A PERIODICAL OF NEW YORK COURT HISTORY

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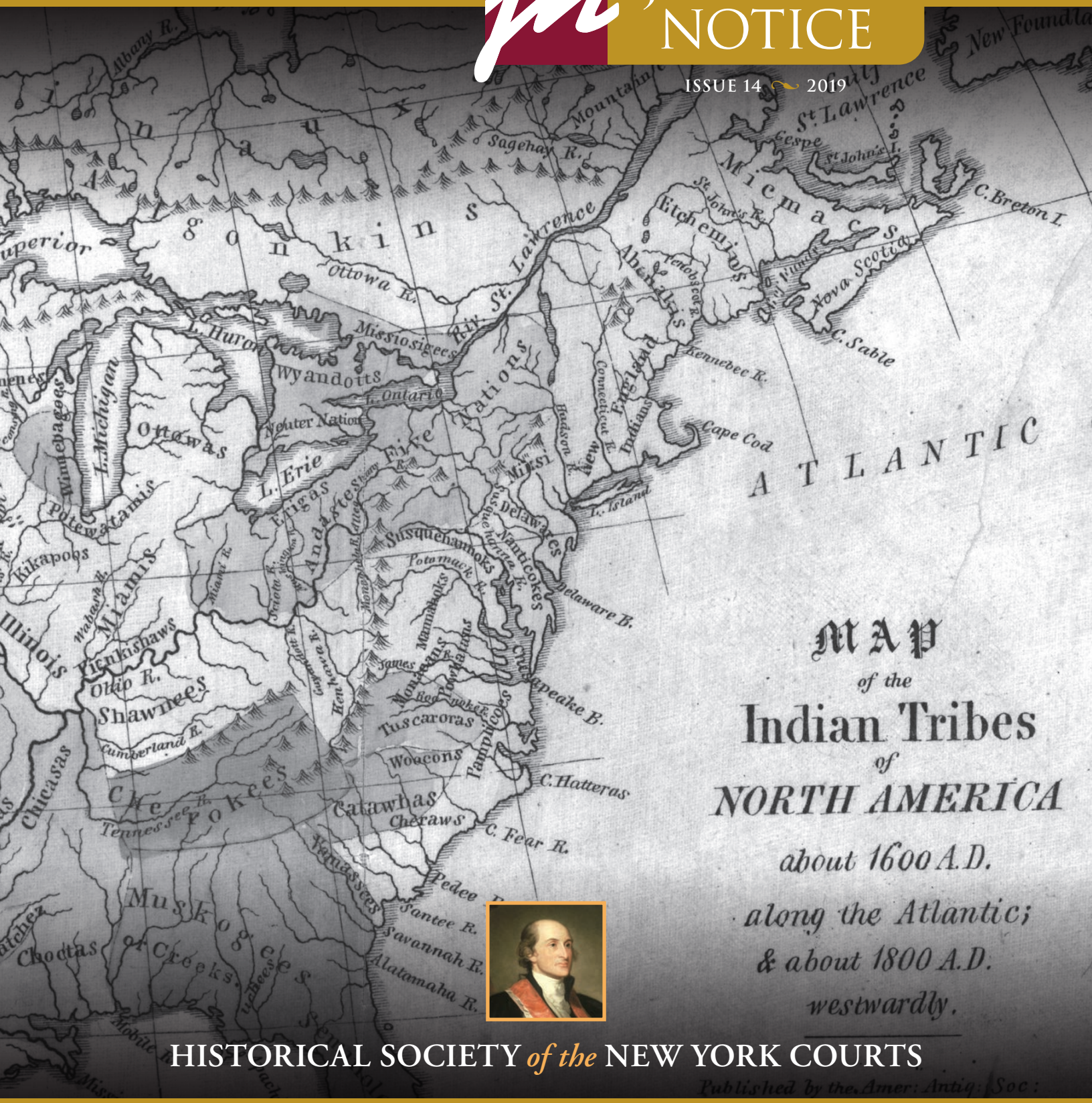
ISSUE 14 ~ 2019



HISTORICAL SOCIETY *of the* NEW YORK COURTS

Jurisdiction over Indian Lands *by Hon. Carrie Garrow* ~ **Judicial Collaboration with Indigenous Partners** *by Hon. Marcy L. Kahn*
Indian Child Welfare Act *by Danielle J. Mayberry* ~ **Thomas Indian School** *by Lori V. Quigley, Ph.D.*

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Judicial Notice accepts articles submissions on a continual basis throughout the year. Submissions are reviewed by members of the Board of Editors. Authors are not restricted from submitting to other journals simultaneously. ***Judicial Notice*** will consider papers on any topic relating to New York State's legal history. Submissions should be mailed to the Executive Director.

From the Editor-in-Chief

Dear Members,

Long before Henry Hudson sailed up the river that bears his name, the Six Nations Confederacy, comprised of the Haudenosaunee, or Iroquois people, was formed in present-day New York. *The Peacemaker's Great Law of Peace* brought what had been warring factions composed of Mohawk, Onondaga, Oneida, Cayuga, Seneca and Tuscarora Nations together into one confederacy. Beginning in the 17th century, European settlers, eager for land and cultural hegemony, disrupted what had become a peaceful civilization for the next 200 years. Three articles in Issue 14 of *Judicial Notice* chronicle much of that unfortunate aspect of NYS history. However, there are silver linings.

Chief Judge Carrie Garrow of the Saint Regis Mohawk Tribal Court and Danielle J. Mayberry, Esq. describe attempts by prominent individuals and NYS officials to circumvent United States treaties, which recognized tribal sovereignty, and detail the treatment of Native peoples that followed. Both authors also focus on the transfer of civil and criminal adjudicatory jurisdiction from tribal to state courts, motivated in part by the State's desire to acquire Haudenosaunee land. The articles also feature efforts to obliterate the Six Nations' culture by forced assimilation of its members into the Euro-American mainstream.

While Ms. Mayberry describes governmental policies favoring the wholesale removal of Indian children from their tribes, Dr. Lori Quigley, Vice President for Academic Affairs at Medaille College, provides considerable detail about the maltreatment of Indian children who were forced into asylums established in the 19th century and still functioning well into the 20th. Children were treated harshly, deprived of knowledge of their culture, and educated only to work as servants. She recounts the story of her own mother's forced placement in 1942 in the Thomas Indian School, which was established as an orphan asylum some 80 years before. Legislative hearings revealing that this policy had precipitated a crisis in the Native community led to the passage of the federal Indian Child Welfare Act (ICWA) in 1978. The passage of ICWA and closing of Indian boarding schools demonstrate increasing awareness of the importance of preserving Native culture.

In another demonstration of increasing awareness, Appellate Division Justice Marcy L. Kahn, at the behest of Chief Judge Judith S. Kaye in 2002 and through work with Judge Garrow, has been instrumental in New York's 21st century effort to recognize the importance of Native judicial systems. Justice Kahn describes her role in establishing the New York Federal State-Tribal Courts and the Indian Nations Justice Forum which has sponsored *Listening Conferences*. The conferences have resulted in promulgation of procedures by which rulings of tribal courts are recognized by NYS courts and a bail reform initiative designed to address needs of tribal members accused of crimes.

We very much appreciate the significant contribution each of these authors has made to our knowledge and understanding of the plight of Native Americans in New York. We continue to be grateful to Marilyn Marcus as Managing Editor, Allison Morey as Associate and Picture Editor, David L. Goodwin as Associate and Style Editor, and Nick Inverso as Graphic Designer with the NYS Unified Court System's Graphics Department for making *Judicial Notice* the interesting publication it has come to be.

- Helen E. Freedman

Map of the Indian tribes of North America, 1836. Library of Congress, Geography and Map Division, 2002622260

New York's Quest for Jurisdiction over Indian Lands

by Hon. Carrie Garrow

Hon. Carrie Garrow, *Chief Judge, Saint Regis Mohawk Tribal Court* (Mohawk) received her undergraduate degree from Dartmouth College, her law degree from Stanford Law School, and a master's in public policy from the Kennedy School of Government at Harvard University. She has worked as a Visiting Assistant Professor and as the Executive Director of the Center for Indigenous Law, Governance & Citizenship at Syracuse University College of Law. She is also a consultant with the Tribal Law and Policy Institute and has had the opportunity to travel to numerous Indian nations to provide training to tribal courts. She has co-authored *Tribal Criminal Law and Procedure (2nd edition)* with Sarah Deer, in addition to writing several articles on tribal law and governance.

Introduction

In the middle of the 20th Century, Congress passed laws granting New York State concurrent criminal and civil adjudicatory jurisdiction over Indian lands in the state. Far from being innocuous, these laws capped off nearly 200 years of disputes. The legislation on its face appears to be a simple grant of jurisdiction. But what the legislation does not communicate is that the battle for jurisdiction between the State and the Indian Nations had been waged for years—and the historical records reveal the State's true motives in its quest for jurisdiction. Despite the Indian Nations' laws and culture based on peace and respect, the State believed the Nations needed to abandon their governments and culture, pay taxes, and assimilate into American society. But perhaps more importantly, the Indian Nations, specifically the Seneca Nation of Indians, held something even more important to the State: land.

The Foundation of Haudenosaunee International Relations

The Haudenosaunee (or "Iroquois") People formed the Five Nations Confederacy prior to arrival of the colonists. Before its formation, the Mohawk, Onondaga, Oneida, Cayuga, and Seneca Nations were at war with one another. But the arrival of the Peacemaker brought the warring nations together. They laid down their weapons of war and formed a formidable confederacy, which—with the addition of the Tuscarora Nation—became known as the Six Nations Confederacy.

The Peacemaker's Great Law of Peace united the Nations. According to the Law, peace is not simply the absence of war, but is instead the *active* pursuit of justice as a way of life.[1] There are three components to the Peacemaker's message of peace: righteousness, reason and power. Righteousness is using a pure and most unselfish mind and all "thoughts of prejudice, privilege or superiority be swept away and that recognition be given to the reality that the creation is intended for the benefit of all equally—even the birds and animals, the trees and the insects, as well as the humans."[2] Reason is "the power of the human mind to make

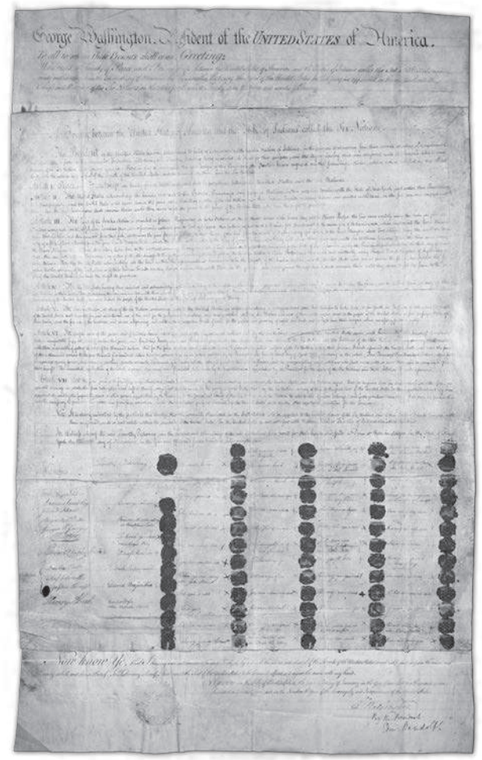
righteous decisions about complicated issues."[3] Power is the "power of persuasion and reason, the power of the inherent good will of humans, the power of a dedicated and united people, and when all else failed, the power of force."[4] The power "to enact a true Peace is the product of a unified people on the path of Righteousness and Reason—the ability to enact the principles of Peace through education, public opinion and political and when necessary, military unity."[5]

The Six Nations Confederacy became a powerful force with which the colonists were forced to contend. From the perspective of the Six Nations, the Great Law of Peace served as the roadmap for interaction with the colonists, encompassing a respect for mutual sovereignty—a respect the Nations expected to be reciprocated.

This understanding of peace laid the foundation for the Confederacy's international relations, which is perhaps best illustrated through the Two Row Wampum or Guswenta Treaty. The Mohawks, representing the Six Nation Confederacy, entered into the Two Row Wampum Treaty with the Dutch in approximately 1677.[6] The Treaty, which acknowledged the Confederacy's sovereignty, was an agreement to live side by side as sovereigns and not interfere in each other's governance. The late Onondaga Nation Chief Irving Powless Jr. described the treaty as a recognition of the equality of peoples.[7] He explained the Treaty in the following manner:

> *The Two Row Wampum belt is made of white and purple beads. The white beads denote truth. Our record says that one purple row of beads represents a sailboat. In the sailboat are the Europeans, their leaders, their government, and their religion. The other purple row of beads represents a canoe. In the canoe are the Native Americans, their leaders, their governments, and their Way of Life, or religion as you say it. We shall travel down the road of life, parallel to each other and never merging with each other.… As we travel the road of life, because we have different ways and different concepts, we shall not pass laws governing the other. We shall not pass a law telling you what to do. You shall not pass a law telling me and my people what to do.*[8]

The 1794 Treaty of Canandaigua, between the newly formed United States of America and the Six Nations, also incorporated this philosophy of mutual sovereignty and respect. The Treaty acknowledges the Nations' right to live freely on their lands and that the United States will never disturb them until the Nations chose to sell their lands to the United States.[9] However, this would change as New York's power and ability to interact with the Indian Nations grew and it began its quest for jurisdiction over Indian land.



The Treaty of Canandaigua, between the United States and the Six Nations, 1794.
National Archives and Records Administration 12013254

The administration building of the Thomas Asylum for Orphan & Destitute Children (later the Thomas Indian School).
Library of Congress, Prints & Photographs Division, HABS NY,15-CATRES,1A—1

The Early Quest for Jurisdiction

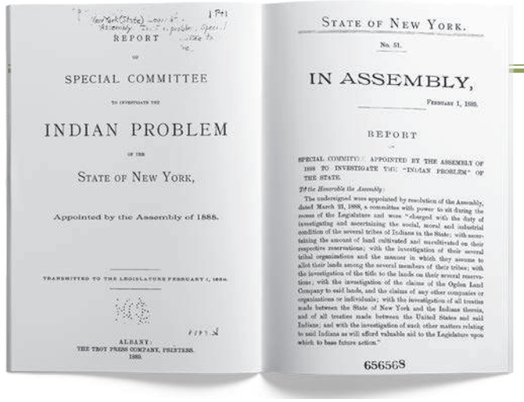
Upon its own formation in 1777, New York focused its efforts on trying to obtain Six Nations' lands. Former President of the Seneca Nation of Indians, Robert Porter, succinctly summed up the early focus of New York's policy: "Regardless of how the United States Constitution limited state powers, New York State officials believed that they had the absolute right and authority to regulate and control relations with the Haudenosaunee. Initially, the State's actions in doing so were focused purely on economic self-interest—obtaining title to the remaining Haudenosaunee lands."[10] Under the Articles of Confederation, New York entered into treaties with the Nations directly.[11] The United States Constitution, by contrast, granted the federal government exclusive authority over Indian affairs, and one of the new federal government's earliest acts was the Trade and Intercourse Act in 1790, which prohibited the sale of Indian land without the approval of Congress. Yet despite these bars to its authority, New York continued to enter into treaties and enact legislation focused on Indian affairs.

This legislative foray into Indian affairs revealed the State's particular focus on Indian lands.[12] The State and prominent individuals trained their Indian policy on extinguishing any claim by the United States of authority over the Indian Nations in New York.[13]

A short six years after the formation of New York, in 1783 the Legislature granted the Council of Appointment authority to appoint three Indian commissioners.[14] The commissioners, along with the Governor, controlled Indian affairs and secured "the rights of the Oneidas and Tuscaroras for their loyal service in the American Revolution."[15] Peter Schuyler was one of the Indian commissioners, despite the fact that he attempted to evade a New York State constitutional provision against private individuals conducting land transactions with the Indians without a license.[16] His brother, Phillip, a senator in the postwar era, was a strong advocate of states' rights over Indian affairs.[17]

In addition to the Schuylers, prominent men of the Revolutionary War, such as the Livingstons and Van Rensselaers,[18] were major players in Indian affairs, while also being land speculators and advocates for New York's authority over Indian affairs. In addition, John Jay and George Clinton, former governors of New York, believed Congress "had no right to interfere in New York affairs, which included state efforts to negotiate and extinguish Indian title."[19] These powerful families formed the foundation of New York's interference with the Indian Nations' sovereignty and self-governance.

Moving forward in its quest to obtain Indian lands, the New York legislature enacted laws in 1784 and 1785 that dictated a land use policy of sharing Indian-owned lands with veterans of the American Revolution, by setting up procedures for the advertisement and distribution of Indian lands even before New York bought the titles.[20] Congress questioned


REPORT
OF
SPECIAL COMMITTEE
TO INVESTIGATE THE
INDIAN PROBLEM
OF THE
STATE OF NEW YORK,
Appointed by the Assembly of 1888.
TRANSMITTED TO THE LEGISLATURE FEBRUARY 1, 1889.
ALBANY:
THE TROY PRESS COMPANY, PRINTERS.
1889.

STATE OF NEW YORK.
No. 51.
IN ASSEMBLY,
FEBRUARY 1, 1889.
REPORT
OF
SPECIAL COMMITTEE APPOINTED BY THE ASSEMBLY OF 1888 TO INVESTIGATE THE "INDIAN PROBLEM" OF THE STATE.
To the Honorable the Assembly:
The undersigned were appointed by resolution of the Assembly, dated March 21, 1888, a committee with power to sit during the recess of the Legislature and were "charged with the duty of investigating and ascertaining the social, moral and industrial condition of the several tribes of Indians in the State; with ascertaining the amount of land cultivated and uncultivated on their respective reservations; with the investigation of their several tribal organizations and the manner in which they assume to allot their lands among the several members of their tribes; with the investigation of the title to the lands on their several reservations; with the investigation of the claims of the Ogden Land Company to said lands, and the claims of any other companies or organizations or individuals; with the investigation of all treaties made between the State of New York and the Indians therein, and of all treaties made between the United States and said Indians; and with the investigation of such other matters relating to said Indians as will afford valuable aid to the Legislature upon which to base future action."
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The Report of Special Committee to Investigate the Indian Problem of the State of New York (Whipple Report), 1889.
Courtesy of New York State Archives 65084

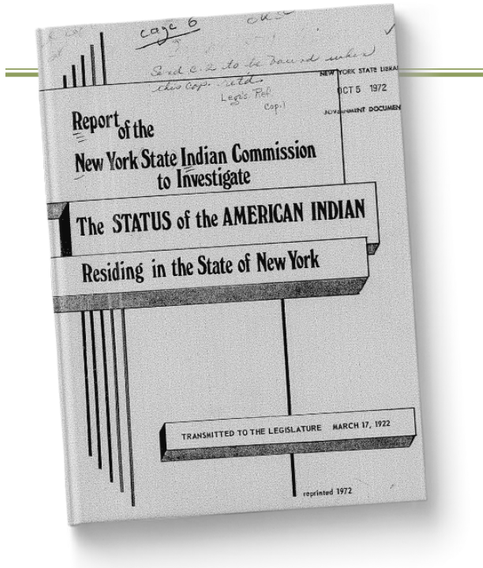
New York's authority to use Haudenosaunee lands for military bounty lands, but the State pressed forward.[21]

Social reformers and missionaries, frustrated by the Indian people's lack of employment, use of alcohol, and continued practice of their customs and traditions, began to advocate that the State broaden its approach.[22] As a result, the State introduced policies and legislation to "help" the Haudenosaunee people, such as through laws regulating the cutting of timber on Indian lands, banning non-Indians from their Territories, appropriating funds for school houses on the Territories, and establishing the Thomas Indian Boarding School.[23]

In the early 1800s, the State began to focus on changing Indian Nations' governments. In 1802, the New York Legislature enacted legislation outlining elective offices and powers for the Saint Regis Mohawk Tribe. Historically the Tribe had chosen leaders through traditional processes including selection of leaders by clan mothers, but there were members of the community who sought to change their form of government. The historical record does not shed any light on whether this was requested by tribal members, was at the State's instigation, or both. However the Tribe's government at the time was functioning and the legislation did nothing to change it.[24] In 1847, New York enacted new legislation outlining voting qualifications, terms of office, and the duties of various elected officials for the Seneca Nation.[25] Subsequent legislation was enacted for the Shinnecock Nation[26] and the Poospatuck Indian Nation.[27]

Regardless of the instigator of the change, the legislation demonstrates New York's belief it had the authority to interfere with tribal governments, despite the U.S. Constitution reserving all government-to-government interactions of that type for the federal government. Perhaps more importantly to the Nations, enacting these laws was a bold step into the Haudenosaunee's canoe and a clear indication that the Nations were not going to be allowed to live freely in their lands.

