University of Nebraska - Lincoln
DigitalCommons@University of Nebraska - Lincoln

Court Review: The Journal of the American Judges Association

American Judges Association

1-1-2009

From Conflict to Cooperation: State and Tribal Court Relations in the Era of Self-Determination

Aliza G. Organick
Washburn University School of Law

Tonya Kowalski
Washburn University School of Law

Follow this and additional works at: http://digitalcommons.unl.edu/ajacourtreview

Organick, Aliza G. and Kowalski, Tonya, "From Conflict to Cooperation: State and Tribal Court Relations in the Era of Self-Determination" (2009). *Court Review: The Journal of the American Judges Association.* Paper 283.
http://digitalcommons.unl.edu/ajacourtreview/283

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

ESSAY

From Conflict to Cooperation:

State and Tribal Court Relations in the Era of Self-Determination

Aliza G. Organick and Tonya Kowalski

The Indigenous nations[1] of the United States have long been subject to federal policy. Since the Civil Rights Era, that federal policy purportedly has been to encourage self-determination and tribal sovereignty. One of the hallmarks of self-determination is the development of Tribal legal systems, which have been actively encouraged and funded by the federal government. As a result, Tribes have been exercising their jurisdiction in ways that were not contemplated decades ago. As Tribes have expressed their sovereignty through their court systems, it is not surprising that states sometimes feel that their own jurisdiction is threatened. This conflict creates a need for increased understanding, communication, and cooperation between Tribal and state governments. The extent to which Tribal-state cooperation succeeds or fails depends in large part upon their ability to understand each other's philosophical, legal, and historical realities. Cultural barriers to communication can, if left unattended, prevent meaningful cooperation from taking place. Historical myths and prejudices about the First Peoples of the United States threaten to keep Indigenous communities impoverished and marginalized. These myths stem from first contact, and form the root of modern, anti-Tribal policies, legislation, and court decisions.[2] If we agree that Tribal-state relationships should evolve, we must first accept that the historical animosity and distrust are the products of a powerful legacy of colonization, genocide, and oppression.

Furthermore, Tribal-state tensions result from a clash of political philosophies and differing worldviews. From the Euro-American standpoint, the concept of national statehood evolved from the philosophy of natural law, as well as from the pragmatic desire to centralize power and encourage long-distance trade.[3] Modern states are also typically characterized by large, somewhat diverse populations.[4] In contrast, from the Indigenous standpoint, sovereignty is "interwoven with the social, spiritual, intellectual, and economic aspects of the communities they serve."[5] Historically speaking, Indigenous nations tended to form around kinship ties or other community-based relationships. They also tended to have "decentralized political structures often linked in confederations, and have enjoyed shared or overlapping spheres of territorial control."[6] These differences can make it difficult for Westerners to comprehend Indigenous sovereignty.[7] Nevertheless, even by the colonizers' definition, Indigenous peoples of the emerging United States were sovereign entities, and governments engaged with them on an international basis.[8] There is ample evidence that early, pre-colonial settlers, the British Crown, and the fledgling American government dealt with Indigenous nations as coequal sovereigns, recognizing that North American lands were already occupied by Indigenous nations.[9]

As with any topic involving Indigenous peoples, Tribal-state cooperative arrangements must be viewed within their historical context. History shows that the hundreds of early treaty relationships between Indigenous nations and colonial governments recognized the potential for cooperative arrangements in establishing trade, building alliances, and defining territory.[10] These relationships remained the status quo while the balance of power between Indigenous peoples and colonists remained relatively balanced. However, as the United States grew in wealth, military might, and population, that balance of power changed.[11] The colonies—and eventually the states—coveted Indigenous territory for settlement and expansion. Before long, it became evident that the Crown could not control its subjects in their hunger for Indigenous lands and for gold.[12] The United States Supreme Court made a decisive move that set the tone for Tribal-state relations for centuries to come. In the landmark case *Worcester v. Georgia*,[13] the State of Georgia attempted to extend its laws and jurisdiction over the Cherokee Nation. The Supreme Court "unequivocally rejected any role for states . . . in favor of an exclusive federal-tribal relationship."[14] The Court premised its holding on inherent Tribal sovereignty vis à vis the hostile, encroaching state, but, as a matter of policy, clearly also

