

CONSERVATIVE AGENDAS AND CAMPAIGNS

CRIMINALIZING THE RESERVATION AND MOVEMENTS FOR SOVEREIGNTY

*“Today, Native people are not free;
they are a colonized people seeking to decolonize themselves.”*

—Luana Ross (Salish)

The U.S. criminal justice system’s intersection with Native peoples is a revealing case study in systematic human rights violations and opposition to self-determination. In addition to being disproportionately overrepresented in the criminal justice system, Native peoples have long faced the criminalization of their identities, culture and traditions; and the U.S. legal system has institutionalized Native criminality.

The imposition of the U.S. criminal justice system on Native reservations has resulted in a complex maze of overlapping tribal, federal, state, and local jurisdictions. Although tribal justice systems predate federal ones, they are viable only if a sovereign tribal entity exists that governs its people, enforces its own laws, and has relations with other similar political/legal entities. Native peoples have negotiated with the U.S. government primarily through treaties (similar to treaties the U.S. government signs with foreign nations) that helped define “Indian Country,” the idea that American Indians have jurisdiction over their own affairs. Sovereignty is a controversial issue in the Native community, in part because U.S. intervention has diminished the reality of tribal sovereignty over time, and different opinions exist about how to respond to these changes and challenges.

Opposition to sovereignty and self-determination on the part of non-Natives is rooted in racism, White supremacy and the stereotype of Native people as “savages” who relentlessly disobey U.S. law. As Native peoples resisted, sometimes violently, the expansion of the United States into their territories, the image of Natives as uncivilized outlaws took hold in the American consciousness. In the face of this resistance, attempts to control Native peoples escalated, state and federal governments and agencies enforced laws that criminalized behavior from performing traditional dances and engaging in religious activities to violating liquor laws and vagrancy.

While the opposition and challenge to Native sovereignty is not restricted to the U.S. Political Right—the U.S. State, regardless of whether liberals or conservatives are in power, has systematically eroded Native sovereignty from its very creation—various right-wing sectors have been at the forefront of the assault on Native peoples’ rights. Whether it is White supremacist and racist groups belonging to the Xenophobic Right such as the Aryan Nation or racist elements within the Militia Movement, the anti-environmental Wise Use Movement sponsored by corporate mining and ranching interests that is part of the Secular Right, or elements among the Christian Right that are opposed to the beliefs and practice of Native spirituality and religion or to Native-owned gaming operations, Native sovereignty represents a real threat to their respective agendas and interests. For that matter, genuine Native sovereignty and self-determination fundamentally challenges the very nature of the United States, which is why this issue (like the larger issue of Criminal Justice this activist resource kit addresses) goes beyond the Political Right to the very heart and soul of U.S. society.

Special thanks to former PRA Intern Maura Klugman for her contribution to this chapter.

SECTION OBJECTIVE

This section will discuss the criminalization of Native Peoples in the historical context of U.S. colonialism.

IN THIS SECTION

- Framing Article: Sovereign Crimes
- Native People and the Current U.S. Criminal Justice System
- Native People and U.S. Domestic Law
- The Anti-Sovereignty Movement
- Q&A with Leah Henry-Tanner
- Additional Resources

Sovereign Crimes: American Indians and the U.S. Criminal Justice System

By Luana Ross, Ph.D.

The history of the colonization of America's indigenous people is a tragic one. From the time of European contact to the present day, these people have been imprisoned in a variety of ways. They were confined in forts, boarding schools, orphanages, jails and prisons and on reservations. Historically, Native people formed free, sovereign nations with distinct cultures and social and political institutions reflecting their philosophies. Today, Native people are not free; they are a colonized people seeking to decolonize themselves.

Criminalizing American Indian Sovereignty

The destruction of indigenous cultures includes the eradication of their judicial systems. Law has repeatedly been used in this country to coerce racial/ethnic group deference to Euro-American power. Understanding this history of colonization is essential because Native criminality/deviancy must be seen within the context of societal race/ethnic relations; otherwise, any account of crime is liable to be misleading. Any explanation of Native criminality that sees individual behavior as significant overlooks the societal and historical origins of the behavior. A thorough analysis of Native criminality must include the full context of the criminal behavior—that is, their victimization and the criminalization of Native rights by the United States government.

There is a widely held belief that America's indigenous peoples were completely lawless. Nothing could be further from the truth. Although the standards of right and wrong varied widely, as did the procedures for punishing transgressors, Native groups all exercised legal systems founded upon their own traditional philosophies. The law was part of their larger worldview. Precontact Native criminal justice was primarily a system of restitution—a system of mediation between families, of compensation, of recuperation. But this system of justice was changed into a shadow of itself. Attempts were made to make Natives like white people, first by means of war and, when the gunsmoke cleared, by means of laws—Native people instead became 'criminals.' *Criminal* meant to be other than Euro-American.

Racialized oppression was not a discrete phenomenon independent of larger political and economic tendencies. Nineteenth century laws and their enforcement can readily be seen as instruments for maintaining social and economic stratification created in the centuries before. In a greedy, expanding young nation building law and custom on the ownership of property, crime-control was part of the maintenance of that sacred foundation. Law-enforcement officials were not simply bystanders in this history; they participated in and encouraged lawlessness in the interests of suppressing minorities. As remaining Native lands were seized and resisting tribes massacred, federal officials often looked the other way or were actively involved. Genocide against Native people was never seen as murder. Indeed, in the Old West the murder of Natives was not even a crime.

One product of colonialism is, thus, the controlling of indigenous people through law. The values that ordered Native worlds were naturally in conflict with Euro-American legal codes. Many traditional tribal codes instantly became criminal when the United States imposed their law and culture on Native people. New laws were created that defined many usual, everyday behaviors of Natives as 'offenses.' The continuous clashing of worlds over the power to control Native

land and resources constantly brought Native people in conflict with the legal and judicial system of the United States, which demonstrates the political intent and utility of Euro-American laws.

Crucial to understanding Native criminality is knowledge of the disruptive events brought about by assimilationist, racist policy and prohibitive legislation mandated by federal, state and municipal governments. These policies and accompanying criminal statutes were concerned with cultural genocide and control as the tenacious Euro-Americans, seeking to replace tribal law and order with their own definitions of criminality and due process, increasingly restricted the power of Native nations.

History tells us that Native ‘criminals’ were not lawless ‘savages’ but rather were living in the turbulent wake of a cataclysmic clash wherein Native legal systems, along with everything else, collided with a most different world. Native worlds have been devastated by their relationship with Euro-Americans and their laws. The number of jailed Natives is a disheartening indication—a reminder that because deviance is a social construct, official crime statistics reveal discretion in defining and apprehending criminals. The behavior of reservation Natives...is clearly subject to greater scrutiny, especially considering the number of [multiple, overlapping, and often contradictory] criminal jurisdictions they fall under, and there is a greater presumption of guilt than for Euro-Americans. This assumption is based on the prevalence of Native Americans in the official crime statistics and the composition of prison populations. But the battle for jurisdiction in the remainder of Indian Country, where various Euro-American legal entities led by the federal government compete for primacy over tribes, is a telling example of the continuing struggle for sovereignty.

Reclaiming American Indian Sovereignty

It is essential to address the intricate factors, within the context of limited self-government and sovereignty, that contribute to social ills found in Native communities. While nothing is ever monocausal, the equation of Native criminality with the loss of sovereignty is convincing. Neocolonial racism may well account for the overrepresentation of Native people in jails and prisons, and decolonizing efforts may alleviate some social problems found in contemporary Native communities. In fact, this premise has been effectively put into practice. The Alkali Lake

CRIMINALIZING AMERICAN INDIAN CULTURE

Numerous American Indian traditional customs were periodically outlawed and the U.S. government banned Native American religion from the late 1800s till 1934. The practicing of outlawed traditional customs resulted in the regular prosecution of Native people. Some of the outlawed customs included: plural or polygamous marriages; immorality [as defined by Whites]; intoxication; destroying property of other Natives (this speaks to mourning practices: destroying the property of the deceased was customary in many tribes); any Native dance [such as the Sun Dance and Ghost Dance “intended and calculated to stimulate the warlike passions of the young warriors of the tribes;” and the practices of medicine people, which were seen as ‘anti-progressive,’ because medicine people used their power in “preventing the attendance of the children at the public schools, using their conjurers’ arts to prevent the people from abandoning their heathenish rites and customs.”

