Court. Peacemaking participants expressed a greater sense of *hózhó*, greater fairness with the process, higher levels of settlement, and expressed that Peacemaking allowed them to communicate their feelings more freely. As such, the study suggests that when measured by participant satisfaction, tribal courts are a viable and practical alternative to the adversarial system used in Western courts.

*Studies Conducted in Alaska*

Just as in the contiguous United States, in Alaska there is very limited information on the effectiveness of tribal courts. A literature search uncovered only one Alaska study on tribal court effectiveness, *Evaluating Restorative Justice in Alaska: The Kake Circle*, and it faces limitations due to the small sample size. This research was conducted by the Alaska Court System First Judicial District area court administrator for the Institute for Court Management for the National Center for State Courts. This 2010 study focuses on the Kake Circle sentencing hearings and the reported recidivism numbers—a recidivism rate of less than five percent—as a measure of effectiveness.

Kake is a Tlingit village located in Southeast Alaska. The methodology of the study was conducted through the review of archival data of cases obtained from the Kake Healing Heart Council. From the over 100 cases files on Kake Circle participants over the period 1999–2008, 46 cases were selected for the study. The study found that of the 46 Circle cases spanning a ten-year period, the Circle offenders recidivated at a rate of 28 percent. For the study, recidivism was defined as follows:

[A] participant in the Circle or the control group recidivates if, upon conviction of the underlying offense, commits a subsequent act **and is convicted of** another wrongful act within five years. For comparative purposes, this project examines recidivism at the one, three, and five year benchmarks following the offender’s entrance into or completion of the Circle or upon conviction (for Control Group cases and Circle cases).

The figure of 28 percent is substantially higher than the recidivism rate of 5 percent

pants reported having the opportunity to express their feelings during the process while 50.0 percent of Family Court participants responded having this opportunity. (See Table 1.)

The study acknowledges that its results are not the product of a true experimental or quasi-experimental design, as cases could not be randomly assigned

**Table 1. Perceptions of Participants in Navajo Peacemaking Court and Navajo Family Court**

Perceptions of hearing participants	Navajo Peacemaking Court N=57		Navajo Family Court N=37	
	Strongly agree or agree	Percent	Strongly agree or agree	Percent
Hearing was fair	46	80.7 %	18	50.0 %
Experienced <i>hózhó</i>	45	78.9	23	63.9
Hearing resulted in a settlement	44	78.6	18	51.4
Had opportunity to express feelings	49	86.0	18	50.0

Note: Percentages may not sum to 100 percent due to missing data.

Source of data: *An Evaluation/Assessment of Navajo Peacemaking* by Erik K. Gross (1999), <https://www.ncjrs.gov/pdffiles1/nij/grants/187675.pdf>

originally reported by the Circle, yet at the same time is substantially lower than the statewide recidivism rate of 66 percent, as reported in an Alaska Judicial Council study using 1999 data. (This figure of 66 percent is the one noted in the Kake study and is the rate for all offenders, regardless of the severity of the offense, and includes reincarceration for probation or parole violations. The Alaska Judicial Council released a follow-up study in 2011 (after the Kake study summarized here) using 2007 and 2008 data. This study found that 48 percent of misdemeanor offenders were rearrested within two years of being released. Circle sentencings only involve misdemeanor-level offenses.)

The study also conducted a comparison of the Kake cases to a control group of cases from the Alaska state court in the Tlingit village of Hoonah. Hoonah was selected due to its close proximity to Kake and relatively similar populations. Alaska Court System magistrates routinely hear cases in both villages. (Note: At the time of this study, the title for magistrate judges was “magistrate.”) In order to effectively compare the Circle cases with the Hoonah control group cases, the study identified offenders of the same sex and approximate age. Of the 46 Kake cases, 26 cases from the period 2002–2006 were chosen for the comparison study with 26 Hoonah cases from 2000–2009. In both groups, female offenders were over 60 percent of the sample population. The overall recidivism rate for the Kake Circle group was 48 percent and the rate for the Hoonah group was 42 percent—a difference which is not statistically significant due to the small sample size. Although the Kake Circle group had a slightly higher recidivism rate, the study also found that both male and female recidivist offenders in the Hoonah control group recidivated earlier than offenders in the Kake Circle group. In the Hoonah state court control group, of the males who recidivated, all did so within the first year, and of the females who recidivated, 89 percent recidivated within the first year. Conversely in the Kake Circle group, of the males who recidivated, only 25 percent recidivated within the first year, and of the females who recidivated, 60 percent recidivated within the first year. While informative, the reliability of these figures is compromised by the small sample size.

