

# HEALING TO WELLNESS COURTS: THERAPEUTIC JURISPRUDENCE +

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*[G]iven the complexity of our species—in particular, the fact of our having thoughts and emotions as well as imaginative and critical faculties—it is obvious that our needs transcend the merely sensual. The prevalence of anxiety, stress, confusion, uncertainty, and depression among those whose basic needs have been met is a clear indication of this. Our problems, both those we experience externally—such as wars, crime, and violence—and those we experience internally—our emotional and psychological sufferings—cannot be solved until we address this underlying neglect. That is why the great movements of the last hundred years and more—democracy, liberalism, socialism—have all failed to deliver the universal benefits they were supposed to provide, despite many wonderful ideas. A revolution is called for, certainly. But not a political, an economic, or even a technical revolution. We have had enough experience of these during the past century to know that a purely external approach will not suffice. What I propose is a spiritual revolution.<sup>1</sup>*

#### INTRODUCTION

The *institutionalization*<sup>2</sup> of healing to wellness courts<sup>3</sup> suggests that a spiritual revolution swirls amid indigenous peoples and nations. Something stunningly spiritual<sup>4</sup> is happening to indigenous North American jurisprudence. In this Article, further described below, the term *spiritual* or *spirituality* is used to convey the relatedness and connectedness human beings share with all Creation and with each other by way of fundamental human and inherent rights and characteristics. For indigenous peoples, sensitivity to elemental relationships with the world around them helps depict and define

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1. HIS HOLINESS THE DALAI LAMA, ETHICS FOR THE NEW MILLENNIUM 16-17 (1999).

2. The term *institutionalization* was first used in the context of healing to wellness courts in 1998. Joseph Thomas Flies-Away, Address at the National Association of Drug Court Professionals 4th Annual Training Conference (June 4-6, 1998); see also Caroline S. Cooper, *Drug Courts: Current Issues and Future Perspectives*, 38 SUBSTANCE USE & MISUSE 1671, 1702 (2003); Joseph Flies-Away, *Institutionalization*, in DRUG COURTS: CURRENT ISSUES & FUTURE PERSPECTIVES app. 1 at 273-75 (Lana D. Harrison et al. eds., 2002).

3. Name adopted by the Tribal Advisory Committee (TAC) to describe and identify Department of Justice funded tribal drug courts. Members of the TAC felt the moniker healing to wellness court, or wellness court, stated better the objectives of this kind of process and procedure. See DRUG COURTS PROGRAM OFFICE, U.S. DEP'T OF JUSTICE, HEALING TO WELLNESS COURTS: A PRELIMINARY OVERVIEW OF TRIBAL DRUG COURTS 1-2, 4 (1999), available at <http://www.tribal-institute.org/download/heal.pdf>.

4. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1137 (9th ed. 1983) (defining spiritual as "related or joined in spirit").

who they are.<sup>5</sup> These relationships are often characterized, commemorated, and, thus, remembered in creation stories and ceremonies. The surviving stories and ceremonies serve to authenticate one's existence and purposes in life, as well as to substantiate individual and collective rights and responsibilities.<sup>6</sup>

Unfortunately, years of interaction with domineering cultures have caused many indigenous peoples to neglect or conceal this coalescing awareness and appreciation.<sup>7</sup> Recently, however, there seems to be a reverent revival and renaissance of traditional and enlightening ways that rekindle this old and respectful knowledge, some of which have found a voice in the United Nations Declaration on the Rights of Indigenous Peoples.<sup>8</sup> This Article proposes that a jurisprudential *spiritual revolution* swirls increasingly more among tribal communities and is partly personified in the planning, development, and operation of tribal healing to wellness courts. This revival manifests further in the growing number of culturally accordant methods or institutions tribes are building to confront conflict and/or address discord and discrimination.<sup>9</sup>

For Indian nations, this revolutionary movement is like the berthing from one world to the next—reminiscent of those creation myths that tell of the destruction of old worlds and the dawn of new ones,<sup>10</sup> the emergence of

5. See PEGGY V. BECK, ANNA LEE WALTERS & NIA FRANCISCO, *THE SACRED: WAYS OF KNOWLEDGE, SOURCES OF LIFE* 11-12 (redesigned ed. 1990); *infra* Part III.

6. See *infra* Section II.A, Subsection II.B.4.

7. See JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 59-91 (2d ed. 2010); BECK, WALTERS & FRANCISCO, *supra* note 5, at 145; RUPERT ROSS, *DANCING WITH A GHOST: EXPLORING ABORIGINAL REALITY* 98 (1992).

8. E.g., Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, Art. 11(1), U.N. GAOR, 61st Sess., Supp. No. 49 (Vol. III), U.N. Doc. A/RES/61/295 (Vol. III), at 19 (Sept. 13, 2007) (“Indigenous peoples have the right to practise and revitalize their cultural traditions and customs.”).

9. *Culturally accordant methods or institutions* means all traditional and cultural ways of thinking from indigenous cultures to Judeo-Christian cosmology that make a difference. In the area of indigenous law, see FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 194-96 (1995); RUPERT ROSS, *RETURNING TO THE TEACHINGS: EXPLORING ABORIGINAL JUSTICE* 279-86 (2d ed. 2006) (providing an example of indigenous spiritual revolutions in justice); BECK, WALTERS & FRANCISCO, *supra* note 5, at 158; RICHLAND & DEER, *supra* note 7, at 73-91; STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 43 (1988); and Joseph Thomas Files-Away, Carrie Garow & Miriam Jorgensen, *Native Nation Courts: Key Players in Nation Rebuilding*, in *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* (Miriam Jorgensen ed., 2007).

10. See FRANK WATERS, *BOOK OF THE HOPI* 3-22 (1963); DAVID ADAMS LEEMING & MARGARET ADAMS LEEMING, *ENCYCLOPEDIA OF CREATION MYTHS* 123-31 (1994) (providing an example of creation stories, which note that one way in which creation occurs is by change of worlds).

which indicates big changes of context and circumstance.<sup>11</sup> These indigenous community spiritual revolutions not only positively affect individuals and citizens due to their support of reconnection and healing, but also they are of big consequence and concern to their peoples' collective paths from tribes to nations.<sup>12</sup> And though it is safe to say that these "native" revolutions do not employ a military "call to arms" strategy, they do demand the thoughtful application of recycled ancient indigenous intellect and modern innovation to the instant, incessant, and intricate community and nation-building campaigns Indian tribes are engaged in.<sup>13</sup> These fights are not only about supporting safe and peaceful communities, which can lead to saving lives and families; they are waged to help rid the indigenous psyche of the remaining symptoms common to a conquered and cowed people.<sup>14</sup> These lingering symptoms of conquest include, but are not limited to, substance abuse and addiction,<sup>15</sup> and the attendant devastating crime, delinquency, child abuse and neglect, and other misconduct.<sup>16</sup>

Consequently, these symptoms cause tribal court judges to hear and handle a huge number of alcohol and drug related cases and controversies,

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11. See *id.* See generally WALKING THUNDER, WALKING THUNDER: DINÉ MEDICINE WOMAN (Bradford Keeney ed., 2001).

12. See Joseph Thomas Flies-Away, Tribes to Nations—Reservations to Peace: People, Policy, Place & Pecuniary Possibilities i-vi (Nov. 2003) (unpublished manuscript) (on file with author).

13. Community and nation building are defined here as the multifaceted process of empowering human capital to contribute to the nation's organizational (institutional), community infrastructure/environmental, and economic development. See Joseph Thomas Flies-Away, Warrior of Law 4-5 (2000) (unpublished manuscript) (on file with author); Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 1-5 (Stephen Cornell & Joseph P. Kalt eds., 1992). See generally REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT, *supra* note 9; AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS (Eric D. Lemont ed., 2006).

14. See Bonnie Duran, Eduardo Duran & Maria Yellow Horse Brave Heart, *Native Americans and the Trauma of History*, in STUDYING NATIVE AMERICA: PROBLEMS AND PROSPECTS 60 (Russell Thornton ed., 1998); EDUARDO DURAN & BONNIE DURAN, NATIVE AMERICAN POSTCOLONIAL PSYCHOLOGY (Richard D. Mann ed., 1995).

15. LAURENCE ARMAND FRENCH, ADDICTIONS AND NATIVE AMERICANS 35-50 (2000).

16. See Nat'l Survey on Drug Use & Health, *Substance Use Among American Indian or Alaska Native Adolescents*, NSDUH REPORT, Oct. 4, 2011, available at [http://www.samhsa.gov/data/2k11/WEB\\_SR\\_005/WEB\\_SR\\_005.htm](http://www.samhsa.gov/data/2k11/WEB_SR_005/WEB_SR_005.htm); Nat'l Survey on Drug Use & Health, *Substance Use Among American Indian or Alaska Native Adults*, NSDUH REPORT, June 24, 2010, available at <http://www.samhsa.gov/data/2k10/182/AmericanIndian.htm>; DARRYL S. WOOD, U.S. DEP'T OF JUSTICE, A REVIEW OF RESEARCH ON ALCOHOL AND DRUG USE, CRIMINAL BEHAVIOR, AND THE CRIMINAL JUSTICE SYSTEM RESPONSE IN AMERICAN INDIAN AND ALASKA NATIVE COMMUNITIES (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/231348.pdf>.

many of which result in great personal and public injury. Sadly, a large number of these defendants, respondents, or otherwise court-involved persons return to court over and over again on similar charges or petitions, most of which involve the abusive use of alcohol and other substances, all of which cause extensive physical, intellectual, emotional, and spiritual harm.<sup>17</sup> From our observation and experiences in criminal matters, it is clear that standard sentencing schemes of incarceration and/or a fine do not effectively deter abusive drinking. Many defendants are not averse to spending a short period of time in jail and/or paying a fine. Though tribal criminal public intoxication provisions of law and order codes<sup>18</sup> are useful, some do not have the desired impact.<sup>19</sup> Standard criminal penalties do nothing for an individual whose addiction is long term; they do not address the underlying problems—the emotional, psychological, and social difficulties many defendants, respondents, or petitioners face in their daily lives that foster their desires to drink and drug destructively.<sup>20</sup>

Encouragingly, the alternative legal procedures and processes found in tribal healing to wellness courts provide participants facilitated access to treatment and supervised support for sobriety. These specialized court dockets enhance government response to substance-related devastations of the human spirit, most of which are preventable and needless. Designed with and from tribal, team, collaborative, and imaginative perspectives, healing to wellness courts help heal and mend human depressions and decay that hinder tribal community and nation building. The healing effect and revolutionary spirit of these innovative institutions, we contend, are nurtured by Therapeutic Jurisprudence (TJ)<sup>21</sup> and a powerful plus (+), a spiritual component that promotes the revitalization or generation of lost or new positive connections, associations, and links. It is within this spiritual aspect where we see ties with human and indigenous rights as founded and articulated in the Universal Declaration of Human Rights, and subsequently recognized by the United Nations Declaration on the Rights of Indigenous Peoples.<sup>22</sup> Specifically, we see healing to wellness courts as institutions that

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17. See Flies-Away, *supra* note 13.

18. HUALAPAI LAW AND ORDER CODE § 6.21(A) (1996) (amended July 2004 to § 6.278).

19. The Hualapai Tribal Council believed the law would deter more profoundly. Interview with Sheri Yellow Hawk, Hualapai Tribal Council Member (Sept. 1999).

20. See David B. Wexler, *Inducing Therapeutic Compliance Through the Criminal Law*, 14 LAW & PSYCHOL. REV. 43, 45 (1990).

21. For an overview of TJ, see Peggy Fulton Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

22. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Declaration on the Rights of Indigenous Peoples, *supra* note 8, at 19.

support and secure a stable standard of living for individuals facing a debilitating illness—addiction. By strengthening individuals, healing to wellness courts (in turn) empower families, which are fundamental to indigenous cosmology and centerpieces of Native societies.<sup>23</sup> We present this Article based on our experiences as tribal court judges and healing to wellness court advocates and technical assistance providers. We hope this text, our analysis, the paradigm, and the stories here initiate career-long conversations and debates about the judiciary's and judge's role as community and nation builders and champions for healing and wellness. We wish to show what is possible in judicial systems and legal procedures when spirituality, rights, and law are considered in tandem, and together, when collaboration and teamwork are persistently practiced. We address, but certainly do not limit, these words to those who are making a difference in the healing to wellness court, drug court, and TJ movements. We write to encourage all citizens and communities who engage each and every day in their own spiritual revolutions, wherein they endeavor to promote balance, seek unity of oppositional and adversarial forces, and try forcefully to support positive relationships and links. And amid all related efforts and like intentions we hope these words push us all closer towards being more powerful, healthy, and formidable human beings, people, citizens, communities, and nations.

In Part I we define healing to wellness courts as tribal renditions of drug courts and describe the connection or relationship to TJ. We offer a short review of common challenges in healing to wellness court planning and operations as well as highlight a few choices and ideas that some courts exploited that show innovation, imagination, and resolve in the fight against substance abuse and addiction. We hope to leave a few lessons learned that might help other Indian nations in their development, community, and nation-building endeavors. These examples and stories of institution building and programming, we believe, cultivate the kind of connections and relationships that help heal and contribute to peaceful, civil societies and adequate standards of living for tribal citizens.

In Part II we describe and discuss what we see and deem the plus (+): spirituality. We relate indigenous perspectives of what this often fuzzy concept means or manifests when applied in a tribal context by sharing examples of indigenous spiritual designs, "traditional" understanding of human connection and relatedness. In addition, and in order to place and make more concrete the notion of spirituality in a demonstrative context, we present a paradigm that joins spirituality, rights, and law with other considerations, which creates a tool that helps to analyze issues, protect and promote rights, and resolve conflict. Most importantly, we assert that healing re-

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23. See generally Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575 (2008) (discussing critiques and potential misuse or application of TJ).

sults—and human rights are secured—when lost connections are revitalized or new ones made and when a spiritual concept is coupled to TJ in tribal court forums such as healing to wellness courts.

In Part III we depict the correlation and draw the connection between healing to wellness courts and human rights. By focusing specifically on a few of the rights articulated in the Declaration of Human Rights and by using the Sphere as a lens, we illustrate the connection between spirituality, law, healing, and peace. We posit that healing to wellness courts and similar tribal institutions must be sought and secured as they promote the accountability and sustainability of fundamental aspects of human life as adopted and pronounced in internationally accepted standards of “living together well.”

