

ANISHINAABE LAW AND *THE ROUND HOUSE*

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The United States is currently mired in an era where a significant number of Americans believe they are not safe from violent crime. Crime rates are up, after many years of slow but consistent decline.¹ “Fear of crime” is a scholarly term of art that may return to mainstream American parlance, if it hasn’t already.²

Unfortunately, rising crime rates and fear of crime are nothing new in Indian country. The Indian Law and Order Commission argued that “American Indian and Alaska Native communities and lands are frequently less safe—and sometimes dramatically more dangerous—than most other places in our country.”³ In the recently decided *United States v. Bryant*,⁴ the Supreme Court began its analysis of the viability of a federal recidivist statute—28 U.S.C. § 117(a)—by noting that domestic violence against Indian women in Indian country is far worse “compared to all

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¹ Mark Berman, *FBI: Murders and other violent crimes increased last year*, WASH. POST (Jan. 19, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/01/19/fbi-murders-and-other-violent-crimes-increased-last-year/?utm_term=.7a3073361cbf (“The numbers of murders, rapes, assaults and robberies were all up over the first six months of 2015. Overall violent crime was up 1.7 percent, an increase that followed two consecutive years of declines, according to the FBI.”).

² *E.g.*, DAN A. LEWIS & GRETA W. SALEM, FEAR OF CRIME: INCIVILITY AND THE PRODUCTION OF A SOCIAL PROBLEM 7–9 (1986); Linda Heath et al., *Toward a Social-Psychological Understanding of Mass Media and Fear of Crime: More than Random Acts of Senseless Violence*, in PSYCHOLOGY OF FEAR, CRIME, AND THE MEDIA: INTERNATIONAL PERSPECTIVES 79, 79–80 (Derek Chadee ed., 2016).

³ INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES v (Nov. 2013).

⁴ *United States v. Bryant*, 136 S. Ct. 1954 (2016).

other groups in the United States.”⁵ In general, federal and tribal officials take the view that more federal and tribal prosecutions of law breakers in Indian country is the appropriate response, while others have strongly criticized enhanced Indian country law enforcement.⁶ What is apparent is that enhanced federal and tribal prosecutions are long-term solutions at best, and ineffectual, or harmful at worst.

Traditional tribal law and order techniques are not part of the national discussion on Indian country violent crime, but the celebrated novelist Louise Erdrich’s *The Round House* (Harper 2012) addresses modern Anishinaabe Indian country violent crime with the story of women who are violently attacked, and the failure of the federal and tribal (and state) criminal justice system to resolve the crime. The shocking conclusion of the story [spoiler alert: the young son of the one woman who survived the attack assassinates the likely perpetrator after the police release him from custody for lack of jurisdiction] is not necessarily a traditional solution, but is perhaps consistent with historic Anishinaabe traditions where violent crime cannot be adequately resolved by the community.

Violent crime, and fear of crime, is a reality within Indian country. Contemporary law enforcement mechanisms are hamstrung both by jurisdictional problems, and by lack of cultural match. The Indian Law and Order Commission’s 2013 report is a catalogue of the jurisdictional problems.⁷ Legal scholars have long complained that American mainstream law enforcement has for too long been imposed upon Indian country, and may be utterly ineffective until Indian people are the architects of the solution rather the passive participants.⁸

This paper addresses the Indian country criminal justice system’s difficulties through the context of the Great Lakes

⁵ *Bryant*, 136 S. Ct. at 1959 (quoting 151 CONG. REC. S4873 (daily ed. May 10, 2005) (remarks of Sen. McCain)).

⁶ *E.g.*, Barbara L. Creel & John P. Lavelle, *High court denies rights of Natives*, ALBUQUERQUE J., (June 26, 2016), <https://www.abqjournal.com/798285/high-court-denies-rights-of-natives.html> (criticizing the *Bryant* decision that favored use of uncounseled tribal court convictions in federal convictions under 18 U.S.C. §117(a) (2012)).

⁷ INDIAN LAW & ORDER COMM’N, *supra* note 3, at 1, 27.

⁸ Troy A. Eid & Carrie Covington Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1072 (2010); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 714 (2006); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 786, 788 (2006).

Anishinaabeg's traditional customs, traditions, and laws, and their modern treatment of crime. Louise Erdrich's *The Round House* expertly captures the reality of crime and fear of crime in Anishinaabe Indian country, and offers a bleak view of the future of criminal justice absent serious reform in the near future.⁹

I. MINO-BIMAADZIWIN AND THE WINDIGO – TRADITIONAL ANISHINAABE LAW

The Anishinaabeg of the western Great Lakes—the Odawa (Ottawa), Ojibwe (Chippewa), and the Bodewadmi (Potawatomi)—established a dynamic legal structure long before the historical arrival of outsiders. These three tribes, known as the Three Fires Confederacy, or People of the Three Fires¹⁰, established complicated domestic relations law, property rights, and criminal law largely derived from the family and kinship relations.¹¹

I argue in this section that the concept of *mino-bimaadziwin* (loosely translated as the act of living or life) was the foundational basis of traditional Anishinaabe society and, implicitly, law and order. To put simply, when things are going right, it is because the Anishinaabeg were living in accordance with *mino-bimaadziwin*. This concept offered controlling guidance to the Anishinaabeg in cases of social disruption; for example, in cases of criminal acts, even physical and sexual assault and murder. But *mino-bimaadziwin* had limitations, and the stories of the *windigo*, a terrifying and supernatural cannibalistic killer featured in Anishinaabe traditional stories and custom, can be construed as expressions of those limitations in the context of criminal law.

A. *Mino-Bimaadziwin*

The Anishinaabe worldview relied heavily on an Indigenous concept known as *mino-bimaadziwin*, occasionally translated as

⁹ See LOUISE ERDRICH, *THE ROUND HOUSE* 60–61, 314–15 (2012).

¹⁰ JAMES A. CLIFTON ET AL., *PEOPLE OF THE THREE FIRES: THE OTTAWA, POTAWATOMI, AND OJIBWAY OF MICHIGAN* 12 (1986); Patty Loew, *Hidden Transcripts in the Chippewa Treaty Rights Struggle: A Twice Told Story—Race, Resistance, and the Politics of Power*, 21:4 AM. INDIAN Q. 713, 714 (1997).

