UC DAVIS LAW REVIEW ONLINE

VOL. 57 MAY 2024

Healing from *Oklahoma v. Castro-Huerta*: Looking to the Future of Indian Country Criminal Jurisdiction Through Healing to Wellness Courts and Public Law 280

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INTRODUCTION

To say that Federal Indian[1] law is increasingly uncertain, particularly when it comes to criminal jurisdiction, is a generous overstatement. At the same time, the imposition of Western criminal justice policy and practices has been a destructive tool of colonization and genocide of Indigenous people since white settlers first arrived on the land now known as the United States. Since first contact, Indigenous nations have been resisting settler colonialism and asserting sovereignty by using traditional healing practices to address conflict and harm.[2] Today these practices are often manifested in Healing to Wellness Courts operated by tribes.

The Supreme Court's 2022 decision in *Oklahoma v. Castro-Huerta* threatens not only continued uncertainty for Indian Country criminal jurisdiction but also a coming attack on all aspects of tribal sovereignty, thus making tools for implementing traditional practices that offer alternatives to Western carceral systems while facilitating assertions of tribal sovereignty more needed than ever. Decades ago, some tribes suffered great affronts to their sovereignty when the passage of Public Law 280 ("PL 280") allowed certain enumerated states to assume criminal jurisdiction on tribal land. Many of these tribes are now leading the way in their implementation of Healing to Wellness Courts despite the additional barriers they face due to Public Law 280. As tribal nations look to the threats forewarned by *Castro-Huerta*, understanding the effects of Public Law 280 on the challenges tribes face in implementing traditional justice practices provides considerations for asserting sovereignty through criminal justice in an era of increasing jurisdictional uncertainty.

Part I of this Essay provides an overview of criminal jurisdiction in Indian Country, Public Law 280, and the immediate changes and future threats brought by *Castro-Huerta*. Part II discusses Healing to Wellness Courts generally. Part III analyzes three barriers tribes face when creating and sustaining Healing to Wellness Courts, and examines how

[1] This Essay uses the term "Indian" when referring to legal classifications set forth in federal law. When not referring to the legal classification, I use the term "Indigenous" or "Native American."

[2] *See* discussion *infra* Part II.

each barrier can be affected by a tribe's PL 280 status. Part IV looks at the Yurok Wellness Court as a case study of a successful Healing to Wellness Court operating under PL 280 jurisdiction. Part V synthesizes the differing challenges and successes faced by the Yurok Wellness Court due to PL 280 status and considers how the accomplishments of Healing to Wellness Courts under PL 280 jurisdiction can offer guidance for all tribes seeking to assert sovereignty in the face of *Castro-Huerta*'s threats.

I. CRIMINAL JURISDICTION IN INDIAN COUNTRY AND PUBLIC LAW 280

Indian Country criminal jurisdiction raises a plethora of issues for Indigenous communities. On one hand, the ability to assert criminal jurisdiction is a crucial element of tribal sovereignty and self-determination. On the other, Indigenous people in the United States are disproportionately likely to be victims of violent crime and are incarcerated in state and federal facilities at a disproportionately high rate compared to other racial groups.[3] Together, these two issues give tribes a strong interest in how criminal matters are handled on their lands and in relation to their members.

Criminal jurisdiction in Indian Country has historically been a complex and dynamic area of law, primarily involving shared jurisdiction between federal and tribal governments. In general, tribal courts have jurisdiction over all crimes committed by Indians in Indian Country,[4] and federal courts share concurrent jurisdiction for certain "major crimes" and for crimes involving a non-Indian victim.[5] In most situations, the federal government has exclusive jurisdiction over crimes committed by non-Indians against Indians[6] and the state has

[3] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.01 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK].

[4] "Indian Country," for purposes of criminal jurisdiction, is defined to include reservations, "dependent Indian communities," and allotments. 18 U.S.C. § 1151.

[5] *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL CT. CLEARINGHOUSE, http://www.tribal-institute.org/lists/jurisdiction.htm (last visited Mar. 22, 2023) [https://perma.cc/65BG-J5YB].

[6] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). The 2013 reauthorization of the Violence Against Women Act has allowed tribes to assume

exclusive jurisdiction over crimes committed by non-Indians against non-Indians, even when those crimes occur in Indian Country.[7]

Prior to the 1950s, the complex criminal jurisdiction scheme was relatively consistent across Indian Country,[8] but this changed with the 1953 passage of Public Law 280.[9] By enacting PL 280, Congress sought to reduce the federal budget, further force assimilation of Indigenous individuals into U.S. society, and address a purported issue of "lawlessness" in some parts of Indian Country by transferring federal criminal jurisdiction in Indian Country to certain enumerated states.[10] PL 280 replaced federal-tribal concurrent jurisdiction with state-tribal concurrent jurisdiction over "offenses committed by or against Indians" in Alaska, California, Minnesota, Nebraska, Oregon, and Washington.[11] In addition to these states where Congress made Public Law 280 mandatory, Congress later allowed other states to fully or partially opt in to PL 280 jurisdiction.[12] Five states — Florida, Idaho, Montana, Nevada, and Washington — successfully did so, although some of this jurisdiction has since been retroceded to the federal government.[13]

Tribes have been overwhelmingly opposed to PL 280 since its first passage.[14] In the 1960s, as the focus of Federal Indian policy began to shift from assimilation to tribal self-determination,[15] Congress responded to concerns over the lack of a tribal consent provision in PL 280 by including in the Indian Civil Rights Act ("ICRA") of 1968 a

concurrent jurisdiction in certain situations and when specific criteria are met. *General Guide to Criminal Jurisdiction in Indian Country*, *supra* note 5.

[7] *General Guide to Criminal Jurisdiction in Indian Country*, *supra* note 5.

[8] DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280, at 5 (2012).

[9] Public Law 83-280, also referred to as Public Law 280 or PL 280, is codified as 18 U.S.C. § 1162 and 28 U.S.C. § 1360. This Essay will focus on PL 280 as codified in 18 U.S.C. § 1162; 28 U.S.C. § 1360 discusses state civil jurisdiction in actions to which Indians are parties.

[10] CHAMPAGNE & GOLDBERG, *supra* note 8, at 7-9.

[11] 18 U.S.C. § 1162. Exceptions are included for a few specific tribes.

[12] CHAMPAGNE & GOLDBERG, *supra* note 8, at 14.

[13] *Id.* at 16-18.

[14] CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280, at 51 (1997).