In addition to analyzing case data, the study sent out a stakeholder survey to Kake Circle participants with open-ended questions. The survey was intended to be filled out by the offender, as well as non-offenders who took part in the Circle sentencing process. The survey was to have been conducted in face-to-face interviews in the village, but

an Elder in the village had passed away and the day-long services were scheduled on the day originally set for interviews. In lieu of face-to-face interviews, the survey was mailed to 22 households and five community service agencies. Twelve stakeholder surveys were returned, of which only one was completed by someone who participated in a Circle as an offender.

The survey results note that every respondent reported that the Circle approach was the best way to address the offender’s problem. Half of the respondents to the survey had participated in only one Circle, and about half had participated in “many” or “several” Circles. The participants who had participated in only one circle reported that they did so to support the offender’s family and to facilitate healing between the offender and the community. In contrast, the participants who attended multiple Circles did so to help or support the offender. Those who attended multiple Circles noted the challenges that the offender faced, including the need for more follow-up Circles and meetings to encourage and help monitor the continued progress of the offender, and the lack of necessary clinical resources for the offender.

The long-term recidivism rate for Kake Circle participants was not significantly different than the long-term recidivism rate for participants in the Hoonah state court control group. This suggests that restorative justice Circles are at least as effective as the Hoonah state court. The study also uncovered evidence that restorative justice Circles may be more effective, because participants recidivated more slowly and were more satisfied with Circles than with the Western approach to crime and punishment. (The Kake study also looked at reconviction by case types and made a number of recommendations concerning cases involving alcohol, the need to involve the community, and future research areas.)

#### *Additional Studies of Tribal Courts*

There are numerous qualitative studies that address the effectiveness of tribal courts in the U.S., Canada, Australia, and New Zealand. One study from 2005, “What Are You Going to Do with the Village’s Knowledge,” evaluates the methods of legal discourse used in the Hopi Indian Nation. Research focused on 15 property disputes—including inheritance—heard in Hopi Tribal Court on the Hopi reservation in northeastern Arizona, and included a review of audio recordings of the court from 1995–2002, interviews with the court members and the community, and ethnographic observations over a 27-month period. The article found that Hopi tribal traditions do not mesh well

with Western terminology and procedures used in Hopi tribal courts. There is a continuing tension between Western-style legal language and process and Hopi language and world-view that results in difficulties integrating Hopi tradition into the process.

An article from 2005, “Delinquency and Justice: Tribal Court Data and Tribal Members’ Perspective from One American Indian Nation,” analyzes the perceived increasingly high levels of crimes committed by American Indian youths across the country by looking at 192 tribal court system arrest records of juveniles and conducting interviews with tribal judges and law enforcement officers in one American Indian community in the Southern Ute Nation in the Four Corners area of the U.S. The study found that “[r]eports of dramatic increases in juvenile crime among American Indians are often inappropriately generalized across all American Indian communities,” that alcohol was a major contributing factor in most juvenile offenses, most offenses were low level, and that involvement from non-Indians and less traditional community members in the juvenile justice system acts as a barrier to more traditional approaches. The authors stressed the need to conduct individual case studies in communities, rather than focusing on aggregate data, to accurately determine the level of juvenile crime and the services needed by American Indian youth.

A 2007 study, “Negotiating Jurisprudence in Tribal Court and the Emergence of a Tribal State: The Lac du Flambeau Ojibwe,” evaluates the adjudication of 580 off-reservation hunting and fishing violations from 1983 through 1999 in the Ojibwe tribal court as a case study on how tribal courts and tribal communities are generally becoming more state-like. The research includes an analysis of tribal records and interviews with community representatives in Wisconsin. Using a detailed reading of the transcripts from three actual cases, the article illustrates how the process of litigation, even in tribal courts, tended toward an assimilation of tribes into Western systems of adjudication and a loss of cultural distinctiveness.