Finally, in Part IV we contend that tribal governments and the federal government must support, build, and systematically institutionalize healing to wellness courts. Funds from the federal government, and money, muscle, and minds from tribal governments must join together to build these courts and others like them because they contribute to indigenous community and nation building and support basic human rights. They do this by helping to support stronger individuals—citizens—who collectively provide a greater source of human capital for their communities, to their tribes, and help create the environment for more than adequate standards of living. Tribal healing to wellness courts are vital to the visions and hopes of indigenous futures as they cause the lost to become found, the disconnected to become linked, and the disinterested person to become a vibrant citizen who can reinvest himself back into his family, her community, and his or her nation in useful and productive ways.

#### I. HEALING TO WELLNESS COURTS, DRUG COURTS, AND THERAPEUTIC JURISPRUDENCE

*Tribal Healing to Wellness Courts bring together community-healing resources with the tribal justice process, using a team approach to achieve the physical and spiritual healing of the participant and the well being of the community.*<sup>24</sup>

Healing to wellness courts, or wellness courts, are tribal versions of drug courts.<sup>25</sup> Debuting in 1989 in Florida, the moniker “drug court” charac-

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24. PATRICIA RIGGS ET AL., TRIBAL LAW & POLICY INST., U.S. DEP’T OF JUSTICE, TRIBAL HEALING TO WELLNESS COURTS: PROGRAM DEVELOPMENT GUIDE 6 (2002), available at <http://www1.spa.american.edu/justice/documents/427.pdf>.

25. For an overview of drug courts, see *id.*; Hora, Schma & Rosenthal, *supra* note 21; DRUG COURT CLEARINGHOUSE & TECHNICAL ASSISTANCE PROJECT, U.S. DEP’T OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS (1999) [hereinafter LOOKING AT A DECADE OF DRUG COURTS], available at <http://www1.spa.american.edu/justice/documents/2049.pdf>; JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT (2001). The Department of Justice Drug Courts Program Office was established in 1995 to

terizes the initial criminal concentration of these judicial innovations.<sup>26</sup> Early drug court cases involved criminal offenders who faced extensive prison terms for substance-related crimes.<sup>27</sup> Prison offered these inmates little or no treatment or rehabilitation in overcrowded facilities, even though, for many, addiction was at the root of their criminal behavior.<sup>28</sup> Consequently, the drug court approach was conceived with specialized court processes developed for non-violent drug cases in order to better address both the offenders' well-being as well as community infrastructure and capacity concerns.<sup>29</sup>

The Office of National Drug Control Policy (ONDCP) found that the costs of drug abuse to this country and various municipalities are immense, estimated at over \$143.4 billion in 1998.<sup>30</sup> Calculated in the costs include health care, productivity losses, and other monetary costs.<sup>31</sup> This calculus undoubtedly does not include intangible costs to individuals, families, and communities that over time tear apart valuable relationships and spirit that support growth and development. Sadly, substance abuse unnecessarily costs all communities a great deal, wherein a better world these resources could be utilized in different and more stimulating ways. Drug courts and wellness courts developed and evolved in response to these issues as a means to systemically address and deter these and other drug and alcohol related crimes and dysfunctions and their attendant social catastrophes.

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implement and support Title I, Subchapter XVI of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3797u-97u-8 (2006), which authorizes the Attorney General to make grants to States, State courts, local courts, units of local government, and Indian tribal governments for the establishment of drug courts in response to increased numbers of nonviolent, substance-abusing adult and juvenile offenders who contribute to the pervasive problems of prison and jail overcrowding and the high recidivism rate of those offenders. *See* DRUG COURTS PROGRAM OFFICE, U.S. DEP'T OF JUSTICE, DRUG COURTS PROGRAM OFFICE: ABOUT THE DRUG COURT PROGRAM OFFICE, available at <http://www.chesco.org/DocumentCenter/View/1447>. The Drug Courts Program Office, Office of Justice Programs, United States Department of Justice administers the Drug Court Grant Program, through which it provides financial and technical assistance, training, related programmatic guidance, and leadership. *Id.*

26. LOOKING AT A DECADE OF DRUG COURTS, *supra* note 25.

27. *Id.*

28. Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1056-57 (2003).

29. LOOKING AT A DECADE OF DRUG COURTS, *supra* note 25; 2 C. WEST HUDDLESTON, III, DOUGLAS B. MARLOWE & RACHEL CASEBOLT, NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 2 (2008), available at [http://d20j7ie7dvmqo0.cloudfront.net/sites/default/files/ndci/PCPII1\\_web%5B1%5D.pdf](http://d20j7ie7dvmqo0.cloudfront.net/sites/default/files/ndci/PCPII1_web%5B1%5D.pdf).

30. OFFICE OF NAT'L DRUG CONTROL POLICY, EXEC. OFFICE OF THE PRESIDENT, THE ECONOMIC COSTS OF DRUG ABUSE IN THE UNITED STATES: 1992-2002 xiii (2004), available at [https://www.ncjrs.gov/ondcppubs/publications/pdf/economic\\_costs.pdf](https://www.ncjrs.gov/ondcppubs/publications/pdf/economic_costs.pdf).

31. *Id.* at 1-2.

Utilizing a team approach, drug courts offered a novel alternative to the typical criminal court process where the participants' treatment was the primary collective focus, and the responsibility for monitoring participant progress was shared amongst a team.<sup>32</sup> Over time, the success of adult drug courts led to the development of other types of drug courts: family dependency treatment courts, juvenile drug courts, DWI courts, reentry drug courts, campus drug courts, tribal healing to wellness courts, federal reentry/drug courts, and veterans' treatment courts.<sup>33</sup> And like their counterpart criminal drug courts, these courts are tailored to serve particular populations. These courts offer participants a stronghold to take cover, arm, prepare, defy, and then hopefully defeat the stalwart and staunch adversary, addiction.<sup>34</sup>

Specialized drug courts, such as juvenile<sup>35</sup> and family wellness courts,<sup>36</sup> have been identified by tribes as priorities given the number of family issues and the amount of community distress experienced in Indian country.<sup>37</sup> Though these tracks require a heightened level of collaboration and planning, they share the original purpose for which juvenile courts were created.<sup>38</sup> The research notes a separate court track for battling addiction stating:

The major differences between juvenile treatment court and traditional juvenile court case processing include having a more systematic framework for frequent judicial monitoring; more formal linkages between the court and community treatment providers; and a case management team that works collaboratively to regularly assess the ongoing and changing needs and strengths of the youth and the family, develop a service plan, and monitor compliance with all court mandates.<sup>39</sup>

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32. 2 HUDDLESTON, MARLOWE & CASEBOLT, *supra* note 29, at 2.

33. WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 23 (2011), available at [http://dwicourts.org/sites/default/files/nadcp/PCP%20Report%20FINAL\\_0.PDF](http://dwicourts.org/sites/default/files/nadcp/PCP%20Report%20FINAL_0.PDF).

34. See Hora, Schma & Rosenthal, *supra* note 21, at 472-73; HARRISON ET AL., *supra* note 25, at 17; Peggy Fulton Hora, *A Dozen Years of Drug Treatment Courts: Uncovering Our Theoretical Foundation and the Construction of a Mainstream Paradigm*, 37 SUBSTANCE USE & MISUSE 1469, 1470 (2002).

35. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, JUVENILE DRUG COURTS: STRATEGIES IN PRACTICE (2003), available at <http://www.ncjfcj.org/sites/default/files/16%20strategies.pdf> (stating its purpose to be "a guide to planning, operating, and implementing juvenile drug courts").

36. See Nicolette M. Pach, *An Overview of Operational Family Dependency Treatment Courts*, 6 DRUG CT. REV. 67 (2008).

37. TRIBAL LAW & POLICY INST., U.S. DEP'T OF JUSTICE, TRIBAL WELLNESS COURTS NEEDS ASSESSMENT 30 (2011), available at <http://www.tribal-institute.org/download/BJAReview/WellnessNeedsAssessmentAB.pdf>.

38. Pamela Linden et al., *Developing Accountability in the Lives of Youth: Defining the Operational Features of Juvenile Treatment Courts*, 7 DRUG CT. REV. 125, 131 (2010).

39. *Id.* at 131.

Though research regarding juvenile drug courts is in its infancy, “evidence is mounting that JDTCs can be effective at reducing delinquency and substance abuse[. Moreover,] the field is just beginning to identify the factors that distinguish effective from ineffective programs.”<sup>40</sup>

Guided by Ten Key Components, drug and wellness courts are founded on holistic and collaborative principles.<sup>41</sup> The Tribal Key Components, based upon the Drug Court Key Components,<sup>42</sup> are specifically crafted to serve the needs of tribal communities and integrate basic community and nation building concepts.<sup>43</sup> The Ten Key Components propose the fundamental framework of wellness courts, and not only promote, but also require collaborative government, teamwork, and cooperation both within and outside of the court’s jurisdiction.<sup>44</sup> The Ten Key Components prompt the determination of what types of cases and participants enter<sup>45</sup> the court and are eligible<sup>46</sup> for its treatment services.<sup>47</sup> They promote a shared case management role by the team, one that necessitates detailed record keeping and data collection,<sup>48</sup> intensive supervision including random drug testing,<sup>49</sup> and swift

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40. DOUGLAS B. MARLOWE, NAT’L ASSOC. OF DRUG COURT PROFESSIONALS, RESEARCH UPDATE ON JUVENILE DRUG TREATMENT COURTS (2010), *available at* [http://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Juvenile%20Drug%20Treatment%20Courts%20-%20NADCP\\_1.pdf](http://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Juvenile%20Drug%20Treatment%20Courts%20-%20NADCP_1.pdf).

41. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS 1 (2004 ed.), *available at* [http://d20j7ie7dvmqo0.cloudfront.net/sites/default/files/nadcp/Key\\_Components.pdf](http://d20j7ie7dvmqo0.cloudfront.net/sites/default/files/nadcp/Key_Components.pdf).

42. *Id.* at iii.

43. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, TRIBAL HEALING TO WELLNESS COURTS: THE KEY COMPONENTS (2003) [hereinafter THE KEY COMPONENTS], *available at* <https://www.ncjrs.gov/pdffiles1/bja/188154.pdf>.

44. *Id.* at 1. Key Component 1 states: “Tribal Healing to Wellness Courts bring together community-healing resources with the tribal justice process, using a team approach to achieve the physical and spiritual healing of the participant and the well being of the community.” *Id.*

45. *Id.* at 3. Key Component 2 states: “Participants enter the wellness court program through various referral points and legal procedures while protecting their due process rights.” *Id.*

46. *Id.* at 7. Key Component 3 states: “Eligible substance abuse offenders are identified early through legal and clinical screening for eligibility and are promptly placed in the Tribal Healing to Wellness Program.” *Id.*

47. *Id.* at 9. Key Component 4 states: “Tribal Healing to Wellness Programs provide access to holistic, structured and phased, substance abuse treatment and rehabilitation services that incorporate culture and tradition.” *Id.*

48. *Id.* at 17. Key Component 8 states: “Monitoring and evaluation measure the achievement of program goals and gauge effectiveness to meet three purposes: providing information to improve the Healing to Wellness process; overseeing participant progress; and preparing evaluative information for interested community groups and funding sources.” *Id.*

49. *Id.* at 11. Key Component 5 states: “Participants are monitored through intensive supervision that includes frequent and random testing for alcohol and other substance use.” *Id.*

responses to participant conduct.<sup>50</sup> Maintaining a primary role, the judge is relied on to facilitate respectful communication<sup>51</sup> throughout the whole collaborative process, a practice that forces a change of attitude and mindset. Not only are expectations high for the continual learning and training<sup>52</sup> of all team members, but the Components also purport that sustainability and longevity compel the court to forge partnerships with critical stakeholders as well as prepare and review policy documents frequently.<sup>53</sup>

Unique to the drug court approach is the use and work of a drug court team. A team of normally adversarial associates is assembled to provide collective case management of participant treatment plans that are closely and regularly monitored for progress and impediments with the help of individual team members.<sup>54</sup> For example, a team is typically comprised of a judge, coordinator, prosecutor, public defender, probation officer, substance abuse counselor, and a mental health counselor.<sup>55</sup> For most jurisdictions, prior to working as a team in drug or wellness court, its members may have had little or no interaction with one another. A major facet of a wellness court's personality and healing potential depends on how well the team works to not only solicit and connect with treatment and other useful resources, but also to support and supervise the components of participant treatment plans.<sup>56</sup>

Teams help develop participant treatment or "wellness" plans and include not only probation-like requirements and counseling programs, but also consist of various ancillary and human services, life skills courses, and other wellness promoting activities.<sup>57</sup> Moreover, wellness court treatment plans may include cultural activities that help reconnect the participant with the culture and traditional ways of life of his people.<sup>58</sup> Each plan prescribes a rigorous and time-consuming schedule that requires a participant's full attention and focus. Providing a source of structure and support, a wellness

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50. *Id.* at 13. Key Component 6 states: "Progressive consequences (or sanctions) and rewards (or incentives) are used to encourage participant compliance with program requirements." *Id.*

51. *Id.* at 15. Key Component 7 states: "Ongoing judicial interaction with each participant and judicial involvement in team staffing is essential." *Id.*

52. *Id.* at 21. Key Component 9 states: "Continuing interdisciplinary education promotes effective wellness court planning, implementation, and operation." *Id.*

53. *Id.* at 23. Key Component 10 states: "The development of ongoing communication, coordination, and cooperation among team members, the community and relevant organizations are critical for program success." *Id.*

54. NAT'L DRUG COURT INST., EXEC. OFFICE OF THE PRESIDENT, CRITICAL ISSUES FOR DEFENSE ATTORNEYS IN DRUG COURT 3 (2003), available at <http://d20j7ie7dvmqo0.cloudfront.net/sites/default/files/ndci/Mono4.CriticalIssues.pdf>.

55. THE KEY COMPONENTS, *supra* note 43, at 1 (addressing Key Component 1).

56. *Id.* at 1, 9-10, 17-18 (addressing Key Components 1, 4, and 8).

57. *Id.* at 9, 11 (addressing Key Components 4 and 5).

58. *Id.* at 9-10 (addressing Key Component 4).

plan keeps a participant very busy moving towards a goal of sobriety, which leaves less chance for idle time to allow temptation and enticement that cause costly detours. A wellness plan not only provides intelligence and strategies to aid participants in their battle with addiction while in the court, but it also acts as the first coat of armor for perpetual defense in the ongoing battle after graduating from the wellness court.