[15] *Id.* at 55.

requirement of tribal consent for any future assertions of PL 280 jurisdiction.[16] Since the passage of ICRA, no tribes have consented to a state's request for PL 280 jurisdiction.[17]

A. Oklahoma v. Castro-Huerta *and the Future of the Criminal Jurisdiction in Indian Country*

The Supreme Court's 2022 decision in *Oklahoma v. Castro-Huerta*[18] marks a new of era of insecurity in Indian Country criminal jurisdiction. In *McGirt v. Oklahoma*, a 2020 Supreme Court case that was considered a monumental win for tribal sovereignty,[19] the Court reaffirmed the existence of the Muscogee (Creek) Reservation and upheld its rule that states lack jurisdiction to prosecute Indians for crimes committed in Indian Country.[20] In *Castro-Huerta*, however, Justice Kavanaugh, writing for the majority, disrupted longstanding precedent by holding "that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian Country."[21] The holding of *Castro-Huerta* did not alter the prohibition against state prosecution of Indians for crimes committed in Indian Country. However, *Castro-Huerta*'s discussion of the relationship between states and tribes, its dismissive treatment of the seminal case

[16] CHAMPAGNE & GOLDBERG, *supra* note 8, at 12.

[17] *Id.*

[18] 597 U.S. 629 (2022).

[19] *See, e.g.*, Matthew L.M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 965 (2022) (characterizing *McGirt* as "a momentous, paradigm-shifting decision that has already altered the Indian law landscape"); Robert J. Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 B.U. L. REV. 2049, 2080-2101 (2021) (discussing the impacts of *McGirt* on the Muscogee (Creek) Nation's jurisdiction and describing the case as "one of the most significant and impactful Indian law cases the Supreme Court has decided in nearly a century.")

[20] McGirt v. Oklahoma, 140 S. Ct. 2452, 2480 (2020). ("When Congress adopted the [Major Crimes Act], it broke many treaty promises that had once allowed tribes the like the Creek to try their own members. But, in return, Congress allowed only the federal government, not the States, to try tribal members for major crimes. All our decision today does is vindicate that replacement promise.")

[21] *Castro-Huerta*, 597 U.S. at 633. Prior to *Castro-Huerta*, the Supreme Court had followed the general rule, which traces its roots to *Worcester v. Georgia*, 35 U.S. 515 (1832), that states lack jurisdiction over non-Indians for crimes committed against Indians in Indian Country. *See McGirt*, 140 S. Ct. at 2479; Williams v. Lee, 358 U.S. 217, 220 (1959).

Worcester v. Georgia, and its reference in dicta to jurisdiction over Indian defendants sound a warning call for future changes to Indian Country jurisdiction that may be waiting in the wings.

The aspect of *Castro-Huerta* that is perhaps most concerning to the future of tribal sovereignty is the basic premise on which the decision rests: that "Indian Country is part of the State, not separate from the State," and that "to begin with, the Constitution allows a State to exercise jurisdiction in Indian Country."[22] This is directly contradictory to the longstanding principle of federal Indian law that tribes are separate from states[23] and that states lack all jurisdiction in Indian Country except for authority explicitly granted by Congress.[24] Justice Kavanaugh goes on to assert that the case that originally recognized the sovereign status of tribes, *Worcester v. Georgia*, "has yielded to closer analysis."[25] Further, although the holding in *Castro-Huerta* does not touch on the issue of criminal jurisdiction over Indians for crimes committed in Indian Country, in a footnote the Court refutes the dissent's assertion that *Castro-Huerta* "leaves undisturbed the ancient rule that States cannot prosecute crimes by Native Americans on tribal lands without clear congressional authorization."[26] Rather than agree,

[22] *Castro-Huerta*, 597 U.S. at 636. The Court goes on to provide that "federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian Country."

[23] COHEN'S HANDBOOK, *supra* note 3, § 3.04[2][a] ("Federal law has always recognized and protected a distinct status for tribal Indians in their own territory . . . Although the policy of complete separation for the Indian Territory ended, the separation policy continued to apply to tribal lands within organized territories and states, and the federal policy of separate territory and status for Indian tribes continues today."). A longstanding exception to this rule exists for crimes committed by non-Indians against non-Indians. United States v. McBratney, 104 U.S. 621, 624 (1881).

[24] COHEN'S HANDBOOK, *supra* note 3, § 6.01[2] ("[S]tate law generally is not applicable to Indian affairs within the territory of an Indian tribe, absent the consent of Congress").

[25] *Castro-Huerta*, 597 U.S. at 636, quoting dicta in *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962). For a discussion of where *Worcester v. Georgia* stands in the wake of *Castro-Huerta*, see generally Dylan R. Hedden-Nicely, *The Reports of My Death Are Greatly Exaggerated: The Continued Vitality of* Worcester v. Georgia, 51 SW. L. REV. 255 (2023).

[26] *Castro-Huerta*, 597 U.S. at 693 (Gorsuch, J., dissenting).

Kavanaugh writes that "we do not take a position on that question."[27] This ambiguity suggests the issue of state jurisdiction over crimes committed by Indians in Indian Country is one the Court may take up in the future.

While the further infringements on tribal sovereignty foreshadowed by *Castro-Huerta* are many fights away from actualization, as Professors Gregory Ablavsky and Elizabeth Hidalgo Reese wrote a few days after *Castro-Huerta* was decided, "To put it bluntly, this decision is an act of conquest. And it could signal a sea change in federal Indian law, ushering in a new era governed by selective ignorance of history and deference to state power."[28] However, for those tribes that have already been operating under Public Law 280 jurisdiction for decades, the threat of increased state jurisdiction forewarns little that has not already arrived. And *Castro-Huerta*'s sentiment towards tribal sovereignty suggests that perhaps it is not too early to question what lessons PL 280 tribes may be able to provide on not only asserting tribal criminal jurisdiction, but also effectively operating tribal criminal justice systems based in traditional healing and dispute resolution practices, all with a backdrop of concurrent state jurisdiction.

[27] *Id.* at 655 n.9; *see* Seth E. Montgomery, *ICRA's Exclusionary Rule*, 102 B.U. L. REV. 2101, 2143 (2022).

[28] Gregory Ablavsky & Elizabeth Hidalgo Reese, *The Supreme Court Strikes Again – This Time at Tribal Sovereignty*, WASH. POST (July 1, 2022, 7:00 AM EDT), https://www.washingtonpost.com/opinions/2022/07/01/castro-huerta-oklahoma-supreme-court-tribal-sovereignty/ [https://perma.cc/275H-GL5K]. One year following its *Castro-Huerta* decision, the Court granted a victory for tribal sovereignty in *Haaland v. Brackeen*, 559 U.S. 255 (2023). In *Brackeen*, the Court upheld the constitutionality of the Indian Child Welfare Act, rejecting all arguments based on state sovereignty and affirming *Worcester*'s principle that the Federal Government has plenary authority over tribal matters. *Id.* at 264, 272-73. However, the dissents from Justices Thomas and Alito carry forth *Castro-Huerta*'s menace to tribal sovereignty, including the premise that *Worcester* is no longer good law. *Id.* at 337-43 (Thomas, J., dissenting); *see also id.* at 374-76 (Alito, J., dissenting). Given the Supreme Court's propensity for about-faces in Federal Indian law, *Brackeen* offers encouragement but does not eliminate *Castro-Huerta*'s threats to tribal sovereignty. *See* W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533, 1606-07 (2023).