Footnotes

1. This essay refers to Indigenous peoples of the United States by a number of names, including First Peoples, Indigenous nations, Indigenous peoples, and Tribes.
2. *See generally* JEFF CORNTASSEL & RICHARD C. WITMER, FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD 3-83 (2008).
3. *See* MARYANN CUSIMANO LOVE, BEYOND SOVEREIGNTY: ISSUES FOR A GLOBAL AGENDA 11-13 (2d ed. 2003).
4. *Id.*
5. Angelique A. EagleWoman (Wambdi Awanwicake Wastewin), *The Philosophy of Colonization Underlying Taxation Imposed upon Tribal Nations within the United States*, 43 TULSA L. REV. 43, 44 (2007).
6. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 22 (2d ed. 2004).
7. *Id.*
8. ROBERT N. CLINTON, CAROLE E. GOLDBERG & REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 11-26 (4th ed. 2003).
9. *Id.*
10. *Id.*
11. *Id.* at 23-49.
12. *See* RICHARD J. PERRY, FROM TIME IMMEMORIAL: INDIGENOUS PEOPLES AND STATE SYSTEMS 13-17 (1996).
13. 31 U.S. 515 (1832).
14. Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 503.

wished to reserve to the government profitable trade relationships. This political sovereignty was qualified by the Court's decision one year earlier, declaring the Tribes to be "domestic dependent nations," a unique brand of internal sovereign that was neither a state nor a foreign country.[15]

In the era immediately following these early decisions from the Marshall Court, the federal government became the exclusive entity to enter into formal relations with Indigenous nations in the United States. However, this exclusivity created points of conflict that continue to this day. Additionally, federal policy—both judicial and legislative—has consistently eroded Tribal sovereignty, creating a paradox in Tribal-federal-state relations: Tribes have inherent sovereignty, however limited, and yet are continually undermined by federal initiatives to erode, assimilate, and ultimately terminate them.[16] Federal erosion of Indigenous sovereignty leaves the Tribes vulnerable to state encroachment, furthering the process of sovereign destruction.

This cultural and historical context also frames the issue of cooperation between Tribal and state court systems. One of the most profound expressions of a sovereign's power to manage the affairs of its people is the exercise of civil and criminal jurisdiction. Historically, Tribes have always had dispute-resolution mechanisms that expressed the cultural values of each Tribe.[17] In 1934, the federal government encouraged Tribes to create their own court systems under the Indian Reorganization Act, but pressured them to adopt largely Anglo-American models of jurisprudence.[18] In the past few decades, Tribal courts have experienced explosive growth, hearing complex cases and responding to federal pressure to maintain many aspects of Anglo-American jurisprudence, while also "crafting a unique jurisprudence of vision and cultural integrity."[19] There are currently over 560 federally recognized Tribes and over 250 Tribal courts in the United States.[20] As Tribal courts have grown in number, ever more practitioners find themselves practicing in Tribal jurisdictions on a wide variety of civil, criminal, and family matters.[21] Typically, as a result of the IRA, Tribal courts have largely Western-style legal systems, often including written Tribal constitutions and codes, appellate courts, rules of civil and criminal procedure, and even rules for appearance *pro hac vice*. In addition to the vertical, Western form of justice familiar to state and federal practitioners, Tribes also have rich sources of internal common law, as well as holistic dispute resolution bodies—both traditional and contemporary—such as Peacemaker circles[22] and Healing-to-Wellness courts.[23]

Just like other aspects of sovereignty, Tribal courts and their jurisdiction have suffered from erosion by Congress and by state and federal judicial decisions. Underlying these decisions is the myth that Tribal courts somehow lack transparency or even competence, especially when dealing with non-Indian entities. This myth is reflected in the erosion of criminal jurisdiction for "major crimes" and for crimes involving non-Indian defendants. One of the most famous examples comes from the aftermath of *Ex parte Crow Dog*,[24] in which the Supreme Court reversed the North Dakota territorial courts' negation of a Tribal decision to resolve a homicide through a traditional form of restitution[25] rather than by capital punishment, thereby recognizing the Tribes' right to express their sovereignty through criminal jurisdiction. The cultural norms reflected by this more holistic, community-centered solution were simply beyond the ken of the non-Indigenous, territorial courts that reviewed the decision. In fact, the Supreme Court's holding in *Crow Dog* prompted Congress to divest the Tribes of much of their felony jurisdiction. The Major Crimes Act[26] extended federal jurisdiction over an extensive list of felonies occurring in Indian country. Even today, this lack of cultural awareness and understanding continues, ironically articulated as a lack of transparency or competence on the part of the Tribal courts.[27]