¹¹ See JOHN BORROWS, *CANADA'S INDIGENOUS CONSTITUTION* 77–80, 82–83 (2010); MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* 10–13 (2011).

the “Good Life.”¹² Beings living in accordance with *mino-bimaadziwin* acknowledge and respect all animate and inanimate things, acknowledge that all things are interconnected, and acknowledge that good and bad actions have impacts on all things.¹³ Eva Petoskey, a member of the Grand Traverse Band of Ottawa and Chippewa Indians, and a former Vice-Chair of the Grand Traverse Band Tribal Council, described the concept in more detail:

There is a concept that expresses the egalitarian views of our culture. In our language we have a concept, *mino-bimaadziwin*, which essentially means to live a good life and to live in balance. But what you’re really saying is much different, much larger than that; it’s an articulation of a worldview. Simply said, if you were to be standing in your own center, then out from that, of course, are the circles of your immediate family. And then out from that your extended family, and out from that your clan. And then out from that other people within your tribe. And out from that people, other human beings within the world, other races of people, all of us here in the room. And out from that, the other living beings . . . the animals, the plants, the water, the stars, the moon and the sun, and out from that, the spirits, or the *manitous*, the various spiritual forces within the world. So when you say that, *mino-bimaadziwin*, you’re saying that a person lives a life that has really dependently arisen within the web of life. If you’re saying that a person is a good person, that means that they are holding that connection, that connectedness within their family, and within their extended family, within their community.¹⁴

The inter connectedness concept extends to all things, including animals. For example, clan or kinship relationships identified by animals formed the foundation of interpersonal relationships, as Francis Assikinack, an Odawa Indian from

¹² Lawrence W. Gross, *Cultural Sovereignty and Native American Hermeneutics in the Interpretation of the Sacred Stories of the Anishinaabe*, 18 WICAZO SA REV., Autumn, 2003, at 128. See also D’ARCY RHEAULT, ANISHINAABE MINO-BIMAADIZIWIN: THE WAY OF A GOOD LIFE 11 (1999).

¹³ Rheault, *supra* note 12, at 11–15, 17d.

¹⁴ Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women’s Reflections*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY at 39, 47-48 (Kristen A. Carpenter, Matthew L.M. Fletcher, and Angela R. Riley, eds. 2012) (quoting Eva Petoskey, Address, Michigan State University College of Law, Indigenous Law and Policy Center 5th Annual Indigenous Law Conference (October 10-11, 2008)).

Michigan, wrote in 1858.¹⁵ Many traditional Anishinaabe people further view inanimate things, such as stones, as valuable contributors to the community as well.¹⁶

The Nottawaseppi Huron Band of Potawatomi Indians Supreme Court (in an opinion I authored, with important input by my judicial colleagues) borrowed Ms. Petoskey's description of *mino-bimaadziwin* in its first appellate opinion, holding that the concept forms the philosophical basis for the tribal law.¹⁷ The court linked *mino-bimaadziwin* to tribal law borrowing from Fred Kelly, an Anishinaabe and member of the Onigaming First Nation in Canada, who drew the connection between *mino-bimaadziwin* and tribal law:

The four concentric circles in the sky –

¹⁵ Francis Assikinack, *Legends and Traditions of the Odahwah Indians*, 3 CAN. J. INDUS., SCI., AND ART 115, 119-20 (1858)

(We have already noticed how the inhabitants were divided into tribes; and I may here state that a tribe was again subdivided into sections or families according to their "Ododams;" that is their devices [or] signs. . . . The members of a particular family kept themselves distinct, at least nominally, from the other members of the tribe; and in their large villages, all people claiming to belong to the same Ododam or sign, were required to dwell in that section of the village set apart for them specifically, which, from the mention of gates, we may suppose, was enclosed by pickets or some sort of fence. At the principal entrance into this enclosure, there was the figure of an animal or some other sign, set up on top of one of the posts. By means of this sign every body might know to what particular family the inhabitants of that quarter claimed to belong. For instance, those whose Ododam was the bear would set up the figure of that animal at their principal gate. Some of the families were called after their Ododam. For example: those who had the gull for their ododam, were called the gull family, or simply the Gulls; they would of course put up the figure of that bird at their gate. Others did not adopt this custom; for instance, the family who set up the bear were called the "Big feet." Many of the village gates must have been adorned with very curious carvings, in consequence of parts only of different animals being frequently joined together to make up the ensigns armorial of a family. For instance, the ododam of one particular section consisted of the wing of a small hawk and the fins of a sturgeon.)

¹⁶ JAMES M. MCCLURKEN, GAH-BAEH-JHAGWAH-BUK: THE WAY IT HAPPENED 14 (1991).

¹⁷ Spurr v. Tribal Council, No. 12-005APP, slip op. at 4–5 (Nottawaseppi Huron Band of Potawatomi Indians Sup. Ct., February 21, 2012).

Pagonekiishig – show the four directions, the four stages of life, the four seasons, the four sacred lodges (sweat, shaking tent, roundhouse, and the Midewe'in lodge), the four sacred drums (the rattle, hand, water, and big ceremonial drum), and the four orders of Sacred Law. Indeed, the four concentric circles of stars is the origin of the sacred four in *Pimaatiziwin* that is the heart of the supreme law of the Anishinaabe. And simply put that is the meaning of a constitution.¹⁸

The court's adoption of *mino-bimaadziwin* was equivalent to recognition of the natural law of the tribal community:

MnoBmadzewen is not a legal doctrine, but forms the implicit basis for much of tribal custom and tradition, and serves as a form of fundamental law. We are careful, however, not to equate customary and traditional law as a common law basis for the decision in all cases before this Court. . . . MnoBmadzewen guides our common law analysis of clarifying the outer boundaries of acceptable governmental conduct. . . .¹⁹

Federal and state courts may base their common law decisions on an Anglo-American jurisprudence, and many tribal courts do as well.²⁰ American sovereignty may derive from an actual sovereign, secular or religious.²¹ Federal and state governmental sovereign immunity may derive from a legal tradition dating back to pre-constitutional eras.²² Tribal law does not necessarily derive from those traditions or realities.

The Nottawaseppi Huron Band court expressly linked *mino-*

¹⁸ *Id.* at 6 (quoted in Vanessa A. Watts, *Towards Anishinaabe Governance and Accountability: Reawakening our Relationships and Sacred Bimaadziwin*, at 77 (2006) (unpublished master's thesis, University of Victoria), <http://web.uvic.ca/igov/research/pdfs/Vanessa%20Watts%20-%20Thesis.pdf>.)

¹⁹ *Id.*

²⁰ See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 592 (1823); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §4.05[4], at 272–74, §4.05[8], at 278 (Nell Jessup ed., 2012).

²¹ See *Johnson*, 21 U.S. (8 Wheat) at 572, 574, 592, 595–96

²² *E.g.*, *Alden v. Me.*, 527 U.S. 706, 715–17 (1999); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 54–55 (1996).

bimaadziwin to modern tribal governance, holding that a government entity acting in accordance with *mino-bimaadziwin* must guarantee fundamental fairness to all persons under its jurisdiction.²³ However, traditional Anishinabe leadership differed dramatically from modern Anishinabe leadership. The Anishinabe referred to their leaders as *ogemuk* (or *ogema* in the singular).²⁴ In large part, the *ogemuk* rose to leadership because of their skill set – for example, war or diplomacy – and their ability to persuade others of a course of action.²⁵ Leadership positions did not automatically confer authority; the Anishinaabeg did not follow an *ogema* unless the *ogema*'s actions persuaded them to do so.²⁶ There are many stories of upstart leaders being deposed or failing to persuade the community to take action.²⁷ Hot-headed *ogitchidawaag* (warriors) occasionally persuaded few to join them in an excursion, such as when a small group of Potawatomi men traveled to Detroit in a failed effort to restart Pontiac's war in 1764,²⁸ but rarely had long-term influence over Anishinaabe communities.