II. HEALING TO WELLNESS COURTS

America's traditional criminal justice system, which focuses on a hierarchical dispensing of justice, is antithetical to the beliefs and customs of many Indigenous communities.[29] As the Honorable Robert Yazzie, Chief Justice Emeritus of the Navajo Nation Supreme Court describes, "What do Navajos (and many other Indians) think of the vertical justice system brought from Europe? They would most likely say *shash kheyadae*, which is a way of expressing disapproval of something horrible."[30] While belief systems are not uniform among Native Nations, the justice ideologies and practices for many Native American communities focus on individual healing and reintegration with community rather than punishment and isolation.[31] Attempts at assimilation have often forced Western criminal justice practices onto tribes,[32] but many tribes have maintained and/or are re-establishing tribal justice systems rooted in traditional values and practices.[33]

One modern mechanism by which tribes are able to (re)integrate their culture into their courts is through a Healing to Wellness Court

[29] Hon. Robert Yazzie, *"Hozho Nahasdlii" — We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 119-20 (1996).

[30] *Id.* at 120 (parentheses in original).

[31] Laura Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One*, INT'L INST. FOR RESTORATIVE PRACS. (Apr. 27, 2004), https://www.iirp.edu/news/restorative-justice-practices-of-native-american-first-nation-and-other-indigenous-people-of-north-america-part-one [https://perma.cc/6W34-Y8PM].

[32] For example, in the late 1880s, the BIA started establishing "Courts of Indian Offenses" on reservations to address a lack of reservation-based dispute resolution systems. However, "[i]nstead of being used as a mechanism designed to enhance tribal sovereignty and legitimacy, the Courts of Indian Offenses were used as a mechanism to perpetuate racism and oppression; strip Native Americans of their customs, culture, and heritage; and erase any notion of tribal sovereignty and legitimacy." Robert J. Wild, *The Last Judicial Frontier: The Fight for Recognition and Legitimacy of Tribal Courts*, 103 MINN. L. REV. 1603, 1609-10 (2019).

[33] *See, e.g.*, ROBERT V. WOLF, PEACEMAKING TODAY: HIGHLIGHTS OF A ROUNDTABLE DISCUSSION AMONG TRIBAL AND STATE PRACTITIONERS (2012), https://www.innovatingjustice.org/publications/peacemaking-today-highlights-roundtable-discussion-among-tribal-and-state [https://perma.cc/X9SX-D4ZV] (synthesizing the discussion of tribal and non-tribal practitioners on tradition peacemaking programs across the country).

("THWC").[34] Healing to Wellness Courts are tribal courts that merge traditional healing customs and dispute resolution mechanisms with the general state drug court model.[35] Each Healing to Wellness Court is adapted to meet the specific needs that have grown out of substance abuse practices of its tribal family and community.[36] "Designed with and from tribal, team, collaborative, and imaginative perspectives," they "help heal and mend human depressions and decay that hinder tribal community and nation building."[37] Healing to Wellness Courts are guided by the Tribal Key Components, which utilize community and nation building concepts and require cooperation within tribal governments and with entities outside the tribe.[38] Because, as the Honorable Gaylen L. Box describes, "Healing to Wellness Courts . . . are nothing more than a resurrection of traditional holistic tribal practices,"[39] each THWC is as unique as the tribal nation it serves.

According to the Tribal Law and Policy Institute, there are ninety-six Healing to Wellness Courts that are currently operational or being planned.[40] Of these ninety-six, nineteen are run by tribes under PL 280 jurisdiction.[41] Conversely, PL 280 affects fifty-one percent of all federally recognized tribes in the lower forty-eight states; this number increases to seventy percent for all federally recognized tribes including

[34] This is the term used to describe Department of Justice funded tribal drug courts. They are also often called Tribal Healing to Wellness Courts ("THWCs") or Wellness Courts. TRIBAL L. & POL'Y INST., HEALING TO WELLNESS COURTS: A PRELIMINARY OVERVIEW OF TRIBAL DRUG COURTS 4 (1999), http://www.tribal-institute.org/download/heal.pdf [https://perma.cc/CHP2-F82C].

[35] Catherine Retana, *Planning a Tribal Healing to Wellness Court 101*, 67 FED. LAW. 80, 80-81 (2020).

[36] *Id.*

[37] Joseph Thomas Flies-Away & Carrie E. Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence +*, 2013 MICH. ST. L. REV. 403, 407.

[38] *Id.* at 412.

[39] Hon. Gaylen L. Box, *Crow Dog: Tribal Sovereignty & Criminal Jurisdiction in Indian Country*, 50 ADVOCATE 13, 15 (2007).

[40] *Tribal Wellness Courts*, TRIBAL HEALING TO WELLNESS CTS., http://www.wellnesscourts.org/state.cfm?topic=54 (last visited Mar. 23, 2023) [https://perma.cc/S3B9-AE9V].

[41] This includes tribes in Nebraska and Washington that have partial PL 280 jurisdiction. *See* CHAMPAGNE & GOLDBERG, *supra* note 8, at 15-18.

Alaska Native Villages.[42] These numbers suggest that disproportionately few tribes under PL 280 jurisdiction operate Healing to Wellness Courts.

Healing to Wellness Courts provide alternatives to incarceration, assist in family reunification efforts, and address the needs of families who are unable to fully participate in community. They also facilitate judicial innovation and give tribes the opportunity to develop their own unique justice practices rooted in their customary values and tradition.[43] Policing and incarceration of Indigenous people have been used as a state legitimized form of white supremacy and settler colonial violence since settlers first arrived on the land of what is now the United States.[44] Indigenous people are significantly overrepresented in jails and prisons[45] and Indigenous incarceration rates have been rising

[42] CHAMPAGNE & GOLDBERG, *supra* note 8, at 14. For all but one tribe in Alaska, there is concurrent state jurisdiction not because of PL 280, but because the land of most tribes is not considered Indian Country. *See* CHAMPAGNE & GOLDBERG, *supra* note 8, at 15.

[43] JOSEPH THOMAS FLIES-AWAY, JERRY GARDNER & CARRIE GARROW, OVERVIEW OF TRIBAL HEALING TO WELLNESS COURTS 19-23 (2014), https://www.wicourts.gov/courts/programs/problemsolving/docs/thwcoverview.pdf [https://perma.cc/2D39-WW28].

[44] Grace L. Carson, *Tribal Sovereignty, Decolonization, and Abolition: Why Tribes Should Reconsider Punishment*, 69 UCLA L. REV. 1076, 1091-1094 (2022).

