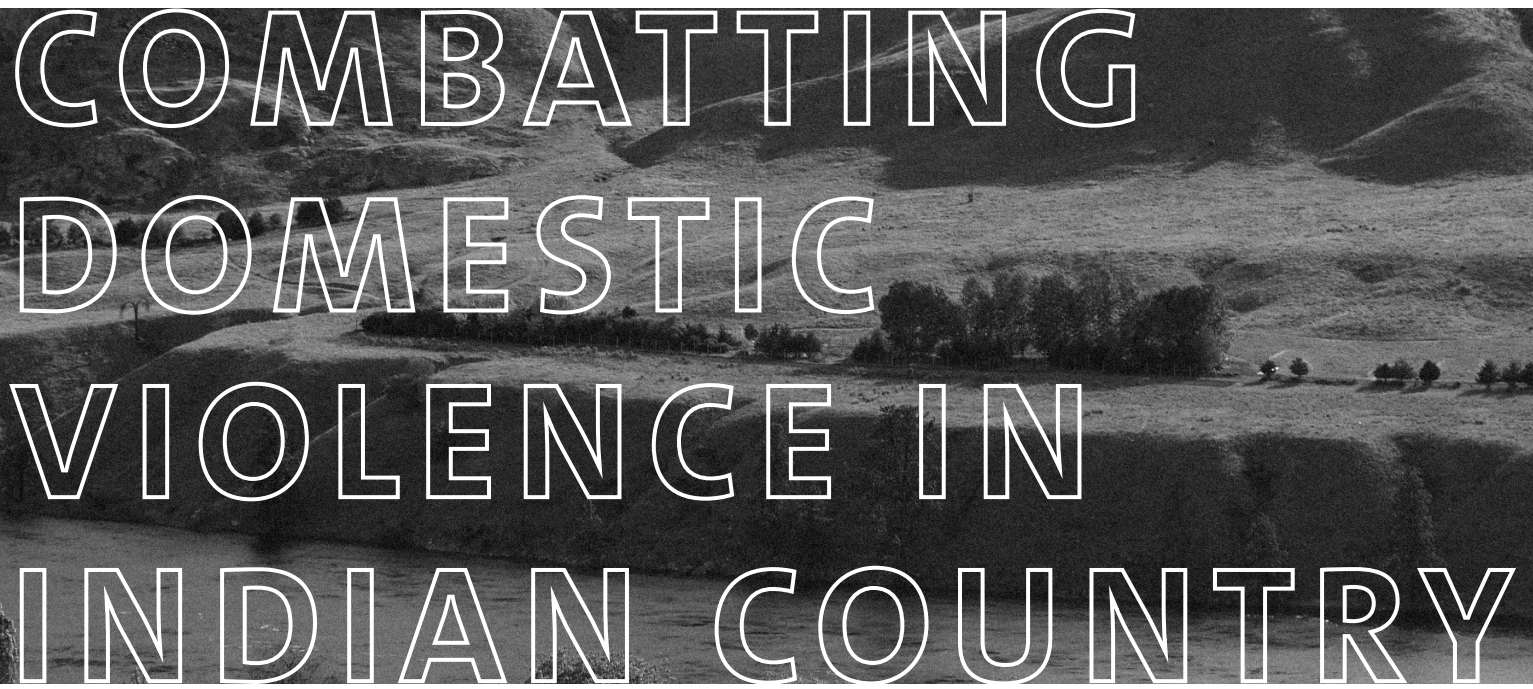


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COMBATTING  
DOMESTIC  
VIOLENCE IN  
INDIAN COUNTRY

Are Specialized Domestic Violence Courts Part of the Solution?