It is revealing that the superintendent’s annual reports from the late 1880s to the late 1930s disclose that the majority of crimes on the Flathead Reservation in Montana were gambling, adultery and liquor violations. For instance, the 1925 data reveal that adultery accounted for 41 percent and gambling offenses 26 percent of all arrests... Native customs were slow to die, and the subjective idea of morality continued to be a significant issue for Indian agents and missionaries, who were particularly concerned with traditional Native marriage and divorce laws. The prosecution for adultery had the effect of criminalizing Native people and their culture.

Aside from laws, special regulations to control Native people, such as the pass system, were created in the nineteenth century. Once segregated on reservations, under the pass system, Natives were not allowed to leave unless they obtained legal permission.

—Luana Ross

WHAT IS AMERICAN INDIAN SOVEREIGNTY?

After declaring independence in 1776, the United States began the process of negotiating treaties with governments of other independent countries. Treaties were signed not just with European nations but also with the governments of Native peoples in North America such as the Iroquois Confederacy and other Native nations whose territories would later be annexed or conquered by the United States. These treaties, which are part of international law, are the means with which sovereign governments establish and conduct political and economic relations with each other.

Scholar Rebecca Robins writes that one of the reasons the U.S. government signed treaties with American Indian peoples was “undoubtedly due in large part to the fact that native nations had held—and in many respects continued to hold for some time—the balance of military power all along the new republic’s western border. Additionally, as Vine Deloria, Jr., has pointed out...Indian nations, many of which had already been formally recognized through treaties as legitimate sovereignties by various European Crowns, were in more of a position to recognize the legitimacy of the U.S. than the other way around.”

“Correspondingly, U.S. relations with American Indians were...formally cast as being government-to-government in nature, a matter abundantly reflected in the fact that the U.S. Senate ratified not fewer than 371 separate treaties with Native American governments between 1778 and 1871. These were complemented by a series of international agreements, unratified treaties, and other instruments of foreign affairs extending into the early 20th century. At least as late as the Supreme Court’s 1903 *Lonewolf v. Hitchcock* decision, federal authorities were still sending de facto treaty commissions into the field to negotiate with native leaders as the heads of nations entirely separate from the United States.”

“Insofar as the federal government is constitutionally prohibited from entering into treaty relationships with any entity other than another fully sovereign national government, it follows that each treaty entered into by the United States with an Indian nation served the purpose of conveying formal federal recognition that the Indian nation involved was indeed a nation within the true legal and political meanings of the term. Further, given that these treaties remain on the books and thus are binding upon both parties, it follows that North American indigenous peoples continue to hold a clear legal entitlement—even under U.S. law—to conduct themselves as completely sovereign nations unless they themselves freely determine that things should be otherwise. For this reason, they have been described as constituting ‘the nations within’ the United States.”

Robins points out that in reality Native sovereignty has been continually and unilaterally eroded by the United States: The 1886 *United States v. Kagama* case effectively demoted the status of Native governments from being sovereign governments to that similar to a U.S. state; Public Law 280 in the 1950s further downgraded this status in many cases to virtually that of counties; And in the case of some reservations in parts of California, even county and municipal authorities have asserted their authority over Native territory.

Source: Robins, Rebecca L. 1992. “Self-Determination and Subordination: The Past, Present, and Future of American Indian Governance.” In The State of Native America: Genocide, Colonization, and Resistance. M. Annette Jaimes, ed. Boston: South End Press, Pp. 87-121, 89-90.

Band of Salish, on a reserve in Alberta, Canada, saw sobriety grow from less than 5 percent to 98 percent today. The Salish tell other Natives how they regained control over their land and their destiny by ousting white traders, setting up Native commerce, reinstating a traditionally designed council, and gathering for communal prayer. They gained control and sovereignty and they became well; criminal/deviant activity decreased.

One way tribes can exercise their sovereign rights, and thereby regain control over their communities and nations, is to design and direct rehabilitative programs. Although the Swift Bird Project, a pilot correctional program started on the Cheyenne River Sioux Reservation in 1979, was unsuccessful for a variety of reasons, indigenous people must seriously consider such projects. It is encouraging that in Canada, the Okimaw Ohci (Thunder Hills) Healing Lodge, specifically designed for Native Canadian female offenders, opened in August of 1995. The concept underlying this alternative prison is true rehabilitation and healing through culture-specific programming. The Healing Lodge encourages an environment conducive to the empowerment of

Native women—one that is free of racism, sexism, and classism. All people, regardless of race/ethnicity, would greatly profit from a similar program.

The criminal justice system in the United States needs a new approach. Of all the countries in the world, we are the leader in incarceration rates—higher than [apartheid] South Africa and the former Soviet Union, countries that are perceived as oppressive to their own citizens. Euro America builds bigger and better prisons and fills them up with ‘criminals.’ Society would profit if the criminal justice system employed restorative justice and readily used alternatives to incarceration such as community service, house arrest, electronic surveillance, and treatment programs. The incarceration of nonviolent offenders is self-defeating and the cases of women who kill their abusers demand the acknowledgment that we live in a patriarchal society. Before we can move forward as a society, we need to recognize that issues of race/ethnicity, gender, and class are inexplicably bound together. Additionally, it is important to recognize the impact of violence, no matter the form, on the seemingly eventual deviant status accorded those defined as Other. Because the contextualizing of the criminalization process is central to the understanding of deviance, the personal lives of those imprisoned must be perceived within the gendered and racialized nature of their lives.

All people in Euro-America, regardless of race/ethnicity, need healing. The criminal justice system would greatly benefit from the philosophy of traditional Native societies. As expressed by Chief Justice Robert Yazzie:

Imagine a system of law that permits anyone to say anything they like during the course of a dispute, and no authority figure has to determine what is ‘true.’ Think of a system with an end goal of restorative justice, which uses equality and the full participation of disputants in a final decision. If we say of law that ‘life comes from it,’ then where there is hurt, there must be healing.”

Luana Ross (Salish) grew up on the Flathead Indian Reservation, home of the Salish and Kootenai peoples in Montana. She is currently Associate Professor, Department of Women’s Studies, University of Washington in Seattle. This article is excerpted from her book, Inventing the Savage: The Social Construction of Native American Criminality (copyright 1998, University of Texas Press) and reprinted with permission.

POPULATION FACTS

American Indians have been called an “invisible” minority because their numbers are too small to show up on government-reported tracking scales.

2.5 million individuals in the United States identify as American Indian or Alaska Native, and 1.6 million identify as part American Indian or Alaska Native.

The American Indian population is geographically clustered, with 62% living in only 11 states. 48% of American Indians live in the West.

60% of American Indians live in urban areas, and 40% live on reservations, trust lands, or bordering rural areas.

Native Americans rank at or near the bottom of most social, health and economic indicators:

- The national poverty rate in the United States between 1999 and 2001 was 11.6 percent. For Native Americans, the national average annual poverty rate was 24.5 percent.
- Almost 1 in 3 American Indians living on reservations live in poverty.
- The unemployment rate for American Indians is twice the general unemployment rate at 12.4%. On reservations, the unemployment rate averages 13.6%.
- Of American Indians aged 18 to 24, 63.2% have graduated high school compared to 76.5% of the national population. For American Indians aged 25 and older, 9.4% have completed 4 or more years of college compared to the national rate of 20.3%.

Note: The term American Indian is used here to accurately represent government data collection categories. Usually the term does not include Native Hawaiians and/or Native Alaskans.

Source: U.S. Commission on Civil Rights. July 2003. “A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country.” Washington, D.C.: U.S. Commission on Civil Rights, p. 7-9.

Native People and the Current U.S. Criminal Justice System

Note: The following is excerpted from a 2003 report by U.S. Commission on Civil Rights titled “A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country.”

Jurisdictional divisions among tribal, federal, and state law enforcement agencies complicate and challenge the unique justice system that prevails in Indian Country...As early as 1817, Congress asserted federal jurisdiction over non-Indians for crimes committed against Indians, as well as over Indians for some crimes committed against non-Indians. Congress also established that the federal government did not have jurisdiction over Indian-on-Indian crimes, those crimes that have been punished by the tribe, or those for which a treaty specifically designates tribal jurisdiction. Seventy years later, however, Congress claimed federal jurisdiction over seven crimes. If committed by Indians in Indian Country, regardless of the victim’s identity, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny are under federal authority. Seven additional crimes have since been added: kidnapping, incest, assault with a dangerous weapon, assault resulting in serious injury, attempted rape, robbery, and felonious molestation of a minor.