[45] According to U.S. Department of Justice data published in 2022, Indigenous people "are incarcerated *in state and federal prisons* at a rate of 763 per 100,000 people. This is double the national rate (350 per 100,000) and more than four times higher than the state and federal prison incarceration rate of white people (181 per 100,000)." Additionally, Indigenous people are "detained in *local jails* at a rate of 316 per 100,000," compared to 192 per 100,000 nationally and 157 per 100,000 for white people. *Native Incarceration in the U.S.*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/native.html (last visited Feb. 17, 2024) [https://perma.cc/9BBB-BBLC] (emphasis in original); *see* E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2021 – STATISTICAL TABLES 25, 27 (2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf [https://perma.cc/Z5WU-XBAS]; *see also* DESIREE L. FOX, CIARA D. HANSEN & ANN M. MILLER, OVER-INCARCERATION OF NATIVE AMERICANS: ROOTS, INEQUITIES, AND SOLUTIONS 7 (2023), https://safetyandjusticechallenge.org/resources/over-incarceration-of-native-americans-roots-inequities-and-solutions/ [https://perma.cc/JK38-5YFR] ("One of the most comprehensive reports on Native people in the justice system, American Indians and Crime, found that American Indians and Alaska Natives (AI/AN) were incarcerated at a rate 38% higher than the national average and were overrepresented in the prison population in 19 states compared to any other race and ethnicity. The National Prisoner Statistics series of 2016 reported 22,744 Natives were incarcerated in state and federal facilities, and represented 2.1 to 3.7% of the federal

drastically.[46] Healing to Wellness Courts allow tribes to address this concerning data by offering their members alternatives to incarceration for drug and alcohol related offenses. Additionally, the holistic, restorative focus of Healing to Wellness Courts allow tribes to address the root of substance abuse in their communities in ways that incarceration does not. Healing to Wellness Courts also facilitate innovative collaboration between judicial entities, leading to the creation of strong partnerships and coordination between various tribal and non-tribal entities.[47]

Healing to Wellness Courts reflect traditional Indigenous methods of justice by "(1) creating an environment that focuses on the problems underlying the criminal act rather than the act itself; (2) stressing family, extended family, and community involvement in the healing process; and (3) offering a team approach to direct and guide the healing to wellness journey with the participant."[48] The opportunity to integrate tradition and custom into modern tribal criminal justice systems strengthens tribal sovereignty and bolsters the autonomy of tribal nations. Allowing tribal members to have their cases handled in a tribal court setting rooted in that tribe's tradition and values can also have a direct positive impact on tribal defendants. A 2007 study found that reservation residents in both PL 280 and non-PL 280 jurisdictions view their respective state or federal criminal justice systems as unfair and having poor understanding of tribal cultures compared to tribal courts.[49] Providing the option of a tribal forum, especially for tribal members charged with off-reservation offenses, increases the opportunity for Indigenous people to have their cases handled in a manner they view as

offender population during 2019, despite only accounting for 1.7% of the United States population.")

[46] The population of Indigenous people in local jails increased 85% from 2000 to 2019, and the number of Indigenous people in jails located on tribal lands increased 61% from 2000 to 2018. During this same period, the overall population of Indigenous people living on tribal lands decreased slightly. Leah Wang, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, PRISON POL'Y INITIATIVE (Oct. 8, 2021), https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/ [https://perma.cc/Z9JA-LKRA].

[47] Flies-Away & Garrow, *supra* note 37, at 417; FLIES-AWAY ET AL., *supra* note 43, at 22.

[48] FLIES-AWAY ET AL., *supra* note 43, at 20.

[49] CHAMPAGNE & GOLDBERG, *supra* note 8, at 96.

fair and understanding of their culture, while also diverting Indigenous individuals out of jail and prison.[50]

The Healing to Wellness Court is a "reactive institution" acting within the ecosystem of Indian Country social issues caused by "genocidal policies, which are doing exactly what they're designed to do."[51] Wellness Courts do not, for example, change the fact that Native Americans are shown to be killed by law enforcement more often than any other racial group.[52] Tribes have the opportunity to further resist the Western criminal punishment system and other related genocidal policies by moving towards abolitionist systems of liberation and care.[53] Nevertheless, the Healing to Wellness model is a powerful tool for tribal nations seeking to assert their sovereignty through alternative criminal justice practices.

III. BARRIERS TO IMPLEMENTING HEALING TO WELLNESS COURTS & DIFFERENCES BASED ON PL 280 STATUS

Healing to Wellness Courts face an array of obstacles to successful implementation, effective functioning, and long-term sustainability. The barriers tribes may run into are broad and nuanced, ranging from challenges associated with effectively treating addiction to the need for tribal courts to establish jurisdiction over participants. This Part will focus on three of the common challenges that are most likely to be affected by PL 280 status: funding, tribal institutions and court infrastructure, and jurisdictional issues, including the need for collaboration between tribes and states.

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[50] *See* discussion *infra* Part III.C.

[51] Michelle Chen, *Restorative Justice in Indian Country*, DISSENT MAG. (Apr. 16, 2021), https://www.dissentmagazine.org/online_articles/restorative-justice-in-indian-country [https://perma.cc/74R8-FQCD] (in part quoting Chase Iron Eyes, Oglala Nation member and lead local counsel with Lakota People's Law Project).

[52] Mike Males, *Who Are Police Killing?*, CTR. ON JUV. & CRIM. JUST. (Aug. 26, 2014), https://www.cjcj.org/news/blog/who-are-police-killing-2 [https://perma.cc/G54P-WPLE] (analyzing data from the Centers for Disease Control and Prevention, National Center for Health Statistics, from 1999-2011).

[53] Carson, *supra* note 44, at 1076.

A. Funding

Access to sufficient and stable funding is a significant barrier tribes face in creating and sustaining Healing to Wellness Courts, and funding directly impacts a tribe's ability to overcome other barriers. Lack of available funding has long posed an immense hurdle for tribal justice systems.[54] Due to a lack of internal funds, tribes are often reliant on federals funds to operate tribal courts.[55] For some tribal courts, the combination of internal and general federal funds is sufficient to operate a Tribal Healing to Wellness Court; many others, however, must seek specific grants from federal agencies, namely the Department of Justice ("DOJ").[56]

The primary grants available for Healing to Wellness Courts are through the DOJ's Bureau of Justice Assistance ("BJA") Drug Court Discretionary Grant Program and the DOJ's Coordinated Tribal Assistance Solicitation ("CTAS") program.[57] These grant programs are essential to the existence of many Healing to Wellness Courts, but they can involve lengthy, competitive application processes[58] and come with limitations. Unlike Bureau of Indian Affairs ("BIA") funding, which provides ongoing support for existing tribal court systems, the DOJ grants are typically limited in time and are targeted at helping tribes develop and enhance specific programs.[59] Healing to Wellness Courts funded by DOJ grants are also not allowed to use the grant money to

[54] CHAMPAGNE & GOLDBERG, *supra* note 8, at 113; U.S. COMM'N ON C.R., A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 79 (2003), https://www.usccr.gov/files/pubs/na0703/na0204.pdf [https://perma.cc/NEM2-V9DZ]; Hon. Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L. J. 733, 736-37 (2008).