In this era of political, judicial, and economic growth for our First Peoples, there is the potential for either increased conflict or increased cooperation. Fortunately, in at least a handful of states, Tribes and states are increasingly looking for opportunities to cooperate, and the last two decades have seen the development of a number of programs. In the legislative arena, the National Conference of State Legislatures and the National Congress of American Indians have joined forces to study and promote cooperative agreements based on mutuality and trust.[28] In the judicial arena, one promising result of recent cooperative movements has been the Civil Jurisdiction in Indian Country Project.[29] A number of Tribal-state court forums have also begun around the country, developed largely under an initiative by the National Center for State Courts and Conference of Chief Justices.[30] State courts and Tribal courts are most likely to resolve jurisdictional differences and protect the integrity of their Native communities when they establish

15. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
16. *See* David E. Wilkins, American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice 24 (1997).
17. Christine Zuni Cruz, *Strengthening What Remains*, 7 Kan. J. L. & Pub. Pol'y 18 (1997).
18. Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 Judicature 110, 112 (1995).
19. *Id.*
20. Pat Sekaquaptewa, *Tribal Courts and Alternative Dispute Resolution*, 18 Bus. L. Today 23, 23-24 (2008).
21. *Cf.* Gabriel S. Galanda, *A Need to Know Indian Law*, 64 Or. St. B. Bull. 62, 62 (Nov. 2003).
22. *See* Zuni Cruz, *supra* note 17, at 19.
23. *See generally* Tribal Law & Policy Institute, Tribal Healing to Wellness Courts, http://www.tribal-institute.org/LISTS/drug_court.htm (last accessed June 5, 2009).
24. 109 U.S. 556 (1883).
25. Sidney L. Harring, Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century 119 (1994).
26. 18 U.S.C. § 1153.
27. Philip P. Frickey, *Tribal Law, Tribal Context, and the Federal Courts*, 18 Kan. J.L. & Pub. Pol'y 24, 30-31 (2008).
28. *E.g.,* National Conference of State Legislatures & National Congress of American Indians, Government to Government: Models of Cooperation Between States and Tribes 8 (2002).
29. Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 Judicature 154, 155 (1995).
30. James A. Bransky & Hon. Garfield A. Wood, *The State/Tribal Court Forum: Moving Tribal and State Courts from Conflict to Cooperation*, 72 Mich. B. J. 420, 421 (1993).
31. *Id.* at 156.

agreements recognizing comity and full faith and credit for Tribal court judgments; possibly share resources like jails, court personnel, and probation officers; jointly develop legislation that contemplates cooperation on Indian child-welfare, taxation, and criminal-law enforcement; and promote awareness of Tribal affairs by the state bench and bar.[31] One fruitful path for opening these intergovernmental and intercultural discussions is the listening conference. In one example, the New York Federal-State-Tribal Courts Forum, in conjunction with several other organizations, "convened state and federal judges and court officials in sessions with tribal judges, chiefs, clan mothers, peacemakers, and other representatives from the justice systems of New York's Indian Nations and Tribes, to exchange information and learn about [their] respective concepts of justice."[32]

Another way in which state courts can support Tribal courts is by developing jurisdictional agreements to adopt a form of Indian abstention doctrine. Although the federal Indian-abstention doctrine may be eroded by the holding in *Nevada v. Hicks*,[33] the Supreme Court has encouraged federal courts to abstain from exercising concurrent jurisdiction in Indian country over suits involving "reservation affairs."[34] The Indian-abstention doctrine is similar to various abstention principles between state and federal courts.[35] Arguably, state courts that have concurrent jurisdiction with Tribal courts, such as Public Law 280 jurisdiction, should exercise their discretion to abstain from matters pertaining to Tribal lands or affairs and should mindfully employ choice of law principles to defer to Tribal court jurisdiction where Tribal law applies.[36] For example, in 2005, the Wisconsin courts and Wisconsin-based Tribes held a conference on jurisdiction, in which they developed a thirteen-factor protocol for determining the proper forum in cases with concurrent jurisdiction.[37]