*In 1978, the Supreme Court ruled in *Oliphant v. Suquamish Indian Tribe* that tribal courts have no jurisdiction over non-Indian defendants, reiterating precedent that reservations must submit to the territorial sovereignty of the United States.*

Matters were further complicated in 1953 when Congress passed a law terminating tribal authority over criminal and civil matters in six states and enabling other states to assume jurisdiction by passing state law or amending state constitutions. In 1978, the Supreme Court ruled in *Oliphant v. Suquamish Indian Tribe* that tribal courts have no jurisdiction over non-Indian defendants, reiterating precedent that reservations must submit to the territorial sovereignty of the United States. However, the decision only dealt with limitations to tribal power, not the federal responsibility to compensate for those limitations based on the trust relationship. The Court did not *require* the federal government to protect tribes or prosecute non-Indian offenders who commit crimes on tribal lands. Only in cases where an enforceable treaty already existed would the federal government be required to provide a justice system and law enforcement for a tribe.

The federal government has treated tribal justice authority inconsistently, at times granting jurisdiction to tribes and at others revoking it. Simply stated, today, jurisdiction over crimes in Indian Country depends on the identity of the victim and the offender, the severity of the crime, and where the crime occurred. Under current laws, tribal criminal authority is restricted to misdemeanors, with sentences limited to one year in jail and/or a \$5,000 fine per offense. Tribes have the authority to create and design independent judicial and correctional systems to address these matters, but often a lack of funds from [the Department of Justice] and [The Bureau of Indian Affairs] limits their ability to do so. The result has been a severe shortage of crime prevention, victim assistance, public safety, and correctional programs on tribal lands. Furthermore, when a criminal perpetrator is non-Indian, tribes and their members depend on the federal government to provide the same law enforcement benefits that other Americans receive from state and local governments. According to one legal expert, the federal government has not always honored this responsibility seriously, and Native Americans have become easy crime targets. Many offenders

know that they can get away with committing minor offenses against Native Americans because the federal government is not likely to spend resources pursuing these crimes.

The lack of federal resources and efforts to address these issues may explain why Native Americans are the victims of crime at more than twice the rate of all U.S. residents...Despite the prevalence of crime, law enforcement in Native communities remains inadequate, with understaffed police departments and overcrowded correctional facilities...Native Americans are... overrepresented in jails and prisons. American Indians are incarcerated at a rate 38 percent higher than the national per capita rate. Alaska Natives are incarcerated at nearly twice the rate of their representation in the state population.

Many Native Americans attribute disproportionate incarceration rates to unfair treatment by the criminal justice system, including racial profiling, disparities in prosecution, and lack of access

THE NUMBERS

Overincarceration

- Currently, an average of 1 in 25 adult American Indians is under the jurisdiction of the nation's criminal justice system. This number represents more than twice the number of White adults in the system.³
- American Indians are incarcerated in federal and state prisons at a rate of 808 per 100,000 American Indians as compared to the 702 persons of all races per 100,000 U.S. residents.⁴
- Native Americans are incarcerated at a rate 38% higher than the national per capita rate.⁵
- The number of Native American youth in the federal prison system has increased 50% since 1994.⁶

Victimization

- Not only are American Indians overrepresented in the system, they experience excessive rates of social violence. Dian Million calculates that “[n]ationally, acts of violence against Native Americans occur twice as often across all age groups that for all other ‘racial’ categories: 124 acts of violence (per 1,000 individuals), compared to 49 for whites, 61 for blacks, and 29 for Asians.⁷
- Native women are victimized most often, and are 50% more likely to be victims of an assault than are black men and women, who are also frequently targeted and abused. Native women’s assailants are of another race 70% of the time (whites are involved in 60% of all victim reports).⁸

Violence

- American Indians experience violence at a rate that is more than twice the national rate.⁹
- Native Americans are more likely than any other racial or ethnic group to experience violence at the hands of someone of a different race.¹⁰
- Crimes reported in Indian Country are twice as likely to be violent in nature than are those reported in the rest of the United States.¹¹
- In Alaska, Natives are also more likely to be victims of crime than any other group, particularly Native women whose victimization rates in both urban and rural areas far exceed state and national averages.¹²
- Although the violent crime rate for Native Americans is highest in urban areas, the crime rate for rural Native Americans is more than twice that of rural whites.¹³

Note: The term American Indian is used here to accurately represent government data collection categories. Usually the term does not include Native Hawaiians and/or Native Alaskans.

to legal representation. Because of burgeoning crime and lack of prevention programs, jails in Indian Country regularly operate beyond capacity. In 2001, the 10 largest jails were at 142 percent capacity, and nearly a third of all tribal facilities were operating above 150 percent capacity. According to a DOJ study, in some Native jails resources are so scarce that inmates do not have blankets, mattresses, or basic hygiene items, such as soap and toothpaste.

Many Native Americans have lost faith in the law enforcement and justice system in Indian Country, in part due to its inadequacy and in part due to a perceived bias...Native Americans face disparate treatment by law enforcement officials at every level. In South Dakota, for example, a strong perception exists among Native Americans that there is a dual system of justice and that race is a critical factor in determining how law enforcement is carried out. Many contend that violent crimes involving Native Americans are dealt with differently from those involving whites and that violence against Natives is investigated and prosecuted less vigorously. Other problems have been evident, including racial profiling in Indian Country and disparities in arrests, prosecution, legal representation, and sentencing.

In Alaska, as with many rural Native communities, the administration of justice is complicated by the remoteness of villages and towns. As one Alaska Native noted, in Native areas, justice services are “both qualitatively and quantitatively inferior to those provided in the state’s non-Native communities.” Many Alaska Natives also believe that they are treated unfairly by the criminal justice system, and that when they are victims of crimes, their cases are low priority. Members of the Alaska Native community attribute the higher rates of incarceration among Natives to differential treatment by the criminal justice system, lack of access to adequate counsel, and racial profiling.

The U.S. criminal justice system conflicts in many respects with traditional views of justice held by Native American communities. Whereas the U.S. system is based on an intricate series of laws and procedures, Native systems of justice are often guided by custom, tradition, and practices learned through the oral teachings of elders. The goal of the Native justice system is to achieve harmony in the community and make reparations. For many Native Americans, lack of familiarity with the “foreign” and often adversarial method of justice characteristic of the federal government foster a cultural divide and further mistrust.

Native People and U.S. Domestic Law

By Andrea Smith, Ph.D.

The U.S. legal system has repeatedly authorized, legitimized, and legalized the eradication of Native sovereignty. The relationship between the United States and Native peoples can be seen within three distinct frames:

- 1) Initially, the United States as an independent government signed a large number of treaties with Native nations, as it did with other foreign powers in Europe. These treaties, following long standing diplomatic precedent, imply an explicit recognition of the treaty partner as an equal and sovereign power with each signatory having certain rights and obligations outlined in the treaty. Additionally, the U.S. Constitution deems these treaties to be “the supreme Law of the Land” and as such treaty violations imply violating the Constitution itself. As, the United States conquered and annexed Native territories within and beyond the original 13 colonies, this frame began to present an obvious problem.
- 2) And so it began to deal unilaterally with Native peoples as “Domestic Dependent Nations” that were in a Trust relationship with the United States; not unlike the colonial protectorates that European powers established distinct from their colonies. This position was codified in two U.S. Supreme Court decisions, *Cherokee v. Georgia* in 1831 and *Worcester v. Georgia* in 1832. The first decreed that the Cherokees were not a sovereign nation, while the second ruled that they were still a nation under federal not state jurisdiction.
- 3) But in the 1903 *Lone Wolf v. Hitchcock* decision, the U.S. Supreme Court gave Congress plenary powers over Native peoples that included the right of the U.S. to unilaterally abrogate the rights of Native peoples expanding the meaning of Section 8, Clause 3 of the U.S. Constitution that gave Congress sole power to negotiate with Native nations. The United States has since interpreted this to mean that it owns all Indian lands which it reserves for use by Native peoples.

Using its legal system, the United States has established a pattern of taking rights and jurisdiction away from Native peoples and giving control and power to states and the federal government. These laws and cases are vital to understanding the connection between sovereignty and criminality, and are best seen within the context of policy positions that evolved according to U.S. needs.