New York also commissioned investigations into the Nations' sovereignty and lands. The first of these, from 1855, focused on education.[28] With complete disregard for the Two Row Wampum and Treaty of Canandaigua, its recommendations focused on mechanisms to assimilate the Nations. The 1855 investigation acknowledged the difficulty of "civilizing



Title page of the Report of the New York State Indian Commission to Investigate the Status of the American Indian Residing in New York State (Everett Report), reprinted 1972.
Courtesy of New York State Archives 10512

the Indian and educating him in the ways of the white man – agriculture, mechanics, household arts,"[29] and recommended both giving more attention to religious and intellectual improvement and that a board of officers—consisting of the governor, secretary of state, and superintendent of public instruction—be placed over Indian affairs.[30] Not surprisingly, the committee also recommended tribal lands be distributed on an individual basis, instead of owned collectively by the Nations,[31] which would free the land from the Nations' ownership and make it easier for the land to be purchased by non-Indians. Despite these sweeping recommendations, this initial investigation proved to be a non-starter; the only change that actually resulted was the 1856 placement of schools on the reservations under the supervision of the first Superintendent of Public Instruction.[32]

The State's second investigation began in 1888 and resulted in the Whipple Report in 1898; and given the State's longstanding focus on acquiring Indian lands, it should come as no surprise that the investigation arose from longstanding intrigue over traditional Seneca lands, and that its mandate was to investigate the true ownership of those lands. The New York State Assembly charged the commission:

with the duty of investigating and ascertaining the social, moral and industrial condition of the several tribes of Indians in the State: with ascertaining the amount of land cultivated and uncultivated on their respective reservations; with the investigation of their serval tribal organizations and the manner in which they assume to allot their lands among the several members of their tribes; with the investigation of the title to the lands on their several reservations; with the investigation of the claims of the Ogden Land Company to said lands, and the claims of any other companies or organizations or individuals; with the investigation of all treaties made between the State of New York and the Indians therein, and of all treaties made between the United States and said Indians; and with the investigation of such other matters relating to said Indians as will afford valuable aid to the Legislature upon which to base future action.[33]

The Whipple Commission, as it became known, did not include anyone from the Nations, or even a proponent of the Nations' sovereignty. Rather, James S. Whipple, the investigatory committee's chairman, was a friend and relative (by marriage) of Republican Congressman Edward Vreeland—an ardent proponent of allotting tribal lands who had proposed several (failed) bills to allot the Seneca lands.[34] Chairman Whipple was not Vreeland's only connection to the Commission: his brother was its special counsel.[35] Vreeland's hopes for the Commission were clear: "I represent 8,000 people who live upon these reservations[,] who hold ninety-nine year leases from these Indians, and want to get a title to their lands."[36]

The Whipple Commission visited each Territory in the State and heard testimony from witnesses. Questions frequently put forth by the Commission members concerned how the land was owned; what the Indian people did with the land; whether the Indians were involved in pagan practices or rituals; and whether there were any laws within the Territories, especially regarding marriage and the probate process. Many the witnesses duly painted a fearful picture regarding the lack of any marital law and a western dispute resolution process. The perceived lack of law led many witnesses to opine

favorably about the need for laws to be applied to the Nations, with one testifying, "They should be made, as soon as possible, citizens, and should be made to obey the laws of the State of New York with reference to marriage."[37]

Some witnesses were asked to give a recommendation as to how the State should deal with the Indian Nations. For instance, when Chancellor Sims of Syracuse University was asked for his opinion on how the State should deal with the Onondaga Nation, he responded, "Obliterate the whole tribe…[,] make them citizens, divide all the lands among them and put them under the laws of citizenship in the State. It is the merest farce in the world to treat them as a nation."[38] His testimony was echoed by many others.

Unsurprisingly, the subsequent conclusion of the Whipple Report regarding the Onondaga Nation reflected Sims's opinion: "[t]heir present condition is infamously vile and detestable, and just so long as they are permitted to remain in this condition, just so long will there remain upon the fair name of the Empire State a stain of no small magnitude."[39] Assimilation was the only option. The question remained was how to do it.

The Whipple Report made four recommendations to the State Assembly. First, enact a compulsory attendance school law.[40] This would supplement the money already spent on schools, as a common theme espoused by teachers in the State-funded reservation schools was that State funding was being wasted as the parents did not always send their children to the schools.

The next two recommendations focused on freeing up tribal lands. The Report recommended that the Legislature ask the State government to extinguish old claims to certain Nations' land, such as the claim of the Odgen Land Company, erasing any doubt that once the land was freed from the Nations' control, it would be alienable and for sale to the highest bidder.[41] Following from this move, the third recommendation was that reservation lands be allotted among tribal members.[42] When lands were allotted to individuals, tribal members would then be free to sell them to anyone and the lands would be subject to property taxes. This had already occurred out west, where tribal lands were allotted and as a result hundreds of thousands of acres were lost, because many tribal members sold their lands in order to pay property taxes or lost them to foreclosure.[43]

The Whipple Report's last recommendation would finally force assimilation and remove any protection of the Nations, through repealing all existing laws relating to the Indian Nations and absorbing the Indian people into citizenship.[44] As befitting its composition, the Whipple Commission was unconcerned about the wishes of the Indian Nations and people or their sovereignty, and believed assimilation was truly for their benefit.[45] The Commission noted that the Indian people's protests should be set aside and that their consent to any of the proposed changes was not necessary "because if past history is any guide, whatever may have occurred or is likely to happen elsewhere, there is little danger that the State of New York will do any injustice to its Indians.[46]

The Whipple Report cemented the foundation of the State's Indian affairs policies in assimilation. It did nothing to improve the relations between the Nations and the State; rather, it only "bred resentment toward the New York State government down to the present day."[47] In explaining the impact of the Whipple Report, former Seneca Nation of Indians President Robert Porter pointed out that while some of its recommendations "were simply a formalization of the State's de facto Indian policy that had long been in place," other aspects "evidenced a new policy because [the Report] served as a catalyst for motivating State officials to embrace the challenge of eliminating the Haudenosaunee as a distinct, autonomous, self-governing people."[48]

Significantly, the Commission and its Report completely disregarded the Two Row Wampum and Canandaigua Treaties. The federal government had agreed to respect the Nations' lands, but New York could only see the land the Nations' controlled. The State now needed to find a mechanism to control that land, and turned its focus to jurisdiction.

The State attempted to change its relationship with the Nations through a 1915 constitutional convention, which approved a referendum question regarding the abolishment of Indian courts, thereby transferring jurisdiction to State courts, and extending all State laws to the Nations, except for those that were prohibited by federal law.[49] But the referendum was defeated by voters.[50]

Map of the Countrey of The Five Nations, 1730.
Courtesy of Darlington Digital Library, University of Pittsburgh

In the wake of this defeat, the State conducted several other investigations regarding the Indian problem, the ownership of the Seneca lands, and whether the State had jurisdiction over Indian lands, but these reports did little to change Indian policy. Several bills were proposed in Congress to allot the Senecas lands, but none passed. The State's quest to secure jurisdiction over Indian lands would continue by contesting a lawsuit over lessees' refusal to pay rent they owed to the Seneca Nation. This battle over rent would spill over into the halls of Congress.

The Federal Government's Indian Policy

To understand how New York was able to lobby Congress to grant criminal and civil adjudicatory jurisdiction over the Indian Nations, one needs to understand the federal government's position on Indian affairs in the 1940s. At the end of World War II, Congress focused on extricating itself from the Indian business. Known as the termination era, this phase of Congressional policy encouraged assimilation and advocated for the end of the federal government's responsibility over Indian affairs.[51] Federal government actions during this policy era "fell into four general categories: (1) the end of federal treaty relationships and trust responsibilities with certain specified Indian nations; (2) the repeal of federal laws that set Indians apart from other American citizens; (3) the removal of restrictions of federal guardianship and supervision over certain individual Indians; and (4) the transfer of services provided by the Bureau of Indian Affairs to other federal, state, or local governmental agencies, or to Indian nations themselves."[52] The termination of the government-to-government relationship between the Indian Nations and the federal government would remove all protections of Nations' lands, subjecting them to property taxes.

Congress was also continually at odds with the Bureau of Indian Affairs, looking for a way to limit the Bureau's power. In response to this congressional pressure, in 1947—one year before the grant of criminal jurisdiction to New York—Bureau Commissioner William Zimmerman testified before congressional committees, representing that he divided the Indians across the country into three groups and that all Six Nations in New York were among those that could be released immediately from federal supervision.[53]

Mohawk Ernest Benedict, a long time defender of Indian Nations and their rights, understood the politics behind the drive for termination of the Nations' political status, as well as the challenge this context placed on their battle against jurisdiction:

I am inclined to accept the statement made by one of the Senators [Arthur Watkins] that they themselves did not think of these bills as a way of placing the Iroquois at the mercy of New York State, but merely as part of a nation-wide drive to place Indians more nearly in the status of the rest of the people, and thus eliminate the need for the Indian Office.… Masquerading under the high-sounding cover of "setting the Indians Free" are a series of Bills which strike at the very roots of Indian economy, and if passed would reduce whole Indian populations to poverty and dependence. These bills, which might, to an unsuspecting friend of Indians, sound like pro-Indian legislation because of the holy guise of "emancipation" wrapped about them, are actually being pushed by the big business interests who want to get hold of Indian property. These interests are many and greedy; big cattlemen of the Plains who want Indian grazing lands; the liquor industry that wants a free hand to debauch and exploit Indians; the mining interests; the timber barons; the fishing industry. It is significant that the proposed legislation affects mainly those tribes still having valuable assets left to their ownership. There seems to be no particular haste to "free" those tribes whose lands are worthless and who own no valuable property.[54]

In 1950, President Truman appointed Dillon S. Myer to lead the Bureau of Indian Affairs. Myer was the former head of the War Relocation Authority and supervised the removal and detention of Japanese-Americans.[55] The Secretary of Interior recommended Meyer because of the outstanding job he had done in the maintenance and relocation of the Japanese, in the belief that this experience qualified him for the position of Commissioner of Indian Affairs.[56]

Upon assumption of his duties, Myer focused his attention on the transfer of the Bureau's functions.[57] Against this backdrop, the federal courts entered into the dispute over whether New York State could exercise jurisdiction over Indian lands.

United States v. Forness involved leases on Seneca Nation lands. In the mid-1800s, the Seneca Nation leased lands in Salamanca to railroad companies and settlers. Congress subsequently ratified the leases, originally for twelve years, and then for ninety-nine years. By 1939, twenty-five percent of the leases were in default and over 200 were delinquent by more than seven years.[58] The lessees "took these payments for granted as 'inconsequential' obligations, in part because they were infinitesimal and in part because they assumed the Indians were powerless to force them to pay."[59] After much discussion with the United States Department of Justice, the Tribal Council of the Seneca Nation passed a resolution terminating all the leases that were in default.[60]

The United States brought suit, on behalf of the Seneca Nation, to enforce the cancellation of the lease of Frank Forness, who had not paid his annual rent of $4 since 1930. Forness promptly paid his overdue rent and argued that the law required the court to dismiss the case against him.[61] However, the flaw in his argument was that *state law* required the dismissal. The Second Circuit, citing the United States Supreme Court's decision *Worcester v. Georgia*, which held that state law did not apply in Indian Nations,[62] ruled that New York's law did not apply in Indian territory because state law is inapplicable to Indian Nations.[63] "[S]tate law," Judge Jerome Frank wrote, "cannot be invoked to limit the rights in lands granted by the United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent."[64] The court noted that the Act of Congress granting the lease did not make the laws of the New York State applicable to the Seneca lands.[65] Thus, state law did not apply and Forness' payment of arrears did not require a dismissal of the cancellation lawsuit.

The federal courts had spoken: the State could no longer argue it had any authority to interfere with the Indian Nations. But New York would not give up that easily.

New York's Quest for Jurisdiction after *Forness*

In response to *Forness,* New York formed the Joint Legislature Committee on Indian Affairs (the "Legislative Committee"). The Legislative Committee was formed to address the "more or less continuous state of confusion about state authority over Indian reservations."[66] Among its members were several

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WEST KEY NUMBER SYSTEM

UNITED STATES v. FORNESS et al.
(SALAMANCA TRUST CO. et al., Interveners).
No. 113.

Circuit Court of Appeals, Second Circuit.
Jan. 20, 1942.

1. Courts ⇐405(16)

In suit to enforce Indian Nation's cancellation of lease because of default in payment of rent, District Court had no authority to strike from record affidavit submitted on motion for summary judgment and containing an offer to rerent although there was no formal disposition of the motion, since final judgment for defendant was equivalent to a denial of the motion. Federal Rules of Civil Procedure, rule 75(h), 28 U.S.C.A. following section 723c.

2. Indians ⇐27(1)

Suit by the United States on behalf of the Seneca Nation to enforce cancellation of lease for nonpayment of rent could not be defeated on theory that it was in effect an action of ejectment barred by New York statute which provides that, upon tender of the arrears of rent before judgment, court shall dismiss complaint, since state law cannot be invoked to limit the rights in lands granted to Indians. Civil Practice Act N.Y. §§ 997–999; Act Feb. 19, 1875, 18 Stat. 330; Act Sept. 30, 1890, 26 Stat. 558; Act Feb. 28, 1901, 31 Stat. 819.

3. Indians ⇐2

State law does not apply to Indians except so far as the United States has

United States v. Forness, 125 F.2d 928 (1942)
Retrieved from New York Federal-State-Tribal Courts and Indian Nations Justice Forum

southwestern New Yorkers who were opposed to the Seneca Nation's exertion of sovereignty over its lands.[67]

The Legislative Committee's intentions were made clear as it held its first hearings. Numerous witnesses testifying before the committee portrayed the Nations' Territories as lawless now that state law no longer applied. The Hon. Thomas H. Dowd, a City of Salamanca judge (and former State Supreme Court judge), was the first witness. He set the tone: "Here is a part of New York State forty miles long and one mile wide [referring to the city of Salamanca] upon which the common law of the State of New York does not prevail, and if there is no Federal common law in existence, that decision holds that there isn't any law on this Reservation at all."[68] However, Dowd was not an disinterested observer. He worked as an attorney for mortgage companies in Salamanca that would be affected by the cancellation of leases; thus, he had a financial interest in their cancellation. His testimony illustrated his financial interest. He informed the Committee, "[t]he effect of this decision is to destroy the value of that property. No sane man would loan One Dollar on Salamanca property."[69] Judge Dowd's testimony echoed the bitterness of many Salamancans about the cancellation of leases.[70]

The Committee subsequently proposed two bills to Congress, one to grant criminal jurisdiction to New York State and the second to grant civil jurisdiction. The bills were proposed as a way to end the lawlessness created by *Forness*. The communities surrounding Indian lands viewed the Indians as threats because state law enforcement had no authority on Indian lands.[71] This was exacerbated by the fact that only two Indian Nations had developed courts, prompting outsiders to believe there was no punishment for criminal offenses on Indian lands.[72] Thus, the Legislative Committee proposed that "[t]he unmistakable purpose of both bills is to fill the void resulting from (1) an almost total lack of tribal or Federal laws of any character applicable to New York reservations, other than the inadequate Federal Ten Major Crimes Law…[,] and (2) literal application of the recent declaration of the Federal Circuit Court of Appeals . . . that [New York] law does not apply to the Indians except so far as the United States has given its consent, which the United States Supreme Court has

declined to qualify."[73] However, the witnesses during the hearings were unable to point to an actual rise in the amount of crime since the *Forness* decision.

Despite the Legislative Committee's stated purpose of combatting lawlessness on Indian lands, its hearings and subsequent reports reveal that the State's true agenda was assimilation. Jurisdiction was a method to achieve assimilation of the Indian Nations and to free the tribal lands from the Nations' ownership. George Ansley, an attorney in Salamanca who was also a New York Indian Agent from 1914 through 1924, testified at the Committee's first hearing that "[m]any Indians are just as intelligent and got along just as well as the whites. Unless we do absorb them into our civilization, we will always have an Indian problem."[74]

The Legislative Committee's initial report in 1944 called for a quick resolution of the jurisdiction problem, citing not lawlessness but instead concerns about "retarding [Indians'] assumption of the responsibilities and enjoyment of the privileges of citizenship."[75] The Legislative Committee noted later in a 1946 report that the State was simply following the federal government's example, and believed the federal government sanctioned its quest for assimilation as "[t]he granting of citizenship [in 1924] had the earmarks of an invitation to the states to work toward further assimilation of Indian populations."[76]

Despite its stated assimilationist motives, the Legislative Committee took issue when the Nations criticized its effort to obtain jurisdiction. The Committee argued that the purpose of the proposed legislation was not to seize reservations, subject them to taxation or destroy the Nations.[77] The Legislative Committee noted that the State had previously enforced State law and provided State services, and built trust with the Nations, thus the change would be minimal."[78] The Committee argued the true reason for the proposed legislation, in the eyes of the Committee, was that the "State is even more deeply concerned than the federal government in promoting eventual social assimilation of the New York Indians into the general population.[79] Thus, the Legislative Committee's own words demonstrated the true concern of the State was not the Nations' sovereignty, but their assimilation, and jurisdiction was a means to that end.

In addition to arguing what it viewed as altruistic motives, New York was entrenched in its belief that the State, not the federal government, possessed jurisdiction over Indian territories, notwithstanding the ruling in *Forness*. At a Legislative Committee meeting in 1948, Assistant Attorney General Henry S. Manley noted "[t]he United States has not now, and never has had, any interest in the soil of any New York reservation. It never has had full sovereignty over them, and the State once had sovereignty limited only by the Articles of Confederation. The New York reservations were not created under treaties with the United States or (for the most part) ratified by it, or Acts of Congress, or executive order.… . It is doubtful whether any of them is 'Indian country' as that phrase is used in the Indian law and other Federal statutes."[80]

The Legislative Committee continually discounted the Nations' opposition to any grant of jurisdiction to the State. "It seems too much to hope that an overwhelming majority of the reservation Indian population will ever, on their own initiative, unite on a program of sorely needed laws for the protection and regulation of these communities."[81] On the other hand, the Committee simultaneously worked to portray the Nations' support of the bills to Congress. When Committee members lobbied Congress to pass the bill granting the State civil jurisdiction, it was misrepresented that those who had previously opposed the bills now believed that the change had worked to their advantage.[82]

The Legislative Committee's efforts were rewarded on July 2, 1948, when Congress enacted the law now codified at 25 U.S.C. § 232, granting New York concurrent criminal jurisdiction:

> *The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: Provided, That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.*[83]

Unlike the federal government's subsequent grants of jurisdiction to states over Indian Nations, Congress did not withdraw the federal government's jurisdiction.[84]

The Committee celebrated this grant of criminal jurisdiction with a reminder that it was now a step closer to achieving the assimilation of Indian Nations. "Enactment of this law, one of the major aims of this Committee since its creation, was an event second in importance only to the Indian Citizenship Act of 1924. It marks the next great forward step toward absorption of Indians into the general community of citizens."[85] The Committee now turned its attention to obtaining civil jurisdiction.

