

INTERVIEW

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Jones has devoted his law practice to serving indigent residents of South and North Dakota Indian reservations and adjoining counties. He has represented clients in federal, state, and tribal courts as well as in administrative hearings. His areas of expertise include federal entitlements, Indian law, domestic relations, and health law. He is a 1984 graduate of the University of Virginia School of Law and is admitted to practice in several state, federal, and tribal courts.

Interviewed by Aaron Arnold and
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Is it difficult to talk about tribal law and tribal justice systems generally when there are hundreds of tribes, including over 560 that are federally recognized?¹

Yes, it is very difficult to generalize amongst all these tribes, and I speak from personal experience. Right now I am the chief judge in Minnesota for a tribal court with a jurisdiction extending mainly to family and election matters. That's vastly different from the tribal court where I'm the chief judge in South Dakota, which has a much broader jurisdiction with about half the cases criminal prosecutions. Some tribes have courts that deal with only a limited number of issues, such as employment disputes. So trying to generalize what a typical tribal court looks like is almost impossible to do.

Do rules and procedures differ dramatically from court to court? Even if, for example, two tribal courts both deal with civil matters, can they operate very differently?

They can be vastly different. Each tribe has its own rules, its own civil procedures, its own civil substantive law, and many times the tribe will adopt a lot of state law, which obviously can vary from state to state. I go to South Dakota, North Dakota, Minnesota, and occasionally into Montana, and I always have to be sensitive to what the tribal code says. Treaties also contribute to the variation. I always tell my students that the first thing I do when I go into a community is read whatever treaty that tribe has with the United States because those treaties are alive and tribal law should be adhered to and respected. So, yes, there is a diversity of law that governs tribal courts.

What is the biggest obstacle facing the optimal functioning of tribal courts today?

The biggest obstacles that we're dealing with are the generations of dysfunction that have been brought about by some of the policies of the United States government. A lot of the disputes that you see in court have a root cause that goes back generations, and a lot of the crimes are alcohol and drug-re-

1. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648, 13,648 (Mar. 22, 2007); Bureau of Indian Affairs, U.S. Dep't of Interior, Frequently Asked Questions, <http://www.bia.gov/FAQs/index.htm> (last visited Jan. 30, 2010).

lated.² They have historical antecedents, and we in the justice system have to work in tandem with those who are trying to make the community well before we're going to see any progress. I think we have to work with tribal leaders and those in the healing professions to try to help the community deal with a lot of the historical things that have happened within families and within the tribes.

How does that manifest itself in your work as a judge?

Just yesterday, for example, I had a custody dispute between a grandparent and a father of a child. The rules say I'm supposed to apply the old model of swearing people in, having them testify and cross-examine each other, but, you know, it's not effective. There were a lot of issues this young man wanted to talk about that had happened to him as a young man. He and his mother had never really been able to sit down and address those issues, and I'm sure she had things that happened to her in her family that she needed to explain to him. So we kind of went off the record and started engaging more in a traditional-type discussion of things, but everybody talked; there were some visitors there who wanted to talk too. It takes a lot longer, but a lot of these things don't get aired in a Western-model type system where you just talk about what's relevant evidence, things like that. I think most tribal judges are like that: we skirt around the surface of the real problem, and we never really take the time to let people air their real grievances and real hardships.

I think in tribal courts now, we're trying to get back to a system that goes right to the root cause of a conflict. The majority of the crime I see occurring has historical antecedents. I could point to a young woman who commits a crime and comes to court. I could point out a situation that occurred 20-25 years ago that probably explains why she's doing what she's doing, yet nobody ever helped her heal from the trauma she suffered. In the criminal justice system we're dealing with a lot of victims who went uncured over the years. And tribes are having to go back and confront some pretty sad realities—not

2. See STEWART WAKELING ET AL., NAT'L INST. OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS 15 (2001) (noting that "the crimes that most occupy police in Indian Country . . . are directly or indirectly related to alcohol abuse).

only what happened to them but what they've done to their own members. That's what we're trying to do in court systems.

How would you describe the fundamental differences between tribal and non-tribal jurisprudence?

I think non-tribal systems rely too heavily upon solutions by others: judges, lawyers. In tribal court we're trying to emphasize that the solutions lie within the community and lie within the persons who engage in conflict. In tribal courts, the lawyers and the judges are really secondary. It's the people who are involved in conflict that have to find their own manner of resolving it because the community is going to rely upon them to make it a healthy community in the future. To me it's a lot more internally-driven rather than externally-driven by judges and lawyers.

