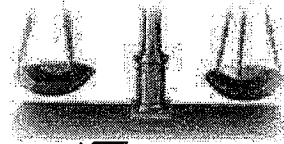




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November 2002

Introduction to Indian Law and Remedies: A Law School Discussion

Place: Sullivan Hall, Room 109, Seattle University School of Law

Date: 7:30 p.m., September 10, 2002

Participants: Seattle University law students in Remedies taught by Adjunct Professor Randolph I. Gordon; Tribal Judge Cindy Jordan; Court Reporter: Elaine Ripper, RPT (Northwest Court Reporters)

What follows is a transcript of the discussion:

PROFESSOR GORDON: When we use the word remedies in a medical sense we're talking about curing bodily ills and disease. The question is: What are legal remedies designed to cure? Jamie?

JAMIE OSBORN: They're designed to put the plaintiff — essentially make them whole, put them back into their rightful position.

PROFESSOR GORDON: Yes, one of the basic principles of remedies, is to restore the parties to their rightful position, to restore "health" by ameliorating social ills and injustice: disputes arising between individuals, civilly; between individuals and the community, within the criminal system; and societal ills and systemic injustice. We have seen that laws, as April [Winberg] has told us, are the product of legislative action, Madisonian interest-trading and lobbying. They are the plumbing through which justice is delivered and by which our thirst for justice is to be satisfied. As Anatole France tells us: "In the infinite majesty of the laws, both rich and poor alike are equally forbidden to sleep under the bridges of Paris, to beg for bread" The origins of justice, itself, however, are more elusive. Justice, unlike legislation, is not the result of a conscious fashioning, of party politics, or the clash of self-interested parties; justice arises from religious and cultural traditions, national and community experience, and family values and teachings. It grows within and, hopefully, springs from, the heart and conscience of the individual. The Rules of Professional Conduct for lawyers expressly reference their origin in the touchstone of individual conscience. Justice is that thing the pursuit of which makes ours a noble profession.

Remedies, we have seen, are often inadequate or irrelevant. The first anniversary of 9-11, near us, we once again reflect how ineffectual compensatory remedies in the form of monetary compensation are for the loss of a limb, a loved one or even for the loss of a nation's innocence and sense of safety.

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In some cases, human ingenuity is tested in trying to fashion a remedy. What have we learned from the humiliating internment of Japanese-Americans during the Second World War, which still eludes effectual remedy for victims and descendants, and which was endorsed by our Supreme Court in the Korematsu case? Have we learned enough to avoid visiting the same humiliation upon Arab-American citizens and followers of Islam? In our previous classes, we have recognized that, on a national scale, our two greatest legacies of injustice still elude remedy: chattel slavery of Africans and the destruction of the indigenous peoples of the Americas. In our first case studied, that of U.S. v. Hatahley, we saw the last stages of the destruction of Navajo traditions where white ranchers and government agents rounded up the horses and livestock of the Navajo and sent them to the glue factory.

Tonight at Seattle University School of Law, it is appropriate to note that the very name of our institution and of this City bears the name of Chief Seattle. And yet, where are the descendants of Chief Seattle? Born on Blake Island of a Duwamish mother, the Duwamish tribe has recently blinked into nonexistence according to the Federal Government. There remain few among us who carry forward the rich traditions of what is lately called the American Indian. The ultimate legacy of the destruction of the indigenous peoples is that we get to write the history. There are very few people here who claim Native American descent, and we are living, every day we live and work, we are living on lands that were taken from others. There remain few among us who carry forward the rich traditions of what is lately called the American Indian.