Drug and wellness court participation is not easy. There are many requirements, expectations, and responsibilities involved in court compliance. Much time and focus is needed to maintain the busy schedule these processes expect of participants. In our work, wellness court team members recount that a common complaint of participants is that the court requires “too much” of them, that they did not expect to spend so much time complying with program requirements. Fortunately, some participants come to see the time as well spent. For instance, Judge Flies-Away was heartened to hear from a Hualapai Wellness Court participant many years after participating that her busy schedule kept her out of trouble, kept her from thinking about drinking. He then explained to her that was exactly why they were kept busy.

The wellness court process incorporates a phased system where the participant works to meet certain requirements and milestones in order to move to the next phase and ultimately graduate.<sup>59</sup> Each phase prescribes various therapeutic and self-improvement activities and expectations. The initial phase is usually the busiest as participants have obligations almost every day of the week and the weekend. The load becomes lighter for participants as they move through the phases. Participants in the Hualapai Wellness Court and three other tribal mentor courts similarly stated that their success in finishing the program provided a certain level of satisfaction and pride.<sup>60</sup> Others, unfortunately, do not comply with all requirements or violate rules and are terminated or discharged from the wellness court. They then face a term of detention and other penalties.

Stability and continuity is critical for participants. For each participant, successful treatment—true healing—is going to take a long time, perhaps as long as three years, or even an entire lifetime. Long-term addicts may need a period of detoxification even before any substantive treatment can begin to address the underlying issues and neglect causing his or her abusive behavior. Drug and wellness courts, however, last for a relatively short period of time, and a participant may require more support after he graduates. Sadly, without long-term support and encouragement, not every participant fully recovers. They cannot maintain sobriety and may commit

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59. *Id.* at 9 (addressing Key Component 4).

60. *See generally* KAREN GOTTLIEB, U.S. DEP’T OF JUSTICE, LESSONS LEARNED IN IMPLEMENTING THE FIRST FOUR TRIBAL WELLNESS COURTS (2010), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/231168.pdf>.

another crime or engage in consequential negative conduct that brings them back to court.

Each jurisdiction determines independently the conduct that triggers referral to a healing to wellness court. Based on the eligibility criteria determined for participation in drug court, referred candidates are legally and clinically screened for suitability. Each must not only meet the legal qualifications for entry such as a type of charge, conduct, or circumstance; they must also present the type or level of substance abuse or addiction for which the court is capable of providing help.<sup>61</sup> Many courts also inquire as to the level of motivation or whether the participant is ready to change behavior as a requisite for participation. Upon acceptance, a participant's problem or addiction is comprehensively assessed, and a plan is created in a phased format that allows for clear and sequenced steps and requirements to advance and complete the court's program.

The range of drugs or substances—both illegal and legal, such as alcohol and prescriptions—used by drug and wellness court participants is diverse. As a matter of treatment, some courts struggle with the issue of whether to require participants to completely abstain from legal drugs, including over-the-counter cold medication and prescriptions. This issue forces a difficult conversation for these drug and wellness court teams. The philosophy and sentiment differs from jurisdiction to jurisdiction, which ultimately direct a team's policy and approach. It becomes a more complicated conundrum in the treatment of recovering heroin addicts. The norm appears to share the opinion that “[j]ust as psychiatrists are not expected to withdraw depressed patients from their antidepressant medication . . . methadone patients should not be required to withdraw from a medication that improves their quality of life.”<sup>62</sup> On another hand, there appears to be less difficulty with allowing, or perhaps in perceiving there is even a problem with, the use of caffeine and nicotine by participants. Though legal and widely used, no doubt by team members themselves, they are both still drugs that affect the body and brain.

Each jurisdiction responds to the drugs of choice of their participants and the needs of their communities. Place and proximity to distribution hubs and production are factors on which the court concentrates its efforts. For example, in some places, the popularity of ecstasy among middle-class Americans is the focus. The unfortunate loss of life by some first-time teen users made that drug a priority in some communities and sounded an alarm

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61. THE KEY COMPONENTS, *supra* note 43, at 5, 7-8 (addressing Key Components 2 and 3).

62. MARK W. PARRINO & LAURA MCNICHOLAS, NAT'L DRUG COURT INST., DRUG COURT PRACTITIONER FACT SHEET—METHADONE MAINTENANCE AND OTHER PHARMACOTHERAPEUTIC INTERVENTIONS IN THE TREATMENT OF OPIOID DEPENDENCE 1 (2002), available at <http://www.ndci.org/sites/default/files/ndci/MethadoneFactSheet.pdf>.

to families from medium- to high-income communities that the drug or substance abuse problem affects the full spectrum of American life. Methamphetamine has become prevalent in rural and lower-income areas of the United States, which causes an array of harm in their communities and has also become problematic for many Native nations.<sup>63</sup>

Not unexpectedly, drug courts in large metropolitan areas tend to hear cases involving the “harder” drugs such as heroin, powder and crack cocaine, ecstasy, and others that one expects to find in city jurisdictions.<sup>64</sup> One study notes that “[m]ethamphetamine abuse was twice as prevalent among rural Drug Court participants as compared to urban and suburban participants. Cocaine/crack abuse was far more prevalent among urban Drug Court participants than rural and suburban participants.”<sup>65</sup> Tribal wellness courts may see more matters involving marijuana, methamphetamine, and most often alcohol. Tribes identify that incidences of alcohol offenses or misconduct are prevalent and cite voluminous and repeated charges of public intoxication, disorderly conduct, drunk driving (DWI or DUI), and domestic violence involving extensive drink.<sup>66</sup>

While these underlying human motivations and legal processes are similar for drug court and wellness court judges, they operate under distinct governmental power and structures. The extent and power over its citizens that the courts of the two sovereigns exercise determines the distinction. For example, Indian nations can exercise criminal jurisdiction over natives only.<sup>67</sup> Their sentencing authority has been limited by the Indian Civil Rights Act to one year, or possibly three years, with certain restrictions imposed by the Tribal Law and Order Act.<sup>68</sup> Many tribes do not have detention facilities or run their own law enforcement programs.<sup>69</sup> Behavioral health programs may be under the direction of the federal Health and Human Services’ Indian Health Service.<sup>70</sup> Moreover, tribes are limited in both financial and human resources. These and others factors cause challenges for wellness court

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63. BUREAU OF INDIAN AFFAIRS, U.S. DEP’T OF JUSTICE, INDIAN SERVICES CONNECTOR (2007), available at <http://www.bia.gov/idc/groups/public/documents/text/idc-001820.pdf>.

64. HUDDLESTON & MARLOWE, *supra* note 33, at 31 (2011).

65. *Id.* at 2.

66. TRIBAL LAW & POLICY INST., *supra* note 37, at 6.

67. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that Indian nations had been implicitly divested of their criminal jurisdiction over non-Indians).

68. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (2006); Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2279 (2010) (codified as amended at 25 U.S.C. §§ 1301-1303 (2010)).

69. See generally U.S. DEP’T OF INTERIOR & U.S. DEP’T OF JUSTICE, TRIBAL LAW AND ORDER ACT (TLOA) LONG TERM PLAN TO BUILD AND ENHANCE TRIBAL JUSTICE SYSTEMS (2011), available at <http://www.justice.gov/tribal/docs/tloa-tsp-aug2011.pdf>.

70. *Behavioral Health*, INDIAN HEALTH SERV. (Jan. 2013), <http://www.ihs.gov/newsroom/factsheets/behavioralhealth/>.

development and operations and in how these judicial institutions process and manage participants. Still, tribes continue to collaboratively and creatively design healing to wellness courts amid complicated circumstances with the limited resources they possess.<sup>71</sup>

Though more studies are required in regards to healing to wellness courts, the passing of time has allowed drug courts to be scrutinized and studied further. By 2008, it became possible to present evidence-based practices of drug courts that improve practice and performance, particularly in improving graduation rates. To name a few, these practices involved drug court screening, relapse prevention, cultural competency, co-occurring disorders, and the application of sanctions.<sup>72</sup> Today, it is claimed that “[t]he effectiveness of adult Drug Courts is not a matter of conjecture. It is the product of more than two decades of exhaustive scientific research.”<sup>73</sup>

The first study to show the benefits of drug courts appeared in 1998.<sup>74</sup> By 1999, drug courts were beginning to prove beneficial and were producing outcomes beyond their original goals.<sup>75</sup> For example, communities were seeing the birth of more drug-free babies, the reunification of families, and even judges quickly volunteering to take on more responsibilities for these alternatives to the status quo of adjudication.<sup>76</sup>

Moreover, an overarching achievement of drug courts is found in their contribution to collaborative government.<sup>77</sup> For both states and tribal governments, drug courts have “generated new levels of program coordination within the criminal justice system, created partnerships with community organizations, fostered collaboration between governmental agencies, inspired judicial leadership, forged innovative linkages with law enforcement, and earned the commitment and dedication of program staff.”<sup>78</sup>

As of May 2001, there were 483 adult, 158 juvenile, 38 family, and 9 combination adult/juvenile/family drug courts in operation, for a total of 688, with an additional

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71. DRUG COURTS PROGRAM OFFICE, *supra* note 3, at 2.

72. NAT’L DRUG COURT INST., EXEC. OFFICE OF THE PRESIDENT, QUALITY IMPROVEMENT FOR DRUG COURTS: EVIDENCE-BASED PRACTICES 5, 25, 45, 53, 109 (2008), available at <http://www.ndci.org/sites/default/files/ndci/Mono9.QualityImprovement.pdf>.

73. DOUGLAS B. MARLOWE, NAT’L ASS’N OF DRUG COURT PROF’LS, RESEARCH UPDATE ON ADULT DRUG COURTS (2010), available at <http://www.leg.state.nv.us/Session/76th2011/Exhibits/Assembly/WM/AWM167F.pdf>.

74. See Steven Belenko, *Research on Drug Courts: A Critical Review*, NAT’L DRUG CT. INST. REV., Summer 1998, at 10.

75. LOOKING AT A DECADE OF DRUG COURTS, *supra* note 25.

76. *Id.*

77. JEFF TAUBER & C. WEST HUDDLESTON, DEVELOPMENT AND IMPLEMENTATION OF DRUG COURT SYSTEMS (1999).

78. *Id.*

432 drug courts in the planning process . . . [A]mong these [were] 31 operational Tribal drug courts, with another 49 in the planning process.<sup>79</sup>

As of June 30, 2012, there were 2,734 drug courts in the United States,<sup>80</sup> of these 89 were healing to wellness courts.

A formidable challenge for any new governmental innovation, service, or program is to keep it going, to institutionalize it for the long term.<sup>81</sup> Primarily, but not exclusively, this means finding the dedicated financial backing to sustain the court and the services it provides its participants.<sup>82</sup> Fortunately, both drug courts and wellness courts have found logical and creative ways to keep their courts afloat and institutionalize them. Jurisdictions have enacted laws, refined administrative structure, assessed fees, and crafted collaborative partnerships in order to sustain and enhance their judicial innovations.<sup>83</sup>

Compared to good theatre where stories are imagined, written, and become a really good play, drug courts and healing to wellness courts find favor for their roles in confronting the crime and conflict caused by substance abuse. Judges in particular find:

More than any other judicial assignment, running a drug court docket will give the judge the opportunity to serve the community by restoring offenders to being productive members of society . . . and to transform the addict from a drain on the system to an employed, law abiding contributor to the community and his or her family.<sup>84</sup>

In comments to graduates of her Massachusetts drug court, Judge Diane Moriarity took the opportunity to further support and encourage them. Judge Moriarity said:

A time comes in your life when you finally get it . . . when, in the midst of all your fears and insanity, you stop dead in your tracks and somewhere the voice inside your head cries out ENOUGH!!! . . . Enough fighting and crying or struggling to hold on. And, like a child quieting down after a blind tantrum, your sobs begin to subside, you shudder once or twice, you blink back your tears and begin to look at the world through new eyes.<sup>85</sup>

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79. STEPHEN BELENKO, NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLOMBIA UNIV., RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 5 (2001), available at <http://www.drugpolicy.org/docUploads/2001drugcourts.pdf>.

80. HUDDDELSTON & MARLOWE, *supra* note 65, at 1.

81. NAT'L DRUG COURT INST., EXEC. OFFICE OF THE PRESIDENT, ENSURING SUSTAINABILITY FOR DRUGS COURTS: AN OVERVIEW OF FUNDING STRATEGIES 5, 93 (2008), available at <http://www.ndci.org/sites/default/files/Mono8.Sustainability.pdf>.

82. *Id.* at 1.

83. *Id.* at 5-12, 61-62, 84.

84. NAT'L DRUG COURT INST., EXEC. OFFICE OF THE PRESIDENT, THE DRUG COURT JUDICIAL BENCHMARK 214 (Douglas B. Marlowe & William G. Meyer eds., 2011).

85. Diane Moriarity, Judge, Quincy, Mass. Dist. Court, Speech at Drug Court Graduation (June 7, 2012).

The judge's sentiment and advice represents a compassionate and committed approach that drug and wellness court judges espouse.

Both public and personal benefits are becoming clear as the burgeoning research and reviews of these courts are generally positive and promising. The attractiveness of these courts is like the buzz of a popular movie that lures others to come see what's going on. Some jurisdictions, in fact, finding that they do work and are effective, have committed operational funding from general funds or taxes.<sup>86</sup> By providing citizens and communities a powerful defense and tool—weapons, in fact—to fight the potent and pervasive adversarial forces of addiction and dysfunction, wellness courts support stronger, safer, and more peaceful communities.<sup>87</sup> Drug and wellness courts work because they approach a critical civic concern through an institutionalized process that not only deals with substance-related misconduct and crime, but the process also considers the impact the institution has on a participant's well-being.<sup>88</sup> By healing disconnection and distress, these judicial institutions therapeutically and forcefully motivate and move the “people to gather ground and grow.”

*Therapeutic jurisprudence seeks to apply social science to examine law's impact on the mental and physical health of the people it affects. . . . [L]aw functions as a therapeutic agent, bringing about therapeutic or antitherapeutic consequences.*<sup>89</sup>

Therapeutic jurisprudence (TJ) is a legal theory that explores how law can be helpful, therapeutic, even healing. A more positive and collaborative approach, TJ places the major emphasis on ascertaining the relationship between legal arrangements and therapeutic outcomes.<sup>90</sup> David Wexler, TJ's founding father, explains that TJ “concentrates on the law's impact on emotional life and psychological well-being” and maintains that TJ is concerned about how legal people, procedures, and paradigms have therapeutic or anti-therapeutic results.<sup>91</sup> Related to legal realism,<sup>92</sup> TJ derives from and has roots in mental health law.<sup>93</sup>

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86. DENNIS A. REILLY & ATOUNDR A PIERRE-LAWSON, NAT'L DRUG COURT INST., ENSURING SUSTAINABILITY FOR DRUG COURTS: AN OVERVIEW OF FUNDING STRATEGIES 23-27 (2008), available at <http://www.ndci.org/sites/default/files/ndci/Mono8.Sustainability.pdf>.