Like many tribal cultures, the criminal law of Indian tribes in the western Great Lakes was invariably local and personal.²⁹ Everyone who was a part of an Anishinaabe village or community had obligations and duties to the entire community, as well as to the spirits.³⁰ The commission of a crime upset the balance of obligations and duties and Anishinaabe justice existed to restore that balance.³¹ Restitution and healing were the preferred methods of dispensing justice, rather than retribution.³² Jails

²³ *Spurr*, No. 12-005APP, slip op. at 4–6.

²⁴ McClurken, *supra* note 16, at 73, 125.

²⁵ *Id.* (noting that Odawa leaders led “by example” and through “respect”).

²⁶ *Id.*

²⁷ See, e.g., JAMES M. MCCLURKEN, OUR PEOPLE, OUR JOURNEY: THE LITTLE RIVER BAND OF OTTAWA INDIANS 23 (2009) (“In 1821, Ogema Keewaycooshcum ceded Ottawa land . . . without the approval of the other Ottawa bands who lived on the land—a breach of political protocol that eventually led to his death.”); ANTON TREUER, THE ASSASSINATION OF HOLE IN THE DAY 166–67 (2011) (detailing killing of Ojibwe leader in Minnesota likely as a result of political disputes).

²⁸ R. DAVID EDMUNDS, THE POTAWATOMIES: KEEPERS OF THE FIRE 90 (1978).

²⁹ Paula Brown, *Changes in Ojibwa Social Control*, 54:1 AM. ANTHROPOLOGIST 57, 63 (1952) (“In social control, . . . individual practical and supernatural abilities were the only means to the achievement of ends, which were usually defined as personal.”).

³⁰ CLIFTON ET AL., *supra* note 10, at 2, 5–6, 8–9.

³¹ Fletcher, *supra* note 11, at 13.

³² *Id.* See also Borrows, *supra* note 11, at 81 (“In Anishinabek law, legal

were nonexistent, although physical punishment perhaps was common, and public censure and shaming especially so.³³ Removing community members, even those who had committed crimes, simply was not acceptable in most circumstances – every person was critical to the survival of the entire tribe. Because of these close relationships, and the interdependence of the Anishinaabeg between families, clans, and even villages, “there was very little interpersonal conflict among the Anishnabeg.”³⁴

Modern Anishinaabeg traditionalists continue to believe that justice is “regenerative and a matter of personal and social healing.”³⁵ The traditional Anishinaabe system of justice stands opposite to the Anglo-American adversarial system, as a Muskrat Dam First Nation elder stated in 1994:

One of the things that I want to raise is that the Anishinaabe way of doing things is different from the white way. You can't really visualize it saying, “This is the way we used to do things”. It's unlike the whiteman's system where there is a judge, written rules and regulations, court system and jails and such. They have the visual things that you can see.

Whereas the Anishinaabe way, you couldn't see it, because it was the way of life. When something happened, we made every effort to find the root of the problem, what caused the turmoil to take place, and we would make every effort, based on what was found, how to help the people or person that was involved.³⁶

The community's response to crime invoked the heart of *mino-bimaadziwin*. In short, the difference is the difference between an adversarial and retributive system of criminal justice and a community and restorative system of criminal justice.

remedies are not usually punitive.”).

³³ CLIFTON ET AL., *supra* note 10, at 44.

³⁴ *Id.* at 83.

³⁵ MELISSA A. PFLÜG, RITUAL AND MYTH IN ODAWA REVITALIZATION 198 (1998).

³⁶ Phil Lancaster, *Omaminomowayak: Anishinaabe Justice in Muskrat Dam First Nation*, 14 WINDSOR Y.B. ACCESS JUST. 331, 338 (1994) (quoting Jake Beady, Interview, Feb. 9, 1994).

B. Windigo Justice

Naturally, there were exceptions to these rules, where, I would argue, *mino-bimaadziwin* and the community ethics that tied the community together broke down. Anishinaabe criminal justice usually was not usually retributive, but in rare and extreme occasions a village might agree to banish or even execute a lawbreaker, usually murderers that the community decided could no longer contribute anything positive to the community. "Ottawa communities would exile, or even execute, a person who violated the trust of the people through the act of murder or another crime."³⁷ One anthropologist reported a community story than an Ojibwe magical practitioner at the Red Lake Reservation caused the death of another Indian whom he believed had killed numerous others.³⁸ She continued:

Direct physical retaliation was an approved reaction to serious offenses such as murder. . . . In the third quarter of the nineteenth century, a Canadian Ojibwa killed a man from Red Lake in a dispute over a woman to whom neither was married. The killer confessed to the victim's father, but it was the victim's father's brother who slew the young Canadian, for the father did nothing and the murder victim was his favorite nephew.³⁹

As the Red Lake story suggests, vengeance and blood feuds were always a possibility, and the tribal community decisions in these cases must have been designed to limit the likelihood of revenge, which would have been disastrous.⁴⁰ In addition to violent local crimes, trespass to hunting territories by outsiders could result in justified bloodshed, as one Ojibwe leader from Lake Temegami, Ontario told Frank Speck: "If another Indian hunted on our territory we, the owners, could shoot him."⁴¹

The story of the *windigo* possibly arises from the occasional problem of the murderer, or criminal who demonstrates no

³⁷ Fletcher, *supra* note 11, at 13. See also CLIFTON ET AL, *supra* note 10, at 44 ("What [the Potawatomi] would not tolerate, however, was violence within the tribal community. . .").

³⁸ Brown, *supra* note 29, at 61.

³⁹ *Id.*

⁴⁰ *Cf. id.* at 63 ("Responsibility for retaliation was at most extended to close relatives, and it is to be noted that the victim's relatives were under no compunction to retaliate; the community was disinterested.").

⁴¹ Frank G. Speck, *The Family Hunting Band as the Basis of Algonkian Social Organization*, 17:2 AM. ANTHROPOLOGIST 289, 295, 297 (1915) (noting "retaliation against trespass" was accepted by the Timagami Band of Ojibwe in Ontario).

remorse and continues his or her criminal ways again and again.⁴² In Anishinaabe legend, a *windigo* is an incredibly disturbing creature known for its giant, humanoid form, ravenous appetites, and murderous cannibalism.⁴³ A *windigo*'s hunger is never satisfied, and the *windigo* continues to consume flesh even while starving to death. The only known solution to the problem of the *windigo* is the death of the *windigo*.⁴⁴ In the more well-known stories, a family member is assigned to execute the *windigo*, or at least consents to the execution. Thus, the revenge problem is solved, or at least assuaged.