[55] According to data from the Bureau of Justice, in 2014, the most prevalent source of tribal court system funding was the BIA, followed by tribal appropriations; less than 40% of tribal courts received funding form the DOJ, and less than 10% received state funding. STEVEN W. PERRY, TRIBAL CRIME DATA COLLECTION ACTIVITIES, 2021, at 6 (2021), https://bjs.ojp.gov/library/publications/tribal-crime-data-collection-activities-2021 [https://perma.cc/8PRS-S8CP].

[56] FLIES-AWAY ET AL., *supra* note 43, at 18.

[57] *Id.*

[58] See, for example, discussion of the Yurok Wellness Court, *infra* Parts IV, V.A.

[59] CHAMPAGNE & GOLDBERG, *supra* note 8 at 123.

serve individuals convicted of violent offenses, thereby limiting the scope of the program.[60]

1. Funding & PL 280 Status

While funding presents a significant challenge for all tribal courts seeking to implement alternative sentencing practices, the barrier is particularly high for those under Public Law 280 jurisdiction. The federal government viewed PL 280 as sanctioning a withdrawal of federal support for PL 280 tribes, specifically for tribal courts and law enforcement, and following the passage of the law, the BIA began redirecting federal funding from PL 280 tribes to tribes in non-PL 280 states.[61] This withdrawal of federal funding continues to considerably impact PL 280 tribes. For example, a 1998 study found that tribes in mandatory PL 280 states received significantly less law enforcement funding from the BIA than their non-PL 280 counterparts.[62] Considering that most tribal courts receive BIA support, the redirection of BIA funds away from PL 280 states reduces the funding options available to tribal courts, including Healing to Wellness Courts, located in states with PL 280 jurisdiction.[63] Although states with PL 280 jurisdiction were given concurrent responsibility for tribal criminal justice, they generally have been unwilling to fund tribal court programs;[64] as noted above, very few THWC receive state funds.[65]

There is less clear disparity in DOJ grants for PL 280 tribes compared to BIA funding.[66] While this leaves available a critical source of funding for Healing to Wellness Courts in PL 280 states, it suggests that those

[60] FLIES-AWAY ET AL., *supra* note 43, at 15.

[61] CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280, at 11 (1997).

[62] CHAMPAGNE & GOLDBERG, *supra* note 8, at 119.

[63] *See* PERRY, *supra* note 55, at 6.

[64] Wahwassuck, *supra* note 54, at 737. PL 280 is considered an unfunded federal mandate because it imposed requirements on state and local governments without providing federal funding to support the new requirements. CHAMPAGNE & GOLDBERG, *supra* note 8, at 115; Aaron F. Arnold, Sarah Cumbie Reckess & Robert V. Wolf, *State and Tribal Courts: Strategies for Bridging the Divide*, 47 GONZ. L. REV. 801, 809 (2012).

[65] Perry, *supra* note 55, at 6.

[66] CHAMPAGNE & GOLDBERG, *supra* note 8, at 125.

programs are more likely to be subject to the uncertainties and limitations of DOJ grants than their non-PL 280 counterparts. Further, even if PL 280 tribes can access the same DOJ funding as non-PL 280 tribes, the historic lack of funding for PL 280 tribal courts, and the correspondingly less established tribal court institutions, create additional barriers to successful implementation of Healing to Wellness Courts in PL 280 states.

B. Tribal Institutions and Court Infrastructure

Well-developed tribal institutions and robust court infrastructure can help tribes build successful programs and develop relationships with state partners. Initially, tribal courts with robust infrastructure and well-established institutions will have an easier time developing, implementing, and sustaining Healing to Wellness Courts. The Indian Law and Order Commission[67] conducted a review of successful alternatives to detention programs, and found that positive outcomes depended on

- judges or other sentencing decision makers who are well-informed about sentencing options;
- a legal code that supports alternative sentencing and does not, by default, create a "jail only" option;
- screening mechanisms that appropriately select individuals into alternative programs and to divert offenders with similar criminal histories into the same supervision groups;
- a strong probation or community oversight unit that is able to manage the alternatives program; and

[67] The Indian Law and Order Commission is an independent advisory group created pursuant to the Tribal Law and Order Act that conducts research and makes recommendations to the President and Congress on issues of safety and justice in Indian Country. *Indian Law & Order Commission*, UCLA AM. INDIAN STUD. CTR., https://www.aisc.ucla.edu/iloc/ (last visited Feb. 11, 2024) [https://perma.cc/Q9VD-PRR6].

- access to the array of services that will help equip the offender to navigate the pathway away from recidivism.[68]

Second, court infrastructure helps tribal courts appear legitimate, capable, and trustworthy in the eyes of potential state and county partners. As discussed below, most Healing to Wellness Courts must collaborate with state courts and agencies,[69] and the perceived legitimacy rendered by effective and longstanding court institutions is a critical aspect of the relationship building needed to create jurisdiction-sharing agreements[70]

1. Court Infrastructure & PL 280 Status

While Public Law 280 did not change tribal criminal jurisdiction, the denial of funding to tribal courts based on PL 280 status has significantly inhibited the development of tribal courts in PL 280 states.[71] PL 280 has also stunted development of tribal court infrastructure by often "preventing an environment of respect for tribal courts from developing."[72] Due to these hindrances, THWCs operating in places with Public Law 280 jurisdiction are likely to face greater challenges relating to court infrastructure than those in non-PL 280 states.

C. Jurisdiction and State-Tribe Collaboration

Tribal courts must contend with complex jurisdictional frameworks when implementing Healing to Wellness programs. As discussed above, tribes do not have criminal jurisdiction over non-Indian defendants and can only exercise criminal jurisdiction over Indian defendants for

[68] INDIAN L. & ORD. COMM'N, A ROADMAP TO MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 133 (2015).

[69] FLIES-AWAY ET AL., *supra* note 43, at 16.

[70] See, for example, discussion of the Yurok Wellness Court, *infra* Parts V.B, V.C.

[71] CHAMPAGNE & GOLDBERG, *supra* note 8, at 20; Jerry Gardner & Ada Pecos Melton, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, TRIBAL CT. CLEARINGHOUSE, http://www.tribal-institute.org/articles/gardner1.htm (last visited Mar. 10, 2023) [https://perma.cc/Q5PA-GP8M].

[72] Kevin K. Washburn & Chloe Thompson, *A Legacy of Public Law 280: Comparing and Contrasting Minnesota's New Rule for the Recognition of Tribal Court Judgments with the Recent Arizona Rule*, 31 WM. MITCHELL L. REV. 479, 521 (2004).

crimes occurring in Indian Country. Tribal members are often charged in state court with drug and alcohol related offenses that occurred off-reservation; this is especially the case for tribes that lack a large land base.[73] Healing to Wellness Courts that want to offer their programs to tribal members who have been charged with off-reservation offenses must therefore collaborate with the state court system to receive referrals and share jurisdiction. For example, dispositional referrals in particular can be shared as an exercise in concurrent jurisdiction. This is also the case for tribes seeking to offer participation to non-Indians.