This discussion has focused primarily on the state courts' role in cooperating with Tribal communities. But Tribal-state cooperation can also reduce conflict in legislative and executive matters, such as taxation, gaming, natural resources, social services, policing, and so on.[38] While it is generally accepted that better relationships will emerge from increasing intergovernmental collaboration, there are also major, legitimate concerns. The devolution of many federal-Tribal programs to state, Tribal, and local governments creates pressure for Tribes to enter into state compacts and contracts, and sometimes even mandates joint programs.[39] By abdicating its role, the federal government is forcing Tribes to negotiate matters that should be reserved to the Tribal-federal trust relationship.[40]

In this era of "forced federalism," it is critical for the courts, as well as state and local governments, to understand that the issue at stake for Tribes is nothing less than their sovereignty.[41] Cultivating healthy Tribal-state relationships requires conscious, mindful efforts to engage in cross-cultural communication based on "mutual understanding and respect."[42] Jurisdictional agreements and other cooperative arrangements that support Tribal sovereignty flow back to the states in the form of increased economic activity and social well-being. Therefore, when the opportunity arises for courts to engage in problem-solving across Tribal-state lines, it benefits both sovereigns, and most importantly, their people.

Aliza G. Organick is an associate professor of law at Washburn University School of Law. She earned her B.U.S. from the University of New Mexico in 1992 and her J.D. from the University of New Mexico in 1996. Professor Organick created the Tribal and State Court Practice Clinic at Washburn Law, and teaches a variety of courses related to tribal court practice, Indigenous peoples, comparative law, and law clinic. She is also a former visiting assistant professor in the Southwest Indian Law Clinic at the University of New Mexico, and the present chair-elect of the Association of American Law Schools Section on Indian Nations and Indigenous Peoples. Professor Organick is an enrolled member of the Diné Nation and is born to the Tjenjikinee (Cliff Dweller) Clan. Professor Organick is co-author of the forthcoming Tribal Court Practice Handbook *(Carolina Academic Press 2011) (with Tonya Kowalski).*

Tonya Kowalski is an associate professor of law at Washburn University School of Law. She earned her B.A. from the University of Florida in 1992, and her J.D. from Duke University School of Law in 1995. Professor Kowalski teaches legal analysis, research, and writing, and occasionally guest lectures in the Washburn Law Clinic on both legal writing and on tribal court practice. She is a former staff member and former visiting assistant professor in the Indian Legal Clinic at the Sandra Day O'Connor College of Law at Arizona State University. Professor Kowalski is co-author of the forthcoming Tribal Court Practice Handbook *(Carolina Academic Press 2011) (with Aliza G. Organick).*

32. Marcy L. Kahn, Edward M. Davidowitz & Joy Beane, *Building Bridges Between Parallel Paths: The First New York Listening Conference for Court Officials and Tribal Representatives*, 78 N.Y. St. B. J. 10, 11 (2006).
33. 533 U.S. 353 (2001).
34. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).
35. John J. Harte, *Validity of a State Court's Exercise of Concurrent Jurisdiction over Civil Actions Arising in Indian Country: Application of the Indian Abstention Doctrine in State Court*, 21 Amer. Indian L. Rev. 63, 76 (1997).
36. *Id.* at 84-102.
37. Robert A. Blaeser & Andrea L. Martin, *Engendering Tribal Court/State Court Cooperation*, 63 Bench & Bar Minn. 18, 21 (2006).
38. *See* National Conference of State Legislatures & National Congress of American Indians, Government to Government: Understanding State and Tribal Governments 2 (2000).
39. *Id.* at 5.
40. Corntassel & Witmer, *supra* note 2 at 16-24.
41. Gabriel S. Galanda & Anthony S. Broadman, *Deal or No Deal? Understanding Indian Country Transactions,* 18 Bus. L. Today 11, 11 (2008).
42. Models of Cooperation, *supra* note 28 at 7.