87. THE KEY COMPONENTS, *supra* note 43.

88. *Id.*

89. BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 3 (1997).

90. *Id.* at 15.

91. David B. Wexler, *Welcome*, INT'L NETWORK ON THERAPEUTIC JURISPRUDENCE, <http://www.law.arizona.edu/depts/upr-intj/> (last visited July 1, 2013).

92. See David Finkelman & Thomas Grisso, *Therapeutic Jurisprudence: From Idea to Application*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243, 245 (1994).

93. David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979, 981 (1991).

Since its inception, TJ-based ideas and notions have impacted many important areas of law. Criminal law, family law, and juvenile law all have taken a little wisdom from TJ<sup>94</sup> in issues such as suicide in prison<sup>95</sup> and sex offenders in the plea process.<sup>96</sup> In a preventive law context, TJ is used to “emphasize[] the lawyer’s role as a planner and proposes the careful private ordering of affairs as a method of avoiding the high costs of litigation and ensuring desired outcomes and opportunities.”<sup>97</sup> Moreover, “[t]herapeutic jurisprudence advocates the study of the[] consequences” or the impact of law using “tools of the behavioral sciences [to] better understand law and how it applies.”<sup>98</sup>

Applications of TJ continue to expand as awareness of TJ grows. “The number of articles explicitly endorsing [TJ’s] approach within the short time TJ has existed testifies to the hunger for a new interdisciplinary way of looking at law [and applying law].”<sup>99</sup> This hunger materializes at conferences such as the International Therapeutic Jurisprudence Conference, where new ways to approach crime and conflict and problem-solving procedures are discussed. This activity demonstrates a desire for law to be a more positively connecting force in our lives; that law can be applied to have a therapeutic effect and make things better.<sup>100</sup> The interest is global and adapts to a wide range of applications and cultures. Bruce Winick notes that “therapeutic jurisprudence can be more international and comparative in scope, allowing for greater opportunities for interchange between scholars of different nations.”<sup>101</sup> Important for our discussion, TJ recognizes the im-

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94. See David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279 (1993) (discussing therapeutic jurisprudence and criminal law); Dennis P. Stolle, *Professional Responsibility in Elder Law: A Synthesis of Preventive Law and Therapeutic Jurisprudence*, 14 BEHAV. SCI. & L. 459 (1996) (discussing TJ and elder law); Kathryn E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients’ Divorces on Their Children*, 67 REV. JUR. U.P.R. 137, 137 (1998) (discussing TJ and family and juvenile law).

95. See Fred Cohen & Joel A. Dvoskin, *Therapeutic Jurisprudence and Corrections: A Glimpse*, 10 N.Y.L. SCH. J. HUM. RTS. 777, 792-803 (1993).

96. Wexler, *supra* note 94, at 284-91.

97. Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 15-20 (1997); ROBERT M. HARDAWAY, PREVENTIVE LAW: MATERIALS ON A NON ADVERSARIAL LEGAL PROCESS 4 (1997).

98. Bruce J. Winick, *Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law*, 21 N.Y.L. SCH. J. INT’L & COMP. L. 537, 542 (2002).

99. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, in LAW IN A THERAPEUTIC KEY 763, 792 (David B. Wexler & Bruce J. Winick eds., 1996).

100. See Flies-Away, *supra* note 13, at 2.

101. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL’Y & L. 184, 204 (1997).

portance of due process and rights and does not suggest that therapeutic goals trump rights.<sup>102</sup>

Hora, Schma, and Rosenthal found the TJ lens useful in explaining the drug court movement.<sup>103</sup> They found it so useful framing their efforts that they proposed that TJ be the drug court movement's "jurisprudential foundation."<sup>104</sup> By adopting the TJ lens and recommending it be the basis of future development, the overarching concern and consideration is devoted to understanding how law—wound up in the justice system—should result in healing rather than dysfunction. Given that the drug court movement was instigated by tying treatment to the justice process, this shows an intent to want to do more for individuals and society. The focus on helping citizens results in their ability to make better contributions to their families and communities.

To refine and focus the scope of TJ's inquiry, Wexler employs four considerations, or angles, of the TJ lens. These perspectives help to capture and reveal images that show: "(1) the role of the law in producing psychological dysfunction, (2) therapeutic aspects of legal rules, (3) therapeutic aspects of legal procedures, and (4) therapeutic aspects of judicial and legal roles."<sup>105</sup> Here, we will concentrate on images involving wellness courts and how the drug court approach helps shed light and clarity on these images.

The first consideration is inclusive and broad, and questions how law contributes to non-therapeutic outcomes or "juridical psychopathology."<sup>106</sup> This inquiry seeks to "identify and, to the extent such a course of action would be compatible with objectives of justice, to minimize law-produced dysfunction."<sup>107</sup> Using confidentiality laws as an example, Wexler's analysis concludes that laws that restrict protection cause some individuals who require treatment to not seek it.<sup>108</sup> To some degree a similar situation exists for voluntary participants of wellness court who must agree to allow a ream of persons to have access to their information, rather than only one or a few. Does less or restricted confidentiality cause an eligible participant to choose not participate in wellness court? Many similar questions await the fast developing legal infrastructure forming around the drug court approach. Similar queries about how these novel legal systems foster therapeutic results present extensive opportunities for further research and investigation. Ap-

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102. See Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 *TOURO L. REV.* 479, 484 (2002).

103. See Hora, Schma & Rosenthal, *supra* note 21, at 440.

104. *Id.*

105. David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 17, 19 (David B. Wexler & Bruce J. Winick eds., 1991).

106. *Id.* at 19.

107. *Id.* at 20.

108. *Id.*

plications of TJ, therefore, offer great potential to stimulate and inspire change and enhancement in the justice system.

The next two perspectives—the therapeutic aspects of legal rules and legal procedure Wexler proffers—specifically examine the impact of rules and procedures on people within the justice system. For our purposes here, we consider rules to be the guidelines that teams employ to the direct team responses to participant conduct in both the positive and negative sense. These include the Key Components discussed above, as well as team handbooks, court rules, and any policies the teams or courts have employed to guide their decision-making process.

Using the team approach, based on the Key Components, illustrates a holistic and comprehensive rule that is derived from the goal to positively impact participant lives. Quite different from the adversarial court process, the team approach provides legal, counseling, career, education, and cultural components. This process embodies TJ as it focuses on healing the participant. Other rules, such as which individuals may be accepted into court, what sanctions to apply and when to apply them, and whether to require drug testing and court appearances, are implemented by the team and are focused on healing the participant. These rules, in their operation, have a therapeutic impact as they are based upon the goal of addressing addiction.

Drug and wellness courts, though fundamentally similar, may take on slightly different forms. All procedures and processes, however, are geared towards promoting wellness and sobriety amongst its participants.<sup>109</sup> The referral process, status hearings, staffing meetings, termination hearings, and graduations are a few drug court procedures practiced daily in drug and wellness courts everywhere.<sup>110</sup> Each step of the court process is undertaken with the intent to help individual participants move to healthier and happier situations and circumstances. Drug testing, for example, is done to support abstinence, accountability, and responsibility. Its intent is to assure the participant does not use drugs, and though sanctions are imposed on those who violate the rule through the drug testing procedure, the court still is considerate as to what is the best therapeutic, rather than punitive, response.<sup>111</sup>

Moreover, the nurturing nature of TJ has adapted to juvenile and family court procedures, which help fashion family and juvenile drug and wellness courts. In these civil procedural courts, the goal is to positively affect a family or juvenile by providing comprehensive support, discipline, and encouragement. These procedures take dysfunctional family members and force them from comfortable crevices where they do not change or grow. The treatment process and regiment is created to address whatever wounds

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109. THE KEY COMPONENTS, *supra* note 43.

110. See James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1542-45 (2003).

111. THE KEY COMPONENTS, *supra* note 43, at 13.

they have by bringing them out into the open, where they are forced to deal with whatever deep-rooted issue surfaces that causes difficult feelings and thoughts that hamper life. When crafted to provide families the opportunity to get to the roots of problems, wellness courts provide greater chances for reconciliation and repair. Wellness court teams and practitioners consistently state the belief that helping families helps the whole community, the whole tribe. If this contention is correct, then as more families become whole and secure, the standard of living improves, and life is better for everyone.

The fourth perspective focuses on the therapeutic aspects of the judicial roles of judges and lawyers, and their impact on the people participating, voluntarily or not, in the justice system. A clear operational distinction from the adversarial adjudication process, the wellness court team actually broadens the cadre of contributing characters. The frequency of contact between a team and participant is significant. There is much more space for connections and relationships to be made between them. Depending on local court rules, team members offer input at team meetings (staffings) and review hearings. Operationally and as a matter of practice, while a team of folks offers a wider range of knowledge, experience, and expertise, and can generate more suggestions and ideas, it can take a lot of time for the team to process each member's input and reach conclusions. Team members do not have a lot of time.

The judge, however, is still the captain and coach of the team. In either capacity or circumstance the judge's role in wellness court is critical. The judge interacts directly with participants at hearings and is the first to congratulate or chastise publicly.<sup>112</sup> Participants come to court with the expectation of interacting with a judge and how the judge engages the participant matters tremendously. It is clear to us that not all judges can serve proficiently as a wellness court judge. There are personality requirements that appear counterintuitive for the usual judicial character. Moreover, administrative responsibilities expand with an additional docket, and there is a greater extra-judicial burden (to take on) in dealing with leaders and the community. Consequently, in the wellness court arena judges can encourage, if not cause, therapeutic results.

The four considerations of Wexler's inquiry are easily applied to wellness courts. They provide a useful and appropriate framework to parse and study the impact of the wellness court approach as manifested in each jurisdiction. Interestingly, wellness courts, the approach, and indeed the very first drug court, are products of a coerced needs analysis, which was prompted by apparent systemic inadequacies in both case processing and detaining defendants/inmates, and in the lack of treatment or healing pro-

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112. See Nolan, *supra* note 110, at 1542-43.

vided to them.<sup>113</sup> The very nature or intent of the new rules, procedures, and roles of drug courts and healing to wellness courts were and are therapeutic.

There are conceivably many potential applications of TJ in justice and law. Its *cutting edge*<sup>114</sup> nature looks deeper into the justice system, its cohort, and how they affect citizens, people, communities, and nations. The growth of drug and wellness courts not only strengthens the assertion that TJ is the foundation that Judge Hora and others suggest, but they also appear to be forming and solidifying it.

## II. THERAPEUTIC JURISPRUDENCE +

*To heal something or someone is to 'make it whole' . . . . To heal, therefore, is to bring together the component parts of any system—be it a human, animal, plant or 'inanimate' system—in an including rather than excluding way. When we do this we bring about true healing rather than just the kind of 'healing' which is concerned with fixing pain, disguising discord or in some way treating the symptom rather than the cause.*<sup>115</sup>

In Part I we described the basic tenets of TJ and explained TJ's relationship with drug and wellness courts. Here in Part II we describe, define, and illustrate the "Plus" (+) and attempt to prove the TJ + equation. We explain how the + works like an adhesive, helping stabilize form, frame, and foundation of not only principles and processes, but also persons. We assert that a clear wellness court programmatic mission, design, and vision grounded in TJ + invigorate and sustain a wellness court participant's healing journey. The TJ + equation, which includes family and community as key factors, causes wellness courts to be viable and valuable tribal institutions.

Simply stated and as specifically defined and described further below, the + is spirituality. Spiritual or spirituality here includes how an individual perceives, accepts, finds, defines, and nurtures connections and relationships with others—both animate and inanimate. A person's spirituality is the expression of how she feels or does not feel related to a part of the world—the environment—around her. Spirituality does not need to only equate to a particular religious dogma or doctrine, though one's faith is influential and a primary connection and basis of a person's morality. Spirituality incorporates the basic correlations one finds amongst or within Creation, the common myriad of links that connects a person in empowering ways to "all that is."

Passing of time, contact with others, and "civilization" forced many indigenous cultures to suppress or forget focal and formal traditional beliefs,

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113. Hora, Schma & Rosenthal, *supra* note 21, at 17.

114. CUTTING EDGE LAW, <http://www.cuttingedgelaw.com> (last visited Sept. 25, 2013) (offering a forum for a group of lawyers advocating peace).

115. WILL PARFITT, THE ELEMENTS OF THE QABALAH 101 (Element Books 1993).

customs, and other spiritual links that were esteemed and essential in the indigenous past. Various circumstances caused many indigenous peoples to lose appreciation for “old” wisdom that these beliefs possess and preserve. Many lost connection to original teachings about those things that keep “the people” tied together; they no longer told the stories about the things that make *the people* whole. Discouragingly, after conquest or “contact” with outsiders, many customs and traditional knowledge were repressed, ultimately forgotten. This drastic change or loss of culture became a contributing factor of what some call historical trauma.<sup>116</sup>

A remedy or response to this condition, we assert, requires the rejuvenation of personal and collective spirit. This includes reconnecting to one’s roots and collective history, and remembering that which keeps *the people* strong. Among Indian nations, one manifestation of this rejuvenation, or what His Holiness refers to as a *spiritual revolution*, materializes in healing to wellness courts. This revolution is partly fueled and energized by TJ +, a blend of reactivated “lost” understanding and knowledge with contemporaneous insight and fortitude. For wellness court participants, the resulting mixture cultivates the self-esteem that helps repair, build, nurture, and sustain essential and empowering relationships. Wellness courts are institutions that work to identify and promote like beneficial connections for their participants and encourage long-term connectivity to sources of support. By doing this, wellness courts nurture communities and nations that can promote human rights and sustain adequate standards of living for their citizens.