Canada also has a distinct population of indigenous people, commonly referred to as First Nations people, who are increasingly using restorative justice/circle sentencing practices. In July 2010 a study was published which looked at the attitudes of Canadian judges toward restorative justice practices used in intimate partner abuse cases. As reported in “Judges’ Attitudes About and Experiences with Sentencing Circles in Intimate-Partner Abuse Cases,” 25 judges from a large Western Canadian province were interviewed face-to-face

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## **Tribal court studies** (continued from page 17)

and two were interviewed over the phone. The study acknowledged that very few (6) of the judges interviewed had experience with restorative justice/sentencing circles in intimate-partner abuse cases, but 18 had experience with circle sentencing in other types of cases. Over three-fourths of the judges were male; 26 identified themselves as white and one as First Nations. The study found that 74 percent of judges reported a belief that sentencing circles are or could be beneficial in intimate-partner abuse cases. The study also found two major commonly suggested benefits identified by judges—community involvement/public awareness and defendant responsibility. Judges felt that getting the community involved in intimate-partner abuse cases may be a way for the community to participate and monitor the abusers. Judges also felt that defendants often blame the victims for abuse, and that circle sentences may help a defendant take responsibility for the offense, thus making reoffending less likely. Overall, the findings again suggest cautious judicial support for restorative justice in intimate partner abuse cases.

### **The Need for More Research and Identified Obstacles to Overcome**

As outlined above, there is a resurgence of Native American and Alaska Native peoples utilizing their traditional ways to resolve legal matters. Though there are few quantitative studies, a growing body of qualitative research has explored tribal courts and traditional Native processes. Still, there remains room for additional study, including quantitative approaches, to aid in determining the effectiveness of Native American and Alaska Native courts and practices.

One issue central to the study of the effectiveness of any court is how to measure and define “effectiveness.” The study of the effectiveness need not necessarily focus on recidivism or reoffending rates—but as seen with some of the studies discussed above may also focus on impact to victims and their perception that the offender was adequately dealt with, the impact of the offender on the community as a whole, and the overall “fairness” of tribal courts. Each of these measures of effectiveness would bring with it different challenges. For example, depending on the types of records that have been maintained, it might be possible to conduct a recidivism study retrospectively and without the involvement of the offenders or any other participants in the tribal court adjudication and sentencing process.

This is how the Kake recidivism study was conducted. The other more attitudinal measures of recidivism—how people perceive the process—would require qualitative data obtained through surveys or interviews. Collecting survey data would require extensive involvement both by the offender and by the tribal court and all participants in the circle or other tribal court process. This raises substantial privacy concerns that would need to be addressed.

While defining the intended measure of effectiveness and determining how best to collect relevant data would be issues for any study of tribal courts or any other court system, there are certain challenges that though perhaps not entirely unique to Alaska are certainly accentuated here. These challenges can be grouped into two main topics—jurisdiction and geography. The remainder of this article will analyze these challenges and then conclude by outlining a possible research agenda to meet these challenges.

### *Tribal Court Jurisdiction*

The jurisdiction of tribal courts in Alaska is an evolving issue, with much of the legal history focusing on civil cases where custody of a child is involved. (See “Key Acts and Cases for Alaska Tribal Court Jurisdiction,” p. 12, and “Current Issues Regarding Alaska Tribal Court Jurisdiction,” p. 14). Criminal jurisdiction of tribal courts in Alaska is even less well defined, with there being currently no court precedent firmly establishing the ability of Alaska tribes to adjudicate criminal cases absent a reservation or some other form of land-based jurisdiction. But initiating cases in tribal courts is only one way for tribal courts or principles commonly used in tribal courts to be employed. Sometimes state courts will refer cases to tribal courts. Other times, state courts will retain jurisdiction over a case but use restorative justice principles, such as circle sentencing, to decide a case. It is worth briefly reviewing how each of these three methods for employing alternate sentencing play out in Alaska with an eye toward how these nuances might impact a study of tribal court effectiveness.