The first period 1781-1828 was one where the United States engaged in making treaties with the Native nations. Yet, even in this initial phase, the U.S. Supreme Court ruled in *Johnson v. McIntosh* in 1823 that while the federal government alone could buy or sell Indian land, Native peoples themselves had no rights to land title and could simply live on those lands. The years 1828-1887 were characterized by the forced removal of Indian peoples to west of the Mississippi river, with President Jackson’s signing of the Indian Removal bill in 1830. The “Trail of Tears” involving the removal of the Cherokee from Georgia is the most well-known case but hardly the only one.

As the United States expanded westward it revised its policies yet again to deal with Native peoples. On the one hand, Indian people were increasingly attacked such as in the Sand Creek (1864) and Wounded Knee (1890) massacres against the Cheyenne/Arapaho and Lakota nations respectively. On the other hand, the United States also sought to assimilate Native peoples, in part through land allotment and restricting them to reservations. In 1887, the federal government passed the Dawes Allotment Act that parceled off Indian land that was traditionally communally owned into lots that were allotted to individuals. The vast majority of land was



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appropriated by the State for various purposes including opening it to White settlers; resulting in Native peoples losing 90% of their land base. Two years earlier in 1885, the U.S. government had wrested jurisdiction over a number of criminal acts from Native peoples through the Major Crime Act.

The period 1934-1953 saw the United States take a series of steps to, what can best be described as, Indian Reorganization—the name of the law passed in 1934 that allowed for many of these policies. The act created a whole new system of “self-governance” that both ignored and negated in many cases generations of Native self-governance systems and methods, based as it was on western models of governance. At the same time it also revoked some of the earlier policies of allotment. Many Native people, however, see this as a revision of U.S. policies to maintain federal control over Native lands which contain the vast majority of natural resources in the United States.

From 1953-1968 the U.S. government began implementing a series of policies that involved termination, compensation, or relocation of Native nations. 109 Native nations were terminated under these policies and lost control over their lands and resources. Simultaneously, the government also promoted relocation policies that pushed Native peoples to move to cities and urban areas. The third leg of this stool was compensation where the federal government sought to settle outstanding treaty claims by financially compensating Native peoples while not honoring their rights to land and self-determination. During this era, the federal government also unilaterally passed Public Law 280, which gave control of criminal jurisdiction over a large number of Native nations covered under the Act to states.

Things took a turn during 1968-1980 with the Nixon Administration, ironically, pursuing a policy of self-determination and passing in 1975 the Indian Self-Determination and Education Assistance Act. However, while the Act ended termination policies, it and Administration policies

in general paid more lip service to Native self-determination and under-funded programs that allowed Native peoples to have a greater degree of control over. Many Native nations have availed of the limited self-determination policies during this period to create their own systems of governance; although the 1968 Indian Civil Rights Act limits what tribes can do vis-à-vis developing self-governance systems. Yet, during this same period the U.S. Supreme Court, in *Oliphant v. Suquamish Indian Tribe*, ruled in 1978 that Native Americans had no jurisdiction to prosecute non-Indians for violation of criminal or civil laws occurring on Native reservations.

The current era from 1980 to the present has been marked by the ascendance of conservatives to power in all branches of the U.S. government. A key component of conservative ideology over the years has been federalism and the devolution of greater powers to the states, and as well the concept of states' rights which has a dubious history of being a segregationist tool. The United States has used both these concepts to absolve the federal government of its responsibilities to Native peoples and to increase state control over Native peoples, lands, and resources. At the time of writing, the U.S. Supreme Court is hearing a case that could disallow tribal police from arresting other Native peoples who are not tribal members.

In the final analysis it is important to remember two things. When Native people make claims based on the treaties they have signed with the U.S. government, they are not asking for special rights but for what they are due under international and U.S. law which those treaties are part and parcel of; and that this is limited compensation for all they have lost since the arrival of White settlers in what is now the United States of America. Moreover, these treaties do not protect only Native peoples. The vast majority of natural resources in the United States lie on or under Native lands that are increasingly under assault by corporate mining, logging, and ranching interests. These treaties afford the ability to challenge corporate takeover and control of these resources, which would ensure that control of these resources, their uses and benefits would remain with Native peoples and by extension others in the United States.

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FEDERAL SENTENCING GUIDELINES

Similar to mandatory minimums, the Federal Sentencing Guidelines are a set of recommendations that federal judges were mandated to use, until January 2005, in sentencing. The guidelines are set by an independent federal agency within the Judicial branch, the United States Sentencing Commission, and not by federal judges or legislators, although Congress can direct the USSC to make changes in the guidelines. The USSC was created in 1984 by Congress through the passage of the Sentencing Reform Act to address the issue of disparity in sentencing. Prior to the federal sentencing guidelines which went into effect in 1987, judges across the federal judiciary did not have to use the same standards.

Native activists and others have long asserted that the federal sentencing guidelines disproportionately affect Native peoples, particularly due to the fact that crimes committed in Indian Country automatically come under federal jurisdiction (and often over and above state, local, or tribal jurisdictions). For example, two identical crimes may have different punishments based on their geographic location—an offense committed on a reservation will likely yield a harsher sentence than if committed outside its boundaries.

Federal Sentencing Guidelines and Native peoples in South Dakota

The South Dakota Advisory Committee to the United States Commission on Civil Rights conducted hearings in Rapid City that resulted in the release in March 2000 of a report, *Native Americans in South Dakota: An Erosion of Confidence in the Justice System* that addresses the issue of the disproportionate impact of federal sentencing guidelines on Native peoples.

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The report notes, “Federal sentencing guidelines, some speakers contended, are primarily to blame for sentencing disparities between Indians and non-Indians...U.S. District Judge Charles Kornmann of Aberdeen, who has been an outspoken critic of the guidelines, agrees. People prosecuted in the ... Federal court system often receive tougher sentences than those convicted of the identical crime in [s]tate courts, he told reporters. ‘Does it make any sense that these Indians are subject to greater penalties than the rest of us?’ the judge asked. ‘It’s ridiculous.’ State Senator Paul Valandra, who lives on the Rosebud Reservation, spoke at the public session and told the Committee, ‘The main thing I wanted to get up here today and talk about is Federal sentencing guidelines that we’re subject to on the reservations and how they are ripping our families apart.’ In addition to being locked away for years, many young Indian men have permanently lost their voting rights because of felony convictions, he added. Later, Cedric Goodhouse said the judge who presided over his son’s trial was forced to hand down an excessively tough sentence. At the sentencing hearing, Goodhouse said the judge told his son, ‘The sentencing guidelines leave no discretion or precious little discretion to the courts. I am adamantly against them. I have always been against them, but they are here, and until Congress in their infinite wisdom changes them, they will remain in.’ Senator Valandra asked the Commission to work toward getting the guidelines changed. For his part, he said he would solicit involvement of tribal governments to help judges regain the discretion and flexibility they once had.”¹⁴

Based on the hearings, the Committee recommended that “The discriminatory impacts of Federal sentencing guidelines must be rigorously scrutinized. Racial factors affecting the administration of justice must be eliminated to restore full confidence in both the Federal and State court systems. Carefully constructed research methodology must be designed to assess accurately whether disparities exist. (The Department of Justice’s Bureau of Justice Statistics might be an appropriate entity to design and conduct some of this research.)”¹⁵

As a result of the report, the USSC held a public hearing of its own on June 19, 2001 in Rapid City. Following the hearing, the USSC convened in 2002 a Native American Ad Hoc Advisory Group “to consider any viable methods to improve the operation of the federal sentencing guidelines in their application to Native Americans prosecuted under the Major Crimes Act.”¹⁶ According to the USSC, “The group’s final report concludes that the sentencing impact on Native Americans resulting from federal criminal prosecution varies from offense to offense and among jurisdictions.”¹⁷

Recent U.S. Supreme Court Rulings

In June 2004, the U.S. Supreme Court ruled in a 5-4 decision that crossed the traditional liberal-conservative divide on a case, which while it did not specifically address the federal sentencing guidelines, could affect them. Justice Scalia who authored the majority opinion was joined by Justice Ginsberg. Some of the dissenters, headed by Justice O’Connor, noted that it could have serious ramifications for the guidelines, and in fact since the decision some lower courts have interpreted the June 2004 *Blakeley* decision to hold that the federal sentencing guidelines are unconstitutional.¹⁸ Following *Blakeley*, the Supreme Court agreed in August 2004 to hear two other cases that could have an impact on the federal sentencing guidelines.