Windigo justice is real, as are *windigo* killers. A well-known case of an alleged *windigo* in Canada in the early 20th century demonstrates how an Anishinaabe community reached the decision to kill the individual.⁴⁵ In 1907, two members of the Sucker Clan of the Sandy Lake First Nation killed a *windigo*, described as:

[A] person who ha[d] become 'possessed with cannibalism' and who ha[d], consequently, become a threat to the viability of the community. When all other attempts to help the person failed, community would kill him in order to preserve the community as a whole. . . . [T]he killing was systematic and sanctioned by the whole community. It was a response, therefore, that could be equated with law and justice.⁴⁶

This killing occurred just over a century ago, and other, more recent killings like this in areas where modern criminal law

⁴² See BASIL JOHNSTON, *THE SUPERNATURAL WORLD OF THE OJIBWAY* 222 (1991); JOHN BORROWS, *DRAWING OUT LAW: A SPIRIT'S GUIDE* 223–24, 226 (1963); Linda LeGarde Grover, *Windigo Presence in Selected Contemporary Ojibwe Prose and Poetry*, in *INDIGENOUS VOICES INDIGENOUS SYMBOLS* 18, 18 (Rachael Selby eds., 2009 ed. 2009).

⁴³ See JOHNSTON, *supra* note 42, at 221–222; BORROWS, *supra* note 42, 224–25; Grover, *supra* note 42, at 18.

A fascinating subset of windigo killer stories includes stories where the killer is a young woman or girl. See, *E.g.*, THOMAS FIDDLER & JAMES R. STEVENS, *KILLING THE SHAMAN* 88–91 (1985).

⁴⁴ BORROWS, *supra* note 42, at 225–26; Ruth Landes, *The Abnormal among the Ojibwa Indians*, 33:1 *J. ABNORMAL AND SOC. PSYCH.* 14, 25–26 (1938).

⁴⁵ Phil Lancaster, *Omaminomowayak: Anishinaabe Justice in Muskrat Dam First Nation*, 14 *WINDSOR Y.B. ACCESS JUST.* 331, 335–36 (1994).

⁴⁶ *Id.* at 335 (citing Fiddler, *supra* note 43, at 50).

enforcement is lacking should not be terribly surprising.

Converse to community sanctioned *windigo* killings, for the most part, is simple revenge. Ever-present in many traditional Anishinaabe stories is the problem of revenge.⁴⁷ The story of the Earth Diver, a foundational creation story from Anishinaabe lore, tells of the consequences of revenge – unending violence and destruction eventually requiring the end of all things.⁴⁸ Drawing upon the work of Ojibwe elder Edward Benton-Benai, Lawrence Gross describes the story:

One common version of the story has Wenabozho running with the wolves. Eventually, one wolf agrees to become Wenabozho's hunting companion. They overhunt their territory, and, in revenge, the animals agree that Michibizhii, the underwater monster, should kill the wolf. Michibizhii succeeds, but in an act of return vengeance, Wenabozho kills Michibizhii. In return, the animals flood the earth. Wenabozho has to rebuild the earth from a speck of dirt brought to the surface by the muskrat. Benton-Benai uses a slightly different version of the Earth Diver myth, especially in the opening section. Benton-Benai writes that the Creator was saddened by the amount of violence among the people. As a result, he resolved to cleanse the land and start from a fresh beginning. He floods the earth, and it is up to Wenabozho to re-create the world.⁴⁹

Revenge is not sanctioned by the community. It is private justice, and the consequences suffered by the Anishinaabeg from Wenabozho's act of revenge were catastrophic. But one can imagine that it could be difficult to distinguish between sanctioned *windigo* killings and invalid revenge killings.

⁴⁷ See, E.g., Lawrence W. Gross, *Cultural Sovereignty and Native American Hermeneutics in the Interpretation of the Sacred Stories of the Anishinaabe*, WICAZO SA REV., Autumn 2003, 127, 127 131, 133.

⁴⁸ *Id.* at 131, 133.

⁴⁹ *Id.* at 131 (discussing EDWARD BENTON-BANAI, *THE MISHOMIS BOOK: THE VOICE OF THE OJIBWAY* 29–34 (Joe Liles ed.1979)). See also Assikinack, *supra* note 15, at 123–25 (retelling the same tale); Paul Radin & A.B. Reagan, *Ojibwa Myths and Tales: The Manabozho Cycle*, 41 J AM. FOLKLORE 61, 73–75 (1928) (recounting same tale as told by Ojibwe from Nett Lake, Minnesota).

The stories of the *windigo* killer show where *mino-bimaadziwin* has broken down. Non-punitive sanctions fail, and the community's other normal responses to crime are ineffective. In the western Great Lakes, *windigo* stories reflect the harshness of Anishinaabe life in the centuries after first contact with the Europeans and the incredible cultural and economic dispossession the Anishinaabeg faced as a result. *Windigo* stories invariably are winter stories, and invoke the ever-present threat of starvation during the leanest, coldest months of the year. For example, John Tanner, a white man kidnapped and raised by Michigan Indians, most famously described the horrors of wintertime starvation.⁵⁰

The presence of Europeans, and later, Americans, exasperated the harshness of Anishinaabe life. The disruption caused by contact with European and American nations generated incredible difficulty for the Anishinaabeg; in my view, this equates to a systematic upsetting of *mino-bimaadziwin*.

II. THE DISPLACEMENT OF TRADITION AND THE RISE OF MODERN ANISHINAABE TRIBAL JUSTICE SYSTEMS

In this section, I will show that the history of Indian affairs in the United States has undermined traditional Anishinaabe tribal justice systems, a history frequently alluded to in *The Round House*. I will also show that the Indian affairs pendulum has swung back in favor of tribal interests, allowing for the development of modern Anishinaabe tribal justice systems. But the paradigmatic balance promised by *mino-bimaadziwin* has not returned, and violent crime in Anishinaabe Indian country remains horrific.

A. *Disruption of Traditional Anishinaabe Justice*

American Indian policy has effectively undermined and replaced traditional justice systems. Federal policies such as allotment and termination have undermined treaty provisions setting aside Indian lands for the exclusive use of Indian people.⁵¹

⁵⁰ JOHN TANNER, *THE FALCON: A NARRATIVE OF CAPTIVITY & ADVENTURES OF JOHN TANNER DURING THIRTY YEARS RESIDENCE AMONG THE INDIANS IN THE INTERIOR OF NORTH AMERICA* 243–44 (2d ed. 1830).