#### A. The Sphere: The Spirituality of Law Analysis—The Warrior of Law Approach

To illustrate and illuminate one understanding and application of the term spirituality, an understandably fuzzy and incoherent concept, we align it with other significant and meaningful aspects or components of life in the

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116. See generally Eduardo Duran et al., *Healing the American Indian Soul Wound*, in INTERNATIONAL HANDBOOK OF MULTIGENERATIONAL LEGACIES OF TRAUMA 341 (Yael Danieli ed., 1998); Spero M. Manson, *The Wounded Spirit: A Cultural Formulation of Post-Traumatic Stress Disorder*, 20 CULTURE MED. & PSYCHIATRY 489 (1996); Robert W. Robin et al., *Prevalence and Characteristics of Trauma and Posttraumatic Stress Disorder in a Southwestern American Indian Community*, 154 AM. J. PSYCHIATRY 1582 (1997); Alf Walle, *Native People and the DSM IV-TR: Expanding Diagnostic Criteria to Reflect Minority Trauma*, 3 J. ETHNICITY SUBSTANCE ABUSE 49 (2005); Robert W. Robin, Barbara Chester, and David Goldman, *Cumulative Trauma in PTSD in American Indian Communities*, in ETHNOCULTURAL ASPECTS OF POSTTRAUMATIC STRESS DISORDER: ISSUES, RESEARCH AND CLINICAL APPLICATIONS 239 (Anthony J. Marsella et al. eds., 1996).

Sphere.<sup>117</sup> In the Sphere, spirituality is tied and connected to other critical life components and considerations. The Sphere places Law and Spirituality/Spirit together on the same axis. In other words, in the Sphere, Law and Spirituality are synonymous. The Sphere acknowledges that “Legal” connections are expressed and captured in at least two different ways: positively, like in a code or common law, or through conduct, such as in custom or common practices. At first, this joining may not be readily understood or realized. The spherical analyses below intend to bring greater clarity to these relationships, which are the basis of our theory of healing and connection, which also secures the tie to fundamental human rights and responsibilities, freedoms, and obligations.<sup>118</sup>

The Sphere in its most practical sense is a tool. It serves the needs of a jurist, a community and nation builder, a court, a participant, or a person. When used to solve problems, disagreements, or disputes the Sphere guides the Spirituality of Law Analysis (Analysis). When used as a development device, it directs the Warrior of Law Approach (Approach). The Analysis and Approach facilitate the formulation of personal and collective visions and provide structure from which to produce roadmaps and guides for strategic responses. Functioning as an analytical tool, the Sphere provides a context for these considerations to be examined together in a structured and holistic way. Allowing analysis from various perspectives and from a big picture to a smaller picture and vice-versa, the Sphere unites what we believe are fundamental associations, connections, and links that human beings and human enterprises and institutions share. These relationships establish responsibilities towards one another and create expectations and assurances that all responsibilities are respected and adhered to.

The Sphere’s Analysis and Approach presume the inherent relatedness of things—that life, lives, and circumstance are connected and related to one another in specific and useful ways. By identifying and honoring this connectivity, the Sphere’s Analysis and Approach<sup>119</sup> conjure a ceremonial context rather than a routine opportunity for contextual consideration. The Sphere encompasses ceremony because it provides a format and configuration to mark and remember important events, situations, happenings, and phases of a process. The visioning and picturing derived in the Spherical

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117. Flies-Away developed the Sphere after being asked by a minor how he made decisions. In thinking about the question, it easily fit with another tool Flies-Away created as the Planner for Hualapai Nation, where he helped the people to gather ground and grow. The planning tool was one dimensional. The consideration for decision making fit comfortably with the planning elements, and it became the Sphere.

118. See AMARTYA SEN, *THE IDEA OF JUSTICE* 357-87 (2009).

119. We acknowledge that there exist many designs or paradigms that offer useful perspectives and possibilities for which to observe and perceive life. Using the Sphere in the manner presented adds depth and breadth to the analysis and conversation.

Analysis and Approach are intended to strengthen and make life whole and meaningful, which are objectives of personal and public ceremonial practice.

Showing connection or disconnection, the Sphere symbolizes how life consists of countless ways people and things are connected or not connected to one another. A spiritual understanding is mindful that some connections can create problems and that problems and conflicts can arise when important connections are threatened or lost. The most important goal of a spherical application, or ceremony, is to move closer to the possibility of peace—to think and devise schemes, plans, means, and paths that promote peace. And given that peace requires balance among contributing and competing components, it promotes wholeness, which is healing. Thus, the Sphere as a tool supports health and wellness, and sustains community and nation building, which ultimately promote and protect basic human rights.

To stimulate restoration and healing, the Analysis and Approach employ versions of TJ +. The formula is pursued in order to increase understanding, develop answers, and invigorate healing by pursuing balance and proportion between the Sphere's components and considerations. In applying both intuitive and learned knowledge of these constituents, one is able to address and approach issues, conflicts and quarrels, plans, projects, and proposals in a positive and all-encompassing way.

## B. Components and Considerations of the Sphere

The Sphere's components and considerations provide the framework and strategy for the Analysis and Approach. Tenants of TJ are inherent in the Sphere. They are personified in specific components that seek to realign individuals to strengths inside and outside of themselves, a process associated with ceremony. These considerations are then connected and linked to spirituality and law, which is the Sphere's primary element. First, we describe the Sphere's components and considerations. We then describe the Analysis and Approach and briefly apply them to healing to wellness courts. But because the ways and manners the Sphere can be applied are far too numerous for this Article, we provide a few examples for illustration.

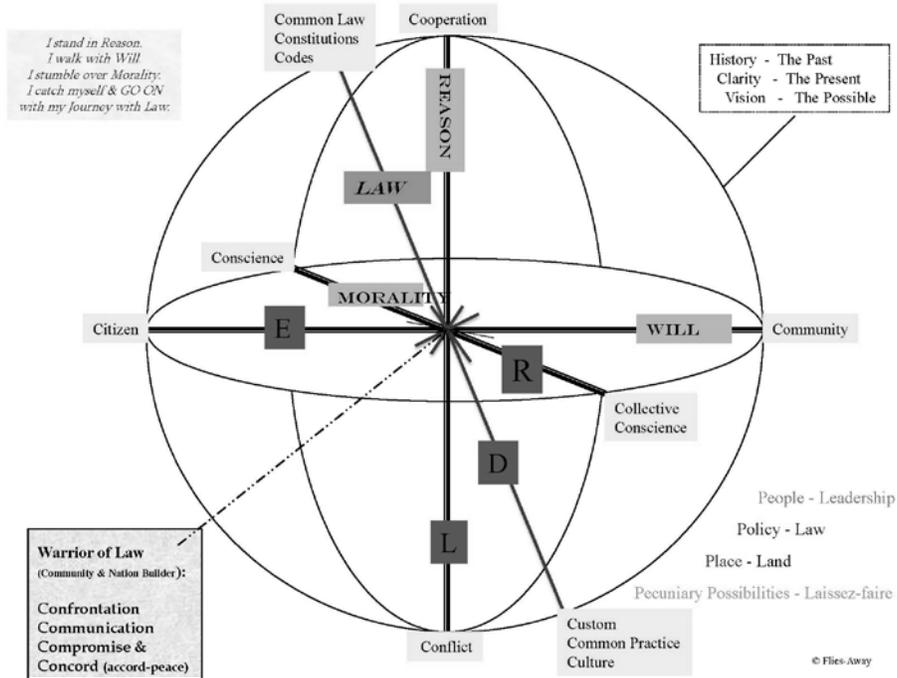
The merging and fusing of four axes form the Sphere.<sup>120</sup> Each axis is identified and named specifically and will be described in turn as will its analytical and developmental significance. The ends of each axis represent two opposite or varying points of view of a primary social principle and human attribute (eight poles all together). Each "pole" and the other considerations in the Sphere also relate to key aspects of being human. Three of the four axes appear only once in the sphere (ELR), while the fourth (D)

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120. Refer to Figure 1 as you read these two paragraphs.

makes up the rest of the Sphere and is the basis for the Analysis and Approach.

**Figure 1: The Sphere**



The first axis is horizontal and at one end (the pole) is Citizen and at the other end is Community. This axis is named Will and E (E = Earth). The second axis is vertical. It is named Reason and L (L = Lightning). The “north” pole on this axis is called Cooperation. The “south” pole is called Conflict. The third axis is also horizontal and perfectly crosses the first (perpendicular). This axis is called Morality and R (R = Rain). Its poles are designated Conscience on one end and Collective Conscience on the other. And the last axis, whose numbers are many and create all the rest of the Sphere, is called Law and D (D = Dream). On one end of the axis Law is Dream are Culture, Custom, and Common Practice. On the other end are Common Law, Codes, and Constitutions. The spectrum between the “poles” of Law distinguishes between that which is written and that which is done.

1. *The Citizen and Community Axis (Will and E = Earth)*

One of the most difficult challenges for any human is to recognize and then balance his or her place as a person in the midst of many people. Individuals are challenged all through life in finding balance between his or her

individuality and that of the people he or she belongs with. Some cultures more than others require that responsibilities to one's people and community supersede personal aspirations and interests. Others promote the very opposite, wherein personal gain is of greater significance. The Citizen–Community axis—Will and E—reminds the human being to consider the spectrum between oneself and the various communities he or she is a part of. It invokes the exercise, perhaps pain, of stretching, forcing the study of an issue from an individual and collective perspective.

Wellness courts promote the wellness of individual citizens so that they can become powerful and contributing members of the communities and groups that they belong to, including their families. Within this process, they protect citizens' rights, such as requiring consent and providing due process, and they also promote rights to both a healthy lifestyle and to be a part of a family and community. Parents are provided greater skills and support to be better moms and dads to their children. Children or minors are encouraged and redirected to better paths and to make better choices, accepting the love and discipline of their parents. The process engaged by wellness courts that engages citizens to embark on healing journeys leads to empowered human capital that has the ability to stand on their own two feet and thrive, giving the participant the power to continue on his or her own and in tandem with the community in which they are a part.

## 2. *The Cooperation and Conflict Axis (Reason and L = Lightning)*

Human existence and history is full of examples and precedent of cooperation and conflict. Rather, it is more reasonable to say that each situation or incident in history, or in one's life, shares aspects of both cooperation and conflict. Every person, almost daily, finds himself somewhere along this spectrum between Cooperation and Conflict, sometimes experiencing more of one than the other. The Cooperation–Conflict axis—Reason and L—presents a constant challenge in life that forces a person to respond and handle the stress or responsibility of what each brings. The goal may be to live life in a way that promotes a medium between these forces and their extremes. It should not be the goal to attain, or reach, total cooperation—though there are times this happens. Life would not provide very many lessons if everyone always cooperated. In fact, in considering this and all the poles, components, and concepts of the Sphere, it is important to recognize that every place in the Sphere is valuable and significant. There is no perfect position on the Sphere, perhaps just a better one.

Wellness courts take on personal conflict, or dysfunction, cooperatively. They also take on and resolve conflicts between individual rights within the criminal justice system and the community's right to a safe place to live. Thus, the power of a team, which is mostly configured of tribal citizens, collectively supports participants in their confrontation against addiction.

The notion of joint venture is generally a tribal strategy, such as a hunting party, war party, and the like. The team helps the participant fight his or her battle. The problems a wellness court participant faces can be so extreme that it requires a collection of resources, tools, or weapons to defend oneself or fight back. Gathering healing resources and then managing them, however, presents a number of issues for wellness courts that take time to work through. The number of people involved in the court and team may become overwhelming to coordinate, particularly if a wide spectrum of services is provided to the participant. Many wellness courts struggle with understanding and assuring confidentiality and lessening participants' concern that so many know of their situation. Working collaboratively to assist participants with their problems takes much trial and error, but nevertheless is the optimal approach in a tribal context.

### *3. The Conscience and Collective Conscience Axis (Morality)*

The Conscience–Collective Conscience axis—Morality and R—creates great confusion and imbalance for individual citizens and communities. Morality can make one stumble and lose footing. The two poles of Morality show the spectrum from an individual belief of right and wrong to a group belief. The group possibilities are numerous. It might present itself in the form of one's peers, family, community, nation, faith, and a host of others. Depending on the attendant circumstance, the singular conscience is usually one's own, in contrast to a group that he or she is engaged in. At other times, the two perspectives are single perspectives compiled by a huge number of others: a collective perspective so large that it seems impossible to calculate. Determining what the points of view are involved in an issue and how there may be compilations of others requires extensive reflection. A simpler example is an individual's belief countered with that of his family. Early in life a considerable overlap may exist between one's conscience with that of her family. Perspectives change, however. As the person grows and develops, he forms his own unique beliefs and understanding of the world around him.

Conflict between the Citizen and Community poles is expected. And conflicts occur with each group or community an individual is connected to. The distances between two perspectives may be wide, and thus conflict resolution and reconciliation is more complicated. Discernment of the various perspectives will help build greater understanding and appreciation of the many motivations that guide and direct one's steps and conduct. Mastery of the Morality axis requires intense reflection and study of the bases of individual and group beliefs. Extensive and diligent effort here will make it easier to negotiate beneficial compromises and propose useful strategies when confronted with similar moral controversies.

Wellness courts represent another group perspective, albeit a powerful one, for a participant to relate to. Suffice it to say, the team's collective understanding of right or wrong will prevail or else the participant is terminated from the court. What presents a conundrum is efficient and fair decision making. The team comes with a collective conscience of the value of a human and his or her right to a healthy life and family. The difficulty is now coming to a collective conscience on what plan or path is needed to achieve that right. A wellness court team consists of a wide range of persons and disciplines that come from different varying perspectives and philosophies of what is right or wrong, or what a person needs to pursue wellness. Social workers may tend to seem soft to police officers. Probation officers may seem harsh to counselors. The various approaches each team member might take as an individual are impacted by the input of the rest of the members of the team. The judge, however, who serves as the captain or coach, is responsible for consolidating opinions and channeling consensus. The only caveat is that community will is considered and accounted for in the team's conclusion. Here, the primary individual requirement is that the participant is afforded the due process guaranteed to him by law.

4. *The Culture/Custom/Common Practice and Common Law/Codes/Constitutions Axis (Law)*

The Culture/Custom/Common Practice and Common Law/Codes/Constitutions Axis (C–C axis)—Law and D—is the most important axis due to its spiritual or legal consequence. The D axes taken all together make up the bulk of the Sphere and contain the variant images of the heterogeneous human condition or human family. The points on each axis reflect the different aspects or configurations of a community, citizen, and family, and represent the mass of spiritual links that tie the human family together. Moreover, the Law axis signifies the spectrum from what is written to what is done, or put in another way, the difference and distance between text and tradition. The Law (D) poles acknowledge that law is written or not written. Either way, law in its two forms serves as a spiritual instrument or conduit because it helps either to bring people or things together, or causes them to move apart. An important aspect of the analysis or goal here includes figuring out where on the axis to be. Where is it most comfortable? Are written words needed? Or does the attendant situation require only a verbal declaration to be followed by example and consistent practice?