The bill before Congress proposed a grant of adjudicatory civil jurisdiction, limited to actions and proceedings in court. Similar to its thoughts on the grant of criminal jurisdiction, the Committee believed civil jurisdiction would move the assimilation process forward. The grant of civil jurisdiction "would end [Indians'] long isolation and inevitably work toward complete assimilation with the main body of citizens."[86] From the Committee's viewpoint this grant of jurisdiction would propel the Indian people forward; "[u]nless it is the destiny of New York Indians to be preserved as museum pieces of an ancient but completely outmoded civilization, it seems time that realism replace mere sentiment in governmental policy toward, them."[87]

The bill proposed only a grant of adjudicatory civil jurisdiction. However the Legislative Committee believed that this limitation would not prevent the State from promoting assimilation by working to change tribal governments, because the bill did not expressly confirm or deny the authority of the State to enact laws modernizing tribal governments.[88]

Subsequently, New York was successful in lobbying Congress for adjudicatory civil jurisdiction, which was enacted in 1950. State courts were granted jurisdiction in civil actions and proceedings between Indians or between Indians and non-Indians.[89] The law was not to be construed as requiring Nations or its members to obtain State fishing or game licenses for the exercise of hunting and fishing rights provided for under any agreement, treaty or custom or subject Reservation lands to state or local taxes.[90] The legislation also included a provision that allowed courts to recognize tribal laws and customs that were proved to the satisfaction of the courts. The Nations were given two years to record any customs they wanted to retain, but given the resentment over the bill none of the Nations complied.

Hauptman writes of the impact of the legislation that "[t]he most longlasting result was increased Indian suspicion of the state its officials."[91] The Legislative Committee's continued meddling after the bill's enactment would only prove the Nations' suspicions.

The Impact of Jurisdiction

New York interpreted the Congressional grant of concurrent criminal and civil jurisdiction as an open door to continue its quest to assimilate the Indian Nations. In 1950, as the civil jurisdiction bill was pending, the Legislative Committee expressed its hope that the grant of civil jurisdiction would result in changes to the tribal governments, but offered its reassurances that there would not be negative changes. "The only significant changes to be expected from passage of the bills would be the positive ones of extending orderly processes of government to the reservations and of ending the power of individual Indians to avoid ordinary civil responsibilities."[92]

By 1952, as the Legislative Committee waited for the new law to become effective, it noted that despite the passage of the legislation, there was still work to be done to "induce reservation inhabitants to assume the hitherto unacceptable role of willing and active citizens."[93] According to the Legislative Committee, the factors slowing this process were hostility due to the loss of Indian lands and an enduring belief that somehow this land would be returned to the Nations.[94] The grant of jurisdiction would help the Committee move forward with the State's goal of assimilation. While it waited for the two-year window to pass, the Committee reported:

Contrary to many assertions to that effect, there is no apparent prejudice in this State against Indians. What is commonly confused with prejudice is general dissatisfaction on the part of white people with an archaic system that has kept Indians separate from the rest of the population… Eventually, therefore, it is greatly to be hoped that Indians will reach the point of desiring to hold their lands in severalty as do western tribes, and to abandon present restrictions against ownership by non-Indians, even at the cost of having all such lands bear a fair proportion of tax burden. Not until then will Indians complete the transition from hermithood to the vigorous and responsible citizenship assured by their intelligence, independence and courage.[95]

This transition would require a change in tribal governance. And the grant of civil jurisdiction was the "new impetus to a movement to remedy the deplorable inadequacy of reservation government."[96] The Committee recommended the creation of a model government pattern resembling the form of town administration,[97] opining that the treaties cited by the Nations had already been discredited by the federal government and presented no barrier to this change.[98] The Nations only needed to make a request and sponsor the necessary legislation.[99]

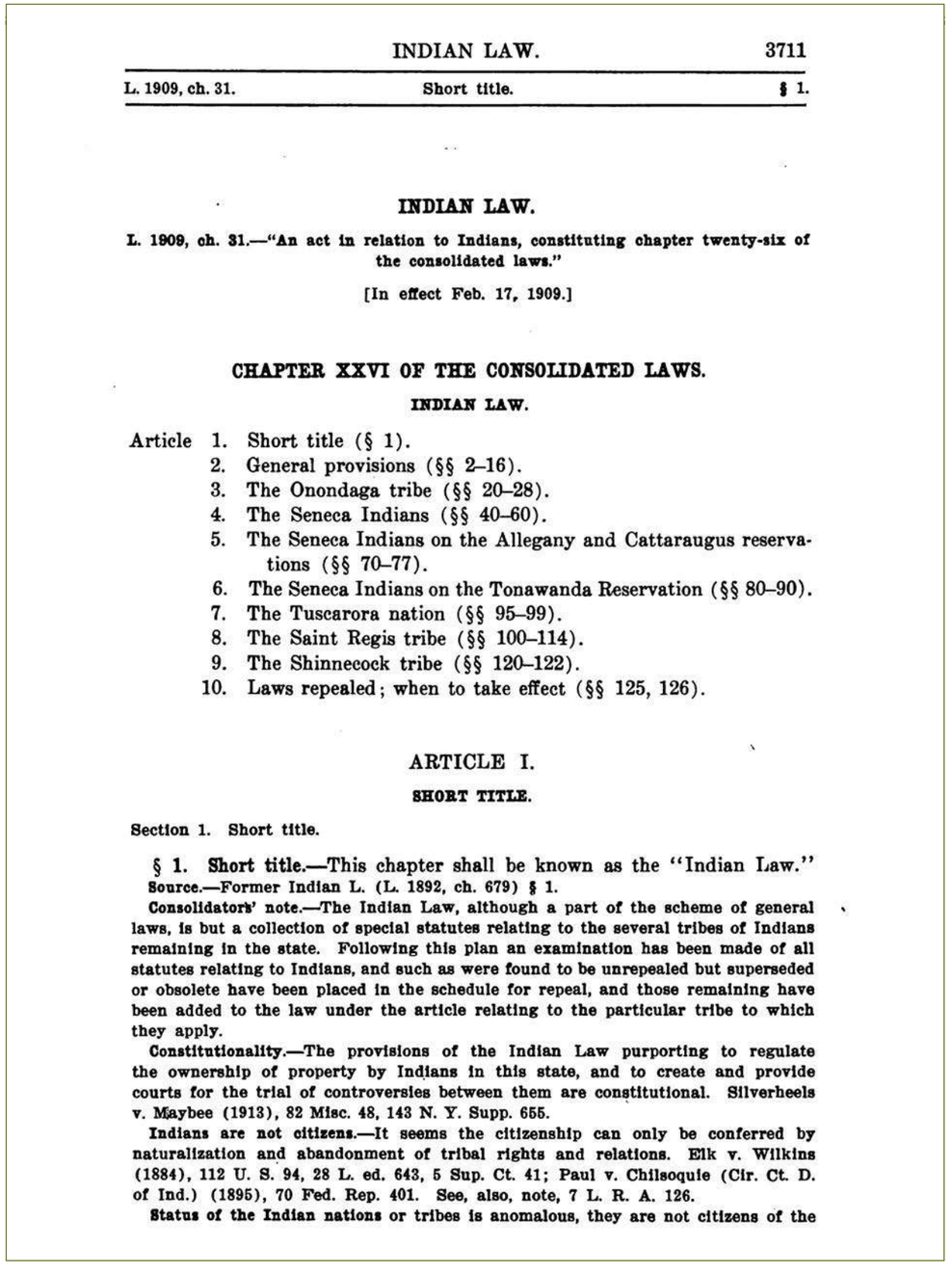
In addition to viewing the grant of jurisdiction as permission to move forward with its assimilation goals, the Committee advocated an expansive interpretation of the legislation while lamenting its limitations. The grant of civil jurisdiction was clearly limited to adjudicatory civil jurisdiction, but the Committee wanted the authority to *legislate* for the Nations, as demonstrated by its desire to pass legislation regarding tribal government reform. To that effect, the Attorney General argued the language "implies the application of a body of law. Generally where the State has 'jurisdiction' it also defines and creates the body of law to be applied."[100] However, the Committee viewed the prohibitions on taxation and exercising jurisdiction over land disputes as limiting its ability to work the needed reforms. The Committee argued that the "only apparent effect of this provision may be the unfortunate one of barring State courts from handling private land disputes in which event most Indians will have no forum for the disposal of such cases."[101]

Despite these perceived limitations, the Committee overall heralded its success in obtaining criminal and civil jurisdiction and the progress it had made with the Nations. In 1954, the Committee wrote in its report, "[s]teadily, if slowly, New York Indians are becoming convinced that attainment of their deserved place in contemporary society requires ever-increasing acceptance of the white man's culture and institutions."[102] The State had finally settled the question of the State's jurisdiction on tribal lands and the controversy over the Nations' sovereignty and jurisdiction and the State had emerged "as the active governing authority."[103]

Conclusion

The New York Joint Legislative Committee on Indian Affairs finally achieved the State's goal: criminal and civil jurisdiction. The Six Nations Confederacy, in its interactions with the State, had sought peace and respect. But as the historical record illustrates, New York ignored their treaties and sovereignty and fought for jurisdiction in order to assimilate the Nations. In 1954, the Committee heralded its success in this endeavor: "The last ten years have produced changes of relationship between reservation Indians and the State of New York hardly conceivable in the light of previous experience. Most important of these has been settlement of the long standing controversies over sovereignty and jurisdiction and emergence of the State as the active governing authority. These changes have brought security and stability to reservation existence and desire on the part of an ever-increasing number of Indians to assume more active roles in contemporary society."[104]

But despite all the Committee's efforts, the Six Nations' Territories and sovereignty still exist. The Nations are stronger, many with good economies. All of the Nations have functioning dispute resolution procedures, some in the form of modern tribal courts. Others use their traditional dispute resolution process. Fortunately, the relations between the Nations and the State have started to improve. But the memories of the battle over jurisdiction still remain.



INDIAN LAW. 3711

L. 1909, ch. 31. Short title. § 1.

INDIAN LAW.

L. 1909, ch. 31.—"An act in relation to Indians, constituting chapter twenty-six of the consolidated laws."

[In effect Feb. 17, 1909.]

CHAPTER XXVI OF THE CONSOLIDATED LAWS.

INDIAN LAW.

Article
1. Short title (§ 1).
2. General provisions (§§ 2–16).
3. The Onondaga tribe (§§ 20–28).
4. The Seneca Indians (§§ 40–60).
5. The Seneca Indians on the Allegany and Cattaraugus reservations (§§ 70–77).
6. The Seneca Indians on the Tonawanda Reservation (§§ 80–90).
7. The Tuscarora nation (§§ 95–99).
8. The Saint Regis tribe (§§ 100–114).
9. The Shinnecock tribe (§§ 120–122).
10. Laws repealed; when to take effect (§§ 125, 126).

ARTICLE I.

SHORT TITLE.

Section 1. Short title.

§ 1. Short title.—This chapter shall be known as the "Indian Law."

Source.—Former Indian L. (L. 1892, ch. 679) § 1.

Consolidators' note.—The Indian Law, although a part of the scheme of general laws, is but a collection of special statutes relating to the several tribes of Indians remaining in the state. Following this plan an examination has been made of all statutes relating to Indians, and such as were found to be unrepealed but superseded or obsolete have been placed in the schedule for repeal, and those remaining have been added to the law under the article relating to the particular tribe to which they apply.

Constitutionality.—The provisions of the Indian Law purporting to regulate the ownership of property by Indians in this state, and to create and provide courts for the trial of controversies between them are constitutional. Silverheels v. Maybee (1913), 82 Misc. 48, 143 N. Y. Supp. 655.

Indians are not citizens.—It seems the citizenship can only be conferred by naturalization and abandonment of tribal rights and relations. Elk v. Wilkins (1884), 112 U. S. 94, 28 L. ed. 643, 5 Sup. Ct. 41; Paul v. Chilsoquie (Cir. Ct. D. of Ind.) (1895), 70 Fed. Rep. 401. See, also, note, 7 L. R. A. 126.

Status of the Indian nations or tribes is anomalous, they are not citizens of the

First page of Chapter XXVI of the Annotated Consolidated Laws of the State of New York, 1918.
Retrieved from Google Books

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Dancers in traditional dress pose with a 2006 Listening Conference sign.
Courtesy of the New York State Unified Court System

New York State's Recent Judicial Collaboration With Indigenous Partners:

The Story of New York's Federal-State-Tribal Courts and Indian Nations Justice Forum

by Hon. Marcy L. Kahn

Marcy L. Kahn is an Associate Justice of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department. She was elected a Justice of the New York State Supreme Court in 1994 and reelected to that office in 2008. She served by mayoral appointment as a Judge of the New York City Criminal Court commencing in 1987. Prior to becoming a judge, she was a partner and associate, respectively, in two major law firms in New York City, and served as a Special Assistant Attorney General of the State of New York. Justice Kahn currently chairs the New York Unified Court System's Tribal Courts Committee and has served as the Convener of the New York Federal-State-Tribal Courts and Indian Nations Justice Forum since its inception in 2003. Justice Kahn received her B.A. from Stanford University and her J.D. from New York University School of Law. She lives with her spouse in the U.S. locale having the largest number of Native residents, New York City.

Foreword

When then-Chief Judge Judith Kaye asked me in 2002 to lead the effort to establish a forum of the state and Indian tribal courts in New York, I enthusiastically embraced the chance to return to work which had long been an interest of mine. This interest derived from three experiences. First, I grew up in Arizona, and attended a public high school located next door to the statewide boarding school for Indian high school students. Those students attended some classes at my school, but we had no other contact with them. We knew nothing of the depredations they had to endure, as discussed in Professor Quigley's article in this issue. Second, while in law school, I worked as a summer associate for the Phoenix law firm which was the outside general counsel to the Navajo Nation. During that time, I accompanied members of the Tribal Council to Washington, D.C. to lobby members of Congress. Third, in our third year at New York University School of Law, a classmate with similar experience and I succeeded in getting the law school to establish a course on Native American Rights Law. On graduation, I sought a position working on Indian rights issues, but was unsuccessful. So Chief Judge Kaye's invitation gave me an opportunity to address matters of longstanding interest to me.

Introduction

In the 21st century, New York's judicial system has been a national leader in improving the administration of justice for tribal nations within the borders of the state. These efforts have been undertaken in large part by the Unified Court System's Tribal Courts Committee (the Committee) and through initiatives developed by the New York Federal-State-Tribal Courts and Indian Nations Justice Forum (the Forum). This article will discuss the origin, history, and mission of the Forum, and will highlight some of the transformative work of this collaborative partnership for New York's indigenous communities.

Hon. Edward M. Davidowitz, then Co-Chair of the New York Tribal Courts Committee, speaks before a panel at the 2006 Listening Conference.
Courtesy of the New York State Unified Court System

Development of Tribal-State Forum Concept by Conference of Chief Justices

The New York Federal-State-Tribal Courts and Indian Nations Justice Forum has its origins in a project of the Conference of Chief Justices—an organization of the chief judges of the courts of the 50 states, the District of Columbia, and the United States territories—with the mission of improving the administration of justice in state court systems.[1] In 1985, the Conference created a body, ultimately denominated the Tribal Relations Committee (TRC), to address concerns about conflicts in the exercise of jurisdiction by state and Indian tribal courts.[2] The discussion was precipitated by two decisions of the United States Supreme Court in *Three Affiliated Tribes v. Wold Engineering, PC*,[3] involving the exercise of civil jurisdiction by a state court over a controversy originating entirely in Indian country, in the absence of consent by the Indian tribal nation in question.

Over the following several years, the TRC convened a series of panels and conferences on tribal jurisdiction, and with funding from the National Center for State Courts and the State Justice Institute, proceeded to set up demonstration forums in Arizona, Oklahoma, and Washington to study tribal-state court relations.[4] After holding a national conference of federal, state, and tribal justice officials in 1991, the TRC sharpened its focus on resolving jurisdictional conflict by creating forums to foster cooperative efforts among federal, state, and tribal courts to address jurisdictional conflicts among their respective courts. By 2003, some 17 states had created tribal-state court forums, and the National Center for State Courts and the State Justice Institute had published a guide for assisting other states in doing so.[5]

Creation of the New York Forum

Organizational Structure and Mission

New York is home to nine Indian tribal nations recognized by our state government, with some 221,058 persons self-identifying as of American Indian heritage.[6] The territories of the Iroquois, or Haudenosaunee, nations are found in the northern, central and western regions of the state, while those of the Algonquian nations are found on eastern Long Island.[7] In 2002, New York Chief Judge Judith S. Kaye established the New York Tribal Courts Committee to study the possibility of creating a federal-state-tribal courts forum in New York, for the purpose of exploring how our various justice systems might collaborate to foster mutual understanding and to reduce conflict. She named me as chair of the Committee, and shortly thereafter appointed Justice Edward M. Davidowitz to co-lead the endeavor. The Honorable John M. Walker, Jr., then Chief Judge of the United States Court of Appeals for the Second Circuit, agreed from the outset to lend his support to the project.

Chief Judge Kaye also arranged for me to meet with the TRC, then led by Chief Justice Shirley Abrahamson of Wisconsin, at a meeting of the Conference of Chief Justices in 2002. Chief Justice Abrahamson and her colleagues shared what they had learned from their early efforts to build forum alliances in other states. These included the need to assure recognition of sovereignty of the tribal nations; the need to establish buy-in from the state court system; the necessity of funding to operate a forum; the need to find a path to establish trust between the justice officials of the nations and officials from the state court system; the need to overcome hurdles created by changes in leadership of tribal nations and state

Author of this article, Hon. Marcy L. Kahn, pictured right, participates in a dance at the 2006 Listening Conference.
Courtesy of the New York State Unified Court System

Hon. Stewart F. Hancock, Jr., Judge on the New York State Court of Appeals and Judge on the Oneida Indian Nation Court, shakes hands at the 2006 Listening Conference.
Courtesy of the New York State Unified Court System

court administrations; and the need to avoid problems arising from efforts to try to solve all problems.

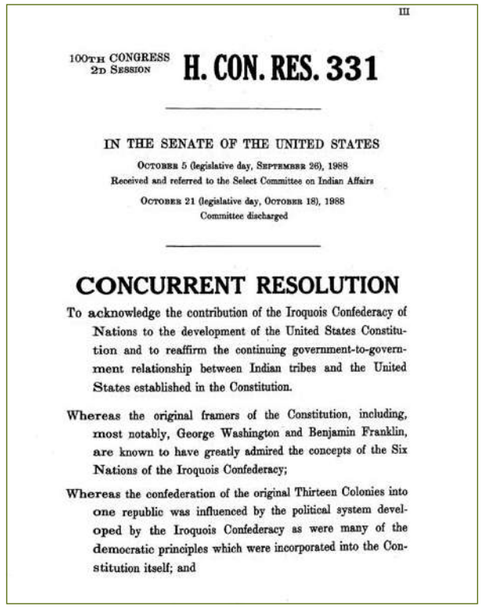
The initial challenge of Chief Judge Kaye's assignment was locating the justice officials of New York's nine state-recognized Indian tribal nations. No umbrella organization existed through which contact could be made. After a year's worth of effort, we finally achieved the success we were looking for.

In March 2003, I was invited by the Director of Native American Services of the New York State Office of Children and Family Services (OCFS) to attend a regularly scheduled meeting in Liverpool, New York with members of New York's nine tribal nations. The topic: protective services for Indian children in the state. I wanted to assess the tribal nations' members' interest in developing a federal-state-tribal courts forum, and see whether they would be willing to explore the process for doing so in a meeting with the Tribal Courts Committee. I offered examples of what tribal-state forums in other states were doing, but emphasized that a New York forum would be free to pursue its own agenda, and would not be bound by what had been done elsewhere. The members of the tribal nations responded with interest, and the project was underway. On May 22, 2003, Committee representatives held our first meeting in Liverpool with the justice and child welfare officials of the tribal nations. We sought to refine further the concept of a forum for New York, and to identify topics of special concern to the nations that the forum could possibly address.