Collaborations between tribal and state court systems for Healing to Wellness Court jurisdiction are formed with the backdrop of a relationship "historically characterized by mistrust, misunderstanding, and outright hostility."[74] Professors Aliza G. Organick and Tonya Kowalski posit that these tensions are the result of "a clash of political philosophies and differing worldviews," and that the evolution of tribal-state relationships requires accepting "that the historical animosity and distrust are the products of a powerful legacy of colonization, genocide, and oppression."[75] This legacy continues to enact distinct barriers for tribal-state cooperation, but the collaborative nature of Healing to Wellness Courts also renders them "a ripe collaborative forum."[76]

1. Jurisdiction, State-Tribe Collaboration, and PL 280

Tribal courts with PL 280 jurisdiction are in the same jurisdictional position as non-PL 280 tribes for offenses by tribal members occurring outside Indian Country, but PL 280 tribes are also subject to concurrent state jurisdiction for all crimes committed by Indians in Indian Country. This means Healing to Wellness Courts under PL 280 jurisdiction must rely on collaboration with the surrounding state for all defendants. Tribal relationships with states under PL 280 jurisdiction generally

[73] FLIES-AWAY ET AL., *supra* note 43, at 17.

[74] Arnold et al., *supra* note 64, at 803.

[75] Aliza G. Organick & Tonya Kowalski, *From Conflict to Cooperation: State and Tribal Court Relations in the Era of Self-Determination*, 45 CT. REV. 48, 48 (2009).

[76] KORI CORDERO, SUZANNE M. GARCIA & LAUREN VAN SCHILFGAARDE, TRIBAL L. & POL'Y INST., TRIBAL HEALING TO WELLNESS COURTS: INTERGOVERNMENTAL COLLABORATION 5 (2021), https://287f3473-8ddb-4a3e-a842-552e544a6932.usrfiles.com/ugd/3fb28d_979365c3029e42b38d7eb8f29167c362.pdf [https://perma.cc/V6DJ-W73M].

share the history of hostility and misunderstanding that impacts non-PL 280 tribal-state relations. Further, the legacies of PL 280 may include increased disrespect for tribal courts by PL 280 states,[77] and tribal courts in PL 280 states may be at a disadvantage in demonstrating legitimacy to states when they lack funding and court infrastructure.

However, it is also possible that the imposition of state concurrent jurisdiction by PL 280 means that tribal courts under PL 280 have already been forced to start the work of relationship building with states. Unlike with the challenges posed by funding and the need for court infrastructure, it is less clear whether tribal courts in PL 280 states are at a disadvantage compared to non-PL 280 tribes in overcoming the jurisdictional hurdles necessary to implement an effective Healing to Wellness Court.

IV. THE YUROK WELLNESS COURT: A PL 280 CASE STUDY

This Part explores the Yurok Wellness Court, a Wellness Court successfully operating under PL 280 jurisdiction.

The Yurok Tribe is a federally recognized Tribe with aboriginal territory along the Klamath-Trinity River in what is now Northern California.[78] Today the Yurok Tribe is the largest surviving tribe in California, a mandatory PL 280 state.[79] The Tribe has more than 6,000 enrolled members and over 500 employees who provide a variety of services to the community.[80] The Yurok Reservation spans approximately eighty-five square miles and includes land situated within Humboldt and Del Norte Counties.[81] The Tribe operates the Yurok Tribal Court, which acts pursuant to the Yurok Constitution and Tribal Code and exercises concurrent jurisdiction with the State of

[77] Washburn & Thompson, *supra* note 72, at 526.

[78] *Our History*, YUROK TRIBE, https://www.yuroktribe.org/our-history (last visited Feb. 11, 2024) [https://perma.cc/S8YB-QTF9].

[79] *Id.*; *see* 18 U.S.C. § 1162(a).

[80] Interview with Judge Abby Abinanti, Chief Judge of the Yurok Tribal Ct. (Feb. 20, 2024) [hereinafter February Interview with Judge Abby Abinanti] (information gathered from interviewee through writing).

[81] *Yurok Wellness Court*, TRIBAL ACCESS TO JUST. INNOVATION, https://tribaljustistg.wpengine.com/places/specialized-court-projects/yurok-wellness-court/ (last visited Mar. 3, 2023) [https://perma.cc/76R9-66EJ].

California.[82] The Yurok Tribal Code specifically provides for the option of the imposition of traditional consequences for community wrongdoing.[83]

In 2009, the Yurok Tribal Court established the Yurok Wellness Court ("YWC") based on the Healing to Wellness Court model.[84] The approximately one-to-two-year YWC program seeks "[t]o provide a path to healing for non-violent Yurok offenders affected by drugs and/or alcohol through an intensive substance abuse treatment program to improve family, community, and cultural involvement, to promote healthy life choices, and to reduce criminal recidivism."[85] The YWC "uses a non-adversarial team approach to link participants with substance abuse treatment, supportive services, and court monitoring to promote recovery and community reintegration" and "integrates unique aspects of Yurok cultural values and spirituality to better suit the needs of its participants and help further integrate members into the Yurok community."[86]

Today the YWC operates as a tribal diversion program under a Memorandum of Understanding ("MOU") with the Humboldt County District Attorney's Office and Humboldt County Superior Court.[87] The MOU enables Humboldt County Superior Court judges to divert eligible misdemeanor charges to the YWC through stipulated agreement between the tribal member's defense counsel and the District Attorney, or, in certain cases, through a Superior Court order without District

[82] YUROK CONST. & TRIBAL CODE, §§ 1.10.030-1.10.070.

[83] Section 2.10.1070 provides, in part, "Where the Court in its discretion deems it appropriate, a form of traditional punishment may be imposed in addition to or in place of any punishment provided in this code," and Section 10.15.140(b) states, "The Court, at its discretion, may choose to provide alternative sentencing options for defendant(s) who are sentenced for a misdemeanor or felony conviction in Tribal Court." The Tribal Code also lists participation in Wellness Court as a penalty following criminal sentencing and has specific provisions concerning Wellness Court Reports. YUROK CONST. & TRIBAL CODE, §§ 2.10.1070, 10.15.140(b). However, the Yurok Tribal Court does not currently hear criminal cases. Interview with Amber Miller, Supervising Staff Att'y, Yurok Tribal Ct. (July 20, 2023).

[84] *Yurok Wellness Court*, *supra* note 81.

[85] *Adult Wellness Court*, YUROK TRIBAL CT., https://yuroktribalcourt.org/programs/wellness-court/ (last visited Mar. 3, 2023) [https://perma.cc/9ZRZ-CT8B].

[86] *Yurok Wellness Court*, *supra* note 81.