(a) **Initial jurisdiction in tribal courts.** Tribal courts can address a wide variety of civil cases. Tribal courts can issue civil protective orders in domestic violence situations where the respondent is a tribal member, where the respondent consents to jurisdiction, or where the health and safety of a tribal member is seriously threatened; these orders can then be enforced by the State. Tribal courts can also resolve custody disputes between parents, as well as adjudicate cases involving the foster placement of children or the termination of parental

rights. The types of civil cases described above can start in tribal courts, though there are also provisions under the Indian Child Welfare Act (ICWA) for transferring foster placement and termination proceedings from state court to tribal court. Recidivism is not an applicable concept for family law or many other types of civil cases, so it would be difficult to derive a quantitative measure of tribal court effectiveness for this type of case. Instead, studies of cases initiated in tribal courts, because these cases are usually family law, would more likely rely on qualitative surveys to measure satisfaction with tribal court proceedings, similar to the Navajo study on *hózhó*. Recidivism can come into play for criminal cases, but there are currently no tribal courts in Alaska that are exercising broad criminal jurisdiction to initiate cases.

(b) **Referral of cases from state to tribal courts.** In addition to the ICWA transfer of cases just mentioned, the State of Alaska is looking into ways to refer misdemeanor criminal cases to tribal courts. Recognizing the remoteness of many villages, the high rates of alcohol abuse and domestic violence in rural Alaska, the frequent difficulties in obtaining a quick response by law enforcement personnel to these areas, and the benefits of tribal and community involvement in the judicial process, the State of Alaska is in the process of negotiating intergovernmental agreements with tribal courts. Under this model, if an individual in a village with a tribal court is charged by the State with one of a number of specified misdemeanor criminal offenses, the case could, with the consent of the offender, be referred to the tribal court for the imposition of a civil remedy using tribal cultural standards. The civil remedy imposed by the tribal court would be in lieu of prosecution in state criminal court. If the offender fails to abide by the terms of the tribal court sentence, he or she would then be subject to prosecution by the State. This agreement has not been finalized as of this writing, so some of the terms may change. (See “Current Issues Regarding Alaska Tribal Court Jurisdiction,” p. 14.)

From a research perspective, the possibility that some cases may be referred to tribal courts creates the opportunity to compare different measures of effectiveness for similar types of cases in different courts. Of course, different tribal courts operate differently depending on their cultural traditions, which is one of the justifications for referring cases to tribal courts. However, just the fact that cases are being resolved through restorative justice programs creates a commonality that is worth exploring. It would be possible in this way to evaluate different measures of tribal court effectiveness, both

quantitative and qualitative.

**(c) Cases retained by the State but resolved using restorative justice principles.**

For several years, the Alaska Court System has explored introducing restorative justice principles in rural Alaska through incorporating these principles into certain criminal cases. The State still retains jurisdiction over the cases, and the cases are tried by an Alaska Court System judge. (For a description of this process, see “Community Justice Initiatives in the Galena District Court,” p. 6.) In addition to Alaska Court System Magistrate Judge Christopher McLain in Galena, circle peacemaking processes are practiced by Alaska Court System Magistrate Judge Mike Jackson in Kake, the source of the Kake study discussed above. The Alaska Court System is expanding the cooperation with and use of tribal courts as alternate sentencing methods through such means as the new Alaska Rule of Criminal Procedure 11(i), effective April 15, 2014, which allows the referral of criminal cases, with the consent of the victim, the prosecutor, and the defendant, to restorative justice programs or models such as circle sentencing. (See “Restorative Justice Programs and Sentencing,” p. 4.)

While circle sentencings are not tribal courts *per se*, the state court’s referral to restorative justice programs such as circle sentencing offers a chance to assess their effectiveness. And to the extent that the judge departs from the circle’s recommendation in imposing a sentence, that could also provide some insights, though it would likely be more qualitative than quantitative. (See “Table 2. Summary of Village Sentencing Hearings,” p. 10.)