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<i>author</i>	<i>date</i>	<i>about</i>
Kathryn Ford Children & Families Specialist, Tribal Justice Exchange & Domestic Violence Programs Center for Court Innovation	2015	This publication was supported by Grant No. 2009-IC-BX-K002 awarded by the Bureau of Justice Assistance to the Center for Court Innovation. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

# COMBATting DOMESTIC VIOLENCE IN INDIAN COUNTRY: ARE SPECIALIZED DOMESTIC VIOLENCE COURTS PART OF THE SOLUTION?

## I. OVERVIEW

All communities struggle with domestic violence. However, Native American communities, even more than other communities in the United States, have experienced an epidemic of domestic violence in recent decades. The limited prevalence data indicate that Native women experience all types of violent victimization at a higher rate than any other racial or ethnic group in the United States. A 2008 study by the U.S. Centers for Disease Control found that 39 percent of Native women reported experiencing intimate partner violence<sup>1</sup>, while in a 2000 national survey, 34 percent of Native women reported having been raped.<sup>2</sup>

The research also shows that Native women are more likely to experience severe forms of domestic violence, such as marital rape, physical assaults that cause significant injury, stalking and homicide<sup>3</sup>. A New Mexico study documented an intimate partner homicide rate for Native women of 4.9 per 100,000 women, in contrast to 1.8 for white women.<sup>4</sup> Tribal justice practitioners are confronted daily with the prevalence of domestic violence. For example, the Northern California Tribal Court Coalition reports that up to one-third of all civil cases are domestic violence-related.<sup>5</sup>

Many of the dynamics of domestic violence are consistent across communities and cultures. However, in Native communities, there are compounding factors, such as historical trauma and forced assimilation. These factors have impacted gender roles, marriage, family life, and norms around peace and violence. According to B.J. Jones, chief judge of the Sisseton-Wahpeton Oyate Tribal Court, “Not only have the women been battered, the culture has been battered, and until that’s restored, women aren’t going to be protected.”<sup>6</sup>

Many Native advocates report that the majority of domestic violence is perpetrated by non-Natives, and the research supports this assertion, with some studies finding that upwards of 65 percent of violent assaults of Native women are committed by non-Native men<sup>7</sup>. According to Chris Peters, cultural adviser for the Northern

California Tribal Court Coalition, “Because of boarding schools and the acculturation of Native peoples, there has always been an oppressor, and more often than not, the oppressors are very violent people. So from sexual violence to physical violence, Native people have been subjected to it for generations.”<sup>8</sup>

These challenges are further complicated by the fact that tribal governments do not have criminal jurisdiction over non-Natives<sup>9</sup>. This lack of authority was identified by several tribal justice practitioners as one of the most significant impediments to protecting Native women from domestic violence. Darrell Dowty, associate justice of the Cherokee Nation Supreme Court, has observed, “There is no question that non-Indians constitute by far the majority who commit these assaults in Indian Country. As long as tribes have no criminal jurisdiction over non-Indians who assault Native women in Indian Country, the problem will not be effectively addressed.”<sup>10</sup> Chronic re-offending by both Native and non-Native perpetrators is another concern. According to Chris Peters, “Over the years, there have been services to help the victims, but the perpetrators go to jail, come out, find another woman, and beat her up, too.”<sup>11</sup>

Tribal leaders consistently report that traditional Native societies did not experience violence against women in the way they do today, and that protections for women were in place and women were highly respected. Judge B.J. Jones describes the disruption of traditional norms in the following way:

I don't mean to generalize amongst all tribal communities, but before contact with Europeans, it was a common theme that women were sacred and the bearers of life, and really, the most important members of the community. Most tribes made punishment so harsh for domestic violence that it was really unseen in most tribal communities, to violate the sacred. But with Europeans, the very first courts that were set up for tribal communities de-emphasized the need to protect women. The original code in no way punished a man for abusing his wife. It made abusing an animal more severe than abusing a wife. As the government attempted to assimilate Indians into the agrarian economy, there was also an emphasis on men to discipline their wives, which brought an unnatural view to men, that it was their right to do this to women. This brought a lot of turmoil to communities where women had been respected previously...The European belief system has been imposed on Natives, that men are the center of the universe, and that's just not the case...In a lot of tribal communities, people don't understand the traditional values, and in a warped sense, people think [domestic violence] is appropriate.<sup>12</sup>