We're fortunate to have with us tonight Judge Cindy Jordan, a Tribal Judge, who has graciously consented to spend time with us this evening answering questions. The tribal courts are heir to distinct traditions and, as we'll see, they seek justice through remedies which flow from distinct cultural traditions. Judge Jordan has a diverse background, having worked as a public defender and guardian ad litem for the Coeur d'Alene Tribe in Worley, Idaho; for the Colville Tribe in Nespelem, Washington; for Legal Services as a prosecutor, as a public defender; as a public defender, tribal attorney and employment rights officer for the Kootenai Tribe in Bonners Ferry, Idaho; and for the Court of Appeals of the Nez Perce Tribe in Lapwai, Idaho. So as a prosecutor, defender, tribal lawyer, judge, appellate judge, I think that the experience of Judge Jordan will be helpful to us. And so I ask you to all please join me in thanking Judge Jordan for accepting our invitation to speak with us tonight.

JUDGE JORDAN: I have to tell you this is just a bit intimidating. I'm relatively new as a tribal judge. I have been on the bench for about three years doing appeals for the Nez Perce Tribe, and I'm currently being considered to serve as a judge pro tem on the trial level for the Coeur d'Alene Tribe. So a lot of my experience comes from a more practical, hands-on practicing attorney in the tribal court system. I guess the main reason that I went to law school is because I am a very firm believer in justice. And I have, because of that, chosen to work with what I consider to be disenfranchised populations, one of which is, of course, the tribal court system and the Indian tribes in our area. Right now my practice is focused mainly on the inmates' criminal defense in tribal court and the tribal court system, and I find that to be very satisfying work. I can tell you you won't get rich doing that, but it is very satisfying.

One of the first things you have to realize is that most of the tribal courts are patterned after the Anglo system of justice. They actually have constitutions, bylaws and court systems. But those were set up during the time that the BIA [Bureau of Indian Affairs] was actually running the show on all of the

reservations, so basically we had courts that were set up by the BIA system, and for a long time were administered by BIA personnel.

The way that the United States has dealt with the tribes has changed throughout different periods of history. Initially they dealt with them on a nation-to-nation basis and considered them to be sovereign nations, and they made treaties with them and did various things where they were dealing with them as a separate nation. Eventually, as we wanted more land, we began to push them further west. How many of you have ever heard of the Trail of Tears? Do you know what that is then, where they essentially marched the Indians from the south out to Oklahoma and many of them died along the way? And during that period is where we came up with the concept of a reservation. And essentially what has happened is we as a government have set aside land that is supposed to be for — we keep it in trust for the Native Americans. So the government is there. We have come to think of them as domestic dependent nations.

Over the course of history we actually tried to annihilate them. And then we tried to assimilate them and bring them into our culture. And when we did that, we took children away from their parents at a very young age, placed them in boarding schools, shaved their heads, refused to allow them to speak their native languages, and essentially tried to bring them up as white people. Afterwards there were frequently adoptions into white families, which is why if you have an adoption you have to give the tribe of that child notice now. That came about because so many of these kids were being taken from the reservation and adopted out by white families with no recourse to the family or the tribe. Now we are at a period where we have decided that they should have self-determination. So essentially they're letting them go their own way. But this has been a long and slow process, and it has taken a long time for people to come to this point. As a result of [the current policy of] self-determination, they are able to make their own law. They are not bound by state or federal law.

We have the Indian Civil Rights Act, which has been adopted by the tribes in order to allow them to have the same bill of rights, or at least most of the same bill of rights, as the rest of us. They don't have all of them. When the tribal councils decided to adopt that, they did not always adopt the whole thing. So the most glaring part of that is that they don't have a right to counsel at their court unless they want to do it at their own expense. Now, most of the time most of the tribes that have moved forward and have gone on have adopted the right to counsel as well. Even though they don't have it stated in their constitution or stated in their Indian Civil Rights Act, they actually have formed public defender offices and they do have counsel available.

ALEXANDER POTEBNYA: Aren't those the tribes that have more financial resources due to gambling, oil revenues, whatever, where they can afford to do that?