Do you see the judge as more of a facilitator—someone who tries to make sure the various participants have a chance to express themselves and come to a resolution—rather than someone who makes determinations and issues orders?

A lot of times people are more satisfied with an outcome, even if it's contrary to their wishes, when they feel that somebody has listened to what they had to say. There are so many problems in Indian country that have never been aired because nobody was willing to listen, so I think the number one quality of a tribal judge is to sit there and listen and then make a decision that people perceive as fair, and perceive as the product of listening to their problem. A lot of people see the state court system as not really interested in listening—unless an attorney is speaking—and applying rules that are concrete and non-malleable and based exclusively on what some legislature has said. So I think the tribal court judge needs to be more of a listener than a law-applier.

What are the most common misperceptions that practitioners in state courts have about tribal courts?

One is the mistaken belief that all decisions in tribal courts are driven by political factors or considerations. I'm amazed by the number of attorneys who have told me they represent a bank, and they make no attempt to repossess collateral or foreclose on properties because they say they have understood that the tribal court is not available to provide a remedy to a non-

member. Then they come into court and they realize that the system is actually more creditor-friendly than the state court system. So I think the number one misperception is that the tribal court is politically-driven, will never make a decision contrary to a tribal member's interest; it's just simply not true.

The number two thing is that tribal courts make decisions based upon some mystical, unwritten law that defies common sense or defies common understanding by non-Indians. Again, that's untrue. I mean, if you ask non-Indians who live in tribal communities, who understand the families, understand the values of the community, they're probably more comfortable going into a tribal setting than a state court setting. There's nothing mystical about what happens in tribal court. Most tribes have written law.³ Sometimes written law is contrary to tribal values and customs, but it's sometimes written by attorneys familiar with state law because tribes like to have laws that are understandable by outside attorneys, and they think that gives them credibility with the outside world.

You've talked about what you see as the proper role of tribal court judges as listeners and appliers of traditional law. Given the fact that some tribes have chosen to contract with attorneys from other tribes or even with non-tribal members to be judges, what effect do you think that has on those tribal courts?

It really depends on who is providing services to the tribe. I think a lot of tribes would say they would prefer to have someone from the outside coming in to be judge just because of all the multiplicity of relationships in Indian communities. Relationships are big things in tribal communities; everybody knows who they're related to, and there's oftentimes a perception that because the judge is related to such-and-such person, it can't possibly be a fair system, so some tribes prefer to bring in outsiders who have no relationships with anyone in a case.

I've seen a lot of successful ventures between tribes and outside attorneys, or outside law firms that come in and run justice systems, and it's because the outside attorneys are really

3. See Tribal Law & Policy Inst., Tribal Codes or Statutes, <http://www.tribal-institute.org/lists/codes.htm> (last visited Feb. 22, 2010) (providing database of tribal codes and statutes).

sensitive to understanding tribal values and trying to incorporate those into the justice system. But, of course, you can also have people coming applying purely state law, who are not really interested in hearing from people. They'll look at a case and say, "You have to rule according to the law," and they'll just go into court and not give people the chance to express their opinions. That's not a very positive thing in the community. Again, listening to people express their feelings is an important aspect of tribal justice; that's why a lot of the hearings in tribal courts go on longer than state court proceedings.

And we rarely resolve disputes by motions—motion to dismiss, motion for summary judgment—because they're kind of contrary to how tribes decided disputes. Tribes didn't decide disputes by writing letters to each other. They decided them by getting together, talking for hours and hours and hours, and reaching a consensus. I think that's one thing that outside attorneys have to realize: there's not going to be a lot of motion practice, where they get to throw out cases or resolve disputes by written motion.

Let's stay with that theme for a second. What do you think that state courts can learn about the administration of justice from tribal courts?

Well, the number one thing I think they need to learn is that tribal courts administer justice for impoverished or poor people a lot better than state courts. My biggest critique of state courts is that they're not user-friendly for people without attorneys. We have tribal members who live all over the country, who come back to the tribal court to get their legal matters resolved—not because they don't think they could get a fair shake in state court, but they just don't have the resources to get a voice in state court.