Historically, when domestic violence did occur in tribal societies, it could be punished severely, including through banishment, disfigurement, and capital punishment.<sup>13</sup> More commonly, though, a community elder would be appointed to mediate between the families and craft a decision requiring the offender to repay the victim, the victim's family, and the community as a whole for the harm they caused. According to Judge Abby Abinanti of the Yurok Tribe, “Family intervention was the traditional response—uncles, brothers, or fathers would intervene on behalf of both parties and there would be a stop to it. In some cases, they would require a

separation and/or they would seriously counsel the individuals, and possibly have someone move into the house to monitor the situation. It just wasn't conduct that was tolerated, and wasn't widespread, frankly, because if you have a firm community standard against it, it just doesn't happen very often. Now the outcome of oppression is that you have a lot of behaviors you didn't have before."<sup>14</sup> However, because family violence was not culturally condoned in traditional Native cultures, an unfortunate side effect today is that community norms requiring silence about victimization may discourage reporting of family violence. "There are strong traditional taboos around that behavior. It's very shaming for both people involved, so the pressure on both of them is to avoid reporting," said Judge Abinanti.<sup>15</sup>

In responding to domestic violence today, tribal communities face several special challenges. Perhaps the most significant is the jurisdictional quagmire created by overlapping federal, state, and tribal jurisdiction. This convoluted legal framework, which has been built and reinforced by more than a century of federal laws and court decisions, requires that tribes, states, and the federal government each play critical roles in the investigation and prosecution of crimes that occur on reservations.<sup>16</sup> Tragically, many domestic violence cases are not prosecuted at all, as cases fall through the jurisdictional cracks. If a non-Native offender commits a domestic violence crime against a Native woman on a reservation, the tribe is unable to prosecute the offender. Moreover, federal or state authorities might fail to take up the case because of lack of resources or other reasons: a 2010 study by the U.S. Government Accountability Office found that U.S. attorneys decline to prosecute nearly 52 percent of violent crimes that occur in Indian Country<sup>17</sup>. According to Judge Dowty of the Cherokee Nation, "Federal prosecutions have been ineffective in reducing the escalating crime rate in Indian Country...There is a current emphasis on improving the federal response to the problem, but until tribes can prosecute all crimes committed by all persons in Indian Country, a void will remain in effective prosecution and in the exercise of true sovereignty."

Even cases involving Native offenders present special problems for tribal communities. If the federal or state government declines to prosecute felony-level physical and sexual assault cases, these cases are sometimes prosecuted by tribal governments in tribal courts. However, federal law severely hampers the ability of these courts to impose appropriate sentences. Until recently, federal law dictated that tribal courts could impose a maximum sentence of one year in jail for even the most serious crimes. In 2010, the Tribal Law & Order Act authorized three-year sentences, but only if the tribal court judge is a licensed attorney and the defendant is provided legal representation by a licensed attorney. Many tribes lack the resources to meet these requirements and, therefore, will not be able to take advantage of the enhanced sentencing authority created by the new law.

Tribes' response to domestic violence may also be complicated by conflict or mistrust between the tribal council and the courts. In many tribal communities, the tribal court is not an independent branch of government. Rather, the court is subject to the oversight of the tribal council, which may be able to appoint and remove judges, control the court's funding, and even overrule judges' opinions. Under these circumstances, judges are understandably concerned about the political repercussions of unpopular judgments, particularly in cases involving council members or their families. According to Chris Peters of the Northern California Tribal Court Coalition, "Judges may serve at the pleasure of the council, so if a councilmember is involved in a domestic vio-

lence situation, it can have consequences for the court. Those are issues that need to be overcome. The court has to be a legitimate institution in and of itself, not subjected to tribal politics.”<sup>18</sup> Similarly, Judge Dowty of the Cherokee Nation reported that in tribes where the council maintains authority over the courts, “The risk of tribal political influence is higher. Judges have difficulty maintaining independence and many good judges have unfortunately short tenure.”<sup>19</sup>

Even if the tribal court is independent, either by law or in practice, existing tribal codes may not adequately address domestic violence; the tribe’s code may not include statutes criminalizing domestic violence, and there may be inadequate sentencing authority or a lack of creative sentencing options like supervised probation and other interventions designed to hold offenders accountable and protect victims. Code revision or even changes to tribal constitutions might be necessary to address domestic violence effectively.