JUDGE JORDAN: Absolutely. I think some of the smaller ones have more difficulty with that. And the gambling is one area where they're actually able to get more facilities. One of the things that you have to realize is most of the reservations have an unemployment rate of seventy percent or more. We're talking massive unemployment and, until they had gaming, it was even higher. The gaming revenue has enabled a lot of the tribes now to be able to provide jobs for their people, provide more educational opportunities, to provide a whole lot of things that they never had before. I remember, as a child I lived on

the Navajo reservation for a while, and I remember we lived in a neighborhood where all the white people lived in housing that was provided by the plant that my father worked for and it was all provided for the people who worked in that plant, and almost all the people who worked at that plant mining uranium, by the way, were white, and we didn't really go out and mix too much with anybody else. At the beginning of school, the BIA would come in and hand out clothing to the Indian children at the school, and I would hear the other white kids talking and saying, "They just get everything given to them." Well, as an adult we went back and lived on the Navajo reservation again, and their average income, and this was in the mid-'80s, was about \$3,000 a year for their whole family. So I think it's the least we can do to provide them with healthcare, to provide them with educational opportunities, to provide them with some of the necessities of life. I honestly don't think that's asking too much since we had been mining their uranium and mining all of their stuff under the ground and taking a lot of their stuff above ground.

ALEXANDER POTEBNYA: What sort of steps do you see have been made in making the Bureau of Indian Affairs accountable for all those misplaced funds that are out there? I mean, how close do you see are they coming to an accountability, an accurate accountability of those funds?

JUDGE JORDAN: My guess is that they're just barely starting to even grapple with the fact that they have missing funds. [Note: since the date of this discussion, Secretary of the Interior Norton has been held in contempt by the court for inaction relating to the accounting of Indian trust funds.]

JEANNE McNEIL: What types of cases do you typically hear? How similar or different are they from state court?

JUDGE JORDAN: Actually the cases themselves are very similar to what you have in state court. Our approaches towards them may be somewhat different depending upon the situation. We carry a caseload at the public defender's office, we have probably over 600 cases for two attorneys to handle at any given time, and mainly what we do is criminal defense. Now, everything in the tribal court level is a misdemeanor offense. However, they can be very serious because some of the cases that we try as misdemeanors would be felonies in the state court system. But the maximum penalty that they can get in our court system is 360 days in jail and/or a \$5,000 fine. We also do what are called minor in need of care cases, which is like the CPS cases, and the other attorney and I usually handle those cases by representing one or the other of the parents.

JOHN ALLEN-PARRA: Are tribal courts allowed to craft remedies with more creativity than the state court is?

JUDGE JORDAN: Absolutely. We're not quite as bound. As I said, federal law and state law are only persuasive authority in tribal court. One of the things that I didn't make clear that I probably should make clear is that each tribe has their own tribal code which is written specifically for what they need on their reservation and, as a result of that, they have a lot more flexibility. One of the other remedies that we have besides actually just going to jail and paying fines, we can empanel what's called an Elders Panel if we have a question. We had a criminal case back a couple of years ago where we had a question of ancestry: was a great niece considered to be an [relation] of someone for the purposes of an incest statute. That sounds kind of awful, but ... , we did empanel an Elders Panel in order for them to give us a traditional answer on that. And they met, they picked three different tribal elders, they sat

down, discussed the case, thought about it, and then came back to us with a decision. Some of the child custody cases that I had when I was dealing with cases on the Coeur d'Alene reservation we also did send to elder mediation where they met with an elder. And I believe they've done some of that on the Colville reservation. We're revamping the juvenile code out there, and one of the things that they want to make for juvenile cases is called a peacemaker circle.

DOUG STEWART: In light of your experience in both the tribal system and the state system as an advocate, what differences or similarities do you see between the roles in the two different systems? Is your duty to your client the same or are you seeking the same things?