A January 2005 Supreme Court ruling changed the federal sentencing guidelines from mandatory to advisory. The Court ruled that the guidelines were “in part unconstitutional because they direct judges to increase sentences based on facts not found by the jury. The court fixed this problem by removing the part of the law that tells judges they must use the guidelines to impose sentence.”¹⁹ Although federal judges are no longer required to impose sentences that they believe over-punish, groups such as the Sentencing Project, believe the decision for the most part leaves the federal sentencing system intact and only offers remedies that are the “least disruptive to the federal courts.”²⁰ For example, mandatory minimum sentencing laws remain unaffected, and the decision “seems to be silent about their retroactive impact.”²¹

Moreover, eliminating the guidelines in and of themselves may not necessarily have a good outcome either. One possible result could be “the risk of more mandatory minimums, which Congress, despite widespread criticism, not only keeps in place but expands to more and more offenses.”²² Native peoples who are directly affected and liberals are not the only opponents of the federal sentencing guidelines. Erik Luna, the author of a report published by the libertarian rightist Cato Institute, notes that “Punishment in U.S. courts has run amok since federal lawmakers launched the current system in the 1980s, and the Supreme Court’s ruling could provide the impetus to raze this regime—and not a minute too soon... Prosecutors, not judges, have become the true sentencers in the federal system....Federal judges—the most qualified and trustworthy decisionmakers in national government—have been rendered impotent at sentencing.”²³

THE ANTI-SOVEREIGNTY MOVEMENT

Brief History and Main Arguments of the Anti-Indian Movement

By Zoltan Grossman, Ph.D.

Some historical context is needed to understand the modern anti-Indian movement, which has its roots in Western society's longstanding effort to exterminate indigenous cultures. In much of North America, the theft of Indian national territories was not carried out to open the land for white settlement, but rather the other way around. Native lands were coveted by railroad, mineral, logging, and other interests, which widely advertised the promise of free land. Settlers were sent to claim land within the sovereign territories of many Indian nations, often unaware of or ill-prepared for the hostile reception they would face. The inevitable clash justified a rescue by federal armed forces, thus securing the land for business interests. Tribal leaders were convinced, coerced, or tricked into signing a total of 371 treaties up through the 1870s, ceding almost all their land to the government, save for some small reservations. By Supreme Court ruling, these reservations constitute "dependent nations."

While some Indian resistance was crushed by dramatic massacres, for the most part it was subdued by a combination of disease, alcohol, food rationing, the cooperation of Indian collaborators, and the theft of children for boarding schools—a situation not radically unlike today. The Bureau of Indian Affairs (BIA), until its transfer to the Interior Department, was part of the War Department. White homesteaders were used to police Indian people—some taking the task more seriously and viciously than the Army would have them, and others coming to see Indian neighbors as good trading partners. Indians were given U.S. citizenship in 1924—some against their wishes—in addition to their Indian national citizenship. In 1936, federal authorities established tribal councils on the reservations, some superseding traditional forms of government.

Nevertheless, even against these overwhelming odds, the traditional cultures and religions (and even some governments) survived underground. Technologies and practices adapted to Western society, but the core values of Native peoples remained, including their strong relationship to the land. The traditionalists literally emerged from hiding in the 1960s and '70s, inspired by the example of African Americans, Latinos, and others. Members of the younger Indian generation were told by their elders of the definition of their Peoples not simply as tribes, but as sovereign nations (some with a larger land and population base than some United Nations member states). They found the legal basis of the supposedly "old and outdated" treaties backed by Article Six of the even older U.S. Constitution as part of the body of law constituting the "Supreme Law of the Land." They found that these treaties guaranteed certain rights on the ceded lands off the reservations, and strengthened their control over ownership of reservation land.

The modern Indian movement met heavy and sometimes physical resistance from all branches of government, including the BIA, FBI, state police, Justice Department, and some tribal councils. The 1973 Army-directed siege of Wounded Knee, South Dakota proved to be a defining moment. Soon afterwards, through the efforts of grassroots Native organizations, federal courts began to recognize the treaties as legally binding international documents, overriding many state and even

federal laws. Congress and the White House couldn't reverse most of these decisions even if they wanted to.

In the meantime, some of the same business interests that had initially colonized Indian lands found themselves becoming more exposed and vulnerable in their new Third World frontiers, and decided to return some operations to their safer old stomping grounds. In the 1970s and '80s, they took another look at cheap resources on Indian-controlled and Indian-ceded lands, including a large percentage of the coal, oil, and uranium in western North America. These companies correctly saw the Indian movement, and the treaties, as probable obstacles to their plans. It is in this context that the modern anti-Indian movement emerged.

Indeed, by asserting their treaty rights and tribal sovereignty, and joining forces with environmental groups and sometimes their rural white neighbors, some Native nations have been able to protect the local environment around their reservations. For example, after a long battle in the late 1980s and early 1990s with white sportfishers over treaty-backed fishing rights, Wisconsin Ojibwe joined with many of their former adversaries to protect the fish from metallic mining projects. By 2003, the multiethnic rural alliance not only defeated the proposed Crandon mine, but two tribes used their gaming revenue to purchase the 5,000-acre site.

Arguments of the Anti-Indian Movement

The modern anti-Indian movement was created out of a white “backlash” against gains made by the modern Indian movement since the 1960s. At least five major factors motivate anti-Indian groups. The first is the call for “**EQUAL RIGHTS FOR WHITES**”—that the increased legal powers of the tribes infringes on the liberties of the individual white American taxpayer. The use of civil rights imagery can reach such extremes that whites are described as an oppressed people victimized by “Red Apartheid,” and the legacy of Dr. Martin Luther King, Jr., is invoked in support of an agenda to roll back Indian rights.

The second factor is **ACCESS TO NATURAL RESOURCES**. These resources can be fish or game, land or water, but the case is the same: no citizens should have “special rights” to use the resources. (It is not mentioned that non-Indians also can retain property use rights over land they sell.) The case is made in anti-treaty pamphlets such as “Are We Giving America Back to the Indians?,” “200 Million Custers,” and the ironically titled book *Don't Blame the Indians: Native Americans and the Mechanized Destruction of Fish and Wildlife* by Massachusetts writer Ted Williams.

The third factor is the issue of **ECONOMIC DEPENDENCY AND SOVEREIGNTY**. In a rural reflection of the “Welfare Cadillac” myths used against urban African Americans, all reservation Indians are said to wallow in welfare, food stamps, free housing and medical care, affirmative action programs, and gargantuan federal cash payments—all tax-free, of course. (No one has to pay state sales tax on reservations, but otherwise Indians have had virtually identical tax obligations as non-Indians.) While any quick drive through a reservation will show the Third World conditions Indian peoples have to live under, anti-Indian groups maintain that these conditions are caused by alcoholism and the breakdown of the Indian family, rather than the reverse. In the same breath, the groups denounce any tribal effort to build some economic self-sufficiency, through appropriate industries, small businesses, tourism campaigns, gaming, or the sale of natural resources. The message is clear and consistent: Indians should be kept under the poverty line, by any means possible.

The fourth factor is the **ATTITUDE OF CULTURAL SUPERIORITY**. Cultural bias comes out in many ways: racist team logos and mascots, the excavation of mounds and burial sites, disrespect of sacred objects such as feathers and drums, and efforts to restrict Native languages and bilingual education. Any Indian objection to these practices more often than not provokes a strong counter-reaction. The very existence of a non-Western belief system, rooted in the middle of the most powerful Western nation, is seen by anti-Indian groups as a fundamental obstacle to overcome.

The fifth factor is simple **RACISM**. This includes not only vicious slurs and violent harassment of Indian people, but also the widespread belief that Indians are unfit to govern themselves. Williams describes Indian people as “children,” as lazy recipients of outsiders’ hand-outs. In a right-wing context, this view can easily be translated into a myth that holds Indians as passive components in a conspiracy run by more intelligent non-Indians. The final step of advocating genocide is not that difficult to make. In the words of one Wisconsin protester, “Just wipe ‘em out.” Anti-Indian groups also make an issue out of Indian people who look white, accusing them of using their “blood quantum” to obtain government benefits. Yet Indian identity is generally more cultural than racial, and based on tribal definition and self-definition.