In addition to legal and political difficulties, tribal communities often struggle with severe socioeconomic inequities and logistical barriers, which can both exacerbate domestic violence and impede an effective response. These can include high rates of unemployment and poverty, low educational attainment, and widespread substance abuse. Many tribal communities are small and geographically isolated, with limited access to services and little privacy or confidentiality. Chris Peters observed that, “Most tribal communities are situated in extremely rural locations where the response rate for tribal security and police is really delayed. Isolation is a major problem.”<sup>20</sup>

Delays in law enforcement response, combined with inconsistency in the handling of criminal matters, has in many cases undermined tribal justice systems. Victims and their families simply may not see law enforcement and the courts as helpful resources that will ensure their safety. According to Judge Abinanti, “On our reservation, you could be an hour or two away from a vehicle arriving after a report, which creates an attitude of ‘why bother?’ And sometimes the police just don’t respond...Reporting to police is not seen as something that will help you be safe.”<sup>21</sup>

In tribal communities, transportation options are often limited, and there may be lengthy travel times both for community members to access services and for service providers to meet and collaborate in person. The services that are available may not be culturally appropriate. And some specialized services that are readily accessible in non-tribal communities, such as batterers’ intervention programs, rape crisis services, trauma-focused mental health care, and domestic violence shelters, may not be available on some reservations. Due to these unique dynamics, and differences in cultural values, many tribal leaders feel that the Western model of responding to domestic violence is not applicable to their communities. In contrast to the case processing that often occurs in state and federal courts, tribal justice has long emphasized a holistic approach that considers the person in the context of his or her life experience and community. As Judge Dowty explained, “Traditional tribal justice has included healing and restoration as well as penal solutions. The codes of some tribes...place a priority on making the victim whole over the imposition of penal sanctions on the offender.”<sup>22</sup>

This viewpoint is also reflected in Judge Abinanti’s assertion that, “We need to address the issue of restoring the family to health, which includes the victims, the family, and the perpetrators, who are often members of our

community.”<sup>23</sup> Chris Peters of the Northern California Tribal Court Coalition noted that, traditionally in tribal communities, “There’s a repayment process. If you hurt someone, you’re responsible for that. A fine may be levied—it could be monetary, labor, ceremonial regalia, a wide range of activities that would be imposed to repay that infringement on someone else.”<sup>24</sup> In a tribal court case, all those affected can be involved in supporting victims and changing offenders’ behavior. The process is non-adversarial and encourages outcomes that benefit both parties, their families, and the community.

In addition, some tribal communities have recently developed specialized victim and offender services that are culturally-informed, such as batterers’ programs that incorporate traditional knowledge and practices “so people know better who they are and that things such as domestic violence or substance abuse or violent crimes aren’t who you are.”<sup>25</sup>

Despite these positive steps, it’s clear that the existing response to domestic violence is often ineffective and that there is a demonstrable need for new interventions. As stated by Chris Peters, “The current system...hasn’t worked for the past 150 years. The situation has just grown worse.”<sup>26</sup>

## II. WHAT IS A DOMESTIC VIOLENCE COURT?

The creation of specialized courts, including domestic violence courts, is one way that state courts have attempted to shift from a “one-size-fits-all” approach to one tailored to individuals and the community. The development of any specialized court is driven by the question, “Is there a better way to do this?” A domestic violence court is a specialized docket that handles domestic violence cases from the moment they are identified through post-disposition monitoring. Similar to many tribal courts, the judge and court staff in domestic violence courts are able to become familiar with the cases and the people involved. As Judge Abinanti explained, “Justice by strangers is a concept of the Western system. Traditionally, we’ve done justice by village people, people who know each other. It’s my responsibility as a community member to tell you that behavior is not OK.”<sup>27</sup> Domestic violence courts aim to marshal the resources of the court and community to respond to each case in the safest, most effective way possible, while holding offenders accountable for their behavior.

