



ADVANCING VICTIM RIGHTS USING CUSTOM AND TRADITION IN TRIBAL COURTS

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While the United States Constitution does not apply In Indian Country,¹ its focus in criminal proceedings is on safeguarding the rights of defendants rather than the rights of victims. This contrasts markedly with the traditional, tribal focus on:

- ensuring that victims and their communities are made whole,
- remedying the wrong that has been committed,
- bringing the community back in to balance, and
- changing the defendant's future behavior.

Since Time Immemorial, tribal dispute resolution has focused not just on a specific victim who had been directly harmed, but also on the victim's family, clan, and community.

American Indian/Alaska Native communities have long recognized that violence committed against an individual also has great consequences for the community at large. Victims, unlike in the Anglo justice system, were not expected to stand silently and alone throughout the dispute resolution process. Rather, in traditional tribal communities, the victim and/or her representative(s) normally had input into the processes as well as in to the type and severity of consequences that the perpetrator would face.

In the Matter of the Interest of D. P., a Minor, 3 Nav. R. 255, 256 (CR Dist Ct. 1982) describes the application of Navajo custom and tradition to punishment and sentencing:

The Navajo tradition recognized that the central ideas of punishment were to put the victim in the position he or she was before the offense by a money payment, punish in a visible way be [sic] requiring extra payments to the victim or the victim's family (rather

¹ United States v. Wheeler, 435 U.S. 313 (1978).

than the king or state), and give a visible sign to the community that wrong was punished. The offender was given the means to return to the community by making good his or her wrong. Surely this is a far better concept of justice than to leave the victim out of the process of justice and leaving the victim with not [sic] means of healing the injury done.

This more holistic approach contrasts markedly with the past two hundred years of Anglo criminal justice in the United States. Until fairly recently, victims of crime in the dominant culture's systems were treated as witnesses rather than as persons who had been harmed and who were deserving of special status and protection. The United States Constitution contains rights for defendants in criminal cases (because of the potential loss of liberty), but is silent on the rights of victims. 2

Victims in the dominant culture's legal systems did not, traditionally, have specific "rights." Historically, there had been a tacit assumption that the prosecutor knew what was best for a victim and represented her rights alongside of his or her representation of the prosecuting jurisdiction's interests. Victims weren't traditionally provided with copies of police reports nor were they consulted for sentencing recommendations. They were not notified of every hearing nor were they notified when a defendant was released from custody. Victims were not routinely consulted by prosecutors (or the courts) on conditions of release, plea agreements, or sentencing. Input into restitution was often the only input requested from a victim under the dominant culture's criminal justice systems.

In 2004, Congress passed the Crime Victims' Rights Act 3. Also known as the "CVRA," this landmark federal legislation formally recognizes that the prosecutor represents the prosecuting government which may have quite different interests than the victims.

While the CVRA applies solely in federal jurisdictions, all states (and an increasing number of Tribes) have adopted their own victims' rights legislation. Included in the CVRA is a new right for a victim to have her own legal counsel present throughout the criminal proceedings. Victims (and their legal counsel) are now allowed input into the setting of conditions of release and the offering of plea agreements. They are also assured the right to provide victim impact statements at sentencing and are provided with protection from the discovery abuses of criminal defense attorneys. Victims must also be notified whenever the defendant has been released from custody.

More than 100 Tribes have adopted some form of victims' rights legislation. 4 Some Tribes have modeled victims' rights codes after the federal and/or state statutes. Notification of hearings and the right to be heard during the sentencing phase are other common victims' rights provisions contained in tribal codes.

2 4th, 5th and 6th Amendments to the United States Constitution
3 18 U.S.C. § 3771

4 For a list of Tribal victims' rights codes, please visit the searchable list found at <https://www.victimlaw.org/victimlaw/tocSearch.do?invoke=getJurisdiction&flow=next>

Those Tribes that currently do not have victims' rights codes may be able to successfully advance the rights of victims utilizing custom and tradition. The "... importance of customary law in American Indian tribal courts cannot be understated. Indian tribes now take every measure conceivable to preserve Indigenous cultures and restore lost cultural knowledge and practices. Tribal court litigation, especially litigation involving tribal members and issues arising out of tribal law, often turns on the ancient customs and traditions of the people." 5

Since Time Immemorial, American Indian/Alaska Native victims and their supporters have provided significant input in to traditional dispute resolution processes. Historically, restitution to make the victim, her family, and her community as whole as possible was a top priority.

Restitution was not strictly limited to monetary payment or the exchange of goods for the benefit of one individual. There was the additional recognition that an injury to a victim reverberated throughout the community. Harm caused to a victim had very real effects on family who were dependent upon an injured or murdered victim's support.

For example, in the United States Supreme Court case Ex Parte Crow Dog, 109 U.S. 557 (1883), a Lower Brule Sioux man murdered another Indian man named Spotted Tail. Under the law of his Tribe, Crow Dog was required to hunt for (and otherwise financially support) the victim's dependent relatives as punishment for the murder. The facts of the case, recounted in careful detail, clearly illustrate that the Lower Brule Sioux recognized a wider class of people as "victims" than under Anglo law. All persons dependent upon the murdered man for their sustenance were considered victims. One could therefore make an argument, based upon custom and tradition, that compensation and restitution for an injured Lower Brule Sioux victim in tribal court should cover all lost wages and lost labor used to support dependents (whether or not they are members of the victim's nuclear family).

Many Tribes allow non-law school trained persons to practice law in their tribal courts (including victim advocates, law students, and community members). Formal or informal representation of a victim as her legal counsel in criminal proceedings may be allowed under tribal code provisions or by arguing that, under custom and tradition, victims were traditionally provided with support and a voice in all conflict resolution proceedings. Clerks of the court for each tribal jurisdiction can provide information on admission to practice law and can also direct advocates and others on where to locate rules of court, tribal codes, and other materials helpful to representation.

5 Fletcher, Matthew L.M., Rethinking Customary Law in Tribal Court Jurisprudence *Indigenous Law & Policy Center Working Paper 2006-04* November 2006

Representation of victim rights in tribal courts may entail filing formal notice of appearance as the victim's counsel. Included in the notice of appearance can be a request to receive copies of all motions, filings, and orders in the case. Practitioners may wish to alert the court in their preliminary filing that they (and/or or they victim) seek permission (under the tribal code or under custom and tradition) to file motions with the court and to make arguments on behalf of the victim as to conditions of release, sentencing, restitution, any motions to continue a trial, and plea agreements.

Additional support for attorneys and lay legal advocates seeking to represent victims in tribal court criminal proceedings can be accessed by contacting the NICCSA hotline at 1-855-4NICCSA (1-855-464-2272) and/or by contacting the National Alliance of Victim Rights Attorneys at 503-768-6950 or at www.navra.org