One thing about the tribe I work for in South Dakota, the Sisseton-Wahpeton, is that the tribe allows its members to get divorced in its court wherever they live. We have people coming into our court from all over the country, and one of their typical complaints is they don't have the resources to go into the state court and get an attorney, and when they try and do things *pro se* in state court, they come up against all these barriers. The tribal court is much more user-friendly to indigent per-

sons. Many people get a sour taste in their mouth in state court because they're told, when they come in to talk to clerical staff, "Just go away, don't come back until you get your attorney"—that's one thing we do a lot better.

Another thing we do a lot better is just let people be heard. I hear so many complaints about state court from say, grandmothers, who come to court for cases about their grandchildren in state court, and they think they're going to be heard. They wave their hand, they raise their hand to be heard, and the judge says, "No, I can't do that. That's out of order; I can't let you just talk." In the tribal court, we listen a lot better, I think.

Thirdly, I think that we do a little bit better job of trying to learn the values and customs of people we administer justice for.

How important do you think it is for state and tribal court systems to have a good relationship or even have collaborative relationships? And how can they go about promoting better communication?

I think it's done on a local level. My perception working in Minnesota, North Dakota, and South Dakota and being involved in tribal state forums all over the country, is you need to develop that local relationship. What happens on a statewide level oftentimes sabotages tribal/state relations, but that doesn't mean you can't have good relations on a local level. Here in Minnesota, for example, we have a great relationship between the Prairie Island Tribal Court and the local state courts. We go out with state court judges every other month for breakfast and we talk about the issues. One of the reasons we do that is we have concurrent jurisdiction over a lot of disputes. We don't want people running back and forth to courts doing forum shopping because it wastes judicial time, and it's just not productive. So, we have a state tribal judges forum here in Minnesota where we get together and talk about things like each other's orders and when one court should defer to the other court's jurisdiction. We talk about child support. We talk about custody orders. We talk about a variety of issues that we deal with, and it just requires you to sit down with the state judges and work one-on-one.

Most of these state judges want to develop good working relationships with tribal courts. It's when you deal with the state-level issues that conflict comes into play, and you just have to be able to deal with that conflict, and keep a good local relationship with the state judge. I think state judges want to learn from tribal court judges. One thing about tribal courts that state judges are most impressed with is the number of cases we process compared to the state court. On some reservations, there are tribes that are processing 8,000 to 9,000 cases a year; whereas the state courts in those areas are processing maybe two to three-hundred—yet the state court has more resources.

How—given the fact that the state courts have more resources, and, as you said, tribal hearings can be more involved and more time consuming—can tribal courts handle that many cases?

Well, a lot of them just don't rely upon attorneys to do things for them. They empower people to do things for themselves. If you look at a typical divorce complaint, there's no reason why an attorney needs to prepare that; anybody can fill in a blank. You look at some of the Montana tribes that handle that volume of cases and see that they have no attorneys at all involved in the system: the prosecutors are lay people, the defense are lay people, the judges are non-attorneys, yet they handle that volume of cases.

Now sure, you're going to go look at a case and say, "Wow, this was not done right. This is a violation of due process." But if people are content with the resolution of a matter, who are we to complain about the method that was utilized? I think it's the fact that they've discovered—and this is really antithetical to most attorney's creeds—but they've discovered that you don't need attorneys to resolve disputes, and that's how they've kept costs down. I'm not advocating for a system like that because I think most tribes realize that there is room for attorneys who are sensitive to the fact that tribes do things differently, but I think that's how costs have been kept down by a lot of tribes.

In the state court system, we sometimes pride ourselves on the idea that we're undergoing an unprecedented period of innovation and growth. We're seeing problem-solving courts,

restorative justice, community justice, and other ideas, many of which really aren't original to us but have roots in tribal justice practices. Do you feel that some of these innovations taking place in state courts can inform the work of tribal courts? Are there any specific programs or initiatives in the state courts that you feel could translate to tribal courts?

I'm not really attuned with too much that goes on in state courts. I don't practice there that much anymore. I do know that, for example, the drug court movement that started in Florida⁴ is ideally suited for tribal justice systems because of its whole theory—that crime is oftentimes committed because of addiction, and if you help with the addiction, you overcome the crime. I think that's why so many tribal courts have chosen to seize upon the opportunity to start such courts.

The model for the drug court is, I believe, the most relevant for crime in Indian communities. I think 95, 96 percent of the crime that goes on is drug or alcohol related,⁵ and I think tribes have taken it a little bit further and instead of saying, "Crime is a result of an addiction," they say, "Crime is a result of an addiction that is a result of a trauma," and you have to find out the trauma. Maybe there's a historical trauma—how the tribe was dealt with historically as the root cause—or maybe there's an individual family trauma that the person has to deal with. But that model, the drug court model is perfectly, ideally suited for tribes.