⁵¹ See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 47, 47–49 (1995); Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the*

Indian country criminal jurisdiction is geographically “checkerboarded,” making law enforcement difficult, if not impossible, in large swaths of Indian country where inter-governmental cooperation is lacking.⁵²

Virtually all of the Great Lakes Anishinaabe nations are signatories to treaties with the United States.⁵³ Military conflicts between the Anishinaabe nations and the United States also were rare, although vicious when they did spring up.⁵⁴ Most of the extant treaties are land cession agreements, that also established reservations and usufructuary rights to on- and off-reservation lands.⁵⁵ Despite the reservation of governance rights and substantial land bases, the treaties alone did relatively little to encourage the Anishinaabe nations to retain their traditional governance structures and economic stability; the federal government’s implementation of their obligations under the treaties ranged from negligent to corrupt.⁵⁶ The 19th and 20th centuries were incredibly difficult for the Anishinaabeg.

Federal Indian affairs bureaucracy undercut traditional Anishinaabe governance and justice systems intentionally, and also indirectly. In Michigan, the Odawa, and Bodewadmi nations suffered through a century of administrative termination when the Department of Interior refused to allow the tribes to reorganize under the Indian Reorganization Act.⁵⁷ In Wisconsin

Termination Policy, 5 AM. INDIAN L. REV. 139, 139–40 (1977).

⁵² INDIAN LAW AND ORDER COMM’N, *supra* note 3, at 2, 9, 15, 235.

⁵³ See CHARLES E. CLELAND, FAITH IN PAPER: THE ETHNOHISTORY AND LITIGATION OF UPPER GREAT LAKES INDIAN TREATIES 10, 16–17, 19–20, 25 (2011).

⁵⁴ See Gregory Evans Dowd, *The French King Wakes up in Detroit: “Pontiac’s War” in Rumor and History*, 37:3 ETHNOHISTORY 254, 268–70 (1990); Colin G. Calloway, *The End of an Era: British-Indian Relations in the Great Lakes Region after the War of 1812*, 12 MICH. HIST. REV. 1, 13–14 (1986).

⁵⁵ *E.g.*, *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200–04 (1999) (adjudicating Minnesota Indian treaty rights); *Lac Court Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 350, 356 (7th Cir. 1983) (adjudicating Wisconsin Indian treaty rights from the 1842 Treaty of LaPointe); *U.S. v. Mich.*, 471 F.Supp. 192, 278 (W.D. Mich. 1979) (adjudicating Michigan Indian treaty rights from the 1836 Treaty of Washington).

⁵⁶ *E.g.*, MATTHEW L.M. FLETCHER, THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS 63–65, 70–71 (2012) (describing incompetent and corrupt implementation of 1855 Treaty of Detroit by the United States).

⁵⁷ *Mackinac Tribe v. Jewell*, No. 15-5118, 2016 U.S. App. LEXIS 13140, at 2–3, 6–7 (D.C. Cir. July 19, 2016); *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Att’y.*, 369 F.3d 960, 961 n.2 (6th Cir. 2004); Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 502–11 (2006).

and Minnesota, Congress imposed significant state control over Anishinaabe lands in the form of Public Law 280.⁵⁸ Congress even terminated its relationship with the Menominee Tribe in Wisconsin, a relatively close relative to the Anishinaabe nations.⁵⁹ The federal government and American citizens and business interests deprived the Anishinaabeg of the value of most of the reservations established by treaty.

B. The Rise of Modern Anishinaabe Justice

Despite over a century of American Indian affairs policies that ranged from ethnocidal to negligent, the Great Lakes Anishinaabe nations have made a remarkable comeback. The Great Lakes Indian nations, both Anishinaabe and other tribes, have benefitted from federal self-governance programs, the restoration and retention of treaty rights, and economic development.⁶⁰ The tribes have, in turn, established and developed tribal justice systems.⁶¹

The rise of modern Anishinaabe justice systems starts in large part with the introduction of tribal constitutions and tribal elections before and after the Indian Reorganization Act of 1934.⁶² This new legal infrastructure dramatically altered methods of tribal leadership selection.⁶³ Elected officials and the adversarial process replaced the traditional governance and justice structures, even for Anishinaabe tribes that had recently adopted new constitutions. Positive tribal law, tribal constitutions, and the introduction of tribal courts often undercut the non-adversarial mediation and community healing processes tied to *mino-bimaadziwin*.⁶⁴ To be fair, modern Anishinaabe tribal

⁵⁸ 18 U.S.C. § 1162 (2012); 28 U.S.C. § 1360 (2012).

⁵⁹ See Stephen J. Herzberg, *The Menominee Indians: Termination to Restoration*, 6 AM. INDIAN L. REV. 143, 159–60 (1978).

⁶⁰ Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J.C.R. & C.L. 45, 62–63 (2012); Catherine M. Ovsak, *Reaffirming the Guarantee: Indian Treaty Rights to Hunt & Fish Off-Reservation in Minnesota*, 20 WILL. MITCH. L. REV. 1177, 1208–12 (1994).

⁶¹ Matthew L.M. Fletcher, *Indian Courts & Fundamental Fairness: Indian Courts & the Future Revisited*, 84 U. Colo. L. Rev. 59, 60–61 (2013).

⁶² 25 U.S.C. § 476 (2012). See generally FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 28 (David E. Wilkins ed., 2006) (discussing governmental structure before and after European conquest and the).

⁶³ 25 U.S.C. § 476; Ann K. Wooster, Annotation, *Application of Indian Reorganization Act*, 30 A.L.R. Fed. 2d 1, 2.

⁶⁴ 25 U.S.C. § 476; Fletcher, *supra* note 61 at 62, 90.

justice system leaders are beginning impressive initiatives to reclaim traditional Anishinaabe law, but most decisions in tribal courts come as a result of the adversarial process.⁶⁵

Modern Anishinaabe tribal justice systems radically differ from traditional Anishinaabe legal structures. The federally recognized tribes of the western Great Lakes are constitutional democracies, with written, codified laws largely replacing the customs and traditions of the old days.⁶⁶ Instead of the traditional tribal leadership structures, modern Anishinaabe leaders are elected.⁶⁷ In other words, the Anishinaabeg no longer follow leaders for indeterminate periods, or based on any particular leadership skill, because the leaders are electable in general elections.⁶⁸ Modern tribal leaders enact legislation designed toward governing Anishinaabe Indian country. Some Anishinaabe tribal codes are extensive, complicated affairs, drafted or approved by tribal general counsel's offices.⁶⁹ More and more tribal lawyers – tribal in-house counsel, prosecutors, criminal defenders, child welfare attorneys, tribal enterprise lawyers, and others – are Anishinaabe, too.