JUDGE JORDAN: I think that in a lot of ways they're very similar. What I find with the tribal system, and one of the reasons that I choose to sort of concentrate my practice there more, is that the remedies that we use in tribal court, whether they're for criminal, whether they're for civil, whether they're minor in need of care type cases, whatever, are usually more rehabilitative. They try to ... look at the core problem. For instance, if we have a lot of cases of possession of drugs or possession of paraphernalia, they look at the root cause of that, and they usually really try to work with the defendant to get them into treatment, to do whatever we have to do to try and help them and to try to solve the root problem. There have been cases where we've had people who could have been employed but didn't choose to be, and yet, because they weren't employed, they got in trouble. And some of the remedies in those cases have been that they had to attempt to get and maintain employment for a certain period. When we're working on minor in need of care cases as opposed to dependency cases in state court, when I did them in state court the state's response, over in Spokane County, at least, seemed to be, Let's put them on a quick track to terminate their parental rights, and then they would plug the parents into these services that really didn't fit anybody. They weren't able to maintain the services because it didn't really suit their needs or they weren't able to address what the problem was. Whereas in the tribal system we have a case worker that works with them one on one and actually will take them to appointments and will make the appointments for them and will be there as more of a support system. And in all the times — I've been doing minor cases in tribal court since in 1993, and in all that time we have never had parental rights terminated on any of the children. Whereas in Spokane County they have a very high percentage of parents whose rights are terminated to their children. That's the main difference that I see with tribal court over state court.

BRIAN BUSHMAN: Going back to what Professor Gordon says about justice stemming from the culture, given that there's two different cultures, how is their sense of what justice is different than ours, and how does that play out in the court system?

JUDGE JORDAN: Well, a lot of the times what they focus on is they're big on restitution and apologies if they have wronged somebody. There frequently will be in our court orders that they have to write an apology letter to whoever it was that they wronged.

PROFESSOR GORDON: Let me point out right there how different that is from our system, because you can have some pretty egregious malpractice cases or personal injury cases and the people get money, but they never get an apology. Even if they settle, you know the standard settlement language is, "We admit no liability," which is kind of like an anti-apology. I've

had clients bridle at that. Even though they were getting money, I said, No, no, no, the money is the apology. It doesn't feel like an apology, though.

JUDGE JORDAN: We had one case recently — and I feel like this one is kind of an important one because it sort of even taught me a lesson, I guess. We had an individual, I had a client who had gotten into a fight with his cousin who had been working with him, and they had gotten into a fight. My client ended up being charged with battery. The other individual really didn't want to press charges as it was getting closer and closer to going to trial, so he left and went to California for a while thinking it would all go away. Well, the prosecutor asked for a material witness for it. He came back. We decided to go forward. In the meantime, outside of our system and without any notice to any of the attorneys or the judge or the court system, the defendant and the victim went and talked to their grandmother, who is one of the tribal elders, a very regal, wonderful woman. I have worked with her on a couple of different matters and she's just very smart, very wise. And she sat them down and talked to them and said, okay, what's going on here. They settled it between them, and then they came back and wanted the prosecutor to dismiss the charges. The victim's mother did not want the charges dismissed because she was very angry about having had her son hurt during this fight that they had had. But her main thing, when we actually sat down and talked to her, her main problem was just dismissing it and saying, okay, let's let bygones be bygones, they've made up. And the grandmother said she had them do sweats and stuff together to make sure that they were back on good terms and that everything was worked out.

PROFESSOR GORDON: I'm sorry, do what together?

JUDGE JORDAN: Sweats, sweat lodge. It's a spiritual —

PROFESSOR GORDON: I've heard of that, but you used it so casually I didn't realize —

JUDGE JORDAN: It's a ceremony — they're usually done with some sort of tribal elder where they go into this main area where they do ceremonial sweats. It is something they do frequently for spiritual reasons. Anyway, she'd had them do that. So what we ended up doing is we went into court. We did what's called a continuance for dismissal. We continued the case out, I think it was six months, on the condition that my client and the victim would participate in ceremonial sweats with a tribal elder to completely work out and get rid of all of the bad problem and the bad feelings. However, the victim's mother, as I said, was very angry. And when we sat down and actually talked to her about it, we realized that mainly what she wanted was an apology. And so I talked to my client. I said, "You don't have to do this, but I think that it would be a really good thing if you did, if you feel comfortable doing this." And he went into court, and on the record in open court apologized both to her and the victim, and they all went away happy. You would never have something like that happen in a state court.