Among the issues initially identified as holding special concern for the tribal nations were difficulty in implementing the federal and state Indian Child Welfare Acts,[8] especially in ensuring an appropriate tribal role in state family court decisions regarding placement of Indian children through foster care or adoption; the recognition of tribal court judgments by state courts; the efforts of tribal nations to develop their own effective law enforcement and judicial systems; and the need to educate and train state court officials on Indian government and culture.

At the second meeting of the group in November 2003, the Native participants agreed to help establish a permanent federal-state-tribal forum in New York, and about a year later, after input from all nine tribal nations and the federal and state judiciaries, the group adopted a formal mission statement. The goals of the newly assembled Forum would be (1) to educate state and tribal justice officials and promote understanding between our justice systems; (2) to integrate training of state and tribal stakeholders in addressing and enforcing appropriate child placements under the federal and state ICWA provisions; and (3) to reduce jurisdictional conflicts and promote inter-jurisdictional recognition of judgments and orders of our respective courts.

Efforts to adopt a structure and operational scheme for the Forum, and even to select its name, were not as easily accomplished, however. A deep, cen-



III

100TH CONGRESS
2D SESSION

H. CON. RES. 331

IN THE SENATE OF THE UNITED STATES

OCTOBER 5 (legislative day, SEPTEMBER 26), 1988
Received and referred to the Select Committee on Indian Affairs

OCTOBER 21 (legislative day, OCTOBER 18), 1988
Committee discharged

CONCURRENT RESOLUTION

To acknowledge the contribution of the Iroquois Confederacy of Nations to the development of the United States Constitution and to reaffirm the continuing government-to-government relationship between Indian tribes and the United States established in the Constitution.

Whereas the original framers of the Constitution, including, most notably, George Washington and Benjamin Franklin, are known to have greatly admired the concepts of the Six Nations of the Iroquois Confederacy;

Whereas the confederation of the original Thirteen Colonies into one republic was influenced by the political system developed by the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself; and

Concurrent Resolution to acknowledge the contribution of the Iroquois Confederacy of Nations to the development of the United States Constitution… H. Con. Res. 331.
Retrieved from the United States Senate

turies-long lack of trust existed between Natives and non-Natives in New York, due to the state's periodic efforts to exercise control over its Native residents and to flout the supremacy of the federal government in dealings with the Indian nations,[9] contrary to principles embodied in New York's early treaties with the Indian Nations and in violation of the United States Constitution.[10] Additionally, Congress developed a uniquely complicated legal framework for the exercise of jurisdiction in Indian country in New York.[11] This situation is rather remarkable, given that our representative form of government and many of our constitutional principles as established in our federal constitution were explicitly modeled on principles in use for centuries by New York's Haudenosaunee people.[12]

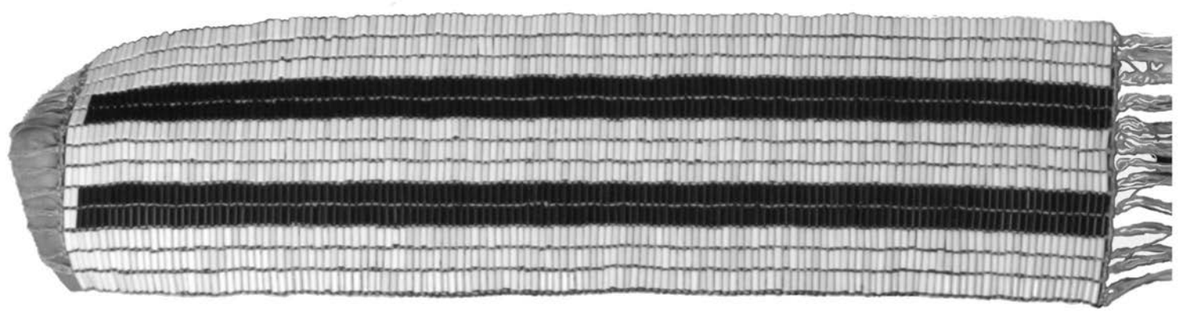
As to Forum membership, several of the nations with traditional forms of governance expressed concerns about joining an entity with state and federal officials and with Western-aligned Native governments, fearing diminution of their nations' sovereignty. As a result, efforts which had succeeded in other states to establish a set number of Native and non-Native members of the Forum, to be specifically designated by their governments,[13] were unsuccessful in New York. The only structure approved by the group was that of a Native co-facilitator and a non-Native co-facilitator to lead each meeting. However, for many years, the nations did not elect to name a Native co-facilitator. The Honorable Hugh Gilbert, then a Supreme Court Justice in Jefferson County, was designated initially by the Tribal Courts Committee as non-Native Co-facilitator, and for most of the Forum's existence, led our meetings single-handedly, with some assistance from myself as Forum convener.[14] It was not until 2016 that the Native nations selected Chief Judge Carrie Garrow of the Saint Regis Mohawk Tribal Court as Native Co-Facilitator to co-lead the meetings with Justice Gilbert.[15] The Forum's loose organizational structure, which continues to this day, is unique among the ten extant tribal-state forums operating around the country.[16]

Governance

The Forum's governance procedures are similarly flexible. The Forum has no formal membership requirements. Rather, all interested parties from New York's state and federal courts, the Indian nations' leadership, the justice and social-service systems, and federal and state prosecutors' offices in New York have always been welcome to attend and participate—especially when matters addressing their respective interests are at issue. Since 2004, Forum meetings have been held semi-annually, in Syracuse, at the James M. Hanley Federal Building and United States Courthouse for the Northern District of New York.

In terms of operations, it was determined early on that the Forum would make decisions by consensus, not by majoritarian rule (a process foreign to most of the nations), and that the Native participants would not necessarily be speaking as representatives of their nations' governments at the meetings. Some nations have sent their members solely to be the "eyes and ears" for their governments, rather than to participate actively in the development of Forum projects.

Further, we established that certain issues are off-limits for the Forum. These boundaries were essential because of the role played in the Forum by state and federal judges, whose advocacy activities are sharply



A photograph of Guswentha, or two-row wampum, from the 2006 Listening Conference.
Courtesy of the New York State Unified Court System

constrained by our respective rules of judicial ethics.[17] We cannot give even the appearance that we would not be impartial in the performance of our judicial responsibilities, nor are we permitted to prejudge any controversies which we might eventually have to decide. Thus, the Forum does not discuss issues relating to land claims, taxation, casino gaming, matters in litigation, or matters of tribal sovereignty. As to the last of these, where conflicts exist internally within a tribal nation as to the nation's legitimate leadership, the Forum will recognize the leadership that has been recognized by New York's executive branch of government as the body speaking for that nation.

As for the name of the new organization, each of the nine tribal nations has its own unique sovereign government, with only three having established justice systems based on Western style court systems, and each of those tribal court systems has a different jurisdictional scope. The other six nations rely on their own more traditional forms of dispensing justice, utilizing their tribal councils, elders, or clan mothers, in accordance with their customs and culture. Some of the traditionally governed nations objected to calling the body a "court forum," while other nations which had developed their own tribal courts wished to mention that fact expressly in the Forum's title. There were also conflicting views among Native participants as to whether or not their justice systems should be characterized as "tribal." Accordingly, after three years of discussion, we reached a long-awaited compromise on a name: the New York Federal-State-Tribal Courts and Indian Nations Justice Forum.

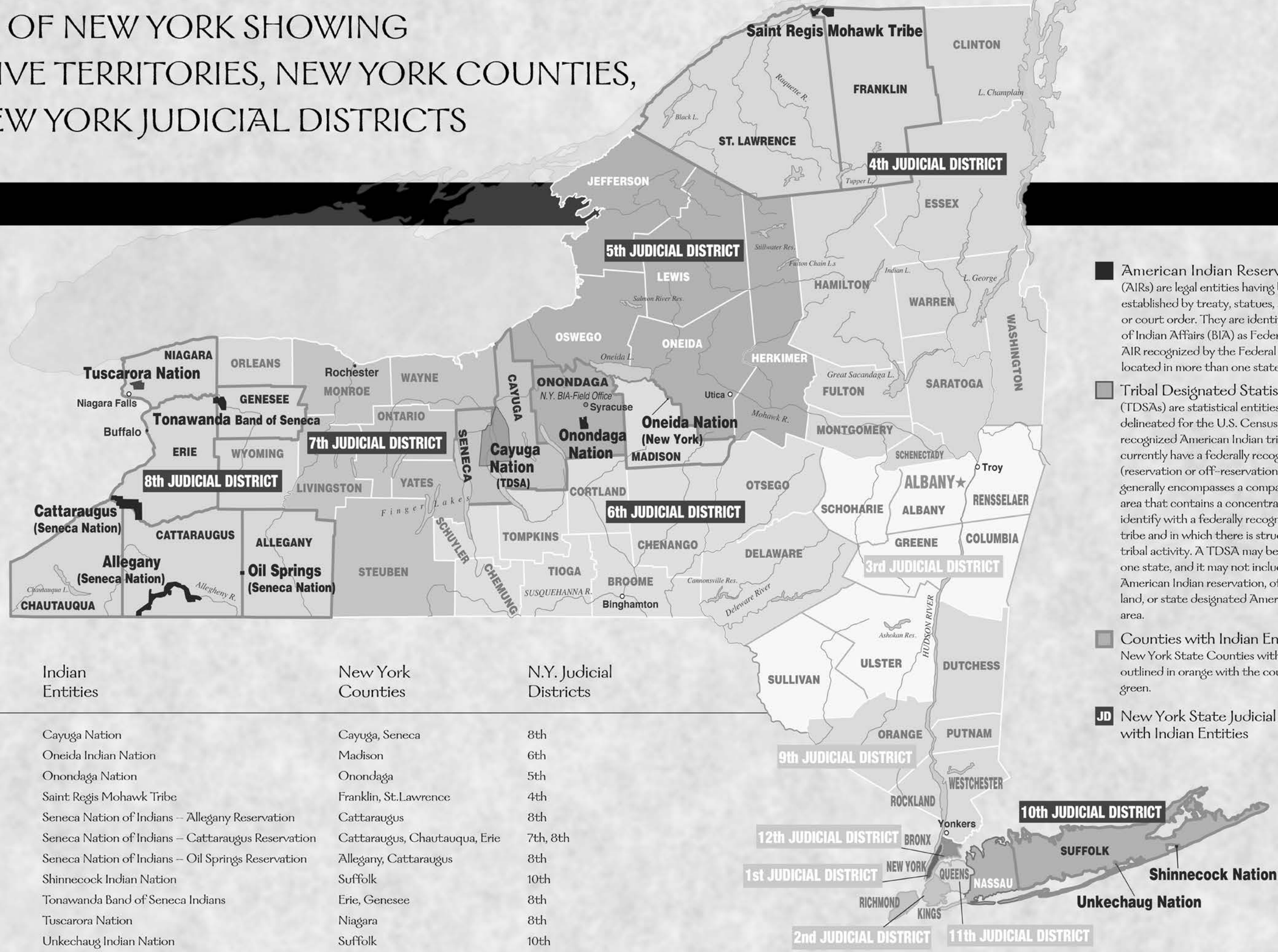
Approach to Process

The federal and state partners in the Forum recognized early on that the first step on the road to success in both overcoming our organizational and operational challenges and building trust would be recognizing the importance of following the principle of Guswentha, or two-row wampum, in our dealings with members of the tribal nations. This concept, first proposed by the Haudenosaunee people in their relations with the newly arrived Europeans centuries ago, formed the basis for the earliest treaties of the Iroquois, including with the Dutch, French, and British, and—commencing in the 18th century—with the colonial government of New York.

The two-row wampum belt consists of two parallel rows of purple wampum, representing the spirits of the Haudenosaunee and non-Haudenosaunee peoples. The two purple rows are separated by three rows of white beads, representing friendship, peace, and respect between the two nations. The belt signifies each nation in its own boat on the river, traveling with its own culture, tradition, and history. Each nation steers its own vessel and travels the river side by side with the other, in harmonious relationship, never interfering in the other's course. The Guswentha thus establishes that each party maintains its own sovereignty, pursuing its own path, while respecting that of the other. The notion that neither party will invade the province of the other, *i.e.*, that the parallel lines will never cross, has been embraced by the Forum's state and federal partners, who have always respected the sovereignty and unique cultural traditions of each of the nine Indian nations.

This approach, while unusual among the ten tribal-state forums nationally, has served us well. A great deal of trust has been established, and we have learned how to cooperate well to address issues of concern. For example, abandoning the notions of designated members and majoritarian governance has enabled us to receive input from many quarters and to empower all participants to become involved in our work, as and when helpful to their particular Indian communities.

MAP OF NEW YORK SHOWING NATIVE TERRITORIES, NEW YORK COUNTIES, & NEW YORK JUDICIAL DISTRICTS



American Indian Reservations (AIRs) are legal entities having boundaries established by treaty, statues, and/or executive or court order. They are identified by the Bureau of Indian Affairs (BIA) as Federal Reservations. An AIR recognized by the Federal Government may be located in more than one state.

Tribal Designated Statistical Area (TDSAs) are statistical entities identified and delineated for the U.S. Census Bureau by federally recognized American Indian tribes that do not currently have a federally recognized land base (reservation or off-reservation trust land). A TDSA generally encompasses a compact and contiguous area that contains a concentration of people who identify with a federally recognized American Indian tribe and in which there is structured or organized tribal activity. A TDSA may be located in more than one state, and it may not include area within an American Indian reservation, off-reservation trust land, or state designated American Indian statistical area.

Counties with Indian Entities
New York State Counties with Indian Entities are outlined in orange with the county name in dark green.

JD New York State Judicial District with Indian Entities

Indian Entities	New York Counties	N.Y. Judicial Districts
Cayuga Nation	Cayuga, Seneca	8th
Oneida Indian Nation	Madison	6th
Onondaga Nation	Onondaga	5th
Saint Regis Mohawk Tribe	Franklin, St.Lawrence	4th
Seneca Nation of Indians – Allegany Reservation	Cattaraugus	8th
Seneca Nation of Indians – Cattaraugus Reservation	Cattaraugus, Chautauqua, Erie	7th, 8th
Seneca Nation of Indians – Oil Springs Reservation	Allegany, Cattaraugus	8th
Shinnecock Indian Nation	Suffolk	10th
Tonawanda Band of Seneca Indians	Erie, Genesee	8th
Tuscarora Nation	Niagara	8th
Unkechaug Indian Nation	Suffolk	10th

Base map source: Bureau of Indian Affairs (Federal Reservations)

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby promulgate a new section 202.71 of the Uniform Civil Rules of the Supreme and County Courts, relating to recognition of tribal court judgments, decrees and orders, effective June 15, 2015, to read as follows:

Section 202.71. Recognition of Tribal Court Judgments, Decrees and Orders

Any person seeking recognition of a judgment, decree or order rendered by a court duly established under tribal or federal law by any Indian tribe, band or nation recognized by the State of New York or by the United States may commence a special proceeding in Supreme Court pursuant to Article 4 of the CPLR by filing a notice of petition and a petition with a copy of the tribal court judgment, decree or order appended thereto in the County Clerk's office in any appropriate county of the state. If the court finds that the judgment, decree or order is entitled to recognition under principles of the common law of comity, it shall direct entry of the tribal judgment, decree or order as a judgment, decree or order of the Supreme Court of the State of New York. This procedure shall not supplant or diminish other available procedures for the recognition of judgments, decrees and orders under the law.

Chief Administrative Judge of the Courts

Dated: May 26, 2015

Recognition of Tribal Court Judgments, Decrees and Orders. Uniform Civil Rule of the Supreme and County Courts Section 202.71. Retrieved from New York Federal-State-Tribal Courts and Indian Nations Justice Forum

Early Forum Activities Through 2006

Trust was to be built over time. As our meetings proceeded, participants began to feel more comfortable sharing their personal experiences with jurisdictional conflicts as well as problems arising in the administration of the Indian Child Welfare Acts—an issue of overarching concern, given the Acts' direct bearing on the preservation of Native culture. Subcommittees were formed to try to share creative approaches to addressing the Forum's core mission issues.

At the September 22, 2005 meeting of the Forum, participants focused on issues of ICWA administration. The regional director of the OCFS, the state child welfare agency, appeared and addressed questions from the participants. This face-to-face meeting enabled the agency to respond to concerns presented first-hand by the Native communities, and dispelled many misperceptions which had existed on both sides. The director assured Forum participants that no legislative changes were necessary, and that he would secure policy changes by his agency to address the problems arising.

Also at that meeting, we announced that the Forum's Conference Planning Committee had secured a commitment from the Tribal Judicial Institute at the North Dakota University Law School through the U.S. Department of Justice (DOJ) Bureau of Justice Affairs (BJA) Tribal Courts Assistance Program for support of

Forum members visit the Saint Regis Mohawk Tribe's Longhouse (Haudenosaunee traditional meeting facility) in Akwesasne in September 2009. Pictured are: in the back row: Lawrence Baerman, Clerk of Court of the U.S. District Court for the Northern District of New York; Dr. Barbara Gray, (then) Clerk of the Saint Regis Mohawk Tribal Court; Todd Weber, Esq., (then) Principal Law Clerk to Hon. Jan Plumadore, Saranac Lake; in the front row: Hon. Edward M. Davidowitz, (then) Co-Chair, New York Tribal Courts Committee; Hon. Norman Mordue, (then) Chief Judge, U.S. District Court for the NDNY; Hon. Marcy L. Kahn, author of this article; and Hon. Peter J. Herne, (then) Chief Judge, Saint Regis Mohawk Tribal Court. Courtesy of the author

the Forum's plans for a major Listening Conference in New York for tribal, state and federal justice officials.[18]

At the First Listening Conference, held in Syracuse on April 26 and 27, 2006, members of all nine of the nations participated in the planning and made presentations at the conference, as did federal and state judges. The goals of the conference were two-fold: first, to provide members of Native communities the opportunity to share their historical perspectives on their relationship with one another and with the state and federal governments; and second, to give federal and state judges an introduction to both New York and federal Indian Law and to the culture of New York's Native peoples.[19] More than 150 participants attended from state and federal courts, law enforcement and social service agencies, and tribal-nation counterparts. Sessions focused on federal and state jurisdiction in Indian country, ICWA, the workings of the various Native justice systems, concepts of restorative justice, and the crafting of new solutions to problems arising from jurisdictional conflicts of our respective courts. The First Listening Conference not only broke new ground for tribal-state forums nationally, it also marked a major step forward in promoting trust among participants in the Forum, including leaders of the tribal nations.[20]

Also, in the early years of the Forum, the Committee accepted invitations from five of the tribal nations to visit their reservations. At the invitation of the Tadodaho (spiritual leader) of the Haudenosaunee people, state and federal judges met at the Onondaga Nation longhouse with the Chiefs, tribal council members, and clan mothers who were representatives of the Grand Council of the Haudenosaunee—from the Onondaga Nation, Cayuga Indian Nation, Tonawanda Seneca Nation, Mohawk Nation Council, and Tuscarora Nation. We also visited the Oneida, Tuscarora, Seneca, and Saint Regis Mohawk reservations to meet with their chiefs and tour their territories. These visits helped further relationships of trust and mutual respect between Native and non-Native Forum participants.

Forum Activities 2007 to Date

ICWA Issues

The Forum has made a centerpiece of its mission the goal of providing basic and advanced education on ICWA for family court judges, practitioners, CASA volunteers, and tribal officials. Believing it critical that the Indian nation be involved at the earliest point in the placement of a Native child by the courts, we have promoted models for developing strong relationships between state courts and Native communities to assure both the best interests of that Indian child and the stability of Indian tribes and families.