Most anti-Indian groups go to great lengths to deny any trace of racism, and will even point to members whose great-grandmothers were Indian in order to prove their point. While many white supremacist groups see an organizing windfall in anti-Indian movements, there are also some racists who will make an ‘exception’ for Indians, who they romanticize as noble savages resisting big government. They see Indians as a pre-Christian warrior race (not unlike Hitler’s images of ancient Teutonic warriors) that is being driven off the land. In 1982, Posse Comitatus leader James Wickstrom’s Posse Noose Report praised the Big Mountain Navajo fight against relocation as a struggle against Jewish interests in the Peabody Coal company. According to the *New York Times* (Oct 4, 1991), Alabama Klan leader Asa Earl Carter may have posed as the “Cherokee” Forrest Carter to write the best-selling mystical portrayal of Indian life *The Education of Little Tree*. These complexities only show the necessity of Indian unity with African Americans, Jews, Latinos, and others that have been targeted by racist organizations.

The face of anti-Indian prejudice in the U.S. has changed since the modern anti-Indian movement began in the 1970s-1980s. At that time, prejudice was directed against Native Americans as a “poor minority,” using the “welfare Cadillac” images previously used against African Americans. With the growth of Indian gaming in the 1990s-2000s, prejudice has been increasingly directed against Native Americans as a supposedly “rich” minority, deploying the “Shylock” images previously reserved for Jews. Two decades ago, Indians were criticized for being on welfare, now they are being criticized for getting themselves (and many of their non-Indian neighbors) off of welfare. The growing movement against Indian casinos exhibits a double standard by not similarly challenging state gaming operations, which legally open the door to tribal gaming, as specified in the 1988 Indian Gaming Regulatory Act. Like the myth of the moneylending “Rich Jew,” the growing myth of the “Rich Tribes” implies that all tribal members are wallowing in cash. The economic realities of Indian gaming are far more complex, with many reservations located far from population and tourism centers. Yet media portrayals of Native peoples have begun to resemble historic anti-Semitic portrayals of Jews (as well as portrayals of “wealthy” ethnic Chinese in Southeast Asia, or Arab and East Indian merchants in Africa). Like Western European Jews of the past, who had agriculture virtually closed to them, Native nations have been denied control over land (in their case through cessions, removals, and allotment), frustrating their land-based economic development. Left with few other economic

options, both American Indian tribes and European Jews had to engage in unpopular financial practices to develop their communities (circumscribed to reservations or ghettos). The majority society that had dispossessed the land base also objected to these financial industries, particularly when they could contribute to a recovery of land ownership.

[Anti-Indian] groups have united in a national coalition known as the Citizens Equal Rights Alliance (CERA). CERA concentrates on pressuring Congress to modify or abrogate treaties. Perhaps the most insidious national groups are those that use legitimate sports or conservation images to cover for their anti-Indian activity. Some environmental, sports, or resort owners organizations can turn overnight into anti-Indian groups, if not first approached with alternative information. Some ecological and animal rights groups—who took issue with tribal harvesting or jurisdiction over parklands—were dissuaded from continuing their campaigns after pressure from pro-Indian groups. Other such groups, such as the Sea Shepherd Society that militantly resisted Makah whaling in 1999—have worked directly with far-right anti-Indian politicians.

Another source of resistance to Indian rights comes from some archaeologists and anthropologists, who defend their professional “right” to dig up and display Indian people’s ancestors and sacred objects. They contend that the interest of science cannot be subordinated to the interest of the tribes. This is especially said to be true when the deceased cannot be directly tied to the tribe asking for their return, even though the tribes see themselves as the caretakers of all who are buried on their ancestral lands. When the Smithsonian Institution finally “agreed” in 1991 to return some bones for reburial, it set up a board made up of leading figures opposing reburial to review each claim. North Dakota reburial advocate Pemina Yellowbird said, “If this society has no respect for our ancestors who have passed on, it cannot have respect for us who are living.”

Dr. Zoltan Grossman is an Assistant Professor of Geography and American Indian Studies at the University of Wisconsin-Eau Claire. This article is updated and adapted from “Indian Issues and Anti-Indian Organizing” in When Hate Groups Come to Town: A Handbook of Community Responses (copyright 1992, Center for Democratic Renewal and Education). The original article, “Treaty Rights and Responding to Anti-Indian Activity,” can be found at: www.dickshovel.com/lanti.html. Reprinted with permission.

DEBUNKING POPULAR CLAIMS OF THE ANTI-SOVEREIGNTY MOVEMENT

In the midst of this complexity, several anti-sovereignty organizations have emerged from a conservative backlash against Native sovereignty claims. These groups, with names like Citizen’s Equal Rights Alliance (CERA), One Nation United, or All Citizens Equal, assert that they are defending the rights of both Native and non-Native people. They call for equal rights for all, and no “special rights” for Indians, usually by criticizing the jurisdictional power of tribes over non-Indian property owners and the American tax payer at large. They dispute the claims of tribes to gaming and fishing rights as well as to other natural resources such as land and water use.

The impact of anti-sovereignty groups varies, but they do offer ways for non-Indians to channel their anti-Indian resentment. Such groups display classic claims of stealth conservative organizations:

- Inclusive mission statements, often citing the U.S. Constitution
- Denial of discriminatory intent
- Diverse membership, especially with representation from the group being criticized

ANTI-INDIAN CLAIM #1: American Indians nations are not and should not be considered sovereign. To consider them sovereign is unconstitutional.

Anti-Sovereignty movements are anxious to explain and use court cases such as *Oliphant v. Suquamish Tribe* to illustrate that American Indian nations are not completely sovereign, and are in many ways dependent upon the United States.²⁴ They go to lengths to explain the plenary power that Congress has over American Indian affairs, and explain that courts have found that the Bill of Rights “does not apply to Indian tribal governments.”²⁵ Some Anti-Sovereignty groups go so far as to declare sovereignty for American Indians unconstitutional. Upstate Citizens for Equality suggests that:

“While it might be successfully argued that the federal government could legally claim guardianship over the Indian tribes for a specific purpose and specified amount of time, no such argument can logically exist for its power to allow any sort of tribal sovereignty as it exists today, especially after its passing of the Indian Citizenship Act of 1924 conferring citizenship upon all Indians born within the United States.”²⁶

The Anti-Sovereignty movement uses concurrent judgments from cases like *Cherokee Nation v. Georgia* (1831), in which the judge declared that “there is not an instance of a cession of land from an Indian nation, in which the right of sovereignty is mentioned as a part of the matter ceded.”²⁷ This line is used to justify the idea that by making treaties with American Indian tribes, the United States was not granting the tribes sovereignty.

Arguments like these, or those that rely on other laws and court cases which have increasingly limited the sovereignty of American people, ignore the colonial and imperialist history which defines this debate. Moreover, even though American Indian sovereignty was not recognized through any explicit treaty or act of Congress, the United States and European governments recognized tribal sovereignty by making treaties with tribes.²⁸

ANTI-INDIAN CLAIM #2: Sovereignty is racist, and makes American Indians into second-class citizens.

The Anti-Sovereignty movement accurately describes jurisdiction, law and government on reservations as a messy mix of state, federal, and tribal control. But rather than look at how self-determination or increased sovereignty for American Indians might address these problems, the Anti-Sovereignty movement presents American Indians as “second class citizens,”²⁹ and suggests that the solution is to abolish sovereignty for American Indians. Some people, like those affiliated with CERA, argue for a Twenty-Eighth Amendment to the U.S. Constitution that would solve the problems of the current system and the “patronizing, destructive, racist nature of federal Indian policy.”³⁰ This amendment would completely abolish American Indian sovereignty.

In his decision *Granite Valley Hotel v. Jackpot Junction Bingo and Casino* (1997), Judge Randall is quoted by Upstate Citizens for Equality as saying: “The present version of ‘sovereignty’ denying reservation residents the benefits of the Minnesota Constitution, the United States Constitution, its Bill of Rights, denying them accountability from tribal government and exempting them from constitutional obligations of due process imposed on the rest of America, is the filthiest piece of misguided patronizing racism this side of hell.”³¹

Randall and Upstate Citizens for Equality argue that American Indians would receive more

equal, fair, and just treatment under the complete jurisdiction of the Bill of Rights and the United States government. This argument makes the assumption that the White, Euro-American system of the United States is superior to tribal governments.

There is no doubt that there are problems on reservations, and that much of federal Indian policy is problematic, especially laws which have assumed that “savage” culture was primitive and in need of the guiding hand of Euro-American White society. But the proposed solutions mask the real agenda of these groups, to gain access to natural resources by removing the legal protections that exist for American Indians.