MOSES ESCOBAR: So could you please explain to me about the prosecution of a non-Indian for misdemeanors committed against Indians?

JUDGE JORDAN: On the reservation?

MOSES ESCOBAR: Yes.

JUDGE JORDAN: That would probably go to state court because

they would have concurrent jurisdiction over that. There's a certain classification of crimes. If it's a misdemeanor, it would probably go to state court, unless it were maybe a hunting and fishing violation, and then it would be in tribal court, because those are civil type things. But for criminal misdemeanors they would be referred to state court. And they cross-deputize a lot of state and tribal officers so that they can do that.

PAMELA SOLIER: So how would that jurisdictional question be answered in a civil dispute?

JUDGE JORDAN: That's a good question. It could be answered either way [if it's fee land]. If it's trust property, then it would have to be in tribal court, and that would be a civil issue, so there you more than likely would have tribal court or federal court jurisdiction.

PEDRIC ARRISGADO: There's a strong assumption in our society that crime is committed by the, quote, unquote, poor and indigent. And, if so, when it comes time to handing out punishment, do you find that difficult finding remedies because of the low income?

JUDGE JORDAN: Yes. Sometimes as far as handing out the punishment it is difficult. We do a lot of community service options in our court. And a lot of the community service is aimed to helping tribal elders cut wood, do that type of stuff, make meals, clean houses, that kind of thing for the elders. As far as the population, what we find is we get a lot of the same people repeating through the system, which is very similar to what you see in the state court. It's about ten percent of the population out there that we see coming through the court system. When you're working doing this type of work, sometimes you lose sight of that and you begin to think that everyone in this economic bracket is going to be doing this. And that's just not the case. There's a population that tends to just repeat itself. And if you go and watch in any of the district courts — I see a lot of the same ones that are repeats that I knew at [various district courts]. It's similar in tribal court.

PAT GRUTTOLA: What's the most difficult legal decision that's facing the Indian tribes today?

JUDGE JORDAN: I would say that a lot of the jurisdictional stuff that they're fighting in federal courts. They really have to fight hard to keep their sovereignty. That always seems to be under threat.

THOMAS RAYMOND: From an ethics consideration, does the tribal court system work with the ABA or do they handle that internally if there's any issues as to attorney conduct?

JUDGE JORDAN: No, they handle it internally. At least the tribes that I've worked with have. It's interesting, because the Colville Tribe, the one that I'm currently at, they have their own bar examination, and so in order to be admitted to practice there, you have to take their examination, and it's on general Indian law principles, and then also over their tribal code. Now, when I was practicing at the Coeur d'Alene Tribe, and I don't know if this is still the case because it's been a while since I've been out there, you just had to be a member of the Idaho Bar if you were not a tribal member, and you sign what they call a spokesman's oath which says you'll abide by their law. But I would assume from that, and I know that on the Colville Tribe if they're going to do any type of disbarment procedures, it is just with the tribe, and I don't believe they have anything that they report anyplace.

SABRINA POWERS: Based on your experience both as an advocate and as a judge in the federal court system, what do you see as the most significant challenges to achieving justice for the Native Americans?

JUDGE JORDAN: I would say the biggest one is money, just like it is in the state court system. The tribal court system is very underfunded. They don't have a lot of money for — for instance, in our office we have no investigators. As I told you, we carry about 600 cases, or a little over that at times, with two full-time attorneys and two full-time staff people and that's it, that's all we have. We do thousands of court hearings in a year. On Fridays our docket is stuffed from eight o'clock in the morning until four in the afternoon, and we're lucky if we get a lunch break most Fridays because usually the docket is just carried over, and sometimes we don't get out of there until quite late. It's expensive to do jury trials. And just like everywhere else, a lot of it's underfunded. So that's what I would say is the biggest challenge.