The Forum has provided technical assistance to tribal nation staff in developing Native expert witnesses for use in ICWA cases. In the 8th Judicial District, regular luncheon meetings of family court judges with tribal judges and state and tribal child

Clause 3. *The Congress shall have Power * * ** To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

POWER TO REGULATE COMMERCE

Purposes Served by the Grant

This clause serves a two-fold purpose: it is the direct source of the most important powers that the Federal Government exercises in peacetime, and, except for the due process and equal protection clauses of the Fourteenth Amendment, it is the most important limitation imposed by the Constitution on the exercise of state power. The latter, restrictive operation of the clause was long the more important one from the point of view of the constitutional lawyer. Of the approximately 1400 cases which reached the Supreme Court under the clause prior to 1900, the overwhelming proportion stemmed from state legislation.[578] The result was that, generally, the guiding lines in construction of the clause were initially laid down in the context of curbing state power rather than in that of its operation as a source of national power. The consequence of this historical progression was that the word "commerce" came to dominate the clause while the word "regulate" remained in the background. The so-called "constitutional revolution" of the 1930s, however, brought the latter word to its present prominence.

The Congress shall have Power * To regulate Commerce with… Indian Tribes. U.S. Const. Art. I, § 8, cl. 3.**
Retrieved from Government Publishing Office

welfare officials were instituted, with the host venues alternating between the state courthouse and the tribal territory. State and tribal officials have met regularly on Long Island to further their collaborative efforts. And in 2017, the Forum offered an all-day training on the newly promulgated federal and state ICWA requirements for tribal members throughout the state. The Forum has also worked with the Office of Court Administration to update family court forms and to ensure the posting of universal signage on ICWA in state courthouses to better assure compliance with ICWA requirements.

Marriage Officiant Legislation

In 2014, the Forum succeeded in securing enactment of state legislation granting recognition to marriages performed in Indian country by tribal officials, with help from the Tribal Courts Committee, the legislative counsel of the Office of Court Administration, and legislative sponsors whose districts included significant Native populations.[21] As a result, tribal court judges and others designated by a tribal nation pursuant to its culture and traditions now have the same authority as other recognized officiants to perform marriage ceremonies on the reservation and have them recognized by the State of New York.

Mutual Recognition of Judgments

Since its first meetings, the Forum has prioritized the development of a procedure for recognition of tribal court judgments by New York's state courts and the establishment of a jurisdictional protocol for the exercise of jurisdiction by state and tribal courts in order to reduce jurisdictional conflicts and eliminate forum shopping. Other than in a few discrete instances,[22] it is unclear whether state and federal courts are required to afford recognition to tribal court judgments.[23] The result has been confusion and duplicative litigation in tribal, state, and federal courts, always with the potential for conflicting results.

In 2008, the Forum and the Committee arranged for the Oneida Indian Nation Court (Oneida Court) and the New York State Supreme Court for the Fifth Judicial District (5th District Court) to enter into a

§ 232. Jurisdiction of New York State over offenses committed on reservations within State.

The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: *Provided*, That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights. (July 2, 1948, ch. 809, 62 Stat. 1224.)

§ 233. Jurisdiction of New York State courts in civil actions.

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided*, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further*, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952. (Sept. 13, 1950, ch. 947, § 1, 64 Stat. 947.)

EFFECTIVE DATE

Section 2 of act Sept. 13, 1950, provided: "This Act shall take effect two years after the date of its passage [September 13, 1950]".

United States Code: Government of Indian Country and Reservations, 25 USC §§ 232 and 233 (1976).
Retrieved from the Library of Congress

pilot program to address these issues. Under Rule 1 of the pilot protocol, the 5th District Court agreed to grant recognition to any judgment, decree, or order of the Oneida Court in accordance with principles of the common law of comity as applied by the New York Court of Appeals.[24] Under Rule 2, the two courts established a protocol for the transfer of cases brought in state court in which the Oneida Court either had exclusive jurisdiction under federal or state law, or had concurrent jurisdiction with the state court under federal or state law.[25]

The Oneida Court-5th District Protocol was in effect for several years, but few, if any, cases were submitted for resolution under its terms. This may have been because its existence had an *in terrorem* effect of prompting non-Native litigants to consent to the jurisdiction of the tribal court. In any case, the Forum began discussions about creating a rule of broader application and permanent effect.

Although some consideration was given to securing a legislative mandate, ultimately we decided to seek the promulgation of a uniform state court rule by the Administrative Board of the Courts. After consultation with the Chief Judge's Civil Practice Advisory Committee, and after presentations by the Forum to the Administrative Board during its public comment period, the Administrative Board promulgated a court rule in 2015 creating a special expedited proceeding at which state courts must apply the same standards in determining whether to recognize and enforce tribal court judgments, orders, and decrees as they do for the rulings of courts of foreign nations.[26] The Forum provided training on the new rule and the applicable procedure to state court judges. We also developed court forms in plain language suitable for use by self-represented litigants in commencing such proceedings, including links to the rules of New York's three tribal courts.

Although the jurisdictional protocol for the transfer of proceedings which had been part of the Oneida Court-5th District protocol was not included in the rule, the new procedure, which is again at the forefront of national efforts in the area, serves judicial economy, eliminates the possibility of inconsistent results and promotes government-to-government respect. Notably, the new rule has already had the unexpected effect of prompting recognition of tribal

court and tribal council orders by the executive branch of the state government and by commercial banks.

Second Listening Conference

Again in 2016, with the support of DOJ/BJA and the New York Unified Court System, the Forum held the Second New York Listening Conference, which, like its precursor a decade earlier, brought together 150 justice officials from the state, federal and tribal systems to collaborate on new initiatives to improve justice for New York's indigenous peoples. While the First Listening Conference focused on training the state and federal participants on Indian law and culture,[27] the Second Listening Conference explored novel solutions to continuing problems, such as the disproportionate pre-trial detention of Indian arrestees awaiting trial in county courts; conflicts in child support enforcement between state and tribal courts; the horrific incidence of violence against Native individuals[28] on the reservation; and the absence of appropriate statutory requirements in New York for Native grave protection and repatriation of remains.[29] At the Second Listening Conference, Forum participants drew lessons from our successful collaborations and redoubled our commitment to pursuing creative solutions to the challenges still remaining.[30]

Native Bail Reform Initiative

Currently, the Forum is taking steps to address the unique problems faced by Native defendants in the state criminal justice system in securing pre-trial release on bail. Although New York provides for nine types of bail,[31] most New York courts typically make bail determinations utilizing only insurance company bail bond and cash alternative options.[32] Native arrestees have significantly more difficulty meeting bail requirements that most other defendants do, as they are not able to use real property on the reservation as collateral to secure an insurance company bail bond, because real property on the reservation is generally inalienable under federal and/or tribal law. As a result, if a Native defendant cannot meet the cash alternative for release on bail, he or she generally must remain in county jail until the case is resolved. This situation creates an incentive to plead guilty just to secure release, despite the reality that doing so drastically limits the individual's future employment opportunities, as the best jobs on the reservation generally entail a criminal records check.

Based upon the successful track record of diversion of Native defendants facing misdemeanor drug charges in state court to the Saint Regis Mohawk dual jurisdiction Healing-to-Wellness Court, another project with which the Forum assisted, this year we launched our Native Bail Reform Initiative, involving a partnership between the Tribal Court, the Town of Bombay Justice Court, the Franklin County Court, and the Center for Court Innovation. The project was funded by a three-year grant secured by the Saint Regis Mohawk Tribe from the DOJ/BJA to pilot this first-in-the-nation pre-trial supervised release program specifically for Native arrestees. The program utilizes a culturally sensitive risk assessment instrument to gauge appropriate health, educational, vocational, and social service needs to ensure the individual's return to the Town Justice Court while the case is pending, where the individual would otherwise be denied release pending trial. The coordinator of the program makes appropriate, culturally specific programmatic referrals to services within the territory, and the tribal court judge oversees the defendant's compliance. Regular reports are furnished by the tribal court program coordinator to the town justice. The program is modeled on similar programs in New York City which have been operating successfully for general population defendants.[33]

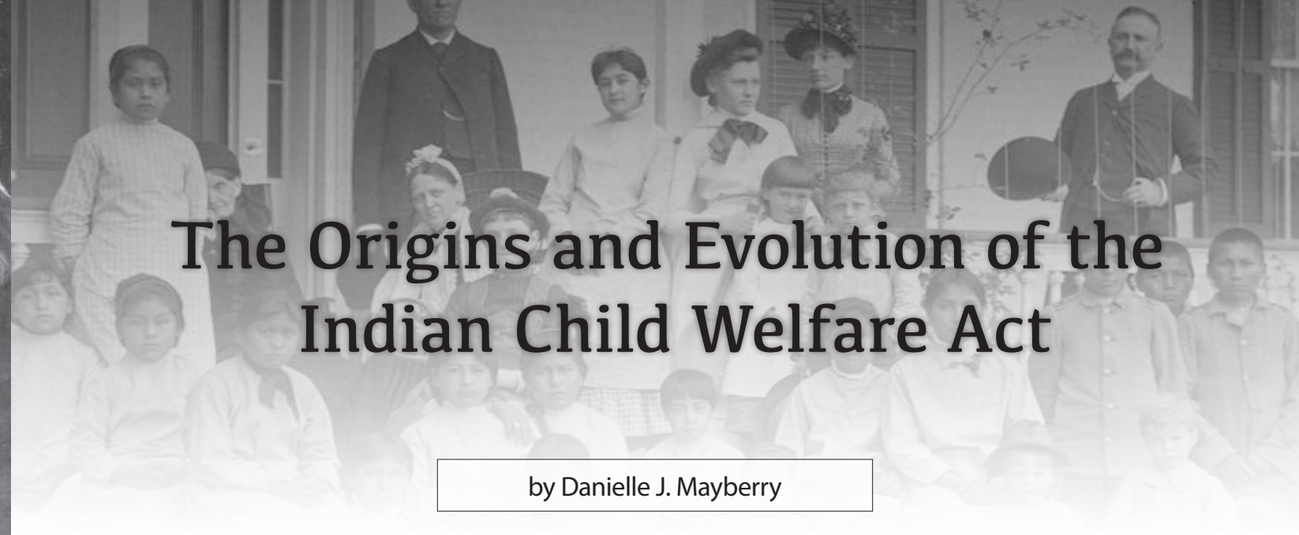
Conclusion

The NY Forum has succeeded by adapting the Conference of Chief Justices' tribal-state court forum model to the unique historical and legal circumstances of New York, adopting a very loosely organized body with a flexible format, capable of growing organically as conditions warrant. The key to moving forward, we have found, is to take time to listen to one another, to respect the principle of Guswentha, and to thereby bring our good minds together. Challenges remain, but we are more optimistic than ever about the Forum's future.

ENDNOTES

1. Ralph J. Erickstad & James Ganje, "Tribal and State Courts — A New Beginning," 71 N.D. L Rev 569, 569 & n.1 (1995).
2. *Id.*; Marcy L. Kahn, Edward M. Davidowitz, & Joy Beane, "Building Bridges Between Parallel Paths: The First New York Listening Conference for Court Officials and Tribal Representatives," 78 N.Y. State Bar J. 10, 11 (2006) ["Building Bridges"].
3. 467 U.S. 138 (1984); 476 U.S. 877 (1986).
4. "Building Bridges," *supra* note 2, at 12; Erickstad & Ganje, *supra* note 1, at 571.
5. "Building Bridges," *supra* note 2, at 12.
6. U.S. Census Bureau, C2010BR-10, 2010 Census Report, "The American Indian and Alaska Native Population: 2010," at 7 (2012), *available at* https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf. Some 106,906 New York residents identified exclusively as American Indian or Alaska Native, while 114,152 of the state's residents claimed a mixed race origin which included American Indian or Alaska Native. *Id.*
7. The nine tribal nations recognized by the State of New York are the Cayuga Nation of Indians, the Oneida Indian Nation of New York, the Onondaga Nation, the Saint Regis Mohawk Tribe, the Seneca Nation of Indians, the Shinnecock Indian Nation, the Tonawanda Band of Senecas, the Tuscarora Nation and the Unkechaug Nation. The New York Legislature passed legislation in its 2017-2018 session granting the same recognition to the Montaukett Indians (Senate Bill S7770), but it was vetoed by the Governor. (https://www.nysenate.gov/legislation/bills/2017/s7770 [last visited Apr. 24, 2019]). All of the nine state-recognized nations are also recognized by the federal government, with the exception of the Unkechaug Nation.
8. 25 U.S.C. §§ 1901–1963; 18 N.Y.C.R.R. § 431.18.
9. *See* article in this issue by Chief Judge Carrie E. Garrow "New York's Quest for Jurisdiction over Indian Lands," 4; Justin B. Richland and Sarah Deer, *Introduction to Tribal Legal Studies* 88 (3d ed. 2016).
10. U.S. Const. art. I, § 8, cl. 3 (Indian Commerce Clause granting Congress exclusive power "to regulate Commerce… with the Indian Tribes").
11. *See* 25 U.S.C. §§ 232 & 233 (extending New York State jurisdiction into Indian country); Garrow, *supra* note 9, at 14.
12. *See* S. Con. Res. 76, 100th Cong., 133 Cong. Rec. S. 12214 (1987).
13. For example, California and New Mexico, among other states, have a prescribed number of members, specifically designated by their respective tribal nations and state governments. *See* Tribal Law & Policy Institute, *Tribal-State Court Forums: An Annotated Directory* (2016) [TLPI Directory].
14. At the Forum meeting of September 22, 2005, an acting Native co-facilitator, Russ Jock, a Saint Regis Mohawk, co-led the meeting with Justice Gilbert.
15. Upon Justice Gilbert's retirement in 2017, the Honorable Mark A. Montour—Supreme Court Justice of Erie County, Vice Chair of the Tribal Courts Committee, and an enrolled Saint Regis Mohawk—has served as State Court Co-facilitator of the Forum.
16. *See* TLPI Directory; Telephone Conversation with TLPI Staff Attorney (July 27, 2018).
17. *See* 22 N.Y.C.R.R. §§ 100.2(A); 100.3(B)(4), (8), (9)(b); 100.4; Code of Conduct for United States Judges, Canons 2 and 3 (2014), *available at* http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges (last visited Jan. 4, 2019).
18. BJA committed to provide scholarship funds to enable Native participants to attend the conference.
19. Jo Ann Harris et al., *New York Federal-State-Tribal Courts Forum: First New York Listening Conference Report of Proceedings* 15 (2008), *available at* http://www.nyfedstatetribalcourtsforum.org/pdfs/NYListeningConference2006Report.pdf [LC-I Report].
20. *Id.* at 29.
21. *See* N.Y. Dom. Rel. Law § 11(3-a); N.Y. Indian Law § 4.
22. For example, in both the federal ICWA statute pertaining to Indian child custody proceedings (25 U.S.C. § 1911(d)) and the Violence Against Women Act (18 U.S.C. § 2265(a)) pertaining to orders of protection, Congress has required that full faith and credit be given by the states and the federal government to orders and judgments of tribal courts.
23. *Cf.* 28 U.S.C. § 1738 (requiring full faith and credit to be granted to judgments of every other "state, territory, or possession").
24. *See Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78 (2006). The court rules of the OIN Court require mutuality in order for the OIN Court to recognize a judgment, order or decree of another jurisdiction. *See* Oneida Indian Nation Rules of Civil Procedure 35, *available at* http://www.oneidaindiannation.com/wp-content/uploads/2017/10/rulesofcivilprocedure-chapter02.pdf (last visited January 4, 2019).
25. The transfer protocol adopted factors used for such determinations in Washington state, *see* Wash. Civ. R. 82.5(a) & (b), and in Wisconsin, *see Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 665 N.W.2d 899, 917–18 (Wis. 2003) (Abrahamson, J., concurring) [the *Teague* protocol].
26. NY Rules of Court, Uniform Rules for the New York State Trial Courts, Part 202, Recognition of Tribal Court Judgments, Decrees and Orders, 22 N.Y.C.R.R. § 202.71.
27. LC-I Report, *passim*.
28. As related by conference presenter Professor Sarah Deer, Native women and men are much more likely than their non-Hispanic white counterparts to be victims of violence, and it is overwhelmingly the case that their perpetrators are of a different race. S. Deer presentation, (Sept. 2016) (citing André B. Rosay, "Violence Against American Indian and Alaska Native Women and Men," (May 2016) (reporting disparity of 97% to 35% for female victims and 90% to 33% for male victims, and that 56.1% of all Native women experience sexual violence during their lifetime)); *see also* Louise Erdrich, *The Round House* 319 & *passim* (2012) (highlighting the "tangle of laws that hinder prosecution of rape cases" in much of Indian country).
29. M. White Eagle et al., *The Second New York Listening Conference Report*, *passim*. (DOJ/BJA 2018), *available at* http://www.nyfedstatetribalcourtsforum.org/pdfs/Second%20Listening_Conference-Report.pdf [LC-II Report].
30. These include the failure to enforce protection orders and the inadequate prosecution of environmental and drug crimes in Indian territory, according to the conference participants. *Id.* at 20.
31. N.Y. Crim. Proc. Law § 520.10(1).
32. *See People ex rel. McManus v. Horn*, 18 N.Y.3d 660, 674 (2012) (holding that C.P.L. § 520.10 requires the setting of more than one form of bail).
33. The programs are operated by the New York Criminal Justice Agency and the Center for Court Innovation, and have achieved rates of return to court which are comparable to those for arrestees released on recognizance.

Portrait of Cornplanter, a Seneca leader, painted 1796.
Collection of the New-York Historical Society 1867.314



The Origins and Evolution of the Indian Child Welfare Act

by Danielle J. Mayberry

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Photo Credit: Alexandrea Delgado.

Since first contact, federal Indian policy and law has impacted American Indian children and families, targeting them as a means to assimilate Indian Nations into American society. In the beginning, Indian children were targeted for military and diplomatic purposes in order to undermine tribal resistance. This assimilation policy later shifted toward stripping these children from their culture and families by placing them in boarding schools during the 1800s, and then to removing Indian children from their homes and placing the children into non-Indian homes.

The high rates of Indian children removed from their homes led to a movement by tribal leaders, Indian activists, and Indian organizations in the 1960s and 1970s calling for Congress's attention to the Indian child crisis. In 1978, after more than four years of hearings,[1] Congress determined that federal intervention was necessary to address the crisis and protect the stability and security of Indian Nations and their families. Congress found that when states exercised jurisdiction over Indian child-custody proceedings, they often failed to recognize the cultural and social standards of Indian families. These failures led to an alarmingly high percentage of broken Indian families.[2]

In order to address this issue, Congress enacted the Indian Child Welfare Act[3] (ICWA) on November 8, 1978. The ICWA is a remedial statute designed to alleviate the "wholesale separation of Indian children from their families"[4] by establishing the "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes"[5] that state courts and administrative officials must follow.

This article provides an overview of the relevant United States federal Indian law and policies that led to the need for the ICWA and provides the framework of the federal trust responsibility to Indian Nations. Second, it addresses the Indian child crisis. Third, this article explores the Indian Country response to the crisis and delves into the legislative hearings before Congress that led to ICWA's adoption. Finally, it provides an overview of the national solution to the Indian child crisis—the Indian Child Welfare Act of 1978.