ANTI-INDIAN CLAIM #3: American Indians are greedy “Super-Citizens.”

As Indian rights advocate Rudolph Ryser, explains:

“Where tribal claims and treaty disputes with the United States concern resources in ceded areas outside Indian reservations, Indian people are depicted as “super-citizens” who have more rights than non-Indian citizens of the United States. Here, the slogan *‘Equal Rights and Responsibilities’* claims a wider audience. By characterizing Indians as ‘super citizens,’ ‘greedy,’ and exploitative, populist bigotry becomes a means to an end. People who never thought of themselves as racist begin to advocate harassment and sometimes violence against Indian people.”³²

This is the reverse of the “American Indians are second-class citizens” argument above. Often, groups will not explicitly state that American Indians are “super-citizens,” but it can be evident in their other arguments. For instance, Upstate Citizens for Equality states that if an independent and sovereign Cayuga Indian Nation were to be established in New York, there would be “increased expenses [to be] paid by all NY taxpayers to support services for roads, water, sewer, emergency and fire protection on reservation land—these can be demanded by the tribe, at taxpayers’ expense.”³³

ANTI-INDIAN CLAIM #4: American Indians are part of our “equal rights” movement.

Many of these groups advertise American Indian supporters who are in favor of the idea of abolishing the reservation system. Roland Morris, a “full-blooded Anishinabe American citizen from the Leech Lake Band of Minnesota Chippewa”³⁴ and the Secretary of CERA, states in his testimony that “federal Indian policy views Native Americans as helpless wards.” He also believes that the current system has led to:

“... depression and loss of hope, [where] people are dying of alcoholism, drug abuse, suicide and violence. Some die quickly, others die slowly. Some live years but are dead in their hearts. If the current system is so good for Native people, why is this happening?”³⁵

CERA is particularly proud of its Native membership, advertising that their membership “includes Indians and non-Indians from both on and off reservations. This diversity helps us understand the impact of Indian policy from the ‘inside out’ and the ‘bottom-up.’”³⁶

Despite the presence of American Indians in the Anti-Sovereignty movement, it is not the case that American Indians, in a broader sense, are part of the movement. As Ryser observes, “Several ‘non-tribal Indians’ participate in the Movement as ‘legitimizers of factual distortion.’” Typically, the “non-tribal Indian supporter” is wealthy as a result of “helping my fellow Indian.” These activists gained their wealth by exploiting other Indians by means of, for example, buying

an Indian's individual land allotment and selling the same allotment to a non-Indian for a vastly higher price. Instead of 'allotment of land' one could substitute any of the following words: Timber, oil, gravel, water, fish, natural gas, or minerals. The Movement helps the 'non-tribal Indian supporter' avoid tribal government regulation."³⁷

ANTI-INDIAN CLAIM #5: Tribal councils are corrupt and need to be eliminated.

The Anti-Sovereignty movement portrays tribal governments as oppressive to American-Indian people. Another CERA author writes that "Like Medieval kings, tribal governments have largely unchecked, centralized power and are generally protected from being sued..." and that "the modern concept of tribal sovereignty involves a great deal of political power from Indian citizens to their largely unaccountable tribal governments."³⁸ Anti-sovereignty advocates claim that such councils perpetuate nepotism and poverty on reservations. Tribal councils are described as being without the checks and balances guaranteed by the United States' Bill of Rights, and stories from American Indian newspapers are used to illustrate that "corruption in tribal governments is the norm, not the exception."³⁹

It is true that some American Indians are opposed to the tribal council as the form of government. The formation of tribal councils resulted from the Indian Reorganization Act (IRA) of 1934, which forced American Indian nations to form tribal councils to replace their traditional governments.⁴⁰ Yet the Anti-Sovereignty movement is not concerned with improving the lives of American Indians. In the same article that called corruption in tribal governments the norm, the author writes: "The policies of tribal sovereignty and tribal sovereign immunity have hurt tribal members, impaired businesses trying to contract with tribal governments, stifled economic development on reservations, and denied basic rights to Indians and non-Indian patrons and employees of tribally-owned operations."⁴¹

The assumption by Anti-Sovereignty groups that tribal councils are corrupt appeals to stereotypes of American Indian criminality and poverty by suggesting that American Indians are unable to effectively govern themselves.

ANTI-INDIAN CLAIM #6: Indian Casinos are bad for the community and cause "crime."

Often Anti-Sovereignty groups list American Indian casinos as one of their main issues.⁴² Their stated goal is to prevent Indian casinos from operating in their states or to remove casinos that already exist. The websites of Anti-Sovereignty groups are not always clear on their justifications for opposing casinos. It is likely, however, that many objections to Indian casinos are self-serving financial ones rather than moral issues: the fact that casinos are taxed differently than other non-Indian-owned businesses; claims that casinos place undue burdens on local and state infrastructures; and resentment that tribal entities make substantial profits in ways unavailable to non-Indians.

Endnotes Available Online!

All citations and references are available at www.defendingjustice.org or by contacting PRA.

ORGANIZING ADVICE: Case Study Of Activism and/or Resistance

Q & A WITH LEAH HENRY TANNER, NEZ PERCE (NI MII PU)

Leah Henry-Tanner, an enrolled member of the Nez Perce Tribe of Idaho, is a long-time activist with experience in challenging the anti-democratic Right and organizing against White supremacists. Leah has worked on issues of tribal sovereignty, treaty, civil, and human rights and reproductive health. She is also a participant in the Native American Women's Dialog on Infant-Mortality group which addresses the high infant-mortality rates in Native American/Alaska Native families. A board member of several progressive organizations, including the Kitsap Human Rights Network (current chairperson), Communities Against Rape and Abuse, and the Portland, Oregon-based Western States Center, Leah currently works as a community advocate for the SIDS Foundation of Washington in Seattle.

PRA: What does sovereignty mean?

LHT: It means political autonomy and the right of tribal nations to self determination, without interference from federal, state, and local governments and their non-Native citizens.

PRA: Can you break that down? What does that really mean?

LHT: It means that tribes have ultimate authority in their territories.

PRA: What are you fighting for?

LHT: Full recognition of the rights of tribes: basically, the United States and its citizens need to honor the promises they made to tribal nations through the treaties they signed with them. These rights were not granted by the U.S. government, and include rights on reservations and ceded territories. Some of these rights include hunting and fishing rights and the right to gather roots, herbs, and other plants. It also includes the rights of tribes to make laws and govern within their territories; develop tribal economies; protect the health and welfare of their peoples; and protect their homelands.

PRA: What do you see as the main issues?

LHT: One of the interesting issues is jurisdiction and how that is really convoluted. The U.S. Supreme Court, which still uses the racist Marshall Trilogy as the framework for federal Indian policy, continues

to erode the rights of tribes. In *Oliphant v. Suquamish*, for example, the Supreme Court ruled that tribes don't have jurisdiction over non-tribal members in criminal matters. This has created legal confusion and allowed some non-tribal members who live on reservations to break tribal laws. For example, in Idaho, a prosecuting attorney refused to recognize the authority of Nez Perce tribal police who attempted to stop him for speeding through the reservation. He did not stop until he left the reservation boundary and was stopped by state police. Other issues include—and by no means is this list complete—land recovery and placing land into trust, economic development, protection of sacred sites, and stopping state incursion into Indian Country.

PRA: Who do you consider the Right?

LHT: From my perspective, a range of political groups, individuals, and elected officials broadly committed to preserving and expanding various forms of privilege and power. "The Right" is most commonly thought of as defending privilege based on property ownership. But we also need to recognize groups committed to White supremacy and male and heterosexual privilege. And, to realize that not all who oppose tribal rights are who we think of as "the Right." On the other side of the political spectrum, environmentalists have not been consistently good allies. Recently, organized labor has also attempted to invade Indian Country.

PRA: How do you encounter the Right in your work?

LHT: The Anti-Indian Movement is a complex and diverse movement, and because Indian issues are so localized, different issues pop up in different locations. In Idaho, the North Central Idaho Jurisdictional Alliance (NCIJA), one of the most pernicious anti-Indian organizations in the United States, is seeking to overturn the sovereignty of the Nez Perce tribe. The NCIJA consists of 23 local government entities. On the Yakama reservation, in eastern Washington State, local non-Native tavern owners organized opposition to the alcohol ban that the Yakama Nation attempted to enforce in their homeland. When the Suquamish Tribe, in the Puget Sound area, petitioned the state of Washington to regain one acre of land that was illegally taken, the Association of Property Owners

and Residents of the Port Madison Area (APORPMA) organized opposition to the Suquamish tribe’s eventually successful effort. During the 2000 Washington State Republican convention, delegates passed a resolution calling for the termination of tribes. Even anti-Indian stalwart Slade Gorton (R-WA) distanced himself from this scandalous resolution. Again, these are just a few examples.