*Alaska’s Challenging Geography*

Research methodology regarding tribal courts needs to take into account Alaska’s geography. Most tribal courts are off the road system and can be difficult to reach, which underscores the need for more rural, local court options due to the difficulty of access—and has implications for the cost of travel to individual villages to conduct research. Moreover, Alaska’s challenging geography is coupled with the state’s demography and the fact that many villages are relatively small in population, with most ranging from approximately 100 to 1,000 residents.

The result is smaller tribal courts that have relatively small numbers of cases. For example, the Kake study found only 46 cases in the Kake Circle program over 10 years that it felt appropriate to use for determining recidivism. (Stretching out a study over this length of time may mask intervening reform efforts that change the manner of the

proceedings or the educational efforts aimed at prevention.) And the Kake program is one in which the State is retaining jurisdiction and using restorative justice principles in sentencing. There are no published figures on the number of cases heard per year by any particular tribal court, but the number of cases from any one court are unlikely to yield results that reach a high degree of statistical significance or confidence. In any study, small numbers of the factor to be examined do not yield results that have great statistical reliability. Given the new frameworks being developed or already in place regarding the involvement of tribal courts and circle sentencing practices, it is likely that there could be larger sample sizes going forward. Even then, no one court is likely to generate enough cases to produce statistical reliability in any quantitative analysis.

Moreover, all records of tribal court cases are inevitably going to be maintained differently. Each tribe is its own sovereign, and there are no uniform standards for maintaining tribal court records. Each tribe may also conduct their hearings differently, which could complicate cross-tribe comparisons or aggregating data from multiple tribes. Further, the remedies/punishments implemented may differ greatly from tribe to tribe or even from offender to offender being sanctioned for a similar offense. All of this impacts the feasibility of retrospective studies. Future studies should involve tribal courts in collecting the desired information on a going-forward basis, resulting in greater uniformity over the variables and measures being studied.

Another issue derivative of smaller courts and smaller sample sizes is privacy concerns. Though circle sentencing involves a substantial segment of the local population, particularly those affected by the offense, the content of the discussion in the circles is usually meant to be kept confidential. Researchers can take steps to protect confidentiality of study participants in any reports that are issued, but if one of the outcomes being measured is recidivism, there would need to be a means for tracking the circle participants. Where cases are being referred from state court or where jurisdiction is being retained by state court, such mechanisms are likely to be in place. But this may not be true for cases handled solely by tribal courts. And the very fact that issues of recidivism are being addressed when the tribal court is small and the number of cases few may unavoidably reveal to those in the village information about Circle participants that might otherwise have been kept confidential. The larger the sample size, the more anonymity, but getting this sample size is difficult when examining individual

tribal courts serving small populations.

*Minor Consuming Alcohol as a Quantitative Measure*

Although qualitative studies can avoid some of the above jurisdictional and geographic challenges, the results of these studies might be hard to generalize, though they could inform quantitative studies. If the purpose of a tribal court effectiveness study is to measure the success of different results between tribal and Western-style courts, then the two systems must be compared directly. The Navajo and Kake studies did this, though the former was focused more on participant satisfaction than on quantitative measures of recidivism and the latter suffered from a small sample size.

A quantitative study of tribal court effectiveness needs to address issues of sample size and control groups. More specifically, not only does a quantitative study need to include enough cases from both the test group and the control group to generate statistical reliability, but there needs to be a common measure of effectiveness that touches both sets of cases. This can be accomplished through examining how the same type of case is handled in different jurisdictions (as the term is used above) and employing a common measure of effectiveness, such as recidivism, or a standard methodology that measures satisfaction.

The criminal offense that best meets these requirements is minor consuming alcohol (MCA) cases. MCA cases are widespread in Alaska. Indeed, the Kake study noted that the “vast majority” of the offenders in the Circle program were there for alcohol-related offenses. Over roughly the same time period, the control group—the village of Hoonah, with a population of around 800—had 132 cases filed involving either MCA or a repeat MCA. This is symptomatic of cases statewide. As reported in “Underage Drinking: Research, Evaluation, and Related Efforts,” based on Alaska Court System data, in 2011 alone there were 3,441 MCA charges statewide in Alaska, 77.2 percent of which resulted in convictions. And these are just the cases for which charges have been brought. Close to 60 percent of Alaska minors will consume alcohol sometime before reaching legal drinking age.