Families camp near the government school at Pine Ridge Agency, where their children are students.
National Museum of the American Indian, Smithsonian Institution - P22546

Carlisle Indian Industrial School students photographed with Richard Henry Pratt.
Richard Henry Pratt Papers, 1862-1956, Beinecke Rare Book and Manuscript Library, Yale University

United States Federal Indian Law and Policies

Since first contact, United States laws and policies regarding Indian Nations have fluctuated,[6] being described as a "pendulum" that appeared to swing between two opposing policy stances.[7] Either the laws or policies aided Indian Nations in governmental self-determination or the laws and policies aggressively promoted the termination of Indian Nations. The federal government's approach was driven by the question of how to deal with Indian people and their lands[8]—the "Indian problem."[9]

The United States Supreme Court also had a leading role in developing federal Indian law and shaping the policies directed towards the relationship between the federal government and Indian Nations. This foundation is defined by three Supreme Court decisions written by Chief Justice John Marshall in the early 1800s known as the "Marshall Trilogy."[10] In the first case, *Johnson v. M'Intosh*,[11] the Supreme Court held that the Indian Nations held rights of occupancy to Indian land; however, the Court also determined that the European nations making "discovery" claims held superior title to the same lands.[12] Thus, the United States, as successor to Great Britain, obtained superior title to all Indian land.[13] Building upon *Johnson*, in the case of *Cherokee Nation v. Georgia*,[14] the Court held the Cherokee Nation was a "domestic dependent nation."[15] The Court defined the relationship between the Indian Nations and the United States as "resembl[ing] that of a ward to his guardian."[16] The final case of the Marshall Trilogy, *Worcester v. Georgia*,[17] involved a habeas petition brought by Samuel Worcester, a missionary.[18] In *Worcester,* the Court defined the theory of the origin of the federal trust relationship by finding a relationship of an Indian tribe to the United States is based upon the "settled doctrine of the law of Nations."[19] The Marshall Trilogy has been pivotal in shaping federal Indian law and policies by redefining the relationship between the Indian Nations and the United States.[20]

In the early history of the United States, Indian Nations and American colonists did not differentiate between members of the military and civilians.[21] Non-Indian military strategy involved attacking Indian villages and families, and specifically targeted Indian children and food sources.[22] "[M]ilitary goals included kidnapping as many Indian children as possible, incarcerating them, and holding them hostage until an Indian nation capitulated to American demands."[23] In recounting the terror imposed by American soldiers, Cornplanter, a Seneca leader, stated: "The voice of the Seneca nation speaks to you, the great councillor, in whose heart the wise men of all the Thirteen Fires have placed their wisdom.… When your army entered the country of the Six Nations, we called you the town destroyer; and to this day, when that name is heard, our women look behind them and turn pale, and our children cling close to the necks of their mothers. Our councillors and warriors are men, and cannot be afraid; but their hearts are grieved with the fears of our women and children, and desire it may be buried so deep as to be heard no more."[24]

Observing the importance of Indian children to their Nations, Americans exploited Indian children's vulnerability in order to undermine tribal resistance by kidnapping and imprisoning Indian children.[25] Tribal treaty negotiators routinely crafted treaties with their children in mind; thus, the negotiated treaties included provisions that guaranteed safety, education, welfare, and land rights for Indian children.[26] These agreements form the earliest account of the federal government's trust responsibility to Indian children.[27]

Throughout the 1820s, various states called for the removal of Indian Nations from within their borders. In 1828, after Andrew Jackson was elected President, the federal government's Indian policy called for the removal of Indian Nations to the west.[28] In 1830, with Jackson's support, Congress enacted the Removal Act, allowing for the relocation of Indian tribes to lands west of the Mississippi River.[29] More than four thousand Cherokee died in the "Trail of Tears," a forced military march moving westward to Indian Territory, present day Oklahoma, from their ancestral homeland in the southeastern United States.[30] As a result of this federal law, tens of thousands of American Indians and their children were driven from their homeland.[31]

Gold discovery and further western expansion brought an endless stream of settlers west, creating a desire for Indian lands.[32] Confrontations between the United States Cavalry that accompanied settlers and Indian Nations were common.[33] United States policymakers and military commanders stated their objective was the extermination of American Indians who resisted dispossession of their land.[34] "The policy was to wear the Indians down by 'keeping them moving and preventing them from laying in supplies of food and ammunition.' Also[,] by preventing the women and children from resting."[35] More than one-thousand battles were fought between Indians and the United States military between 1866 and 1891.[36]

The end of the Removal Era ushered in the Reservation Era. In response to the Indian "problem," efforts were made by the federal to assimilate Indians into mainstream American society. Moving American Indians to reservations was seen as the solution to attaining the ultimate goal of obtaining landholdings from American Indians.[37] Indian reservations were under the complete control of the Bureau of Indian Affairs (BIA).

Federal officials also began instituting Courts of Indian Offenses on the reservations, which were intended to eliminate the perceived "heathenish" cultural practices of Indian Nations.[38] Except for the Five Civilized Tribes, the Indians of New York State, the Osage, the Pueblo, and the Eastern Cherokee, Courts of Indian Offenses were established within reservations where a BIA agent and the Commissioner of Indian Affairs believed a court was needed.[39]

In 1879, the United States began to provide funding for Indian boarding schools. The education of American Indian children was seen as an important tool in order to accomplish assimilation. The beginning of government-run boarding schools can be traced to the Superintendent of the Carlisle Indian Industrial School, Richard Henry Pratt, who initially experimented with Indian prisoners-of-war.[40] The philosophy for educating Indian students was described by Richard Henry Pratt as "Kill the Indian, save the man."[41] Once there, these children were subjected to violence, physical and sexual abuse, neglect, and rigid forms of psychological and physical discipline.[42]

A student reads in her dormitory at the Thomas Indian School.
Courtesy of New York State Archives, NYSA_A1913-77_126

Tom Torlino, a Navajo student at the Carlisle Indian Industrial School, before and after.
Richard Henry Pratt Papers, 1862-1956, Beinecke Rare Book and Manuscript Library, Yale University

Following the Civil War, when the federal government's Indian law and policy refocused on achieving the so-called civilization and assimilation of American Indians, the communal ownership of property by Indian Nations appeared to be a significant barrier to assimilation.[43] Under assimilationist reasoning, if Indians adopted civilized life, they would not need large areas of land,[44] which would also have the collateral effect of freeing up Indian lands for white settlers.[45]

In 1887, Congress passed the General Allotment Act, also known as the Dawes Act, beginning the "Allotment" Era.[46] The Dawes Act divided reservation land-tracts into smaller parcels, which were subsequently deeded to Indians in trust for a period of twenty-five years.[47] Unsurprisingly, as a result of the Dawes Act, 65% of tribal lands were transferred to non-Indians.[48]

In addition to bringing about the transfer of land from Indians to non-Indians, proponents of the Dawes Act also had an underlying purpose directed at Indian families and children. It was believed the communal ownership of property was a contributing cause of Indian poverty and common title of land enabled the Indians' supposed dysfunctional familial behavior.[49] By eliminating communal land ownership and granting only Indian men land through allotment, the hope was it would force Indian families to resemble American "nuclear" families.[50]

Somewhat significantly, the Dawes Act did not apply to all Indian Nations; for instance, while the Indian Nations of New York State were generally subject to the Dawes Act, the Seneca Nation was exempted.[51] This particular exemption led to New York's establishing the Whipple Commission in 1888, tasked with investigating the status of the Indians within New York State.[52] The Commission duly described Indians as pagans and encouraged the removal of children from Indian homes.[53] Indian children were removed from their homes and placed in boarding schools such as the Asylum for Orphan and Destitute Indian Children in New York.[54]

In the mid-1920s, federal Indian policies shifted once again. The catalyst for change began in 1928 with the findings of "The Problem of Indian Administration"—also known as the *Meriam Report*, named for Lewis Meriam, its principal researcher and author[55]—which had been commissioned to assess decades of Indian assimilation efforts and policies. The report's beginning bluntly stated that "an overwhelming majority of the Indians are poor, even extremely poor, and they are not adjusted to the economic and social system of the white person."[56] The report also indicated that child removal "largely disintegrates the family and interferes with developing normal family life."[57] Ultimately, the *Meriam Report* determined that the allotment and assimilationist policies had failed. It also provided procedures for improving the Indian service and made specific recommendations for the expenditure of funds for programs.[58]

These findings led to the government implementing a policy of restoring the recognition of Indian self-rule—for example, through the Indian Reorganization Act of 1934 (IRA),[59] which enabled Indian Nations to exercise powers of limited self-government, but did not end federal involvement in tribal matters. The IRA provided a process for Indian Nations to reorganize their governments by adopting written constitutions.[60] Notably, boilerplate IRA constitutions included blood quantum as a criterion for tribal membership, specifically calling for "one-half or more Indian Blood."[61] The United States Supreme Court has since held that Indian Nations have the right to define their own membership as part of the political status of their nations.[62] Only those with legal status, or those eligible for membership in a federally recognized tribe, receive trust benefits guaranteed by the United States.[63]

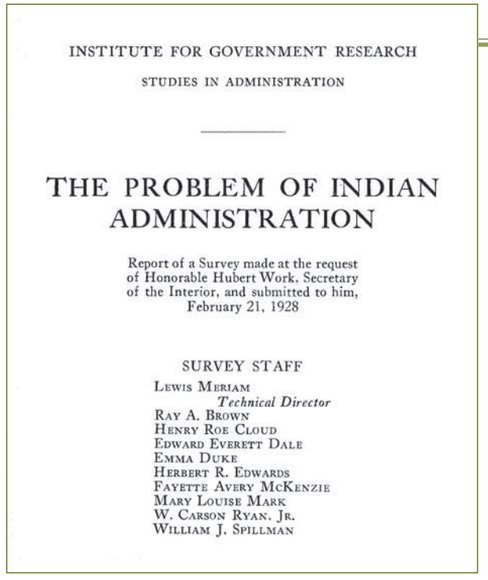
By the end of World War II, the United States hit its full economic stride. However, American Indians were left behind.[64] Indians experienced the highest rates of unemployment and suicide, as well as the lowest incomes and life expectancies in their history.[65] The past policies promoting Indian self-rule were considered a failure.

Once again, the government began transitioning back to assimilation type policies as a solution, ushering in the Termination Era. Congress solidified this approach on August 1, 1953, when it adopted House Concurrent Resolution 108, declaring as policy its aim to "as rapidly as possible … make the Indians … subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens [and] to end their status as wards … and to grant them all of the rights and prerogatives pertaining to American citizens."[66]

The government's termination policy also included the eventual transfer of civil and criminal jurisdiction to state governments and courts. New York State was constantly in conflict with the federal government in supreme control over Iroquois land affairs,[67] arising out of the State's assumption of a self-defined role as guardian of the Indians, similar to the earlier trust role of the United States.[68] The state hoped through assimilation, Indian Nations would eventually hold land in severalty, abandon present restrictions against ownership by non-Indians as do western tribes and transition "… from hermithood to the vigorous and responsible citizenship assured by their intelligence, independence, and courage."[69]

But much confusion surrounded the general question of the state's power to legislate for Indians living on the reservation.[70] In 1942, the Second Circuit addressed this issue in *United States v. Forness*.[71] *Forness* involved an attempt by the Seneca Nation to cancel a lease in the City of Salamanca for nonpayment.[72] The Second Circuit determined "state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because state law does not apply to Indians without the consent of the United States."[73]

Forness led to the creation of the Joint Legislative Committee on Indian Affairs,[74] which in turn led to the 1948 grant by Congress of concurrent criminal jurisdiction to New York State,[75] and a similar grant of partial civil jurisdiction in 1950.[76] Congress took



INSTITUTE FOR GOVERNMENT RESEARCH

STUDIES IN ADMINISTRATION

THE PROBLEM OF INDIAN ADMINISTRATION

Report of a Survey made at the request of Honorable Hubert Work, Secretary of the Interior, and submitted to him, February 21, 1928.

SURVEY STAFF

Lewis Meriam
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Edward Everett Dale
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Mary Louise Mark
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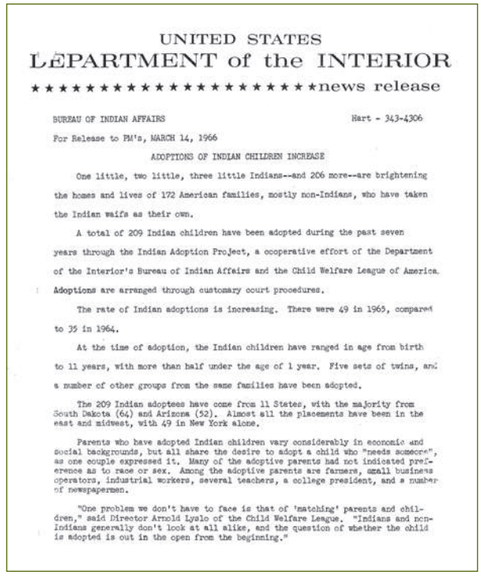
William J. Spillman

Title page of the Meriam Report: The Problem of Indian Administration, 1928.
Retrieved from the National Indian Law Library/ Native American Rights Fund



UNITED STATES
DEPARTMENT of the INTERIOR
★★★★★★★★★★★★★★★★★★★★★news release

BUREAU OF INDIAN AFFAIRS Hart - 343-4306

For Release to PM's, MARCH 14, 1966

ADOPTIONS OF INDIAN CHILDREN INCREASE

One little, two little, three little Indians--and 206 more--are brightening the homes and lives of 172 American families, mostly non-Indians, who have taken the Indian waifs as their own.

A total of 209 Indian children have been adopted during the past seven years through the Indian Adoption Project, a cooperative effort of the Department of the Interior's Bureau of Indian Affairs and the Child Welfare League of America. Adoptions are arranged through customary court procedures.

The rate of Indian adoptions is increasing. There were 49 in 1965, compared to 35 in 1964.

At the time of adoption, the Indian children have ranged in age from birth to 11 years, with more than half under the age of 1 year. Five sets of twins, and a number of other groups from the same families have been adopted.

The 209 Indian adoptees have come from 11 States, with the majority from South Dakota (64) and Arizona (52). Almost all the placements have been in the east and midwest, with 49 in New York alone.

Parents who have adopted Indian children vary considerably in economic and social backgrounds, but all share the desire to adopt a child who "needs someone", as one couple expressed it. Many of the adoptive parents had not indicated preference as to race or sex. Among the adoptive parents are farmers, small business operators, industrial workers, several teachers, a college president, and a number of newspapermen.

"One problem we don't have to face is that of 'matching' parents and children," said Director Arnold Lyslo of the Child Welfare League. "Indians and non-Indians generally don't look at all alike, and the question of whether the child is adopted is out in the open from the beginning."

Press release from the Bureau of Indian Affairs indicating an increase in adoptions of Native American children, 1966.
Retrieved from the Bureau of Indian Affairs

similar action with regard to other states. In 1953, Congress enacted Public Law 280,[77] delegating concurrent criminal jurisdiction and limited civil jurisdiction to California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska, with other states later allowed to gain partial jurisdiction.[78] This policy also required the BIA Welfare Branch to transfer Indian child-welfare services to state social-service agencies.[79]

The Indian Child Crisis

The passage of Public Law 280 led to additional controversy over the care and support for Indian children. Once the state took on this responsibility, it also undertook the cost—*without* aid from federal funding.[80]

Many states resisted this new responsibility,[81] embracing solutions such as sending Indian children to foster care or facilitating the adoption of children into non-Indian families.[82] Those jurisdictions with large Indian populations requested federal subsidies to provide child-welfare resources for Indian children.[83] Minnesota was ultimately granted a contract for providing foster care and other services to Indian children.[84] Initially, only California and Florida accepted responsibility for financing in full the welfare services to Indians without a federal subsidy.[85]

In 1958, the BIA established a solution that appealed to both the federal government and state welfare agencies: the Indian Adoption Project, a joint project by the BIA and the Child Welfare League of America and led by Arnold Lyslo, a former BIA employee.[86] Its mission was to place the children in non-Indian households, away from a child's reservation. Lyslo boasted that the Project would solve the governments' financial concerns because adoptive families would bear the financial burden of raising Indian children.[87]

To support the removal of Indian children from their homes, Lyslo and followers perpetuated the myth of unwed Indian mothers and, similar to proponents of allotment, attacked the child-rearing norms of American Indian families.[88] State social workers and judges routinely imposed middle-class standards on Indian families and diverged from standards in other child-welfare cases involving

non-Indian children.[89] This outlook on "inferior" Indian families found its way into state courtrooms across the nation. Often, the Indian parent was denied information about due process or did not have access to an attorney.[90]

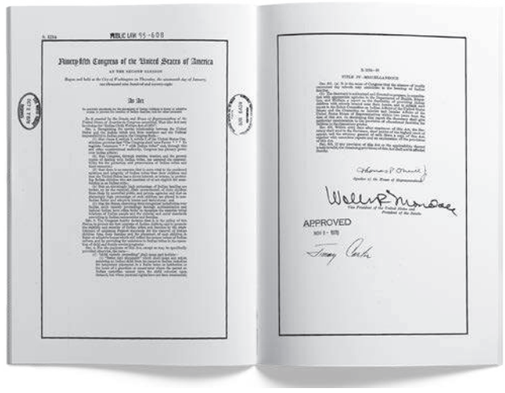
Eventually, this approach led to pushback. During the autumn of 1967, members of the Spirit Lake Sioux Tribe contacted the Association on American Indian Affairs about a child placement case: North Dakota County officials were attempting to remove a six year old boy from his home within the Spirit Lake Indian Reservation, where he was living with his grandmother by tribal custom, and place him in a non-Indian adoptive family.[91] Although there were no allegations of neglect, the County argued that his sixty-three-year-old grandmother was unfit to care for the child.[92] Prompted by the case, the Association on American Indian Affairs gathered statistics and found that "one third of all Spirit Lake Sioux children had been removed and placed into non-Indian homes."[93]

The findings at Spirit Lake sparked a movement led by Indian social workers, activists, tribal leaders, and advocacy organizations, calling for attention to the Indian child crisis.[94] The Association on American Indian Affairs along with tribal leaders and other Indian organizations took the lead in bringing this issue to Congress.[95]

ICWA Congressional Hearings

The Senate Select Committee on Indian Affairs, chaired by Senator James Abourezk of South Dakota, held hearings on the issue in April of 1974. Senator Abourezk opened the congressional hearings, stating:

> *Up to now, however, public and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indian. The result of such policies has been unchecked: abusive child-removal practices, the lack of viable, practical rehabilitation and prevention programs for Indian families facing severe problems, and a practice of ignoring the all-important demands of Indian tribes to have a say in how their children and families are dealt with…. It has been called cultural genocide.*[96]



PUBLIC LAW 95-608

Ninety-fifth Congress of the United States of America

AT THE SECOND SESSION

An Act

APPROVED

Indian Child Welfare Act, signed by President Jimmy Carter, Pub. L. 95–608, 92 Stat. 3069, enacted November 8, 1978.
Retrieved from the National Indian Law Library/ Native American Rights Fund

Indian social workers, psychiatrists, non-Indian social scientists, and those personally involved in the crisis testified to the abuses and injustices that American Indian families had suffered as a result of the unwarranted removal of children and their placement in non-Indian families. Indian women testified as to the intense pressure they experienced from social workers and other authorities to give up their newborn infants for adoption.

In August 1977, the Senate Select Committee on Indian Affairs held a second set of hearings on the proposed legislation by-then known as the Indian Child Welfare Act. During the 1977 hearings, federal representatives and officials in opposition voiced concerns regarding the passage of legislation that strictly addressed Indian child welfare.[97] A representative from the Department of Health, Education, and Welfare contended that the policy of the proposed Indian Child Welfare Act represented one of racial discrimination by requiring Indian children be placed with Indian families.[98] This argument continues to be put forth today by opponents of ICWA.[99]

On February 9th, and again on March 9th, 1978, the House of Representative's Committee on Interior and Insular Affairs, chaired by Arizona Representative Morris Udall, held hearings on the proposed Indian Child Welfare Act. During these hearings, proponents advocated for the importance of tribal heritage, sov-

Portrait of Sen. James Abourezk, who chaired the Senate Select Committee on Indian Affairs which held the hearings on the topic of Indian child welfare.
Courtesy of the South Dakota Hall of Fame

Cheryl DeCoteau (Sisseton Wahpeton Dakota) testifies during the 1974 congressional hearings on Indian child welfare describing the removal of her children in South Dakota. She testified that she not receive notice of two hearings regarding the removal and placement of her son. During her testimony, her attorney interjected that the process was the "grossest violations of due process he had ever seen." 1974 Senate Hearings at 67 (statement of Cheryl DeCoteau). Image courtesy and permission of the Association on American Indian Affairs.

ereignty, and a different conception of group rights in regard to Indian Nations. Representative Udall recognized the ties Indian children have to the wellbeing of Indian Nations, stating: "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people are being placed in jeopardy."[100]

Advocates of the ICWA argued that the ongoing removal of Indian children undermined group rights and sovereignty of Indian people.[101] Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, testified:

> *Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the way of their People. Furthermore, these practices seriously undercut the tribe's ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.*[102]

Over four years of legislative testimony and data confirmed for Congress that many state and county social services agencies, with support from state courts and the BIA, engaged in the systematic removal of Indian children into non-Indian communities,[103] often for illegitimate reasons. Between 25% and 35% of all Indian children had been removed from their homes nationwide.[104] Ninety percent of the time, these children were moved into non-Indian homes.[105] Testimony indicated that these removals were done without due process of law; in most cases, there was not even an adjudicatory process. Due to the availability of the waivers and the great number of Indian parents depending on welfare payments for survival, families were often exposed to the coercive arguments of welfare departments.