Law, whether customary (conduct) or positive (words), is crafted to define relationships and delineate the bounds of human interaction. Many of these defined relationships are between individuals (organizations as individuals included), while others are between individuals and groups or society. Law prescribes and prohibits conduct for a person, polity, or govern-

ment. In the spherical context, law includes rules, regulation, guidelines, policies, and procedures. Consequently, in all manners or forms where official guidance and direction is given and the expectation is that it be followed, it results in either promoting the relatedness or un-relatedness of persons, citizens, people, groups, and other entities. While there is a certain level of connection a law inspires and creates, there are the unintended effects and consequences, i.e. disconnections, a law unfortunately can provoke.

Deriving from an oral tradition, writing sometimes does not come smoothly or easily for indigenous people, particularly for those with language challenges. Nevertheless, many cultures have moved from an oral tradition to a textual one, where written contracts replace a handshake or verbal promise, and books replace stories told at night. Moreover, modern judicial processes are heavily text based. Constitutions and codes are drafted and judges are expected to issue written orders and opinions directing behavior and explaining the law. This must be balanced with the past where law (ways of life, expectations, and responsibilities) was modeled and spoken about in story and tale. Creation stories, for example, relate to individuals and their history and ancestry, as well as explain their connection and responsibilities to it and each other. They highlight the benefits one receives for honoring these connections and relationships and how harmony, peace, and good things are derived from following the rules. The security and benefits promised for all “the people” reflect the sentiments of modern and international articulations of human rights.

And just as it is as difficult for nations of the Earth to all agree on what written human rights should say, healing to wellness court teams are challenged by finding the proper balance of written and verbal policies to guide their court processes and procedures and protect and promote participants’ rights. While it is necessary to put as much as possible in writing, many situations are unforeseeable, and they must occur before they can be addressed. This practice and experience induces courts and teams to craft necessary text when needed, when they arise. At other times, teams seem to proceed with one goal in mind, which is to promote a better way of living for a participant and family. This standard serves to bring the team together to assure the law is protecting the participant from an overbearing criminal and civil justice system while assuring civil and human rights.

### 5. ELDR (*Earth—Lightning—Dream—Rain*)

As outlined above, the four primary axes of the Sphere are co-named ELDR.<sup>121</sup> ELDR is a lens that focuses attention on four compliments of a being human. These compliments are also useful in review of issues and projects that are related to human interaction. The four aspects are: the physical (E = Earth), the intellectual (L = Lightning), the spiritual (D = Dream), and the emotional (R = Rain). Acknowledging ELDR implications is important for citizens, communities, families, and nations in making plans or solving problems. A balanced ELDR perspective helps identify distinctions and find relationships between physical realities, intellectual abilities, spiritual links, and emotional possibilities that a situation and circumstance may produce, or that a person may evoke.

The material, the tangible, and corporeal are included in E (Earth). Human beings have bodies and a physical place, an environment in which their bodies grow and experience life. Physical health and well-being, money and budgets, the economy, community infrastructure and facilities (such as buildings), and weather are a few physical realities that affect citizens and communities. L (Lightning) includes the intellectual, creative, psychological, and thoughtful attributes: the abilities of humans to think, imagine, and remember. L allows the capacity for people and groups to realize ideas into form—to create. Planning, writing, speaking, and education are L tools. D (Dream), which is the most important in *Spheritual* analyses, symbolizes the way people feel connected to Creation, to Creator, to whatever one defines as “all that is.” Spirituality is how one feels connected or unconnected to and included, or not, in total Creation. And finally, R (Rain) is representative of emotions; water symbolizes tears, or the pain or other feelings induced when one feels disconnected, angry, and alone, or the opposite feelings when one feels totally connected and apart: joy, ecstasy, etc. For a human, it is impossible to be unemotional and unfeeling; therefore, emotions must be acknowledged. Still they must be managed, as unchecked emotions, like a broken dam or levy, cause floods and devastation. Lingering sadness and despair can create sickness and disease. The ELDR perspective reviews, not always in this order: the physical, the intellectual, the spiritual, and the emotional nature, effect, potential, requirements, and other aspects of a project, situation, circumstance, person, etc.

As noted above, Wexler states that TJ “focuses on the law’s impact on emotional life and on psychological well-being”<sup>122</sup> of the people involved in the justice system. Here, R (emotions) and L (intellect) are specifically iden-

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121. ELDR was initially developed and applied by Flies-Away as a planning & development tool during his tenure as a Tribal Planner. Its considerations are incorporated here as complements to the Sphere’s complexity.

122. Wexler, *supra* note 91.

tified as focuses of consideration. An E (physical element, such as an act or conduct) is implied given the person would not be in court but for some challenged behavior. In criminal law there must be an act and the requisite mental state along with specific conduct for finding a crime, unless strict liability applies. TJ takes the analysis one step further. E and L of ELDR represent the actus reus and mens rea requirements, but because TJ considers a psychological *and* emotional impact or aspects, its formula or calculation becomes ELR. ELR acknowledges the impact on one's emotions (R) from a situation and how judicial people handle or respond to them impact defendants, victim(s), or the community in various ways. Because human beings generally feel something in regards to crime or conflict, they will be further affected by how an institution, court, or team works to address the conflict or situation.

Thus, TJ + is revealed by how wellness courts weigh and evaluate spiritual considerations (D), the connective or dis-connective quality of acts and conduct, and the manner in which they are addressed or resolved. The resulting TJ + formula, ELDR, becomes more inclusive and considerate to a larger, more complete, whole, incorporating an appreciation of ceremony. Including a further element, TJ + is mindful not only of the act, crime, or conduct that causes one to be referred to wellness court, but it also fully consider the sickness or addiction of the participant (E). An entire treatment and healing regimen is prepared, taking into consideration the participant's chemical and physical nature of addiction (E), state of mind (L), and emotional situation (R). The comprehensive and phased treatment approach of wellness court is intended to (re)connect the person to treatment, wellness activities, and positive situations; to provide better connections and relationships that promote healing; and to disconnect the negative ones (R). Each jurisdiction is individually responsible for ascertaining what the positive connections are based on the mores and culture of the people of its community.

#### 6. *The Past, the Present, and the Possible (HVC)*

A tri-consideration of the Sphere is HCV—History, Present, Clarity, and Vision. HCV is a tool and ceremony to assure that lessons and wisdom of the past guide our present steps toward a bold and prosperous future. This analysis is common: a regular analytical process, amongst people, perhaps intuitive, to consider the past, the present, and future when planning or confronting conflict. Challenge and hardship are natural and expected along one's entire life path and journey. They will undoubtedly cause misdirection or even a fall at different junctures. For some, miserable memories consume their being and negatively affect their heart, mind, body, and soul. But unable to forget all the bad things, they are stifled and they lose momentum. The goal of HCV, however, is not to relive and retain bad memories but to

acknowledge and accept any lessons learned from past experiences, to find resources that will help one move forward. The main purpose here is to create or develop a vision and then, with all known resources, to take the requisite steps to move in that direction, realize the vision, and seek the possible. Other Spherical components help to identify these resources.

Our technical assistance experiences have taken us to many Indian nations who share similar, yet very different, histories, stories, and visions. It is not always easy, however, to work together to take the best from the past, merge with contemporary circumstances, and determine a vision that all can clearly see and share. There are tribes, such as Hualapai, who have developed a wellness court and after federal dollars ceased, the court no longer processed wellness court cases. But because there is something familiar about working together for the benefit of the whole, or tribe, at Hualapai and other jurisdictions general excitement and enthusiasm persist to re-establish their wellness courts. Unfortunately, the difficult social and economic situations tribes face tend to discourage and derail development. Fortunately, what remains and fosters change is the desire for health and wellness, better standards of living, and safe and peaceful communities.

### C. People, Policy, Place, and Pecuniary Possibilities

People, Policy, Place, and Pecuniary Possibilities are a set of considerations applied in community and nation-building efforts or development projects. The P's are: human capital development, organizational/institutional development, community infrastructure development/environmental support, and economic development, or what is alternatively stated: *the people gather, ground, and grow*. The P's are reviewed in various ways and in conjunction with the other components of the Sphere. Here, we ask the question of what is needed in terms of the P's for wellness courts to thrive. Another way, which patterns Wexler's observations, is to look at the effect of these institutions on them.<sup>123</sup>

The P's needs analysis explores what is required to accomplish something; that is to determine what is needed in terms of people, policy, place, and pecuniary possibilities. Thus, the question is what is needed in order to develop a wellness court? What staff is needed and what relationships need to be established to support the court's functions? What experience and education is required of these individuals? Second, similar to above, what organizational needs or advances in legal infrastructure are necessary? Does an ordinance need to be promulgated? What new policies, procedures, and court rules must be put in place? Does the court need to develop formal relationships with other arms of government or foreign governments where

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123. Wexler, *supra* note 105, at 19.

Memoranda of Understanding (MOU) are required to outline the relationship and responsibilities outside agencies will have to the court and vice versa in order to provide services to participants? And finally, is there funding to support a wellness court? How is the court to operate? While grants can help in the initial development of a wellness court, long-term sustainability requires a plan for continued support. These are just a few questions that illustrate the needs analysis line of considerations the P's invoke, which can be applied to almost any institution that is being contemplated and discussed. Finding that wellness courts serve to sustain human rights, it is reasonable to consider that a similar line of structured questions can be applied to begin thinking how an institution might be designed specifically to address that purpose.

D/Lakota philosophy states that everything was in pairs of opposites . . . . To have one without the other would cause an imbalance. So they were given ceremonies to maintain a balance. . . . Traditional D/Lakota belief was that man's purpose on earth was to return to the center, and the method for doing this was to walk the Red Road (maintain a balanced life).<sup>124</sup>

#### D. A Warrior of Law Approach

The Warrior of Law Approach (Approach) concentrates on moving people—both individuals and groups—projects, and issues towards concord, accord, or peace. One primary means to move towards peace is by seeking balance in all aspects and areas of life. The Sphere incorporates a number of these critical areas and in fact identifies opposing energies that are common to life and for the most part necessary. Of course, exact balance is not usually attainable, nor is it always practicable. Take for example conflict and cooperation. There will always be both throughout one's life and accepting this fact is an example of balance. The Approach is similar. When dealing with an issue or development possibility, one must consider what all the negatives and positives are or who they are. Ascertaining, for example, where a matter initially sits on the Reason (L) axis in the Sphere provides simple information about its mood. Is conflict or cooperation lacking or superfluous?

Take another example, crime, more specifically drug or alcohol related crime. If you were to place it somewhere on the E axis, where would you put it? Does the issue of crime fit more towards the community pole or citizen pole? Crime definitely is a community issue, but the conduct is carried out by an individual, and they are afforded rights. Finding a balance between the appropriate government response and the rights afforded the individual has been a constant struggle ever since societies began. The community must be protected, and the individual must be made to realize how his

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124. ALLEN ROSS, MITAKUYE OYASIN: "WE ARE ALL RELATED" 185 (1989).

conduct hurts others. On the other hand, if a matter is already too people- or government-based and taking too much from the individual, efforts are made to move the other way. Moreover, each individual comes with a different perspective. Every person is unique. The center of the Sphere is the place where all the components and considerations are balanced and proportional. An equal expression and supply of the components are available at this central point—the nucleus, so to speak. This is why the most important point, but not most perfect, is at the Sphere's center. At the center of the Sphere are Confrontation, Communication, Compromise, and Accord.

Confrontation means that the controversy, situation, or goal must be identified and ultimately addressed, in whatever manner, form, or process the forum prescribes. Communication is sharing and the exchange of knowledge, development of ideas, debate, and discussion in the manner prescribed or practiced. Compromise is give and take, a negotiation that must take place so as to continue balancing the Spheritual components. And lastly, at the core of the Sphere is concord or peace. The Warrior of Law Approach teaches that it is powerful to come from the center, in order to promote peace and healing.

Healing to wellness courts are institutions designed to confront a serious and debilitating force that cripples tribal nations. These courts are developing into many different varieties and configurations based upon the same fundamentals and framework. Each court is constructed to communicate or process the issue in a team approach, which undoubtedly forces compromises to old ways of doing things that sometimes are not easily accepted. They require people to work together and share information, which results in formidable challenges and checks on a participant's efforts given he or she is being monitored collectively and intensely. Though both are forced to give things up to receive something better, the wellness court and client are driven by a desire to achieve wellness, seek security, and find peace.

Tribal healing to wellness courts embody TJ +. As TJ "focuses on the law's impact on emotional life and on psychological well-being . . . and is concerned about how legal people, procedures, and paradigms have therapeutic or anti-therapeutic results," the + is defined to include connections, relations, and links. The + represents the supplemental value of seeking out those relationships that nurture and sustain life, and recognizing where there exist disconnecting, damaging, and destructive ones. The combination of TJ and spirituality (the +) hence support healing and wellness.

TJ alone already supports the efforts of drug courts by providing valuable insight as to how participants are affected by the court's attempt to redirect them away from a path of addiction. Tribal wellness courts can consider other results by adding a spiritual ingredient to the mix, thereby creat-

ing variations of the TJ + formula. Many wellness courts incorporate what they call a spiritual aspect into their procedure and processes.<sup>125</sup> Whether it is conducting talking circles, sweats, or smudging ceremonies and prayer, tribal wellness courts apply culturally accordant ways to reconnect their lost members back to the tribe, the people.

Healing to wellness courts have great potential because they help to restore, rejuvenate, or re-create lost connections between misplaced community members and their relatives or other citizens. Spirit is what ties human beings together<sup>126</sup> and what empowers human relationships. The resulting connections or reconnections promote wholeness; they help return lost and disconnected individuals back onto a good path and healing journey.<sup>127</sup> Connections and links that may have been abandoned due to suppression, neglect, or non-use enable one to envision a future, a vision, or a belief that the future holds promise, contentment, and peace. Wellness court participants have simply lost sight of personal and collective goals and aspirations due to circumstances that make life difficult for them. Without vision, they are lost and have nothing to look forward to. Wellness courts provide mechanisms to support reconnections and make beneficial associations and links; they restore or create connections that facilitate the formation of vision that empowers, rejuvenates, and is ultimately healing.