Minors consuming alcohol is obviously a serious problem in Alaska. But from a research perspective, it is one that provides many data points for study with a fair degree of common characteristics for the offense, regardless of where it is committed. Furthermore, there is a concerted effort by the Alaska Court System, which organized a conference on April 4, 2014 just on MCA issues, to involve tribal courts in resolving these types of cases. However, not all MCA cases will be

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### **Tribal court studies** (continued from page 19)

resolved using restorative justice principles in state court or referring cases to tribal court jurisdiction. Many MCA cases will still be handled by the state court system, even in rural areas. Some tribal courts may even choose to address minor alcohol consumption situations without resort to the state court system, though the extent to which these may be informal resolutions as opposed to tribal court proceedings could become an issue from a research perspective. Regardless, the range of options should provide a solid comparison of effectiveness between different methods of adjudication with substantial sample sizes while still retaining a core control group.

Because widely different remedies will be adopted by these alternate sentencing methods, the effectiveness of each might be difficult to study unless some commonalities between remedies can be found with large enough sample sizes. Indeed, this aspect may be better studied qualitatively than quantitatively. Yet, valuable insights can be gained on the effectiveness of tribal courts and restorative justice principles by examining recidivism rates when these methods are implemented, independent of the actual alternate sentence employed. Minor consuming alcohol cases could potentially provide the research tool to achieve sample sizes of statistical reliability.

### **Conclusion**

People who advocate for and participate in tribal court proceedings intuitively believe

that they are effective. But there is little empirical research to support this. The few studies that have been conducted tend to support the notion that tribal courts can be more effective than Western-style courts, though more work needs to be done in this area. Although there are challenges in structuring a research study of Alaska tribal courts, there

are ways to meet these challenges. Minor consuming alcohol cases might be a tool for creating a statistically reliable study of tribal court effectiveness in Alaska.

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## **Rural Governance Report 2014**

*Mara Kimmel*

Empowering rural people through strengthening rural governance systems—in accordance with the mandate of the Constitution of the State of Alaska—was the underlying theme throughout the recommendations of the 1999 Rural Governance and Empowerment Commission (RGC). Almost all of the RGC's original recommendations remain pertinent today. There is a pressing need to identify and advance effective solutions to rural concerns, particularly in the area of public safety. Gathering in 2013, a group of committed Alaskans—including Alaska Native leaders, rural residents, local government officials, former legislators and state government officials, and academics—revisited the 1999 report and identified the following pathways necessary to ensure public safety for rural Alaskans:

- **Reform state-tribal relations.** Recognize tribes as governments, support tribal public safety programs, and clarify and empower tribal jurisdiction to eliminate barriers to justice in rural Alaska.

- **Strengthen Alaska Native culture.** Cultural integrity is a powerful tool in attaining educational or academic success and in combatting high rates of suicide and crime.

Language, dance, art, and other forms of cultural education are essential.

- **Reconfigure state systems to work with and for Native cultures, not against them.** Strong cultures mean safe communities, and our state justice institutions should be responsive to the variety of cultures throughout our state.

- **Expand tribal compacting.** Federal and state governments could enter into formal agreements (compacts) with tribes to share resources to fill the gap in rural public safety needs not met by government systems.

- **Build Native leadership.** Alaska Natives need to continue to grow culturally-connected, strong, compassionate leaders, as they have for the last 10,000 years. Alaskans from both Native and non-Native populations need to work together to find committed leaders to face statewide challenges and amplify the help we give each other across the state.

The full report, *Rural Governance Remains Unfinished Business in Alaska—A Call to Action*, can be accessed at <http://www.ruralgov.org/>.

*Mara Kimmel is a visiting scholar at the UAA Institute of Social and Economic Research and was among the 50 Alaskans who participated in the 2013 reconvening of the RGC.*