And then there's the problem-solving model.⁶ We run a treatment court in Sisseton-Wahpeton. We try to invite as many community members into the partnership as we can. You need to get the perspective of a variety of the community members to really know what's going on and try to propose a solution that'll work. So I like that model applied to Indian communities. There's a myth out there that state court models don't

4. See generally Hon. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 454 (1999) (noting that the "first [Drug Treatment Court] was established in Miami, Florida, in the summer of 1989").

5. See WAKELING, *supra* note 2.

6. See generally Greg Benjamin & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, in JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 73, 73-86 (Bruce J. Winick & David B. Wexler eds., 2003).

work in tribal communities. I don't think that's correct. I think the state court model that's strictly based on the adversarial system is not going to work in most tribal communities. But state court models based upon problem-solving like the drug court model, the restorative justice model, really come from tribal thought processes, so I think they work really well in tribal communities.

Can you talk more about historical trauma? It's such a huge issue, and we wonder how it's addressed in the justice system, or how the justice system can even begin to address it?

Well, let me give you an example from treatment court. Most of the participants we have in this court have been convicted of a felony—a drug or alcohol-related crime in state court. And they've received a suspended sentence, with the opportunity to expunge their conviction if they complete our treatment court. A lot of them are really young people. We had a young lady—only like 20, 21—but she already had multiple driving-under-the-influence charges and some violent charges; when she got intoxicated she was very violent. We had a situation where she was allegedly assaulting a deputy, and one of the things we knew with her was that she had been the victim of some pretty horrific abuse, and nobody had ever helped her confront it, and nobody ever helped her perpetrator confront it, and he was a family member. So what we did was instead of just working with her, we worked with him, to help him confront what had happened with him. When we got them together, he fully explained to her what had happened to him. She didn't know why she had been victimized, and thought it was her fault. When she got an understanding of what had happened to him, in a way she got a little healing from that. So by working to heal her perpetrator, we kind of helped heal her. That's what I mean by historical trauma.

What's happening with the present generation? You could probably explain a lot by looking at what happened a hundred years ago. But nobody ever took the time to go back and try to help those people heal. So you have to go back and find the oldest generation that's still living, still suffering from trauma, and work with them before you're ever going to help the youngest generation. It's a little unorthodox to say to a victim,

“Hey, you need to grieve for your perpetrator,” but that’s kind of what we had to do in this particular case.

Is innovation difficult to foster in tribal justice systems? And how do you mesh the idea to innovate and create change in tribal justice systems with the desire to adhere to traditional practice as well?

Innovation is tough in one sense because a lot of the tribal courts that exist today are based upon a tribal code and rules that evolved from the old courts that the Bureau of Indian Affairs set up.⁷ It’s really hard to be innovative when you have a really restrictive tribal code.

I’ve tried to get innovative, for example, in probate cases. There are a lot of customary laws about what would happen to property after a person’s death, and a lot of these customary laws run totally contrary to most of the probate codes from the Bureau of Indian Affairs that tribes have enacted. The Bureau of Indian Affairs laws specifically attempted to do away with the customs and traditions.⁸ Now for example, I may be hearing a probate case, and the probate code specifically says, such-and-such person gets this property. Well, what’s happened if the family has burned everything on that property? And, one of the family members is saying, “Hey, I want this code strictly adhered to. I want them to reimburse me for all this property that’s been burned,” but maybe under customary law, burning was what was supposed to happen. Or, under customary law, each of the decedent’s friends had a right to come in and choose some of this property, and now what happens if one of the heirs says, “Hey, the code says I get all this property.” So, the tribal codes sometimes inhibit innovation because they are the by-product of an assimilationist code that was enacted by the Bureau of Indian Affairs.

The number one problem we have with innovation in the court system is that we have some pretty rigid tribal codes that

7. See Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 147 (2006) (“The first tribal courts for many reservations were the old Courts of Indian Offenses These courts [were] Article II courts created by the Secretary of the Interior and run by the BIA to regulate the reservation activities of Indians.”).