Domestic violence courts have been implemented in numerous states and in all types of jurisdictions: urban, suburban, and rural. The structure of each domestic violence court is tailored to the needs of the community and its particular caseload. A typical domestic violence court begins with an intensive planning process that lasts six months to one year. Baseline data on how domestic violence cases are being processed can and should inform the development of each court. For example, some domestic violence courts operate full-time. Others convene only once per month due to a small number of eligible cases. Central to the model is the resource coordinator position. The resource coordinator’s function is to develop and maintain relationships between the domestic violence court and its community partners, including victim services agencies and batterers’ programs. The resource coordinator enables the court to make appropriate service referrals for both defendants and victims.

Another, related innovation in responding to domestic violence is the integrated domestic violence court model. These courts employ a “one family, one judge” approach, handling overlapping legal cases—family, crimi-

nal, and matrimonial—involving the same family. In conventional court systems, these cases are often heard in different courts, with little or no communication between them, leading to frequent court dates in different courtrooms with different judges. This lack of coordination creates the potential for conflicting court orders that could jeopardize victims' safety. By pulling all these cases together into one specialized court, integrated domestic violence courts seek to improve coordination and communication and simplify the court process for litigants. The judge can make more informed decisions about cases, especially child custody and visitation matters, when he or she has access to more information about each family's case history and needs. It should be noted that while the different cases are coordinated, and are put together in a single file folder for each family, the integrity, confidentiality, legal procedures, and rules of evidence of each case are maintained—each case is heard separately, and has a separate section in the file folder. The integrated domestic violence court model may be similar to current tribal court practice in many ways, given that in many tribes a single judge handles both criminal and civil cases.

Both domestic violence courts and integrated domestic violence courts operate on several guiding principles. As in all specialized courts, a primary goal is to identify and address the underlying issues that people bring with them to court. In this way, offenders can be linked to appropriate services and resources, including batterers' programs, parenting programs, and substance abuse and mental health treatment. Domestic violence courts and integrated domestic violence courts also frontload services for victims. This may involve victim advocates being present in the courtroom to meet with victims, sending outreach letters to victims, or creating procedures to link each victim with an advocate at the prosecutor's office or police station.

Courthouse safety is an important consideration for domestic violence courts and integrated domestic violence courts—it's critical that community members aren't deterred from seeking justice and accessing the courts because of safety concerns. Typical safety measures include creating separate waiting areas for victims and offenders, providing private space for attorney-client interviews, training security staff to recognize and respond to intimidation and abuse in the courtroom, protecting confidentiality of victim addresses and other private information, and providing escorts for victims entering and leaving the courthouse. Tribal courts, which are chronically underfunded, are often faced with serious courthouse safety concerns. Judge Dowty of the Cherokee Nation recalls having to conduct a criminal domestic violence trial in a small trailer, requiring the victim, defendant, and their families to sit in close proximity to each other.<sup>28</sup> This kind of scenario poses obvious safety concerns that domestic violence courts strive to eliminate.

Domestic violence courts and integrated domestic violence courts seek to craft the safest and most appropriate decisions for each case. In many state courts, judges are forced to make important decisions in a vacuum, with little information about the defendant's history of violence, prior legal cases, or risk of future violence. Specialized courts seek to gather information from a variety of sources to help judges make individualized decisions. This may include the use of technology. For example, the Domestic Violence Court Application created by the Center for Court Innovation, and used in dozens of courts, tracks both case history and the offender's compliance with court mandates so the judge can respond swiftly and meaningfully to noncompliance.