MO BRAYTON: My stepfather is a full-blood Nez Perce who was adopted by two white parents, and so he was an Idaho citizen. And when he met my mom, she said you really need to get involved in this culture. And now he is a tribal member. So how does that happen? I mean, he basically has dual citizenship. How do you consider him in the court?

JUDGE JORDAN: If he were on the reservation, they would have jurisdiction over him if he is full blood and enrolled. Usually they look at whether they're enrolled or they're descendants. And even if they're descendants if they're living on the reservation, they frequently will exercise jurisdiction over them. To get enrolled, each tribe has their own system. You have to have some Indian blood, usually the quantity is determined by the tribe itself, and then there's an enrollment process where you have to go fill out paperwork and go through all these steps to prove your blood quantum, and then they give you enrollment.

PROFESSOR GORDON: And if you have intermarriage and the quantity of blood, if you will, diminishes from generation to generation, doesn't a tribe basically mark itself for extinction?

JUDGE JORDAN: Yes. And, in fact, that was one of things that I did while I was at the Kootenai Tribe. The Kootenai Tribe of Idaho is a very small tribe, they have about two hundred members enrolled, at least that's what they had when I was there, and they suddenly realized at that point they were requiring that they have a fourth Kootenai blood quantum. And they suddenly realized, the tribal council was sitting there one day and suddenly realized that their grandchildren would be the last generation that would be able to be enrolled. So they realized we've got a problem here, we need to solve it. So we essentially went back and redid their whole constitution, I rewrote the constitution, and we rewrote their bylaws and, as a part of that, we rewrote the part relating to blood quantum. We changed it to they had to have some Kootenai blood and at least a quarter Indian blood, because that would continue on for a few more generations. But because the tribe itself is so small, they had been intermarrying with other bands and other tribes, and so it causes some great concern. The other interesting part of that was in their old constitution that had been written they had put everything subject to the approval of the BIA. And I said to them, "Why do you have that in there?" And they said, "Well, we thought we had to." I said, "No, you're a sovereign nation. Let's take it out." So we did, and they were quite happy with that.

BORIS PETRENKO: By what agency or how is tribal law enforced?

JUDGE JORDAN: They actually have their own police departments, most of them. Some of them still use BIA policemen, but for the most part they have developed their own tribal police.

DOUGLAS WOOD: I was just curious as to whether the [tribal courts] have any written form books? Is it all just word of mouth from tradition? Are the majority of the cases that are heard by the tribal system put into writing so that then they can go back and research these individual cases or does somebody just have to remember?

JUDGE JORDAN: It depends upon the court again and upon their system. For example, the Colville court actually has their own set of court reports that [my colleague, Jane Smith], as a matter of fact, has put together over the years, she started it, and they have both trial court decisions, the ones that were written, they only use the ones that were written, and they have the appellate cases. And she's even developed a time-saver system similar to Shepards to Shepardize those kinds of cases. Some of the court systems are real sophisticated. Some don't have any written opinions. And if you're arguing in those cases, what you may want to do is look at the American Indian Law Reporter, which has cases from all over the nation. Again those are still persuasive only. But a tribal court looking at a decision in an issue from another tribal court is probably fairly likely to follow in that same direction.

PROFESSOR GORDON: As we have no more time for questions, let's acknowledge Judge Jordan. [Applause.] And we can't let our court reporter work thanklessly forever. So first of all, let's acknowledge our court reporter, Elaine Rippen of Northwest Court Reporters [Applause]. Let me tell you one of the most impressive things that you'll see about Judge Jordan, she's not afraid to indicate when she doesn't know. Have you noticed that? Here's a person who has drafted constitutions for sovereign nations and has done all that work, and yet there's some areas in the law that you simply don't know. Nobody can know everything. Remember that. Because that's valuable to see how someone can pull this off and be as impressive as this person. Thank so much for being here. [Applause.]

Last Modified: Friday, June 13, 2003

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