Many of the modern Anishinaabe tribal constitutions allow for the creation of tribal or community courts modeled on local American courts.⁷⁰ Some of these tribal justice systems enjoy the status under tribal constitutions of a separate and equal branch of government, ensuring judicial independence from the political

⁶⁵ See Fletcher, *supra* note 61, at 61–62.

⁶⁶ *E.g.*, CONSTITUTION OF THE POKAGON BAND OF POTAWATOMI INDIANS Nov. 1, 2005, art. 13; CONSTITUTION OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS Feb. 1, 2005, art. 12; CONSTITUTION OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS Mar. 29, 1988, art. 7.

⁶⁷ CONSTITUTION OF THE POKAGON BAND OF POTAWATOMI INDIANS, art. 13; CONSTITUTION OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, art. 12; CONSTITUTION OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, art. 7.

⁶⁸ See Erma J. Vizenor, State of the Nation Address for the White Earth Nation of Anishinaabe at the Shooting Star Casino Event Center, (Mar. 3, 2011) (in which Chairwoman Vizenor speaks about the duties of elected chiefs and Tribal Council members) in ANISHINAABEG TODAY, Mar. 2011, at 2, https://whiteearth.com/data/upfiles/files/State_of_Nation_Special_Edition.pdf; *Elected & Appointed Officials*, MILLE LACS BAND OF OJIBWE, <http://millelacsband.com/tribal-government-home/elected-and-appointed-officials/> (last accessed Oct. 4, 2016).

⁶⁹ WAGANAKISING ODAWA TRIBAL CODE OF LAW, xciii (2016).

⁷⁰ CONSTITUTION OF THE POKAGON BAND OF POTAWATOMI INDIANS, art. 12; CONSTITUTION OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, art. 9; CONSTITUTION OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, art. 5.

branches of government.⁷¹ Tribal judges may be elected, but Anishinaabe judges are more likely to be appointed by the executive and legislative policymaking branches of tribal government.⁷² Depending on the tribal constitution's specific requirements, a tribal judge might be a licensed attorney or a tribal member or elder (or all three).⁷³ For example, generally speaking, lower peninsula Michigan tribal judges are lawyers (especially at the appellate level), but upper peninsula Michigan tribal judges tend not to be.⁷⁴ An Anishinaabe tribal judge might be a nonmember or a non-Indian.⁷⁵

The criminal law of modern Anishinaabe tribal justice systems is usually analogous to American criminal law, with tribes adopting a written criminal code and occasionally borrowing the criminal code of the state in which the tribe is located.⁷⁶ Anishinaabe tribal justice systems sentence offenders to fines and imprisonment just like any other American justice system, with a few modifications. While Congress has mandated that tribal governments guarantee minimum criminal procedure rights based on American constitutional law, tribal governments are not required to provide paid counsel to criminal defendants.⁷⁷ The United States prohibited Indian tribes from sentencing convicted persons to more than three years in prison for individual offenses,

⁷¹ CONSTITUTION OF THE POKAGON BAND OF POTAWATOMI INDIANS, art. 12(2); CONSTITUTION OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, art. 9(H); CONSTITUTION OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, art. 5(6).

⁷² CONSTITUTION OF THE POKAGON BAND OF POTAWATOMI INDIANS, art. 12(8); CONSTITUTION OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, art. 9(D); CONSTITUTION OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, art. 5(4).

⁷³ CONSTITUTION OF THE POKAGON BAND OF POTAWATOMI INDIANS, art. 12(7); CONSTITUTION OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, art. 9(E); CONSTITUTION OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, art. 5(5).

⁷⁴ *Court of General Jurisdiction: Tribal Court*, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, <http://www.ltbbodawa-nsn.gov?Tribal%20Court/ContactUs.html>.

⁷⁵ CONSTITUTION OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, art. 9(E).

⁷⁶ *E.g.*, *Champagne v. People of the Little River Band of Ottawa Indians*, No. 06-178-AP (Little River Band of Ottawa Indians Tribal Ct. App.), at 13 (Little River Band of Ottawa Indians Court of Appeals 2007) (affirming conviction under tribal incorporation statute, since replaced with LITTLE RIVER BAND OF OTTAWA INDIANS, Ordinance § 11.02 #03-400-03, codifying Law and Order – Criminal Offenses – Ordinance).

⁷⁷ 25 U.S.C. § 1302(a)(6) (guaranteeing right to counsel, but not right to paid counsel for indigent defendants).

but only if the tribes meet additional criminal procedure safeguards.⁷⁸ Most tribes are limited to a one year sentencing authority, and relatively few tribes sentence anyone at all to any jail time. Importantly, tribes may not prosecute non-Indians at all, excepting the few tribes that prosecute non-Indians for certain domestic violence crimes.⁷⁹ In general, tribal criminal jurisdiction in Anishinaabe Indian country is limited to misdemeanor jurisdiction and only to Indians.

A heady batch of Anishinaabe tribal governments have developed systems – usually labeled Peacemaker Courts – resembling traditional justice systems in an effort to divert first-time, juvenile, and nonviolent offenders from the standard retributive criminal justice mechanisms of fines and jail time. The Grand Traverse Band of Ottawa and Chippewa Indians was one the first in the region to formally adopt a Peacemaker Court⁸⁰ (and one of the first to drop its peacemakers during the tough budget times of the late 2000s, though Peacemaking has since returned). Other Michigan Indian tribes have followed suit, most notably the Little Traverse Bay Bands of Odawa Indians.⁸¹ The goals of the peacemakers are to remove relatively minor disputes from the American-style adversarial process and into a process that replicates the traditional community-based remediation process.

When it works, the Peacemaker process is a great success. However, Peacemakers may not have success in the areas of violent crime, and especially domestic violence.⁸² Much like traditional Anishinaabe justice systems that resorted to execution or banishment to deal with the worst offenders, the Peacemaker process breaks down in extreme cases like murder, and sexual assault, and in cases involving unequal power dynamics, such as domestic violence.

⁷⁸ 25 U.S.C. § 1302(c).

⁷⁹ 25 U.S.C. § 1304.

⁸⁰ Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. Det. Mercy L. Rev. 875, 875–77 (1999).

⁸¹ *Peacemaking Circles*, Little Traverse Bay Bands of Odawa Indians, <http://www.ltbodawa-nsn.gov/Tribal%20Court/Peacemaking/Intro.html> (last visited Oct. 5, 2016).

⁸² Compare SARAH DEER, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA* 124–25, 129 (2015) (doubting efficacy of peacemaking in the context of domestic violence) with Donna Coker, *Restorative Justice, Navajo Peacemaking and Domestic Violence*, 47 UCLA L. Rev. 1, 13–16 (2006) (offering more positive outlook in regards to peacemaking and domestic violence).