Strict monitoring of defendants' compliance with court orders over time sends the clear message to offenders that "the judge is watching" and that they will be unable to manipulate the system or continue their abusive behavior without consequences. Many domestic violence courts have created a calendar specifically for compliance hearings. This "compliance calendar" may be held on the same day as the regular domestic violence court calendar or on a separate day. Compliance monitoring is often graduated, with an increase in frequency as a result of noncompliance, and a decrease in frequency when an offender is compliant with all court orders and conditions. In the case of noncompliance, many domestic violence court judges are creative in their use of sanctions, which may range from a weekend (or longer) in jail to community service, a fine, or having to sit in court for the day. Research by the Center for Court Innovation has found that defendants perceive the court process to be more fair when the court's expectations and conditions, and the potential consequences for noncompliance, are clearly delineated and the court adheres to these guidelines. The defendant's perception of fairness, in turn, promotes compliance with court orders.<sup>29</sup>

All specialized courts are predicated on a "coordinated community response," with the court acting as a convener to bring parties to the table to improve the system as a whole. Judicial leadership is essential to the ultimate success of any domestic violence court project, as is a commitment to partnership. Key partners include law enforcement, prosecutors, defense counsel, civil legal services, probation and parole, victim advocates, child welfare services, batterers' programs, substance abuse and mental health treatment providers, community leaders, health care providers, social services, and others specific to each community. In tribal communities, a domestic violence court stakeholder team might also include tribal council members, spiritual leaders, elders, cultural services, and traditional healers. Ideally, each partner agency should assign a designated representative to the domestic violence court. Domestic violence cases are among the most challenging and complex cases to handle. Specialization allows for the accumulation of practical experience and the development of strong inter-agency relationships.

More than other specialized courts, including drug courts, domestic violence courts emphasize the accountability of offenders. Research indicates that domestic violence is not an "illness" or a mental health disorder.<sup>30</sup> Nor are there any universally effective treatments for abusive behavior.<sup>31</sup> Therefore, domestic violence courts emphasize victim safety as a primary goal. Rehabilitation of some individual offenders may be a welcome byproduct of their court involvement, but as of yet, it's unknown exactly how courts and services can facilitate this change. Another significant difference between domestic violence courts and drug courts is that while drug courts are "opt-in" courts, in which a defendant can choose whether or not to participate, a domestic violence court is mandatory for all defendants whose cases meet the eligibility criteria established by the court.

Evaluation is a hallmark of the domestic violence court model and is essential to determining whether the court's intended outcomes are actually achieved. Some encouraging results have been documented in domestic violence courts. These include reductions in the number of cases that are dismissed; increases in conviction rates; more efficient case processing, as indicated by reduced time to disposition; reduced pre-trial recidivism by defendants; increases in the percentage of offenders mandated to participate in specialized programming;

increases in defendant compliance with court mandates; and improvement in victims' satisfaction with the court process.

But what about the cost of creating a domestic violence court, especially when resources are limited? In many places, domestic violence courts do not require any financial investment above and beyond typical court operations. The resource coordinator role can be performed by existing court staff, such as a court clerk or case manager, and the other elements of the domestic violence court model typically involve reorganizing and improving court practice rather than creation of new programs or services. For these reasons, domestic violence courts can be relatively easy to create and sustain.

### III. APPLICABILITY TO TRIBAL COMMUNITIES

So how might the domestic violence court model apply to tribal communities? Domestic violence courts are more aligned with traditional tribal justice values than conventional state courts, in that domestic violence courts are intentionally holistic and community-focused. They emphasize addressing the individual needs of offenders, victims, and children exposed to domestic violence, and they can provide a forum for improved community collaboration. Domestic violence courts can play the role of convener, bringing together representatives from relevant agencies to collaborate. The goal is to develop relationships, promote mutual learning, and make sure that scarce resources are used efficiently. Domestic violence courts can nurture this collaboration by holding stakeholder meetings several times a year.