PRA: What is the nature of the opposition? What are their tactics? What is their goal?

LHT: They oppose the existence of tribal governments and the rights those governments exercise. They organize opposition in a variety of ways, some of which I mentioned earlier. It’s my belief that their ultimate goal is the total destruction of Indian Country. They want to finish what the U.S. government started.

PRA: What is their rationale or motivation?

LHT: Anti-Indian activists couch their rhetoric in the language of equal rights and they think indigenous people have “special rights.” Slade Gorton used the term “Supercitizen” when describing Native people. The treaty rights that Native peoples have are not “special rights,” rather they are rights that were reserved in treaties negotiated by tribal leaders and the U.S. government and are no different than the rights and obligations in treaties the United States signs with other countries. According to the U.S. Constitution, treaties are the highest law of the land. The motivation behind the movement against Native rights differs depending on who is involved. Corporate mining and logging interests want access to natural resources, the vast majority of which, in the United States, sit under Native lands. White supremacists are obviously motivated by racism, while other conservatives who oppose multiculturalism and pluralism see Native sovereignty and identity as a threat to American hegemony.

PRA: What barriers do you face in challenging them?

LHT: It’s challenging to organize opposition to State policy. It is really hard to find allies.

PRA: How have non-Native progressives been on Native sovereignty issues?

LHT: Even non-Native progressives get really confused. It seems that we have to constantly educate them. I think because treaty rights are different from civil and human rights, progressives haven’t developed much analysis around Native issues.

PRA: Why don’t people get it?

LHT: Because genocide was so successful against Native people in the United States, most folks today don’t have any meaningful contact with indigenous people. We’re the forgotten peoples in our own countries.

PRA: What advice would you give to progressive activists?

LHT: Remember that the United States is occupied territory. Learn about tribes and the issues that are impacting Indian Country. Most of all, listen when tribal people share their stories with you.

Additional Resources

Right-Wing Organizations

Citizen's Equal Rights Foundation/Citizen's Equal Rights Alliance

*P.O. Box 93, Ronan
MT 59864*

Phone: 605-374-5836

www.citizensalliance.org

CERA and CERF are affiliated groups that are part of the U.S. Anti-Sovereignty movement. They use a rhetoric of equal rights to argue that Native people should be citizens like all other American citizens, and that the sovereign status of tribes recognized by the federal government should be eliminated. CERA's focus is national, and they target specific legislation. Articles available through its website discuss why sovereignty has harmed rather than helped American Indians, and why it is unconstitutional. Ultimately they suggest that a constitutional amendment eliminating native sovereignty may be necessary to ensure the pledge of "one nation under God, indivisible, with liberty and justice for all." The Montana Human Rights Network and others have observed that groups like CERA/CERF are part of the Anti-Indian movement, and that their "systematic effort to deny legally established rights to a group of people [Native people] who are identified on the basis of their shared culture, history, religion and tradition" makes it "racist by definition."

Right-Wing Websites

www.IndianRelations.com

The Reservation Report, at: http://www.thecommunityforum.com/Reservation_Report.htm

The Native American Press/ Ojibwe News, at: <http://www.press-on.net/>

Progressive Organizations

Colorado American Indian Movement (AIM)

www.coloradoaim.org

denveraim@coloradoaim.org

American Indian Movement of Colorado (Colorado AIM) has rooted its political, social, cultural and economic program in four basic, essential, and non-negotiable principles: Spirituality, Sovereignty/Self-determination, Support and Sobriety. Any indigenous person from Turtle Island who embraces and actively supports these principles is welcome to join.

Center for World Indigenous Studies

PMB 214

1001 Cooper Point Road SW, Suite 140

Olympia, WA 98502-1107

Phone: 360-486-1044

Fax: 253-276-0084

www.cwis.org

CWIS publishes and distributes literature written and voiced by leading contributors from Fourth World Nations. An important goal of CWIS is to establish cooperation between nations and to democratize international relations between nations and between nations and states.

Fourth World Center for the Study of Indigenous Law and Politics

Department of Political Science

University of Colorado at Denver

Campus Box 190, P.O. Box 173364

Denver, CO 80217-3364

Phone: 303-556-2850

Fax: 303-556-6041

http://carbon.cudenver.edu/public/fwc/index.html

The Center is resource of authoritative information on indigenous peoples' affairs. The Center creates university-level curriculum, publishes a journal on indigenous politics with a global concentration, holds public forums and presents testimony before international legal organizations.

Honor Our Natives, Origins and Rights (HONOR)

3901 Chicago Ave S, Suite 202

Minneapolis, MN 55407

Phone: 612-827-2766

Fax: 612-827-2769

www.honoradvocacy.org

HONOR is an organization devoted to protecting the rights of American Indians and Alaska Natives by monitoring legislation and educating the general public about issues involving Indian people.

Indian Law Resource Center

602 No. Ewing St.
Helena, MT 59601
Phone: 406-449-2006
Fax: 406-449-2031
www.indianlaw.org

This organization provides legal advocacy for the protection of indigenous peoples' human rights, cultures, and traditional lands.

Midwest Treaty Network

P.O. Box 1045
Eau Claire, WI 54702
Phone: 715-833-8552 or 800-445-8615
www.treatyland.com

The Midwest Treaty Network is an alliance of Indian and non-Indian groups supporting Native American sovereignty. It works, mostly in the western Great Lakes region, to educate and organize those who serve as obstacles to treaty rights and sovereignty. Resourceful website.

Montana Human Rights Network

PO Box 1222
Helena, MT 59624
Phone: 406-442-5506
www.mhrn.org

MHRN is a grassroots statewide network of human rights organizations, including the Flathead Reservation Human Rights Coalition. MHRN monitors the activities of the Religious Right, militias, and White supremacist groups across the state. Published a report on the anti-sovereignty movement in Montana.

Native Americans Rights Fund (NARF)

1506 Broadway
Bolder, CO 80302
Phone: 303-447-8760
Fax: 303-443-7776
www.narf.org

NARF provides legal representation and technical assistance to Indian tribes, organizations and individuals nationwide.

National Congress of American Indians (NCAI)

1301 Connecticut Ave NW, Suite 200
Washington DC 20036
Phone: 202-466-7767
Fax: 202-466-7797
www.ncai.org

Founded in 1944, NCAI is the oldest and largest tribal government organization in the U.S. NCAI serves as a forum for consensus-based policy development among its membership of over 250 tribal governments from every region of the country. NCAI informs the public and the federal government on

tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments.

North American Indian Legal Services (NAIL)

435 Wright Street, No. 37
Denver, CO 80228
Phone: 720-840-5438
www.nailsinc.org

NAIL provides legal representation for North American Indian tribes and individual indigent people, to protect tribal resources, to promote effective and accountable tribal government practices and procedures, to improve tribal economic prosperity and to safeguard and ensure individual rights.

Progressive Books/Reports

Deloria, Vine, Jr., and Clifford M. Lytle. 1983. *American Indians, American Justice*. Austin: University of Texas Press.

Gedicks, Al, and Zoltan Grossman. 2004. "Defending a Common Home: Native/Non-Native Alliances against Mining Corporations in Wisconsin." *In In the Way of Development: Indigenous Peoples, Life Projects and Globalization*, ed. Mario Blaser, Harvey A. Feit, and Glenn McRae. London: Zed Books. Online at http://web.idrc.ca/en/ev-64531-201-1-DO_TOPIC.html (accessed February 4, 2005).

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Ross, Luana. 1998. *Inventing the Savage: The Social Construction of Native American Criminality*. Austin: University of Texas Press.

Ryser, Rudolph. June 1992. "Anti-Indian Movement on the Tribal Frontier." Olympia, WA: Center for World Indigenous Studies. Occasional Paper #16, Revised Edition.

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Endnotes Available Online!

All citations and references are available at www.defendingjustice.org or by contacting PRA.

All of the content in this publication, plus additional information, can be downloaded from the *Defending Justice* companion website: www.defendingjustice.org.