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.”).


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).

other groups in the United States.” 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. 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. 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.

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

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7 *Indian Law & Order Comm’n*, supra note 3, at 1, 27.

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 Fires,\(^10\) 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


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 interconnectedness 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


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

Michigan, wrote in 1858. Many traditional Anishinaabe people further view inanimate things, such as stones, as valuable contributors to the community as well.

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. 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.).


Pagonekiishig – show the four directions, the four stages of life, the four seasons, the four sacred lodges (sweat, shaking tent, roundhouse, and the Midewe’iin 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.  

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. . . .

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

The Nottawaseppi Huron Band court expressly linked mino-

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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
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

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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. MCCURKEN, OUR PEOPLE, OUR JOURNEY: THE LITTLE
RIVER BAND OF OTTAWA INDIANS 23 (2009) (“In 1821, Ogema Keewaycooshum
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
detailing killing of Ojibwe leader in Minnesota likely as a result of political
disputes).
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.\textsuperscript{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.”\textsuperscript{34}

Modern Anishinaabeg traditionalists continue to believe that justice is “regenerative and a matter of personal and social healing.”\textsuperscript{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.\textsuperscript{36}

The community’s response to crime invoked the heart of \textit{minobimaadziwin}. 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.

\textsuperscript{33} CLIFTON ET AL., \textit{supra} note 10, at 44.
\textsuperscript{34} \textit{Id.} at 83.
\textsuperscript{35} MELISSA A. PFLÜG, \textsc{RITUAL AND MYTH IN ODAWA REVITALIZATION} 198 (1998).
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

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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

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43 See Johnston, supra note 42, at 221–222; Borrows, supra note 42, 224–25; Grover, supra note 42, at 18.
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. 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. 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 Michibizhi, the underwater monster, should kill the wolf. Michibizhi succeeds, but in an act of return vengeance, Wenabozho kills Michibizhi. 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-Banai uses a slightly different version of the Earth Diver myth, especially in the opening section. Benton-Banai 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.

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.

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48 Id. at 131, 133.
49 Id. at 131 (discussing Edward Benton-Benai, 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


Indian country criminal jurisdiction is geographically “checkerboarded,” making law enforcement difficult, if not impossible, in large swaths of Indian country where intergovernmental 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

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52 Indian Law and Order Comm’n, supra note 3, at 2, 9, 15, 235.
and Minnesota, Congress imposed significant state control over Anishinaabe lands in the form of Public Law 280.\textsuperscript{58} Congress even terminated its relationship with the Menominee Tribe in Wisconsin, a relatively close relative to the Anishinaabe nations.\textsuperscript{59} The federal government and American citizens and business interests deprived the Anishinaabeg of the value of most of the reservations established by treaty.

\section*{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.\textsuperscript{60} The tribes have, in turn, established and developed tribal justice systems.\textsuperscript{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.\textsuperscript{62} This new legal infrastructure dramatically altered methods of tribal leadership selection.\textsuperscript{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.\textsuperscript{64} To be fair, modern Anishinaabe tribal

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\begin{itemize}
  \item \textsuperscript{63} 25 U.S.C. § 476; Ann K. Wooster, Annotation, \textit{Application of Indian Reorganization Act}, 30 A.L.R. Fed. 2d 1, 2.
  \item \textsuperscript{64} 25 U.S.C. § 476; Fletcher, \textit{supra} note 61 at 62, 90.
\end{itemize}
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.
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.
69 WAGANAKISING ODOWA 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 ODOWA 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,

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71 CONSTITUTION OF THE POKAGON BAND OF POTAWATOMI INDIANS, art. 12(2); CONSTITUTION OF THE LITTLE TRAVERSE BAY BANDS OF ODWA 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 ODWA 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 ODWA 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 ODWA INDIANS, http://www.ltbbodawa-nsn.gov/Tribal%20Court/ContactUs.html.
75 CONSTITUTION OF THE LITTLE TRAVERSE BAY BANDS OF ODWA 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. 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. 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 Court (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. 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. 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.

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. State law enforcement in Public Law 280 states like Minnesota and Wisconsin also is ineffective. 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, 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. Tribal and federal law enforcement initially have difficulty determining the identity of the attacker. As a result, Geraldine’s husband Bazil, the reservation judge, and her son Joe investigate the crime. Bazil parses through the cases he has heard over the years, looking for people he has ruled against, 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 land – jurisdiction over the offense cannot immediately be

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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.\textsuperscript{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 \textit{windigo}, and deserving of death.\textsuperscript{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.\textsuperscript{95} Moreover, tragedy surrounds him—he alienates his extended family and his close friend Cappy perishes in a terrible car wreck.\textsuperscript{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.\textsuperscript{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.\textsuperscript{98} Geraldine is a tribal enrollment officer, a link to the tribal membership disputes that riddle Indian country.\textsuperscript{99} Bazil holds recent editions of the \textit{Cohen Handbook on Federal Indian Law} in his study.\textsuperscript{100} Ms. Erdrich brings up the foundational Supreme Court cases that outlined the contours of Indian law, especially \textit{Oliphant v. Suquamish Indian Tribe}.\textsuperscript{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.\textsuperscript{102} And of course Indian law furnishes the reason for Linden Lark’s release—the jurisdictional maze of Indian country criminal jurisdiction requires federal

\textsuperscript{93} Erdich, \textit{supra} note 9, 50–52.
\textsuperscript{94} \textit{Id.} at 305–06.
\textsuperscript{95} \textit{Id.} at 292–93.
\textsuperscript{96} \textit{Id.} at 316–17.
\textsuperscript{97} \textit{Id.} at 292–93, 298–300.
\textsuperscript{99} Erdich, \textit{supra} note 9, at 149.
\textsuperscript{100} \textit{Id.} at 48, 228.
prosecutors to prove to a jury of non-Indians beyond a reasonable doubt that the crime occurred in Indian country. 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. 

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. 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. Prosecutors have the same trouble with jurisdiction. And so the cycle repeats. Indian children witness appalling violence far too often. 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.
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 2010 and special jurisdictional provisions in the Violence against Women Act reauthorization of 2013. 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. The 2013 Act reaffirms inherent tribal authority to prosecute non-Indians for intimate violence. Some Anishinaabe tribes have expressed interest and capacity to

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.”).
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.\textsuperscript{112}
Whatever remains of \textit{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.\textsuperscript{113}

That said, the infrastructure is being laid, little by little. As
\textit{The Round House} tragically demonstrates, tribal governments
are the only conceivable first responders to Indian country
crime.\textsuperscript{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 \textit{The Round House}, Bazil channels the hopes of
so many tribal sovereignty warriors that are working toward a
tribal solution to this violence:

\begin{quote}
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
\end{quote}

\textsuperscript{112} \textit{See Bryant}, 136 S. Ct. at 1959
\textsuperscript{113} Cf. \textit{Mich. State Univ. Coll. of Law Indigenous Law \\& Policy Ctr.,}
\textit{Statement of the Michigan State University College of Law Indigenous Law \\& Policy Center on the Tribal Law and Order Act 1–2 (Nov. 11, 2011),}
\textsuperscript{114} \textit{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.