The domestic violence court model also provides space for innovative court practices and integration of services based on local culture and tradition. In domestic violence cases, such interventions might include community service, mentoring, traditional healing practices, culturally-specific batterers' programs or substance abuse treatment, "identity-based counseling,"<sup>32</sup> and the involvement of tribal elders. For example, Judge Jones of the Sisseton-Wahpeton Oyate Tribal Court has advocated for the incorporation of peacemaking into the domestic violence court model: "The integrated domestic violence court is a great idea and really needed in Indian communities, as long as peacemaking is implemented alongside of it...How can we construct an integrated model that uses Indian concepts and holds offenders accountable?"<sup>33</sup>

In jurisdictions where a lack of tribal identity is thought to contribute to domestic violence, the domestic violence court can mandate offenders to cultural education and training, which may include instruction in tribal languages, traditional survival skills, and cultural norms. As Chris Peters of the Northern California Tribal Court Coalition observed, "With domestic violence, there's no ceremony, there's no process to [address] it. We have to talk to cultural leaders about what's available, what can we do...We have to own our responsibility for healing. It may be a period of time, trial and error, but at least we begin to own the illnesses, whatever they may be, and heal them within the traditions of our tribe."<sup>34</sup> Courts can play a critical role. Judge Abinanti described her role as a judge this way: "I try to say to the community, if you have this problem, come see me and I'll give you help and resources. Don't wait until you're arrested or the problem becomes bigger. You know what's right and wrong Yurok behavior. If you're doing wrong Yurok behavior, come address it and I'll help you."<sup>35</sup>

A domestic violence court can be creative in crafting victim compensation orders by using traditional practices like restitution through goods or labor. In addition, courts can harness the power of families and community members by using them to monitor offenders' behavior in the community, conduct preventive education activities, mentor offenders, and provide culturally-based healing practices. Chris Peters identified compliance monitoring as the purpose of a domestic violence docket: "Compliance monitoring either with a cultural mentor or a representative of the court [should be used], and there has to be a consequence if they're not coming in or cooperating. What the consequence should be is the million dollar question. [It could be] taking away visitation, imposing child support, or not being allowed to participate in ceremony."<sup>36</sup>

Tribal courts can be innovative in thinking of ways for offenders to repair the harm to individual victims, children, and the community as a whole. Tribal courts can also take advantage of the cultural practices that traditionally protected women and families, and use them in a systematic way to attempt to change offenders' behavior. An arrest or contact with the court system can thus be viewed as an opportunity to disrupt the intergenerational cycle of trauma and violence and create safer families and healthier communities.

Implementing a domestic violence court is no simple task. It requires thoughtful planning and the active involvement of multiple government and non-government agencies. Resources are always an issue, particularly given the needs in many tribal communities. Despite these obstacles, several tribal jurisdictions have begun the process of implementing a domestic violence court in an effort to increase safety and promote healing in their communities. It is still too soon to judge the success of these experiments. What is clear is that the development of domestic violence courts in tribal communities must reflect the local culture and the community's needs. According to Judge Abinanti, "It's really important that you develop a system that's consistent with your own culture...The problem has to stop, and the shared values against domestic violence have to be supported."

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9. All interviews for this article were conducted prior to the enactment of the tribal provisions of the Violence Against Women Act in 2013. As a result of that law, tribes have recently begun to prosecute non-Natives for domestic violence crimes. This option was first available to three tribes under a pilot program and is now open to all tribes who meet the statutory requirements. For more information, please see [www.ncai.org/tribal-vawa](http://www.ncai.org/tribal-vawa).
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14. Interview with Abby Abinanti, Chief Judge of the Yurok Tribal Court and Commissioner of the Superior Court

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21. Interview with Abby Abinanti, Chief Judge of the Yurok Tribal Court and Commissioner of the Superior Court of California (San Francisco), May 2011.

22. Interview with Darrell Dowty, Associate Justice, Cherokee Nation Supreme Court, May 2010.

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