But it is a mistake to assume that the patchwork of federal, state, and modern tribal criminal law has been efficient or effective at guaranteeing law and order in Anishinaabe Indian country. Since the tribes have no jurisdiction over non-Indians and have limited sentencing authority over felons (imagine sentencing a person convicted of aggravated rape to a year in a jail; many tribes don't even bother, or cannot afford to house an inmate for a year), modern Anishinaabe justice systems have serious limitations and challenges. Federal law enforcement, while slowly improving, rarely is an effective first responder.⁸³ State law enforcement in Public Law 280 states like Minnesota and Wisconsin also is ineffective.⁸⁴ In too many areas of the Anishinaabe world, violence rules.

III. THE CLASH OF TRADITIONAL AND MODERN JUSTICE IN *THE ROUND HOUSE*

Louise Erdrich's National Book Award-winning novel, *The Round House*,⁸⁵ takes as its subject the very real and horrific problem of sexual violence in Indian country. In the novel, a white man named Linden Lark rapes an Anishinaabe woman, Geraldine, and rapes and murders another Anishinaabe woman.⁸⁶ Tribal and federal law enforcement initially have difficulty determining the identity of the attacker. As a result, Geraldine's husband Basil, the reservation judge, and her son Joe investigate the crime. Basil parses through the cases he has heard over the years, looking for people he has ruled against,⁸⁷ while the hero of the story, Joe, puts boots to the ground. Both independently determine that Linden is the attacker, and he is jailed. However, because Geraldine has no recollection of the exact location of the attack – whether it was on a tribal trust allotment or on non-Indian law – jurisdiction over the offense cannot immediately be

⁸³ *E.g.*, *Bryant*, 136 S. Ct. at 1961 (2016) (“In short, when § 117(a) was before Congress, Indian perpetrators of domestic violence ‘escape[d] felony charges until they seriously injure[d] or kill[ed] someone.’”) (quoting 151 Cong. Rec. 9062 (2005) (remarks of Sen. McCain)).

⁸⁴ *Id.* at 1960 (“Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country.”).

⁸⁵ Erdrich, *supra* note 9.

⁸⁶ *Id.* at 11–12, 210, 305.

⁸⁷ *Id.* at 48–52, 54–5.

determined and Linden is released.⁸⁸

Joe learns from local history that Linden is alive to attack and kill only because his twin sister Linda Wishkob has previously donated an organ to save his life. Linda has a disability due to complications from her birth and, like Linden, is white. Her family rejected Linda, kept Linden, and an Anishinaabe family raised Linda as their own. She grew up Linda Wishkob and is a member of the reservation community; she knows the people and the traditions and the community largely treats her as one of their own. When she learns about her blood relatives, and Linden's need for an organ transplant from her, she reluctantly agrees to make the gift. The power of giving in Anishinaabe traditions is not to be underestimated. However, it is clear from the story that Linden is unworthy of Linda's grace, and that in fact he is a truly dangerous individual.

Eventually, Joe, who has been talking revenge from the beginning, seeks out Linden and murders him in cold blood on a golf course.⁸⁹ No one in authority searches for Joe, though it is apparent that the reservation community believes he did it. Bazil and Geraldine finally confront their son, and sadly acknowledge that what he did probably was the right thing. Bazil even suggests that Linden was a windigo, and that the only way to deal with a windigo is death.⁹⁰ Joe goes on to become a lawyer. The community, we can imply, has been healed to the extent possible by Joe's revenge killing.

Several parallel threads of law frame the story. The first thread is the law of the reservation judge, the modern tribal justice system. Bazil, Judge Coutts, hears disputes in an adversarial legal process and decides which party should prevail. Several of his opinions appear in the text of the novel, including the legal story of Linda Wishkob.⁹¹ When Linda's adoptive parents die, the blood Anishinaabe relatives seek to probate the estate in their favor, but the tribal court rules in Linda's favor.⁹² Bazil deals with reservation disputes as a judge, but his opinions demonstrate a commonsensical approach to resolving the disputes before him. Still, his court is an adversarial court, and at least one of the parties will walk away dissatisfied. As tribal

⁸⁸ *Id.* at 226.

⁸⁹ *Id.* at 282.

⁹⁰ *Id.* at 306.

⁹¹ Erdrich, *supra* note 9, at 50–51.

⁹² *Id.*

judges throughout the western Great Lakes know, tribal court resolutions are no good at solving problems where the parties cannot disappear into the population when the whole reservation community knows each other so well.⁹³

The second thread is what appears to be a rough form of Anishinaabe traditional justice, with all of its attendant consequences. Bazil appears to validate Joe's revenge killing on grounds that Linden appeared to him to have been a *windigo*, and deserving of death.⁹⁴ The reservation community, by not seeking prosecution of Joe for the murder of Linden, seems to have acquiesced to Joe's actions. Even so, Joe does not come through unscathed. He is a killer, and his parents and community know it.⁹⁵ Moreover, tragedy surrounds him—he alienates his extended family and his close friend Cappy perishes in a terrible car wreck.⁹⁶ One could even argue that his decision to leave the reservation and become a lawyer has made him even more an alien to his people. As with any unrepentant murderer, Joe is effectively banished from the tribal community.⁹⁷

A third thread permeates the story without expressly driving it—federal Indian law. The motive for the violent attacks on the two Anishinaabekwe is related to the Indian Child Welfare Act.⁹⁸ Geraldine is a tribal enrollment officer, a link to the tribal membership disputes that riddle Indian country.⁹⁹ Bazil holds recent editions of the *Cohen Handbook on Federal Indian Law* in his study.¹⁰⁰ Ms. Erdrich brings up the foundational Supreme Court cases that outlined the contours of Indian law, especially *Oliphant v. Suquamish Indian Tribe*.¹⁰¹ Up for special critique is Public Law 280, the statute in which Congress indirectly but intentionally undermined modern Minnesota and Wisconsin Anishinaabe justice systems.¹⁰² And of course Indian law furnishes the reason for Linden Lark's release—the jurisdictional maze of Indian country criminal jurisdiction requires federal

⁹³ Erdrich, *supra* note 9, 50–52.

⁹⁴ *Id.* at 305–06.

⁹⁵ *Id.* at 292–93.

⁹⁶ *Id.* at 316–17.

⁹⁷ *Id.* at 292–93, 298–300.

⁹⁸ 25 U.S.C. § 1901 (2012).

⁹⁹ Erdrich, *supra* note 9, at 149.

¹⁰⁰ *Id.* at 48, 228.

¹⁰¹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 199–200 (1978); Erdrich, *supra* note 9, at 228–29.

¹⁰² 18 U.S.C. § 1162 (2012); 28 U.S.C. § 1360 (2012).

prosecutors to prove to a jury of non-Indians beyond a reasonable doubt that the crime occurred in Indian country.¹⁰³ In her afterword, Ms. Erdrich notes the publication of *Maze of Injustice*, a 2009 Amnesty International report, jump-started the movement toward doing something about violence against Indian women.¹⁰⁴

The Round House is a tragedy that shows the complexity of Indian country law and order, and the consequences of that complexity.