As connectedness is what makes something spiritual and since ceremony is carried out to support reconnection,<sup>128</sup> the notion of ceremony is inherent in the healing to wellness court process. This process, like ceremony, is a journey,<sup>129</sup> which can be described as a special and solemn process, one that can be reflective and responsive to healing and rejuvenation, and one that can even help to restore a community's "healing myths."<sup>130</sup> Wellness courts serve to reconnect individuals back to the community, to the family, and even to themselves—which is a spiritual activity. Conflict resolution and problem solving are achieved by finding relationships or connections between that which appears to be unrelated and maneuvering a balance between competing points of view.

The spiritual supplements found in healing to wellness courts, especially if they are reinvigorated with ancient knowledge, provide extra poten-

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125. See THE KEY COMPONENTS, *supra* note 43, at 1.

126. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1137 (9th ed. 1983) (defining spiritual as "related or joined in spirit").

127. THE KEY COMPONENTS, *supra* note 43, at 23.

128. See Joseph Flies-Away, Ceremony 2 (1988) (unpublished manuscript) (on file with the author).

129. Key Component 1 states, "The overall goal of Tribal Healing to Wellness Courts is the healing of individuals, families, and communities by directing participants onto a healing journey." THE KEY COMPONENTS, *supra* note 43, at 1.

130. CARL A. HAMMERSCHLAG, THE THEFT OF THE SPIRIT: A JOURNEY TO SPIRITUAL HEALING WITH NATIVE AMERICANS 28 (1993).

cy to their healing process. As shown above, wellness courts have infused various spiritual aspects in their efforts to realign a lost, disoriented, and disconnected participant back on to a healing journey. As spiritual traditions remain very strong among indigenous people, it seems appropriate that they be expressed in influential and useful institutions such as a wellness court. In time and after further practice, more applications of TJ and TJ + will develop as drug courts and wellness courts adapt and improve their ways of doing things. For now, as the total sum of TJ +, wellness courts are sources of healing and reconnection for human capital that Indian nations require in order to support their ongoing community and nation-building campaigns. Healing to wellness courts are revolutionary institutions that command the requisite force to powerfully push indigenous people to gainfully gather, ground, and grow, and to sustain basic human rights that are afforded to all citizens and peoples.

Analyzing with the components and considerations of the Sphere in their totality illuminates the Spirituality of Law, i.e., the knowing there is a “relatedness of things.” It aids in identifying important relationships and connections that serve your goal and objective. When using the Sphere physically, it is mindful that depending on where you place something on the Sphere, you need to find that which moves you closer to the center. It forces one to think from alternative perspectives that promote balance and equity in the task at hand. Due to their balancing and holistic natures, the Spirituality of Law Analysis and Warrior of Law Approach, we assert, sustain principles that promote the wholeness, thus, healing. They help human beings find or fix important and essential relationships that make one whole and sustain aspects of life that should be afforded to everyone, individually, in families, and in nations.

### III. WELLNESS, WHOLENESS, PEACE: HUMAN RIGHTS AND INDIGENOUS VALUES

*The field of international human rights has achieved the comprehensive and elevated global quality of preferred world public policy. It supplies a framework for a world order of human dignity.*<sup>131</sup>

Rights are a critical component of TJ +. TJ does not ever trump rights or advocate their violation. Rather by advocating for the use of law that has a better impact on a person, TJ inherently promotes rights. TJ + seeks to promote rights even further. Rights, dictated by law and spirituality, define our connections, relations, and responsibilities to one another. And wellness courts seek to strengthen the rights, connections, or relations of its partici-

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131. *Human Rights as an Agenda for Preferred World Policy*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 5 (Richard Pierre Claude & Burns H. Weston eds., 2d ed. 1992).

pants. Rights can also define what governments may or may not do to help its citizens live better lives. And importantly for our topic, rights encompass a right to life or an adequate standard of living and the right to one of our main connections—our families.

There is no universal agreement on the nature or definition of human rights.<sup>132</sup> Burns H. Weston asserts there are five interrelated hypotheses that assist in determining the nature of human rights, while noting they are not without dispute. First, human rights represent individual and group demands for “the shaping and sharing of power, wealth, enlightenment, and other cherished values in community process, most fundamentally the value of respect and its constituent elements of reciprocal tolerance and mutual forbearance in the pursuit of all other values.”<sup>133</sup> Second, human rights refer to a “wide continuum of value claims ranging from the most justiciable to the most aspirational,”<sup>134</sup> including legal and moral issues. Third, human rights are “quintessentially general or universal in character, in some sense equally possessed by all human beings everywhere, including in certain instances even the unborn.”<sup>135</sup> Fourth, most rights “are qualified by the limitation that the rights of any particular individual or group in any particular instance are restricted as much as is necessary to secure the comparable rights of others and the aggregate common interest.”<sup>136</sup> Finally, human rights encompass “‘fundamental’” as opposed to “‘nonessential’” claims.<sup>137</sup>

Additionally, scholars Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen argue that eight values supply the “menu for global human rights study and action”: respect, power, wealth, enlightenment, well-being, skills, affection, and rectitude.<sup>138</sup> They believe, “Human rights, conceived in terms of these eight values, involve the underlying concerns of a world public order of human dignity, and they delineate the focus for intellectual inquiry and appraisal in the field we have come to call human rights.”<sup>139</sup>

Despite the lack of a definitive definition, human rights can be traced to natural law, which some believe is a law higher than the positive or written law of states.<sup>140</sup> However, historically, state sovereignty, or states’

132. Burns H. Weston, *Human Rights*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION, *supra* note 131, at 14, 17.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 18.

137. *Id.*

138. MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 90 (1980).

139. *International Human Rights: Overviews*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION, *supra* note 131, at 1, 6.

140. WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 2 (4th ed. 2009).

rights, acted as a bar to any protection of individual rights until World War II, which initiated the beginning of the modern human rights movement.<sup>141</sup> After World War II, the United Nations Charter was established to incorporate human rights as an international matter of concern. Article 1 of the Charter states the creation of the United Nations is to “achieve international co-operation . . . in promoting and encouraging respect for human rights.”<sup>142</sup> Article 68 calls for the creation of a Commission on Human Rights, and the first task of the Commission was drafting the Universal Declaration of Human rights to “provide an authoritative definition of the broad human rights obligations of the member states.”<sup>143</sup> After discussion and debate, the Universal Declaration was adopted in 1948 by the U.N. General Assembly “articulating the importance of rights which were placed at risk during the decade of the 1940s.”<sup>144</sup> There are no enforcement provisions contained within the Declaration and it is not a treaty, but rather a common standard of achievement for all nations.<sup>145</sup> However, in application, the Declaration has “acquired a status juridically more important than originally intended. It has been widely used, even by national courts, as a means of judging compliance with human rights obligations under the UN Charter.”<sup>146</sup>

Prior to colonization, the culture, traditions, laws, and infrastructure of American Indian nations worked together to protect the rights of their citizens. However, indigenous rights do not always resemble or even encompass European rights as defined by Western law, such as the Universal Declaration on Human Rights. Cultural relativists also concur that “even if, as a matter of customary or conventional international law, a body of substantive human rights norms exists, its meaning varies substantially from culture to culture.”<sup>147</sup> For example, indigenous rights often focus on communal rights and individual duties, rather than on individual rights.<sup>148</sup> The introduction of Western law causes friction within the Indian nations as the nations’ definition of rights often clashes with the understanding of rights within Western law. Mohawk scholar Taiaiake Alfred notes, Western concepts of rights introduce a tension between individual and collective rights into indigenous societies.

The concept of “rights,” especially in the common Western sense, leads nowhere for indigenous peoples because it alienates the individual from the group. By con-

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141. *Id.* at 8.

142. U.N. Charter art. 1, ¶ 3.

143. WEISSBRODT ET AL., *supra* note 140, at 13.

144. *Id.*

145. Weston, *supra* note 132, at 25.

146. *Id.*

147. Fernando R. Tesón, *International Human Rights and Cultural Relativism*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION, *supra* note 131, at 42, 43.

148. 2 Carrie E. Garrow & Sarah Deer, TRIBAL CRIMINAL LAW AND PROCEDURE 202 (2004).

trast, the tension between individual and collective rights is a mainstay of discussions about justice in Western societies, which conceive of rights only in the context of a sovereign political authority because the law that defines and protects them depends on the existence of a single sovereign. . . . Native people respect others to the degree that they demonstrate respect. There is no need, as in the Western tradition, to create political or legal uniformity to guarantee respect. . . . Internally, instead of creating formal boundaries and rules to protect individuals from each other and from the group, a truly indigenous political system relies on the motif of balance; for the Native, there is no tension in the relationship between the individual and the collective. Indigenous thought is based on the notion that people, communities, and the other elements of creation coexist as equals. The interests and wants of humans, whether as individuals or as collectives, do not have a special priority in deciding the justice of a situation.<sup>149</sup>

Thus, to avoid creating friction or conflict, it is imperative at the outset to determine if Western law and Western human rights comport with an Indian nation's definition of law and rights.<sup>150</sup> This discussion manifests differently for each nation.

For example, the international political philosophy of the Six Nations Confederacy or Haudenosaunee<sup>151</sup> is based upon the Two Row Wampum or Guswentah, a treaty entered into with the Dutch in 1610. The Two Row Wampum includes two parallel purple rows of wampum beads signifying that the Haudenosaunee Nations and the Dutch Nation are separate and equal sovereigns and agreed they would not interfere in each other's governments.<sup>152</sup>

The United Nation's Declaration on the Rights of Indigenous Peoples (UNDRIP) is compatible with this political philosophy, as it respects each nation's freedom and ability to govern itself.<sup>153</sup> UNDRIP incorporates the Universal Declaration of Human Rights<sup>154</sup> by affirming that all peoples have the right to full enjoyment, as a collective or as an individual, to the rights and freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights, as well as international human rights law.<sup>155</sup> Thus, applying most provisions of UNDRIP or the Universal Declaration of

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149. TAIAlAKE ALFRED, PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO 140-41 (1999).

150. See Carrie E. Garrow, The Freedom to Pass and Repass: Can the UN Declaration on the Rights of Indigenous Peoples Keep the US-Canadian Border Ten Feet Above Our Heads?, in INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION 172, 172-73 (Elvira Pulitano ed., 2012).

151. The Six Nations consist of the Seneca, Cayuga, Tuscarora, Oneida, Onondaga, and Mohawk Nations.

152. CHIEF IRVING POWLESS JR., TREATY OF CANANDAIGUA 1794: 200 YEARS OF TREATY RELATIONS BETWEEN THE IROQUOIS CONFEDERACY AND THE UNITED STATES 23 (G. Peter Gemison & Anna M. Schein eds., 2000).

153. See Garrow, *supra* note 150, at 179-82.

154. Universal Declaration of Human Rights, *supra* note 22.

155. Declaration on the Rights of Indigenous Peoples, *supra* note 8, at 1.

Human Rights would not create conflict within the Haudenosaunee Nations, as they are respective of Haudenosaunee sovereignty, or the right to govern themselves.

In our examination of how a spiritual revolution is exemplified by the work of healing to wellness courts, it became apparent these courts are promoting and protecting many rights embraced by the Western world in the Universal Declaration on Human Rights<sup>156</sup> as part of TJ +. Here we focus on two rights specifically: Article 25 and Article 16(3), embraced by the Universal Declaration.

Article 25 protects a person's right to a

standard of living adequate for the health and well-being of himself and of his family<sup>157</sup> including . . . necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>158</sup>

Commonly accepted as an illness or disease, some forms of addiction are considered a disability that warrants protection under the American Disabilities Act.<sup>159</sup> Regardless of legal arguments, providing treatment to addicted persons, in lieu of incarceration or fines, ultimately supports a better standard of living.

Our experience and observations with wellness courts show us that these healing-focused institutions, based upon TJ +, embrace this right and collaboratively work to help an individual to achieve a standard of living adequate for his or her health and well-being and that of his or her family's health or well-being. Wellness courts provide necessary services that address or counter the disability, disease, or affliction. Team members view the participant not simply as an addicted criminal defendant or civil respondent but as a human being with various rights and entitlement to assis-

156. Healing to wellness courts also protect many of the collective rights contained in the Declaration on the Rights of Indigenous Peoples, such as Article 3 (the right to self-determination); Article 4 (the right to self-government); Article 5 (the right to maintain and strengthen their legal institutions); and Article 7 (the right to life, and physical and mental integrity). *Id.* at 4-5. For a discussion of the impact of UNDRIP on Indigenous nations, see generally INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION, *supra* note 150.

157. Again noting the importance of family.

158. Universal Declaration of Human Rights, *supra* note 22, at 5.

159. Americans with Disabilities Act, 42 U.S.C. § 12114 (2006). The Americans with Disabilities Act (ADA) extends to addictions if the person is addicted to drugs, has a history of drug use, or is regarded as having an impairment under the law that poses a substantial limitation on one or more major life activities. *Id.* However, to be protected under the ADA in one's employment, the employee cannot currently be using illegal drugs. See DISABILITY RIGHTS SECTION, U.S. DEP'T OF JUSTICE, QUESTIONS AND ANSWERS: THE AMERICANS WITH DISABILITIES ACT AND HIRING POLICE OFFICERS (1997), available at <http://www.ada.gov/copsq7a.htm>; Laurence M. Westreich, *Addiction and the Americans with Disabilities Act*, 30 J. AM. ACAD. PSYCHIATRY & L. 355, 357-59 (2002) (discussing the ADA's coverage of addictions and the exclusion of many addicted individuals).

tance, which ultimately helps the participant achieve an adequate standard of living. Through a team approach, services are provided to participants, including substance abuse counseling, mental health counseling, job training or school, life skills, and cultural teachings, to help them work towards achieving an adequate standard of living. As many participants have battled addiction for years, burning family relationships and taxing the patience of government workers, the teams are often the participants' last hope in fighting addiction and achieving a standard of adequate living, which is a basic human right.

From a Spherical, or *Spheritual*, perspective, we see how wellness courts work to promote and protect a right to an adequate standard of living. On the Will axis,<sup>160</sup> wellness courts focus on addressing the disease and disability of addiction and restoring the individual to his or her community of family, extended family, and nation. He or she has a right to this community, but perhaps more important in indigenous communities, the community has a right to the participant. As an addict, the participant cannot fulfill his duties as a citizen and contribute to the community. Without him or her, there is a hole within the family and community. Wellness courts pull together all necessary social services to restore the participant and make him functional within his community. Thus, not only does the participant exercise his right to an adequate standard of living, but the community also benefits and grows from the addition of a healthy citizen within the community.