8. See *id.* (“The BIA enacted reservation law-and-order codes as federal regulations for every activity of reservation life from crimes to curfews to religious ceremonies.”).

need to be revised or looked at. I think the Justice Department's funding of tribal courts has been much more open-minded than the Department of Interior's because the Justice Department has said to the tribes, "Here's money. You design the systems the best way you see fit for your community," whereas sometimes [the Bureau of Indian Affairs] has said, "Here's some money. You need to hire a judge, prosecutor, probation." And by using that money they'd steer the tribe towards a western system. If you hired a peacemaker in court, I doubt the Bureau of Indian Affairs would pay for that position because they would say, "That's not part of the justice system." So I think the Department of Justice has been more conducive to innovation than the Bureau of Indian Affairs.

How important is it for a tribal justice system to have an independent judiciary?

It's extremely important that the tribal court have an independent judiciary, as long as the tribal court understands there are boundaries beyond which it can't go. I think if you look at cases where there's been conflict between tribal courts and tribal governments, a lot of those conflicts were maybe due to the tribal court exceeding their authority. Tribal governments need to be a little bit better explaining in their codes the limits of a tribal court's jurisdiction. Can a tribal judge, for example, overturn an election when there's not been a formal protest of the election? Can people just go right to the court and ask that the election be overturned? That's where conflict comes in. A lot of people believe tribal courts are not independent because you can't march into them, and get some active tribal government overturned. But the same thing is true about state and federal courts: you can't just march into a state court and get a state judge to overturn a decision that the governor made to expend money in a certain area.⁹ A lot of this is overblown, this notion that, "Oh tribal courts aren't really independent branches of government because they're limited in their powers and they can't overturn what a tribal government's done."

But I do believe that a lot of tribal courts do suffer from their limited ability to address wrongs that tribal governments

9. See, e.g., *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 615 (2007) (finding no taxpayer standing over executive discretionary spending).

have perhaps inflicted upon tribal members. Many tribal governments recognize this and now are starting to execute limited waivers of immunity, allowing themselves to be sued in tribal courts.¹⁰ I believe that this is because they understand that if the remedy is not provided internally by the tribal courts, one day the federal courts may opt to start exercising jurisdiction over internal conflicts. This is an evolving process. Maybe 50 years from now it'll be better to judge whether tribal courts are truly independent. If you look at the early federal courts, there's no way you could say they were really independent branches of government. Most states ignored what the federal courts did. In fact, I'm pretty sure there was a U.S. Supreme Court decision that ordered Georgia not to execute a Native man.¹¹ The state of Georgia openly ignored it with impunity; nothing was ever done to Georgia even though they executed a man in violation of a U.S. Supreme Court stay of an order.

Tribal courts are evolving. To judge them now as not being truly independent when they're relatively young is a little premature. Give them some years and let tribal government and tribal courts air out their differences and work out a resolution. Then we can judge them.

It does sounds like you're saying that, within certain boundaries, an independent judiciary is important for the overall health of a tribal government.

Maybe, if that's what the people want. I always think it's up to the people. Maybe the people don't want a judge who's beyond the control of the tribal council because ultimately everybody should be accountable to the people. And I personally don't think judges should be able to come into a community, and say, "I made the decision. I'm the judge. You can't question what I do." To me, yeah, that sounds like independence, but it's not what independence means in a tribal community. So I think most tribal people will say they don't want judges like

10. See generally Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137 (2004).

11. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 12 (1831) ("The individual, called in that bill Corn Tassel, and mentioned as having been arrested in the Cherokee territory under process issued under the laws of Georgia, has been actually hung; in defiance of a writ of error allowed by the chief justice of this court to the final sentence of the court of Georgia in his case.")

that; they want judges who can be removed when they step out of line. But it should be up to the people what kind of system they want. I don't necessarily accept the premise that an independent judiciary is essential to effective tribal government; it's up to the people.

Do you think that tribal court innovations are being adequately promoted and shared among the tribes themselves?

That's a real good question. I think we really—with so many tribes and so many good things going on—we really don't know what all the tribes are doing that's innovative and can help other tribes. I am amazed every time I go to a conference and talk to a judge, and he's telling me about some innovative thing they're doing in their community. I was talking to a judge who has a veterans' court where they get veterans to judge the misdeeds of other veterans in criminal and civil cases. I thought that was greatly innovative. But you would never find out about this unless you met someone who was involved.

We have a real need, I think, for maybe a publication or something, about innovative practices in tribal courts. We've been trying to throw something like that together but it's just so difficult to find out what's going on in tribal communities because tribes just are so busy with dispensing justice that they don't have time to toot their own horn sometimes. I think it would be a great idea to have some publication canvas all the innovative things going on in tribal communities.