IV. MERGING AND DISAGGREGATING ANISHINAABE JUSTICE

The world of *The Round House* can be terrifying, and the markers of its terror are real. Women; mothers, sisters, and daughters, are attacked far too often in Indian country.¹⁰⁵ Even the strongest Anishinaabe women choose not to report their attacks, or testify in court. Federal, state, and tribal police trip over their jurisdictions frequently, and cannot properly investigate these difficult crimes.¹⁰⁶ Prosecutors have the same trouble with jurisdiction. And so the cycle repeats. Indian children witness appalling violence far too often.¹⁰⁷ Do solutions lie with federal, state, or tribal powers?

Anishinaabe Indian country, similar to Indian country throughout the United States, can be a terribly violent place. Anishinaabe traditions, most especially *mino-bimaadziwin* and the kinship structures that served as community control, have broken down to a large extent. The amalgamation of federal, state, and tribal law enforcement is also failing. *The Round House* informs readers what many in Indian country already know – traditional Anishinaabe justice is back (and in some places never left), but *mino-bimaadziwin* is not an effective limit on revenge, or *windigo* justice. Modern stories of the *windigo* are tangled. I suspect it is relatively easy for one individual or small

¹⁰³ Erdrich, *supra* note 9, at 196–97, 210–11, 226.

¹⁰⁴ *Id.* at 319.

¹⁰⁵ *Bryant*, 136 S. Ct. at 1958–59 (citing MICHELE C. BLACK ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER & SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 39,47 tbl.4.3 (2011)).

¹⁰⁶ INDIAN LAW & ORDER COMM'N, *supra* note 3, at 9, 15, 17.

¹⁰⁷ *Bryant*, 136 S. Ct. at 1959 (citing ATT'Y GEN'S. ADVISORY COMM. ON AM. INDIAN & ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, DEP'T OF JUSTICE, ENDING VIOLENCE SO CHILDREN CAN THRIVE 2, 6 (Nov. 2014)).

group to label an individual a *windigo*, and even take action, but this particular criminal law process likely is no longer sanctioned by entire Anishinaabe communities.

The Round House exposes the tension between traditional and modern tribal justice systems, but it also most acutely exposes the weakness of modern justice when individuals commit terrible crimes and adversarial law enforcement is ineffective. *The Round House*, in my view, is a warning about the long-term consequences of the failure of the criminal justice system in Indian country. The rule of law is broken in many parts of Indian country. With governments – federal, state, and tribal – utterly useless in reducing the crime wave, it is only a matter of time before reckless individuals take matters into their own hands, if they are not doing so already. The breakdown of modern law enforcement may compel victims to resort to self-help, vigilantism, and revenge – as it would in any community. But it is no solution; instead, it is merely a step toward oblivion.

Indian country criminal justice has long been federalized, but the federal government's role rarely has been beneficial to the Anishinaabeg. In recent years, however, thanks to the Obama Administration's Department of Justice and a growing national recognition that violent crime in Indian country is a serious problem, the United States enacted the Tribal Law and Order Act of 2010¹⁰⁸ and special jurisdictional provisions in the Violence against Women Act reauthorization of 2013.¹⁰⁹ These statutes, while helpful but limited to the on-the-ground realities, are good exemplars that the federal government is willing to take action to cut crimes rates in Indian country.

In the Anishinaabe nations, these statutes may over time be very beneficial. The 2010 Act offers "Public Law 280" tribes a chance to reintroduce federal authority to prosecute Indian country crime.¹¹⁰ The 2013 Act reaffirms inherent tribal authority to prosecute non-Indians for intimate violence.¹¹¹ Some Anishinaabe tribes have expressed interest and capacity to

¹⁰⁸ Tribal Law and Order Act of 2010, Pub. L. No. 111–211, tit. 2, 124 Stat. 2261–63.

¹⁰⁹ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, § 904, 127 Stat. 120–23 (codified at 25 U.S.C. § 1304).

¹¹⁰ 25 U.S.C. § 1321(a)(2) ("At the request of an Indian tribe, and after consultation with and consent by the Attorney General, the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of title 18 within the Indian country of the Indian tribe.").

¹¹¹ 25 U.S.C. § 1304.

implement the required tribal law amendments to qualify for enhanced tribal criminal justice authority.

Federal law designed to improve federal criminal law enforcement responses and enhance tribal criminal jurisdiction still involves reliance upon adversarial retributive justice mechanisms such as trial by jury and prison sentences.¹¹² Whatever remains of *mino-bimadziwin* is not going to be a part of the federal aspect of the program. Moreover, it is very possible these minor improvements, which are heavily dependent on the maintenance of a large-scale federal financial and political investment, are not going to dramatically reduce the problem of Indian country violent crime over the long term.¹¹³

That said, the infrastructure is being laid, little by little. As *The Round House* tragically demonstrates, tribal governments are the only conceivable first responders to Indian country crime.¹¹⁴ Federal and state jurisdiction, no matter how well intentioned, and no matter how intertwined with tribal authorities, is simply inadequate. And always will be. Tribal governments are hamstrung by limitations of federal law, and by governance capabilities resulting from more than 150 years of federal and state interventions in tribal governance. Changes in federal Indian law can correct that, but only through the concurrent improvement of tribal governance capabilities. The goal, however long it takes, must be plenary tribal criminal justice authority.

Near the end of *The Round House*, Bazil channels the hopes of so many tribal sovereignty warriors that are working toward a tribal solution to this violence:

Everything we [tribal judges] do, no matter how trivial, must be crafted keenly. We are trying to build a solid base here for our sovereignty. We try to press against the boundaries of what we are allowed, walk a step past the edge. Our records will be scrutinized by Congress one day and

¹¹² See *Bryant*, 136 S. Ct. at 1959

¹¹³ Cf. MICH. STATE UNIV. COLL. OF LAW INDIGENOUS LAW & POLICY CTR., STATEMENT OF THE MICHIGAN STATE UNIVERSITY COLLEGE OF LAW INDIGENOUS LAW AND POLICY CENTER ON THE TRIBAL LAW AND ORDER ACT 1-2 (Nov. 11, 2011), http://www.aisc.ucla.edu/iloc/_files/MSU%20ILPC%20Statement%20to%20the%20Indian%20Law%20and%20Order%20Commission.pdf.

¹¹⁴ See INDIAN LAW & ORDER COMM'N, *supra* note 3, at 17.

decisions on whether to enlarge our jurisdiction will be made. Some day. *We want the right to prosecute criminals of all races on all lands within our original boundaries.*¹¹⁵

However, it isn't merely a question of *prosecution*, but community-wide *resolution*. That will be the problem of the next seven generations.

¹¹⁵ Erdrich, *supra* note 9, at 229–30.