The hearing testimony demonstrated that these high rates of removal were a nationwide problem. For example, in South Dakota, a state with a high Indian population, the number of Indian children in foster care was sixteen times greater than those of other children.[106] Likewise, in Oklahoma, 4.7 times more Indian children were in adoptive homes than non-Indian children.[107] In Minnesota, Indian children were placed in foster or adoptive homes at a rate of five times that of non-Indian children.[108] "In New York State, 1 in 74.8 children were in foster care, while the non-Indian rate was 1 in every 222.6. Approximately 96.5% of those Indian children were placed in non-Indian foster homes[,] and Indian children in New York

Jimmy Carter working at his desk, 1977.
National Archives and Records Administration 173610

State were placed for adoption at a per-capita rate of 3.3 times the rate of non-Indian children."[109]

The impact of the removal of Indian children from their communities was devastating, both for the communities and for the children themselves. For Indian Nations, no resource is more vital than their children, who carry forth culture, lifeways, government, and the continued existence of Indian communities.[110] The removal of these children from their communities severed these connections with their communities, the consequences of which are still felt today within Indian communities. Furthermore, many removed Indian children suffered the trauma of separation, as well as difficulty in forming a positive identity later in life, often exhibiting serious emotional and psychological problems.[111]

Children who have experienced childhood removal from their Indian families continue to face difficulties today. For instance, the Nez Perce Tribal Social Services agency periodically receives calls from those adopted-out prior to ICWA.[112] The agency "received one call from an elderly non-Indian woman saying that her adopted Nez Perce daughter was in severe trouble again with the law. The caller indicated her only hope to help save her daughter from self-destruction was reconnecting with her Tribe. Clearly, even when raised in a loving non-Indian home, the loss of identity can lead to trouble."[113] And for Indian families, having children removed is connected with the broader history of abusive federal Indian policies that were specifically directed at American Indian families.

Following the 1978 hearings before the House Committee on Interior and Insular Affairs, ICWA passed the House on October 14, 1978, with the Senate following soon after.[114] The Congressional reports documented the ignorance and hostility toward tribal culture and customs by the state social workers and judges—even with regard to traditional *benefits,* such as the involvement of extended families in child rearing. Despite opposition from three major United States agencies—the Department of Health, Education, and Welfare; the Department of Justice; and the Department of the Interior[115]—President Jimmy Carter signed the Indian Child Welfare Act into law on November 8, 1978.[116]

Following the passage of ICWA, the BIA issued regulations addressing notice procedures for involuntary child custody proceedings involving American Indian children.[117] These regulations did not address the specific requirements the ICWA imposed upon state-court child-custody proceedings; however, the BIA published guidelines for state courts to use in interpreting ICWA's requirements in such proceedings.[118]

The Indian Child Welfare Act

The ICWA is an attempt to counter generations of misguided federal and state policies that were designed to remove Indian children from their parents. To reverse that trend, the ICWA was crafted to protect Indian families by affording rights to the Indian child, the child's parents, and the child's nation. The ICWA is grounded in the federal government's trust responsibility to Tribes and Indian people and is based on the presumption that the policy of acting in the interest of Indian children is compatible with the policy of protecting tribal interests. Congress included in its findings:

> *(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children … ;*
>
> *(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and*
>
> *(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.*[119]

The ICWA is applicable to Indian child custody proceedings and provides the minimum federal standards to protect Indian children from unwarranted removal. The Act defines "child custody proceedings" as proceeds involving foster care placement, the termination of parental rights, pre-adoptive placement, and adoptive placement.[120]

The Act also reaffirmed the authority that Tribes have over tribal membership. An "Indian child" is defined as "any unmarried person who is under age eighteen and is either a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian Tribe."[121] An Indian Tribe is defined as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians…."[122] Although, the ICWA only applies to federally recognized tribes, New York State has expanded the federal definition to also *include* Indian tribes recognized by New York State or any other state.[123]

New York State implements a broad understanding of tribal identity. It does not require a child to be the biological child of a tribal member within the state. State regulations include coverage of biological children of a member of an Indian tribe who live on a reservation or tribal land within the state, regardless of where enrolled.[124] New York State also extends coverage to the age of twenty-one if the child entered foster care prior to his or her eighteenth birthday.[125]

The ICWA recognizes the Indian Nations' exclusive jurisdiction over child custody proceedings when the Indian child is domiciled within the reservation of the Tribe.[126] The statute fails to define domicile; however, the United States Supreme Court has held that children born out of wedlock to tribally enrolled members are considered domiciled on the reservation.[127] In the event that an Indian child does not reside or is not domiciled within the reservation, the state court must transfer to the proceeding to the Tribal Court "absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe."[128] Lastly, an Indian custodian or the Indian child's tribe may intervene at any point in the proceedings regarding the child.[129]

Due to Congress's grant of concurrent civil jurisdiction to New York State, the Indian Nations are required to obtain the Secretary of the Interior's approval for the assumption of exclusive jurisdiction.[130] As such, the Office of Children and Families may enter into an agreement with a Tribe in order for the Tribe to assume the provision of foster care, preventive, and adoptive services for Indian children.[131] In order for state-recognized Tribes to assume exclusive jurisdiction, a local commissioner has to grant approval.[132] Once granted, the Tribe has exclusive jurisdiction over the child that is domiciled or resides within the Reservation or is a ward of the tribal court.[133]

The ICWA also requires notice to Indian parents, custodians, and Indian Nations, along with a raised burden of proof prior to removing the child.[134] If a party cannot identify the Indian child's Nation, parent or custodian, the notice shall be given to the Secretary of the Interior.[135] Next, in order for a foster placement to be determined, there must be clear and convincing evidence, requiring guidance from a qualified expert witness addressing whether the continued custody by the parent or custodian is likely to result in serious emotion or physical damage to the child.[136] Lastly, in the event parental rights are terminated, ICWA requires that evidence beyond a reasonable doubt show potential harm to the child.[137]

The ICWA also establishes requirements for voluntary foster care placement and the termination of parental rights. The consent of the parent must be in writing and recorded with a court of proper jurisdiction.[138] Furthermore, the parent or legal guardian must be fully aware of the consequences of providing consent.[139] A parent may withdraw their consent at any time and the child shall be returned.[140] Consent may be withdrawn at any time prior to the entry of a final decree with the child returned.[141]

The Indian child's Nation may also establish a preference order for placement in foster care and adoption.[142] Extended family shall be given preference when adoption is necessary.[143] If there is no extended family that wishes to adopt the child, preference is given to a member of the child's tribe.[144] In the event that a Tribe establishes through a resolution or sets a different order of preference the agency or court affecting the placement shall follow such order. In regards to foster care and pre-adoption placements, the ICWA requires that an Indian child be placed in the least restrictive setting and within reasonable proximity to his or her home.[145]

Since its enactment the ICWA has met with opposition, with the most critical issues involving "(1) lack of regular oversight of ICWA implementation; (2) … children not being identified early in child welfare proceedings, (3) tribes not receiving early and proper notification of child welfare proceedings involving their member children and families, (4) lack of placement homes that reflect the preferences defined within ICWA, (5) limited training and support for state and private agency staff to develop knowledge and skills in implementing ICWA, and (6) inadequate resources for tribal child welfare agencies to participate and support their state and private agency counterparts."[146] State Courts have created exceptions to ICWA such as the existing Indian family exception.[147]

New York Courts have not demonstrated the same hostility towards the law as courts located in western and southern states.[148] However, noncompliance nonetheless exists. In New York State, large numbers of Indian children live outside reservation boundaries.[149] This may result in courts not inquiring early in the case about the possible Indian status of the child.[150] Thus, the Indian child's Tribe is not notified and the proceeding is not conducted in accordance with the law.[151]

In sum, while the ICWA has helped restore the ability of Indian Nations to help Indian families, it is not always followed. Indian children continue to be removed at alarming rates. However, if violations occur, Indian families and the Indian child's tribe may invalidate certain actions under 25 U.S.C. § 1914, including violations such as foster care placement or termination of parental rights may be invalidated. This provision of the law provides a protection for Indian families and Indian Nations when a court violates the provisions of ICWA.[152]

Conclusion

Since the formation of the United States, the federal government has implemented laws and policies that focused on the acquisition of Indian land and the assimilation of Indian people. The assimilation of Indian children into the American culture was seen as a means of resolving the Indian problem. But these policies have had devastating impacts to American Indian families and children.

Prior to the ICWA, state courts and placement agencies adopted out Indian children to non-Indian families at high percentage rates. The ICWA was designed to slow down and, ideally, stop the process of removing Indian children from their families, reservations, and culture. The statute is designed to guarantee procedural safeguards for Indian families and Nations within state forums. Since its enactment, the ICWA has been fought by pro-adoption groups in the United States. Contrary to the arguments regarding the constitutionality of the law, the ICWA is not based upon race. Similar to other federal Indian legislation, the ICWA is based upon the unique political status of Indian Nations, their members, and the trust relationship with the United States.[153] The protection of Indian children is a part of the government's federal trust relationship with the Indian Nations. Not only does the ICWA protect Indian children, but the federal law also strengthens and supports families. For over forty years, the ICWA has been called the "gold standard" of child-welfare policy due to its emphasis on placing children with relatives as the foremost goal.

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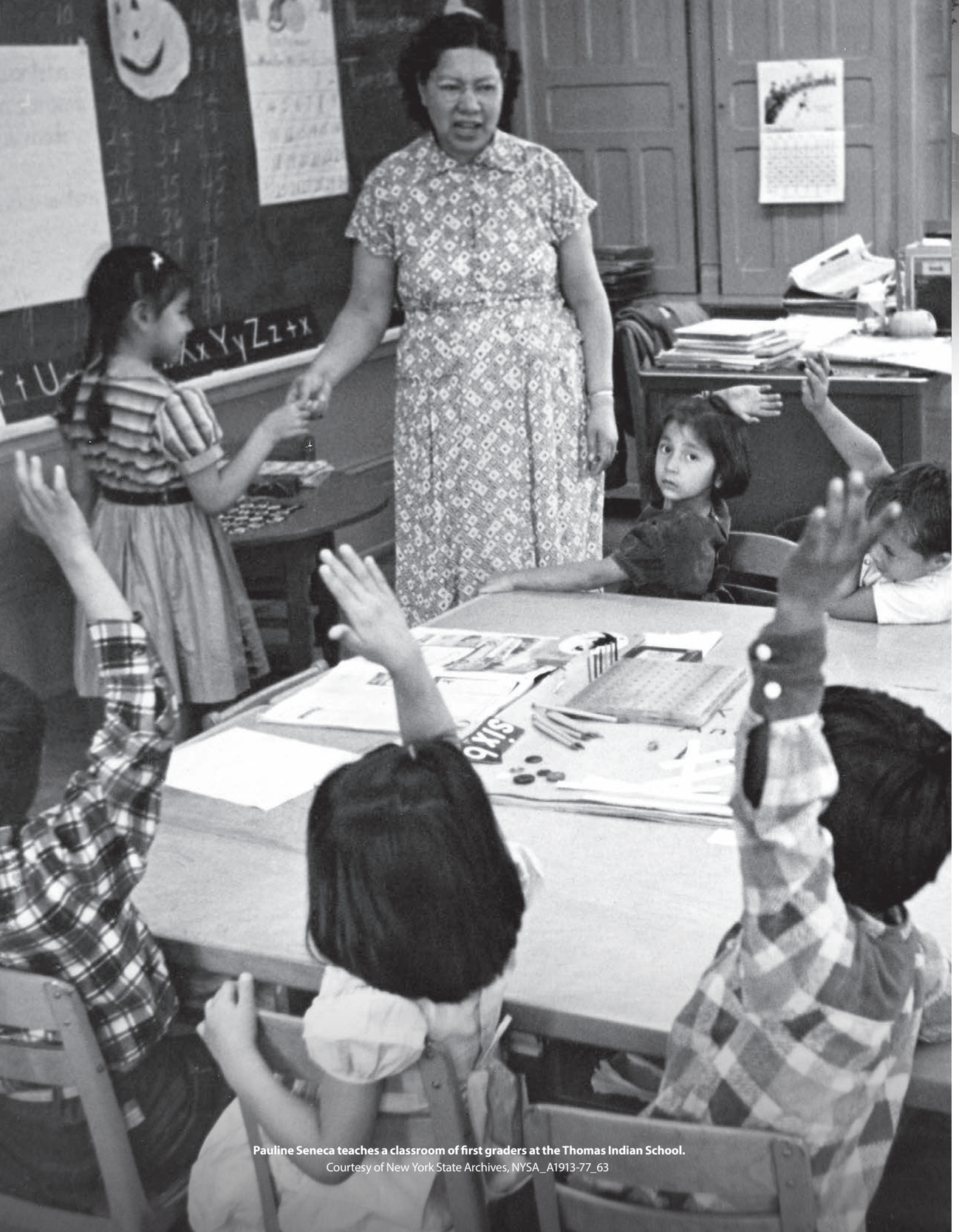


Pauline Seneca teaches a classroom of first graders at the Thomas Indian School.
Courtesy of New York State Archives, NYSA_A1913-77_63

THOMAS INDIAN SCHOOL

Social Experiment Resulting in Traumatic Effects

Lori V. Quigley, Ph.D.

Dr. Lori V. Quigley is the Vice President for Academic Affairs and chief academic officer at Medaille College in Buffalo, NY. She earned her bachelor of arts from St. Bonaventure University, and her master's and Ph.D. from Fordham University. She grew up on the Allegany territory of the Seneca Nation of Indians and is a member of the wolf clan.

Lori's academic leadership roles have involved articulating a vision for the future and building a culture of intellectual excitement to shape centers of excellence and distinction by establishing a diversified portfolio of programs. Her research interests include second language acquisition, culturally relevant pedagogy, learning community theory and multigenerational trauma. In her work, Lori focuses a great deal of energy on the development and sustainability of programs that are socially just, culturally responsive, and aggressively seek to serve all students.

In the late 1800s, the United States created special boarding schools in locations all over the United States, with the purpose of "civilizing" American Indian youth. It was an educational experiment, one that the government hoped would change the traditions and customs of American Indians. In the past several decades, research into these boarding schools has produced a rich, growing body of American Indian history. The best of this burgeoning scholarship looks beyond an examination of the federal policies that drove boarding school education to consider both the experiences of Indian children within the schools and the responses of Native students and parents to school policies, programs, and curricula. Incorporating archival research, oral interviews, and photographs, these studies portray the history of boarding schools from American Indian perspectives, uncovering of the meaning of boarding school education for Indian children, families, and communities both past and present.

This particular topic resonates with me and my family. In 1942, at the age of five, my mother Marlene, a young Seneca girl, was designated an orphan and ward of the State of New York and placed in the Thomas Indian School, where she lived and was a student for ten years. From what my mother had been told by our relatives, her mother, Georgianna Bennett, was simply unable to care for her. Needless to say, her life was forever changed. For while Thomas Indian School became a place where my mother developed life-long friendships and learned homemaking skills designed to help her gain employment, the boarding school was also a place where non-Indian matrons held complete disregard for the cultural and linguistic heritage of Indian children. As a survivor of the Native American residential boarding school era, my mother never fully understood the reasons why she was placed at the school—that is, until years of research allowed me to begin unraveling pieces of the puzzle.

As a young Seneca woman and mother, I witnessed the continued sociological impact of the residential boarding school era on my own family, as well as families throughout the Cattaraugus and Allegany reservation communities. I yearned to learn more in an effort to support tribal and agency initiatives focusing on healing. For nearly two decades, my research has focused on the *impact* of the Native American residential boarding school era. I have studied the policies of forced separation of Indian children from their families and tribal communities; information

Thomas Indian School boys at work in the fields. Courtesy of New York State Archives, NYSA_A1913-77_117

regarding gender roles, gender role reversal and family relationships impaired as a result of the boarding schools; and, most disheartening, the trauma compounded with the loss of parenting skills, the loss of children's identification with parents and community, and other complex processes.

Funded through the Larry J. Hackman Research Residency Program in 2006–2007, my early research started with the founding of the school framed within historical and social contexts. I sought the residency at the New York State Archives shortly after a S.U.N.Y Distinguished Professor of history informed me that I might possibly locate my mother's file (contents to be discussed in the latter section here) from Thomas Indian School in the Archives collections.

Historical Background

In the late 1700s, the Senecas were among the Iroquois who, while at first reluctant, aided the British during the American Revolution in battles like the famous Oriskany and the notoriously controversial Wyoming and Cherry Hill. Unfortunately for the Seneca, the Revolutionary War proved disastrous for the Indian loyalists. In 1779, General John Sullivan, sent by George Washington, led an expedition that annihilated forty Indian towns and burned nearly 60,000 bushels of stored corn, thus destroying the agricultural base of the Iroquois and causing a great exodus to Fort Niagara—the start of a great winter of suffering, during which time thousands died of exposure to the elements and starvation. At the war's end, no provisions were made for the Indians who supported the loyalist factions. The war with the Senecas and their Indian allies was finally settled at a treaty signed at Fort Stanwix, present day Rome, New York, in 1784.

In 1794, the Canandaigua or Pickering Treaty defined Seneca territory as lands west of the Genesee River, ostensibly preserving the agreed-upon lands for the Senecas in perpetuity. However, because of unrelenting demands for new lands for settlements, the chiefs of the nation signed another agreement, The Treaty of Big Tree, which sold the greater part of their lands to the Holland Land Company in return for $100,000 and additional annuity payments. The Senecas retained 310 square miles of the existing settlements in the Genesee Valley, at Buffalo Creek and Tonawanda, and on the Cattaraugus Creek and Allegheny River.[1]

In the 1830s, Andrew Jackson's Indian Removal policy led to the Buffalo Creek Treaty of 1838, through which the Ogden Land Company purchased the remaining Seneca reservations—Allegany, Buffalo Creek, Cattaraugus and Tonawanda—for $202,000, causing roughly 200 Seneca to emigrate to Kansas. The relocation was disastrous, and after about half of the emigres died, many others returned to New York.[2] Having been betrayed by their leaders, and with the support of a Presbyterian Reverend Asher Wright and some Quakers, these returnees contested the Buffalo Creek Treaty, lobbying Congress after an investigation uncovered bribery and fraud. But when the treaty was ratified nonetheless, the Seneca again marshalled the

Students are photographed under the arches of the boys' dormitory. Courtesy of New York State Archives, NYSA_A1913-77_16

help of their Quaker friends, successfully fighting for a compromise treaty which, in 1842, left the Seneca Nation in control of the Allegany and Cattaraugus reservations, as well as an additional square acre of land at Cuba, New York.[3]

The Buffalo Creek reservation, however, did not share the same fate. When both the city of Buffalo planners and the Ogden Land Company laid claim to the Buffalo Creek reservation, some of the Indians at Buffalo Creek moved to Canada, while most moved to the Cattaraugus reservation. The aforementioned Reverend Wright and his wife Laura, who had together operated a mission at Buffalo Creek since 1831, also moved to Cattaraugus, where experienced Seneca community members who opposed Christian missionaries.[4] A letter written by Philip E. Thomas—a Quaker banker from Baltimore who would become the early financial backer of his namesake Thomas Indian School—reminded the Seneca of their friends in the Quaker community: "When these Friends came to your relief you had by the frauds of your enemies, assisted by some of your own chiefs, been deprived of every foot of your land in the state of New York ...."[5]

The Wrights also interviewed when typhoid fever broke out at Cattaraugus in September 1847, killing seventy Indians within six months. Caring for the orphaned children fell to Laura Wright and her niece, Martha Hoyt, who cared for the children in the mission house.[6]

The typhoid epidemic also brought increased political instability among the Seneca, and by December 1848 the authority of the Seneca chiefs was overthrown. In its place was born an elective system of government with a new constitution, which was acknowledged by both the federal government and the State of New York.