[87] Interview with Amber Miller, *supra* note 83.

Attorney agreement.[88] The Tribal Diversion program requires the collaboration between defense counsel, who screen defendants for tribal membership and eligibility; Yurok Tribal Court staff, who assess Wellness Court suitability, develop an individualized Tribal Wellness Plan, and submit progress reports; and the District Attorney and Superior Court Judge, who agree to the diversion.[89] While in Tribal Diversion, defendants regularly appear in Yurok Tribal Court, and the Tribal Court additionally supervises defendants with alcohol and drug monitoring and home visits.[90] If the tribal member successfully completes Tribal Diversion, their criminal charges are dismissed.[91] Tribal Diversion is often viewed favorably by the prosecutors and judges because it clears defendants out of the over-crowded state court docket while maintaining accountability through regular progress reports from the YWC.[92]

The YWC was originally instituted with funding by the DOJ and BJA, including a CTAS grant that was shared across five tribal program areas.[93] Today the YWC is funded by a combination of DOJ, BIA, and California Health and Human Services grants, all of which involve extensive application and reporting processes.[94] Initially, funding posed one of the biggest issues in implementing the Yurok court system, due in part to being under PL 280 jurisdiction, as well as being located in an under-resourced rural area.[95] The Tribe has overcome those barriers, but must maintain ceaseless fundraising and grant writing efforts.[96]

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[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Yurok Tribe – Criminal Assistance Program – Memoranda of Understanding with Del Norte and Humboldt Counties*, TRIBAL ACCESS TO JUST. INNOVATION, https://tribaljustistg.wpengine.com/places/specialized-court-projects/yurok-tribe-criminal-assistance-program-memoranda-of-understanding-with-del-norte-and-humboldt-counties/ (last visited Mar. 3, 2023) [https://perma.cc/5HS6-JGZK].

[94] Interview with Amber Miller, *supra* note 83.

[95] Interview with Judge Abby Abinanti, Chief Judge of the Yurok Tribal Ct. (Oct. 19, 2023) [hereinafter October Interview with Judge Abby Abinanti].

[96] *Id.*

The establishment and ongoing vitality of the YWC's collaboration with Humboldt County partners has been substantially supported by strong personal relationships between tribal and state court officials and the demonstrated capacity of the Yurok Tribal Court. The Yurok Tribal Court's Chief Judge Abby Abinanti previously served as a California Superior Court Commissioner for the City and County of San Francisco for seventeen years, and as such had established relationships and respect with state and county justice practitioners and officials prior to developing the YWC.[97] This background contributed to developing the Tribal Court's credibility with local judges and prosecutors, enabling them to trust that justice would be served if they agreed to divert tribal members to the YWC.[98] The YWC also focused on developing its capacity and expertise for monitoring and treating tribal members before setting up its diversion agreements, and continued to build credibility and trust after implementation through maintaining discreet parameters for the program and following established systems.[99] For example, in describing the YWC's reporting to the state court, Judge Abinanti will tell Tribal Diversion participants, "We will not lie for you."[100] State court judges increasingly engaged with the program as they learned that they could trust the YWC and saw the successes of Tribal Diversion.[101]

The YWC also operates joint Family Wellness Courts with the Humboldt and Del Norte County dependency systems, where Judge Abinanti sits jointly in Humboldt County with their assigned judge and Judge William Bowers sits jointly with the Del Norte judge.[102] These Courts combine the resources of the County and Tribe to assist the

[97] October Interview with Judge Abby Abinanti, *supra* note 95; *see also Yurok Tribe – Criminal Assistance Program*, *supra* note 93.

[98] *Id.*

[99] October Interview with Judge Abby Abinanti, *supra* note 95.

[100] *Id.*

[101] *Id.*

[102] February Interview with Judge Abby Abinanti, *supra* note 80; *Family Wellness Court Brings Healing to Tribal Families*, CAL. CTS. NEWSROOM (Apr. 2, 2019), https://newsroom.courts.ca.gov/news/family-wellness-court-brings-healing-tribal-families [https://perma.cc/ZWH6-B9MA].

parties and act as teams for tribal members, who are allowed to opt into the Courts.[103] They have rigorous demands and accountability.[104]

The YWC has received considerable attention[105] and is considered highly successful by the tribe as well as by state officials.[106] Most importantly, the YWC supports tribal sovereignty by implementing Yurok ideologies and practices. Unlike the state and federal court systems, the YWC is based on responsibility, not rights.[107] It also focuses not on punishing people for misdeeds, but on helping individuals understand their behaviors as symptoms and learn to act in a way that enables them to become a good ancestor.[108] The Yurok Tribe's use of this model not only supports its own community, but, as seen by Judge Abinanti, "can help the court system in general learn a better way of doing things."[109]

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[103] *Id.*

[104] *Id.*

[105] *See, e.g.*, Elizabeth Cook, *California's Yurok Tribe Reclaiming Lost Lives with Old Tribal Values, Spiritual Healing*, CBS NEWS (Apr. 19, 2023, 6:45 PM PDT), https://www.cbsnews.com/sanfrancisco/news/yurok-tribe-unseen-murdered-missing-indigenous-women-wellness-court/ [https://perma.cc/UG7V-QRGN] (discussing the role of the YWC within the missing and murdered Indigenous women crisis); Lee Romney, *Yurok Tribe's Wellness Court Heals with Tradition*, L.A. TIMES (Mar. 5, 2014, 7:35 AM PST), https://www.latimes.com/local/lanow/la-me-ln-yurok-wellness-court-20140304-story.html#axzz2vD6GrIw7 [https://perma.cc/3VZ9-96BV] (recounting the experiences of former YWC participants).

[106] For example, according to John Alexander, a former State Prosecutor, "Judge Abinanti and this system here puts their word behind it. It carries juice. As it should. Because they've got a great success rate." Documentary: Tribal Justice, at 15:06-15:13 (Makepeace Productions 2017), https://makepeace.vhx.tv/products/tribal-justice [https://perma.cc/3FM3-NWS2]; *see also Yurok Tribe, Humboldt District Attorney & Superior Court Launch Program*, YUROK TRIBE (May 30, 2023), https://www.yuroktribe.org/post/yurok-tribe-humboldt-district-attorney-superior-court-launch-program [https://perma.cc/63VG-H4FR]. Humboldt County District Attorney Stacey Eads, on the signing of the current diversion agreement, noted "With the agreement we memorialized today, I anticipate many successful outcomes from the Yurok Wellness Diversion Program — a program of opportunity and accountability, guiding eligible participants towards a productive, law-abiding life." *Id.*

[107] October Interview with Judge Abby Abinanti, *supra* note 95.