On the Reason axis,<sup>161</sup> we see the team coming together in cooperation, mobilizing to develop and implement a wellness plan to promote and protect the right to an adequate standard of living. Wellness team members come together within a team, often overcoming conflict about treatment plans, imposition of sanctions and incentives, and how to share confidential information, realizing that conflict within the team will not help the participant. Thus when conflict arises within the team, they work together to overcome the conflict and focus on cooperating to help the participant battle his or her disease and addiction. Moreover, the wellness courts teach the participant to overcome the conflict in his or her life, or triggers, that often result in using drugs and alcohol. They focus on teaching the participants to use reason, often a skill that has become buried and unused due to addiction, to overcome challenges in his or her life.

Focusing on the Morality axis,<sup>162</sup> we witness individual team members with individual opinions working together to develop a collective opinion, focused on helping participants achieve a healthy lifestyle. The team, led by

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160. See discussion *supra* Subsection II.B.1 (defining and discussing the Will axis).

161. See discussion *supra* Subsection II.B.2 (defining and discussing the Reason axis).

162. See discussion *supra* Subsection II.B.3 (defining and discussing the Morality axis).

the tribal court judge, works to share individual opinions and form a collective opinion about the correct treatment plan, sanctions and incentives, and graduation from both phases and the court. Often, individual team members come to wellness court with well-defined individual opinions based upon their training and expertise. Through cross-team trainings and developing better understandings of each team member and the healing to wellness journey, the individuals are able to form a collective opinion focused on overcoming addiction and achieving an adequate standard of living. Moreover, the participant often comes into wellness court with his or her own opinion about his or her addiction and often feeling that he or she is not able to climb the steep path to wellness. However, with assistance from team members, the participant's opinion changes and he begins to see the team's collective vision of the path towards wellness and begins to work harder to achieve that goal.

Finally, the Law axis<sup>163</sup> notes the continuum between written law and oral law. Both are critical components to protecting the participant's right to an adequate standard of living. Oral law, or custom and tradition, is the basis of wellness courts as they embrace the indigenous understanding of restoring the individual to health. Indigenous peoples often came together to problem solve and help individuals overcome unhealthy lifestyles. Traditionally, punitive forms of justice were last resort efforts if restorative practices did not work. Moreover, custom and traditional laws are often used by wellness courts to help the participant heal. Traditional healers, whether medicine men, clan mothers, or elders, often participate on the team or are additional resources used by the team to assist the participant achieve a healthy lifestyle. As elders and healers work with participants, they learn or relearn oral law that helps reconnect them to their culture and nation. Written law is used first to protect the participant's rights within the justice system. Written law is also used to keep the participant on the path, as the court's rules and guidelines are given and continually reviewed with participants to ensure they know the consequences of breaking the wellness court rules.

The second right we focus on is encompassed in Article 16(3), which states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."<sup>164</sup> Significantly, the Declaration does not define family, allowing each nation to define family based upon its culture. A critical part of that healing is re-establishing family ties that may have been damaged by substance abuse. Adult healing to wellness courts typically do not exercise jurisdiction over the family, yet encourage participants to work on strengthening family ties. For example,

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163. See discussion *supra* Subsection II.B.4 (defining and discussing the Law axis).

164. Universal Declaration of Human Rights, *supra* note 22, at 3-4.

one wellness court is based upon the principles of individual, family, community, and nation, acknowledging that the participant is not alone in his or her battle against addiction.<sup>165</sup> Moreover, the family is critical to the nation and entitled to protection. Another wellness court judge in court hearings continually encourages a participant to redevelop ties to his children by engaging in visitations finally allowed due to his abstinence.<sup>166</sup> Reminding the participant that re-establishing ties to his children is part of his path to wellness helps protect that family and ensures that one day ties will be strengthened and a healthy individual and family will emerge from wellness court. Other wellness courts are family-based models, exercising jurisdiction over the entire family to ensure wellness of all family members.

On the Reason axis,<sup>167</sup> team members recognize the conflict within the participant and the family. This may be due to the participant's addiction but may also be due to other family members' addictions. Teams work collaboratively to identify steps for the participant to address conflict within his or her family and rebuild ties to his or her family. And if the court is able to exercise jurisdiction over the family, the team may require family members to participate in the treatment plan. Team members understand the participant is not alone, but is an integral member of a family, and that family is entitled to help and protection. Thus, the team does not solely focus on the conflict within the individual, but addresses conflict within the family. By helping the participant identify triggers and address conflict within the family, the team helps the participant develop a good family life based on cooperation rather than conflict.

On the Morality axis,<sup>168</sup> we see the participant is often in conflict with his or her family over his addiction. Or often, wellness court participants belong to families who also battle addiction, which increases the conflict within the family. Regardless, the participant is often at odds with his or her family, and there is no family collective conscience about how to operate as a family. Also, the team works towards a collective conscience, developing a treatment plan. The treatment plan focuses primarily on the individual, but by moving the individual towards wellness, he or she is able to reconnect and rebuild family relations, moving towards a family collective conscience. As noted above, one wellness court judge continually requires participants to reconnect with children. Moreover, family wellness courts focus on the

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165. Penobscot Indian Nation Healing to Wellness Court Phases (on file with authors).

166. It is not our practice to name the individual healing to wellness courts or nations we visit, as the courts are based on confidentiality, and we do not want to make any comments that might reveal a person's identity.

167. See discussion *supra* Subsection II.B.2 (defining and discussing the Reason axis).

168. See discussion *supra* Subsection II.B.3 (defining and discussing the Morality axis).

entire family wellness, creating a path towards a wellness for the entire family.

Within the Law axis,<sup>169</sup> custom, common practice, and culture define and protect the role of the family. Some written laws may protect the family, such as court-ordered restrictions on visitation with children. To protect the family, the team may encourage or even require the participant to spend time with an elder or other appropriate person to learn or relearn custom, common practice, and culture. Part of this learning process is understanding the role of family, the role of the participant within his family, and what is needed of the individual to help protect his or her family—whether it be helping other family members address addictions or being a better parent or child. This learning process, fostered by the team, protects and strengthens tribal families, an essential unit to all indigenous nations.

Wellness courts, recognizing the importance of each participant and his or her rights, focus on more than the law's impact on the participant's psychological well-being. Included in their decision-making process is the participant's spiritual well-being, which includes his or her rights and ties to his or her community. Using the Will axis, Reason, Morality, and Law or Spirituality, teams embrace a participant's rights, including the right to an adequate life and the right to a family. They spend numerous hours helping the participants reclaim and exercise their rights and rebuild their connections to the community. With this focus, the team overcomes conflict to assist the participant to conquer the conflict within his own life.

#### IV. IN SUPPORT OF JURISPRUDENTIAL *SPIRITUAL REVOLUTIONS*: SHAPING INSTITUTIONS THAT HELP HEAL AND SUSTAIN HUMAN RIGHTS

In the twenty-first century, the struggles and terrors<sup>170</sup> facing indigenous peoples—individually and collectively—are as much internal as they are external.<sup>171</sup> In this new millennium citizens of indigenous nations must work together to develop strong, cohesive, and cooperative communities and build solid frames and forms of government.<sup>172</sup> Sadly, conflict and crime caused by alcoholism and drug abuse complicate this struggle. Substance-related offenses and misconduct that interfere with community peace present difficult challenges to all jurisdictions. Costly to adjudicate, it is

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169. See discussion *supra* Subsection II.B.4 (defining and discussing the Law axis).

170. See HAMMERSCHLAG, *supra* note 130, at 28 (“To restore some healing myths to our own lives and to the world, we can revive old powerful rituals that have sustained peoples for centuries. And we can create new ones to meet the terrors of today.”)

171. These terrors are both internal to the individual and internal to the nation. See *Flies-Away*, *supra* note 12 (commenting on both the internal and external struggles facing modern tribes); Cornell & Kalt, *supra* note 13, at 1-3 (discussing the internal struggles of tribes, including tribal development and economic hardship).

172. See *Flies-Away*, *supra* note 12, at xii-xiii.

difficult to provide the balance of treatment and supervision that offenders and addicts need in order to alter and mend attitudes, minds, and hearts. Fortunately, healing to wellness courts are assisting nations in this task and battle by defending and promoting peace and spawning spiritual revolutions for positive and prosperous change.

Nations are only as strong as the sum of their human capital. Indian nations require a citizenry that is able and willing to contribute to their families and their community and nation-building campaigns. Unfortunately, alcohol abuse among the indigenous people of the United States is extreme. One study notes that “[d]eath rates from alcohol-related causes are more than three times higher than other groups.”<sup>173</sup> Another study notes that “[a]mong tribes with high rates of alcoholism, reports estimate that 75 percent of all accidents, the leading cause of death among American Indians, are alcohol related.”<sup>174</sup> Many of these accidents occur when driving off dry reservations to the closest non-reservation town to purchase the liquor.<sup>175</sup> Moreover, arrests among American Indians for alcohol related offenses are “more than double that found among all races.”<sup>176</sup> These and other social problems reduce or limit the human capital needed to sustain strong native nations.

Wellness courts offer tribes a novel yet familiar strategy to address the dysfunction and disruption caused by substance abuse and addiction. As collaborative and creative institutions, wellness courts confront conflict from a stronger base of knowledge and experience gathered together and coordinated in a team or teams. The cooperative and team approach of the wellness court is culturally compatible or accordant to indigenous practice, which makes it a more viable and powerful process to help tribal citizens move towards visions of wellness and peace. As lost tribal citizens need help finding something important to connect to in order to gain strength and healing, directing energy and resources to developing wellness courts in Indian nations can contribute to stronger indigenous futures.

The wellness court process is not just a court—it is a healing technology, tool, and judicial system. Wellness courts reinvigorate and reinforce traditional ways of thinking and working together and in tandem as a people

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173. NAT’L CLEARINGHOUSE FOR DRUG & ALCOHOL INFO., PREVENTION PRIMER: AN ENCYCLOPEDIA OF ALCOHOL, TOBACCO, AND OTHER DRUG PREVENTION TERMS 10 (1993).

174. FRENCH, *supra* note 15, at 51 (quoting Nat’l Inst. on Alcohol Abuse & Alcoholism, U.S. Dep’t Health & Human Servs., *Medical Consequences and Alcohol Related Trauma*, ALCOHOL ALERT, Jan. 1994, at 1, available at <http://pubs.niaaa.nih.gov/publications/aa23.htm>).

175. *See id.* at 45-47 (describing incidences of violence facing Native Americans in border towns).

176. LAWRENCE A. GREENFIELD & STEVEN K. SMITH, U.S. DEP’T OF JUSTICE, AMERICAN INDIANS AND CRIME vii (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/aic.pdf>.

for the benefit of the tribal community. The phased format and team-based approach of wellness courts operate like revived rituals that provide respite and remedy for those terrors that result from alcohol and drug abuse. These rituals are intended to help move participants to a more productive future partly by holding on to strengths and insights from culture and traditions from long ago. The less-adversarial, wellness-focused, and team approach found in wellness court we believe contributes to a more comprehensive confrontation of participants' illnesses and addictions. While the regular adversarial process functions well to adjudicate crime and misconduct, the wellness court approach seeks judicial resolutions that result in restoration and healing.<sup>177</sup> Wellness courts tackle *today's terrors* by promoting healing and reconnection.<sup>178</sup>

The formula for TJ + promotes healing and wellness because it emphasizes reconnection and reclamation. The plus symbolizes more than the addition of something. It represents balance, peace, and wholeness; it signifies connections, relationships, responsibilities, and rights. The plus is a spiritual symbol, a notation identifying a specific purpose: to promote connection, secure links, relationships, and rights with and between all that is, and with and between all persons with whom life is shared. The plus indicates that an effort at reconciliation is going to be made by assisting and guiding a lost individual back onto a more productive path. The plus is what promotes enhanced therapeutic results for tribal wellness court participants and ultimately serves to advocate for and to protect participants' human rights.

Along with other culturally accordant, re-created processes and contemporary ceremonies, wellness courts represent one form of revival of the "old powerful rituals that have sustained peoples for centuries."<sup>179</sup> They are a means to affect healing, rights, and reconnection of lost and disconnected people. The innovative application of TJ + of wellness courts contributes to positive therapeutic outcomes by utilizing a culturally accordant, spiritual, and team-based approach that requires personal accountability and responsibility in participants' healing journeys.<sup>180</sup> Moreover, these specialized courts are institutional models that support basic and fundamental rights of all members of a community by contributing to adequate standards of living and safe environments for citizens to thrive.

Due to their enormous potential to contribute to stronger and more healthy native communities, federal and tribal governments must find a

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177. THE KEY COMPONENTS, *supra* note 43, at 1, 23 (discussing Key Components 1 and 10).

178. *See id.*

179. HAMMERSCHLAG, *supra* note 130, at 28.

180. For a comprehensive summary of TJ +, see *supra* notes 75-97 and accompanying text.

means to institutionalize them. Tribal governments should think about conducting strategic planning on substance abuse in their communities and whether a wellness court will help them address this problem. Tribal leaders, including wellness court teams, should examine their customs and traditions and ensure they are appropriately part of either planning or running a wellness court. Tribal governments can examine their funding and commit funds to the wellness courts. Tribal councils can enact legislation to support the development and implementation of wellness courts. Tribal councils can direct their agencies to develop MOUs to ensure participation by appropriate agencies on the wellness court teams. Tribal leaders can also develop relationships and MOUs with non-tribal jurisdictions to incorporate non-tribal agencies on the team and implement the transfer of state or county court cases into tribal court so those individuals can benefit from the wellness courts. Federal and state governments can support these MOUs. Moreover, federal governments can assist with providing financial resources and training.

A less adversarial approach and holistic legal process, not centered on punishment and retribution, healing to wellness courts are concerned with healing (treatment), personal responsibility, and accountability. With these and other powerful attributes, wellness courts can contribute to more dynamic and disciplined indigenous community and nation building. Tribal governments must continue to support their development and growth because they result in the healing of citizens, which promotes the positive change and spiritual revolutions our tribal communities need. These and other therapeutic processes restore lost ties and connections that help heal the disconnected, idle, and dysfunctional human beings who are needed in order to grow Indian nations. By encouraging reconnection and reconciliation, wellness courts signal the dawn of a revolutionary healing spirit, a spirit generated by TJ +.