[108] *Id.*

[109] *Id.*

V. THE YUROK WELLNESS COURT AS AN ILLUSTRATION OF THE BARRIERS AND SUCCESSES FOR WELLNESS COURTS UNDER PL 280 JURISDICTION

The Yurok Wellness Court provides an example of a Healing to Wellness Court functioning successfully with PL 280 jurisdiction, and demonstrates the ways PL 280 status affects, and does not affect, the challenges tribal courts face in implementing traditional justice practices that can serve as an alternative to sentencing and incarceration.

A. Funding

The YWC's funding challenges and ongoing grant reliance demonstrate the challenges tribes under PL 280 jurisdiction face when implementing tribal court systems. While the Yurok Tribe is able to receive federal grants, as well as some state grants, reliance on grant funding requires the Tribe to undergo intensive application and reporting processes. Further, the Yurok Tribe is a large tribe with highly developed tribal institutions, and it is likely that other Healing to Wellness Courts in PL 280 states would experience the funding challenges even more acutely than the YWC has.

B. Tribal Institutions and Court Infrastructure

The Yurok Tribe has robust tribal institutions and court infrastructure that has facilitated successful implementation of its Wellness Court. The Tribe has its own judges, probation officers, social workers, and other service providers to support the Wellness program. Additionally, there are Tribal Code provisions that support alternative sentencing and specifically consider the Wellness Court. These features support the effective functioning of the YWC and were likely also contributing factors to the ability of the Court to develop relationships and enter into MOUs with the Humboldt County District Attorney's Office and Humboldt County Superior Court. The requirement of Superior Court judges to see the YWC's capacity, expertise, and trustworthiness before engaging illustrates the challenges tribes face in appearing legitimate and capable to state entities and the successful

relationships that can be built when states are able to trust tribal court programs.

The Yurok Wellness Court demonstrates how well-established tribal institutions and court functioning are important in building legitimacy with states and running effective programs. It also shows how effective implementation of Healing to Wellness Courts can be at least partially dependent on the strength of tribal institutions and the extent to which tribal infrastructure supports alternative sentencing. The Yurok Tribe's comprehensive and well-developed institutions and social services network renders it somewhat of an outlier among PL 280 tribes;[110] and in general PL 280 tribes that have experienced inhibited tribal court system development will likely find it challenging to institute similar programs.

C. Jurisdiction and State-Tribal Collaboration

The Yurok Tribal Court does not currently hear criminal cases,[111] and California holds concurrent jurisdiction for all crimes committed on the Yurok reservation, so collaboration with the surrounding counties is necessary for the YWC to be able to engage with criminal defendants.

The YWC's path to implementation suggests that successful collaboration with states is highly determined by the nuanced characteristics of a tribe and the individual relationships between tribal and state officials. The Yurok Tribe was in large part able to build trust and develop a strong partnership with Humboldt County because of Chief Judge Abinanti's background in the state court system and her prior relationships with state and county officials. While the Yurok Tribe's institutional capacity may be an outlier among PL 280 tribes, the ability to buttress development of traditional justice programs with personal relationships is available to all tribes regardless of PL 280 status.

[110] For example, the Yurok Tribal Court operates over twelve distinct programs, and the Yurok Social Services Department provides a broad variety of services to tribal members. *Court Programs*, YUROK TRIBAL CT., https://yuroktribalcourt.org/programs/ (last visited Feb. 11, 2024) [https://perma.cc/P3HZ-HT7W]; *Health and Human Services*, YUROK TRIBE, https://www.yuroktribe.org/health-and-human-services (last visited Feb. 11, 2024) [https://perma.cc/CDQ8-XX59].

[111] Interview with Amber Miller, *supra* note 83.

The demonstrated success of the Yurok Tribal Court in building a strong working relationship with the county officials, as well as other examples of PL 280 tribes breaking new ground in state-tribal collaboration, raises a question of whether the history of forced state concurrent jurisdiction has contributed to modern successful collaboration between PL 280 tribes and their surrounding states and counties. In Minnesota, another mandatory PL 280 state, the Leech Lake Band of Ojibwe and Cass County together operate a Wellness Court via a Joint Powers Agreement between the judges of the Leech Lake Tribal Court and the Cass County District Court.[112] The Agreement created a joint tribal-state court that is considered the first of its kind in the United States and has strengthened the Leech Lake Band of Ojibwe's tribal sovereignty and opened the door for collaboration in areas other than drug and alcohol offenses.[113]

Without the legacy of PL 280 and ongoing concurrent state jurisdiction, the Yurok Tribe and the Leech Lake Band of Ojibwe might not have needed to partner with the surrounding counties in the ways that they have. As seen by Judge Abinanti, concurrent state jurisdiction under PL 280 made Tribal Diversion easier by allowing for the better formation of state-tribal partnerships.[114] Further research is needed to understand the full effects of PL 280 on tribal-state relationship building. It is clear, however, that effective collaboration is not limited to non-PL 280 tribes, and innovative collaborations between PL 280 tribal and state court systems provide a model that can be useful to all tribes looking towards a *Castro-Huerta* future.

CONCLUSION: THE PL 280 WELLNESS COURT'S LESSONS FOR A *CASTRO-HUERTA* FUTURE

The implications of *Castro-Huerta*'s dicta suggest that the story of state criminal jurisdiction encroaching onto Indian Country is not over. *Castro-Huerta* also highlights how assertions of tribal sovereignty are

[112] Wahwassuck, *supra* note 54, at 747-48. The Leech Lake Band of Ojibwe later developed a second collaboration with the Itasca County District Court. Arnold et al., *supra* note 64, at 826.

[113] Wahwassuck, *supra* note 54 at 747-749; *see also* Arnold et al., *supra* note 64, at 824-27; Wild, *supra* note 32, at 1626.

[114] October Interview with Judge Abby Abinanti, *supra* note 95.

needed now more than ever. Healing to Wellness Courts directly promote tribal sovereignty by replacing American criminal punishment with traditional justice practices and increasing the authority and perceived legitimacy of tribal courts. At the same time, Healing to Wellness Courts often demonstrate effective cooperation between tribes and states and can provide models for successful state-tribal collaboration that furthers tribal sovereignty.

The Yurok Wellness Court shows us that PL 280 status can create additional barriers to implementing traditional justice practices, namely funding challenges. Yet we also see that PL 280's effects on funding and court infrastructure do not foreclose tribes from establishing and sustaining successful Healing to Wellness Courts. Individual relationship building between tribal and state officials and savvy capacity building that demonstrates court legitimacy without compromising tribal values are tools available to all tribes, regardless of jurisdictional authority.

As the Supreme Court foreshadows drastic threats on tribal sovereignty and the American criminal punishment system continues to cage and kill Indigenous people at unfathomable rates, Healing to Wellness Courts provide a nation-building and sovereignty-promoting tool that offers tribes the opportunity to opt out of the Western carceral paradigm. Of the many tribes already using the Healing to Wellness Court instrument successfully, those under Public Law 280 jurisdiction shine a particularly bright light for how to continue the fight for liberation and decolonization when all of tribal sovereignty is on the line.