In the years following, the missions at Cattaraugus witnessed a growth in membership. At the same time, the deplorable living conditions of the children on the reservation reached a crisis.

Establishment of an Orphan Asylum

When Laura Wright investigated the living conditions at Cattaraugus, she discovered nearly fifty orphaned or destitute children in a "very wretched condition and exposed to the most fearful of degrading influences." The Wrights responded by dedicating their lives to the creation of a school, or asylum, that would assist them in caring for many poverty-stricken orphans.

Laura Wright immediately sought assistance. Despite realizing the Seneca government treasury could not support her efforts, Laura Wright convinced Nathaniel J. Strong, one of the Seneca Nation councilors, to initiate a resolution that would call for the establishment of "an orphan asylum for the benefit of the destitute orphan children, and to locate it upon the Cattaraugus reservation."

The first donation to the new project was $100 provided by Thomas, who, ironically, had earlier in the year encouraged the Senecas to establish an industrial school in a building abandoned by Quaker missionaries; Thomas viewed this opportunity as a chance to restore the Quaker presence at Cattaraugus.

Girls in a classroom in the Thomas Indian School. Courtesy of New York State Archives, NYSA_A1913-77_101

Whatever his motivation, Thomas's donation had the intended effect. Noting his assistance, the Board of Missions voted to approve the mission house as a temporary shelter for the children until a permanent building could be constructed.[7] Thomas also encouraged Wright to travel to Albany with a charter application in hand and lobby members of the State Assembly—such as J.V.H. Clark from Onondaga, who was chairman of the Committee on Indian Affairs—to support the school.

Eventually, on April 10, 1855, the New York State Assembly passed an act incorporating the Thomas Asylum for Orphan and Destitute Children as a private institution receiving State aid. The State appropriated $2,000 for the construction and maintenance of a suitable building, to be built on the Cattaraugus territory of the Seneca Nation of Indians in Iroquois, New York.[8]

In accordance with an earlier resolution, on April 27, 1855, the school was charged to receive destitute and orphaned children from all Indian reservations and tribes across the state—Seneca, Cayuga, Onondaga, Oneida, Mohawk, Poospatuck (Unkechaug), Shinnecock, and Abenaki. The State allotted ten dollars for the maintenance of each child and placed the school under the jurisdiction of the Department of Instruction. On June 14, 1855, the Seneca Nation authorized the purchase of 15 acres of land for the institution. Then, in 1856, the State legislature appropriated an additional $1,500 and provided a total of $4,000 for the building of the asylum. Additional funds came from the federal Commissioner of Indian Affairs, whom Thomas persuaded to grant a $500 appropriation to the school.

The asylum was furnished with contributions from The Society of Friends, who held fundraisers in Buffalo. Funds also paid for a double wagon and three milk cows.

By July 1856, the children moved from the old mission house into the asylum building. Yet among all of this movement, an ominous note sounded: the trustees passed a resolution requiring exclusive use of the English language in order to erase the children's Native past and accelerate their assimilation into the dominant society.[9]

Four years later, in a letter to Eber M. Petit, treasurer of the asylum, Thomas indicated how pleased he was with the school's success. He was particularly gratified by "the continued improvement in the moral, social and intellectual life of my Indian friends at Cattaraugus, especially of the improvement already realized by the children who have been received into the orphan asylum, and I trust thy anticipation of the future beneficial influences of that institution here after, upon the Seneca nation, will be realized."[10]

The yearly reports of the Superintendent of Public Instruction from 1855 to 1875 provide detailed records of the continued growth of the asylum. Reports indicate unstable finances for the school, with state and federal aid remaining small and with the trustees relying heavily on the benevolent support of the Society of Friends and the public. Annual trustees' reports during these early years show financial records

Girls inside their dormitory. Courtesy of New York State Archives, NYSA_A1913-77_140

filled with increased debts, accompanied by pleas for more funding by the state.

Early Years: Education and Labor

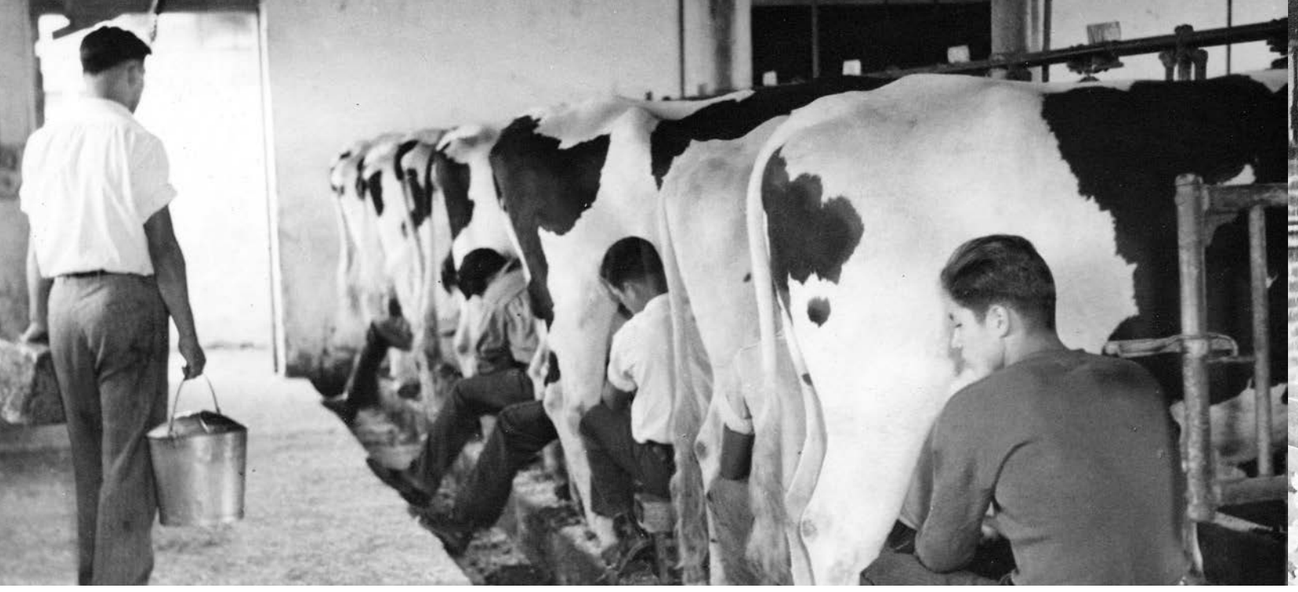
The first twenty years of the asylum provided the students—often referred to in historical documents as "inmates"—with the rudiments of an elementary education. According to an 1860 report, the children were plainly clad and furnished with "cheap but wholesome food." The boys were trained in the elements of agriculture; the girls, by contrast, were trained as domestics to run "civilized households." At the age of sixteen, the children were sent out for employment as farmers or domestics in neighboring counties. An 1864 Trustees Report stated, "Those girls who have been placed in white families to perfect their knowledge of domestic employment have surprised their employers by their energy and efficiency—so much beyond what had ever been expected of them."[11]

At Thomas, each day was divided equally between manual labor and basic elementary education. Boys performed perfunctory duties such as chopping wood, pulling out stumps to clear fields, planting and harvesting, and milking cows alongside a hired hand. Girls performed domestic work ranging from house cleaning to serving food and dish washing. The children's daily routine started with the:

> *rising bell at 5 am; followed by chores and morning worship at 6 am; more chores until 9 am followed by the noon diner; school and then more chores in the afternoon; followed by evening chores and supper at 6 pm and evening worship at 7. At 8 o'clock the younger children go to bed while the older children are taught instrumental music and singing; books are read to them and on Friday night there is a special feature—the Band of Hope, a temperance organization composed of all of the older children meets. Saturday morning, after chores are done, work classes are conducted for the boys on the farm or shop and the girls in the sewing room. Saturday afternoon was devoted to the weekly bath and recreation. On Sunday—according to the laws of the Christian Sabbath they rested, attended Sunday school, listened to sermons and attended worship service.*[12]

In effect, the Thomas Asylum had become a manual labor school, much like the Irish industrial schools during the same historical time. In 1875, William P. Letchworth, Vice President of the State Board of Charities, noted, "The importance of inculcating habits of industry is fully recognized, and forms the principle feature of asylum training."[13]

Lewis Seneca, an Indian and president of the Board of Managers, reported in October 1875 that the workforce at the asylum consisted of nine people. The



Young men at work milking cows. Courtesy of New York State Archives, NYSA_A1913-77_107

seven year-round employees were the superintendent, a matron, assistant matron, seamstress, housekeeper, assistant laundress and general assistant. A farm hand was employed during the summer and a foreman oversaw the broom shop where the boys made brooms out of cob in the winter. However, Seneca also noted most of the intense work at the asylum was performed by the children.[14]

The Thomas Asylum continued this child labor pattern until the early decades of the twentieth century when the asylum was somewhat modified to add more academic work. Willard Beatty, then the federal Director of Indian Education, noted upon his inspection of the school in 1946 that he was "surprised to discover that the school still maintains a program of part-day details where children are assigned to do non-educational labor in the laundry, the dairy, etc. around the school."[15]

Financial and Operational Challenges

By 1874, Trustee meetings painted an unsettling picture, with 75% of the operating funds coming from the state treasury. That year, the school's enrollment rose to 104, and for the first time, state appropriations amounted to more than $11,000. At the same time, however, an amendment to the state constitution stated that "neither the money nor credit of the state shall be given or loaned, to or in aid of any corporation, association or private undertaking." Thus, in its annual report to the state assembly, the Board of Trustees reminded the assembly that 104 children would be friendless and homeless if the institution closed. The report stated, "The children who are received at the asylum are mostly those of the poorer and pagan class of Indians, and unless they were taken charge by the asylum authorities, would grow up, if they are arrived at maturity at all, ignorant, idle and vicious."[16]

During the winter of 1875, Letchworth, who was a good friend of the Wrights, persuaded Senator Daniel P. Wood to hold hearings in Albany. A frail and feeble Asher Wright also traveled to Albany and, with the help of Letchworth and Wood, succeeded in convincing the state to pass the Act of April 24, 1875, which transferred ownership of the asylum to New York State. As a result, the residents became subject to the supervision and control by the State Board of Charities (the agency name was changed to the Department of Social Welfare in 1929).[17]

In effect, Letchworth and the Wrights had saved the school from financial disaster, believing that Thomas Asylum would become a haven for orphaned and destitute Indian children and stand as a beacon of hope that would uplift the Indian population at Cattaraugus. Letchworth wrote, "it must be admitted that the most hopeful means of elevating the Indian race is by instructing children in the industries and usages of the white people," emphasizing that the mission is an important one "especially as the class relieved by it would, if neglected, largely become outcasts."[18]

Young women at work in the laundry room. Courtesy of New York State Archives, NYSA_A1913-77_11

Nutrition and Health Concerns

In 1875, Letchworth also interviewed B.F. Hall, who served as superintendent of the Thomas Asylum for seventeen years and spent a total of twenty-nine years among the Indians. Realizing the limitations of the institution he supervised, Hall shared with Letchworth his conclusions that:

> *if the Indian children could be brought into families where they could have a thorough family bringing up, where they would have a seat at our tables and eat the same kind of food as we eat, making no difference between them and ourselves, more satisfactory results would be attain. We do here all that is possible, under our system, still I think the children realize that they do not enjoy the full sympathy of family membership, so much so that I have been almost tempted to sit down with them and eat at their table. They are, I know, under the impression that their food is not as good as mine, but if I ate at the same table with them they could not think so.*[19]

Public records located in the New York State Archives document the meagre diet of the children of the asylum. Daily logs detail each meal's menu, and what the children ate depended largely on what they raised on the institution's farm; annual reports provide summaries of produce harvested and either used to feed the children or sold for profit to other state institutions. The farm supplied vegetables and fruit, and the cows provided milk. Cattle were purchased and fattened to supply meat. Potatoes, flour and sugar were bought from outside vendors. In years of drought, the children's diets suffered further.

The poor diet, compounded by the hard manual work and close living quarters, took its toll on the children. Epidemics raged; dysentery and tuberculosis (consumption) were not uncommon. A sampling of the death rates of the children indicates the following: in 1864, of the fifty-six children in the asylum, twelve died; in 1875, the year that the state assumed control over the asylum, eight out of 104 inmates died of consumption.[20] Annual reports indicate that by 1905, a combination of better health care, new buildings and dormitories, improved sewage and well planning, and more abundant diet contributed to a decline in the yearly death rates at the school, which was now known as the Thomas Indian School.[21]

However, as the meticulously detailed hand-written ledgers of the school's daily meals denote, the children's diet remained monotonous at best until the closing of the school in 1957. Mary Pembleton, a student who spent her early years in the 1920s at the Thomas Indian School, recollected that the food "just wasn't good to eat. The oatmeal was wormy, the salt pork was cooked and served in its own grease and the beans and potatoes weren't done." Calvin Kettle, who lived there in the late 1930s, recalled that "at night after milking, we separated the cream from the milk. The whole milk went to the employees and teachers, the skim milk went to us kids."[22] Interestingly, diet was rarely blamed for the children's many sicknesses.

The author's mother Marlene Bennett is pictured in the second row, second from the left, with classmates in front of the administration building. Courtesy of the author

John H. Van Valkenburg, the school's superintendent from 1881–1892—and who, at the time of his appointment, was viewed by Letchworth as embodying the right philosophical approach to the care and educational training of Indian children—attributed the children's ill health to heredity: "We do not find in the youth of this race, at present time, the strong physical development that enables them to battle against disease and endure hardships but rather [a] weakened constitution, in which hereditary seeds of decay have been handed down."[23]

Tumultuous Years Filled with Scandal

Van Valkenburg was the first to publish formal superintendent's reports, which are all housed in the New York State Archives. Van Valkenburg's annual reports contained moral allusions and reference to local temperance union work and were accepted prima facie for the next decade by the State Board of Charities and Letchworth. Some of Van Valkenburg's comments provide important insight into his beliefs, such as "The old sloth, improvidence, and passion for a wild life still dominate [the children's] nature"; "I have become fully convinced that the means of education and improvement will never be productive of the highest good as long as [the children's] tribal relations continued"; and "too much importance cannot be attached to the industrial training of Indian children, as they cannot hope to become valuable members of any community or hope to do away with their inherited shiftlessness."[24]

Shortly after Van Valkenburg's tenure as superintendent, scandal broke out at the Thomas Asylum, leading the State Board of Charities to open an investigation. The scandal brought to light allegations that claimed Van Valkenburg, who was by this point nowhere to be found, committed indiscretions ranging from illicit relations with young female residents to mishandling of the institution's finances. The allegations also highlighted the general poor treatment and abuse of the Indian children.[25]

The individual who purportedly broke the scandal was a newspaper journalist named Varian, who wrote for The Buffalo Enquirer, which would eventually publish nearly verbatim the testimony of the Board of Charities' investigation. (The paper remains the primary source of this evidence, as thousands of pages of testimony and documentation seem to have "disappeared" and cannot be found in files of the State Board of Charities or the Correspondence files housed in the State Archives.) The story first appeared in the Enquirer in April 1892, with detailed testimony from the investigation printed from July through December of that year. During that first month, the Enquirer questioned the Trustees' careless oversight of Van Valkenburg's leadership of the school by posing the important question: "If he is innocent, why has he disappeared?" The authors followed their question with an assertion: "If Van Valkenburg is guilty, his irregularities must have extended over a number of years. If he is guilty, the Board of Trustees [is] convicted of gross and unpardonable negligence."[26]

During the investigation, one of the trustees, Frank C. Vinton, was also indicted for receiving a one

Students participate in a graduation ceremony at the Thomas Indian School. Courtesy of New York State Archives, NYSA_A1913-77_68

dollar commission for every $6.50 barrel of flour sold to the asylum. The entangled details as reported in the Enquirer note that Van Valkenburg signed the checks for each delivery.[27]

In a July 22, 1892 article called "Simply Awful: Poor Indian Orphan Girls Beaten, Starved, and Horribly Ill-Treated," the Enquirer printed signed affidavits and sworn testimony by the staff and children who served as witnesses for the State. Witness accounts continued, and the Enquirer reported on July 27, 1892 that Van Valkenburg had been found in Brockport and arrested. The next day, Van Valkenburg pleaded not guilty and was released on bail.

On October 3, 1892, Oscar Craig, President of the State Board of Charities, sent a letter to Simon N. Rosendale, the Attorney General of New York, emphasizing that "the matter is an important one." Craig reported to Rosendale that complaints of negligence had been made against the Trustees in respect to finances and of supervision of the late superintendent, and that the gravest of charges "against the late superintendent allege illicit relations with girls under the age of sixteen at his institution."[28]

In all, the evidence uncovered painted a frightening picture of Van Valkenburg's treatment of the Indian children under his care. On December 7, 1892, the Enquirer ran a story entitled "Horrible Soup" that printed detailed testimony on the substandard and sometimes rotten food provided to the children on a daily basis, as well as accounts attesting to the many cruelties practiced on the children, from cold water baths and solitary confinement lasting several days at a time, to the youngest children being horse-whipped.

Before the trial resumed later in February 1893, on January 6, 1893, the Enquirer reported that Van Valkenburg had been admitted to the Buffalo State Hospital in December, having been judged insane by a Dr. Mann of Brockport. After a lengthy investigation and thousands of pages of testimony, the case was eventually closed by mid-March. A group of commissioners of the State Board of Charities, along with Attorney General Gilbert, announced after an hour's deliberation "that in view of the fact that John H. Van Valkenburg was insane and that a new board of trustees had been appointed and that their appointment ratified it would be useless expense and loss of time to continue." Attorney General Gilbert favored closing the investigation.

The special committee on the scandal issued its formal report to the State Board of Charities in 1893. It concluded:

> *Material found and substantial evidence has been received on the part of the people to prove the charges in the case of [the major complainant], and other similar charges, and other improper conduct, of the late superintendent toward female inmates, and to sustain complaints of improper and insufficient food, of undue severity, of cruelty in punishment and disciplining, and in other matters…*[29]

In summary, Van Valkenburg was declared insane and he was never brought to trial; the Van Valkenburgs later moved to Ann Arbor, Michigan. Any reported misdeeds of the trustees went unpun-

VAN'S BAD FOOD.

Orphans Were Starved and Gladly Delved Into the Asylum Swill Tub.

Terrible Revelations Regarding the Management of the Indian Institute at Versailles.

Little Indian Children Forced to Partake of the Stuff Called Soup—Dog's Food Preferred.

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VAN'S BAD FOOD.
The Buffalo Enquirer, December 8, 1892

VAN'S CRUELTY.

Rotten Food and Severe Punishment For the Little Indian Orphans.

Resumption of the Thomas Asylum Investigation—More Startling Disclosures.

Former Inmates Tell Almost Incredible Stories of Harsh Treatment at the Versailles Institute.

Hungry Children Forced to Resort to

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VAN'S CRUELTY.
The Buffalo Enquirer, March 2, 1893

ished. "The whole matter," wrote Board of Charities president Craig, "seems more exasperating now in the suggestion that the late superintendent was simulating, and that his malingering was not detected by the specialist, who left us to believe that he was in fact, as was as in law, to be considered insane."[30]

Improvements and Reorganization

The impact of this scandal was enormous: the entire Board of Trustees was dismissed, and a new board was appointed by Governor Roswell P. Flower. Unfortunately, the next two succeeding superintendents, Hooker and Bennett, became enmeshed in similar scandals, embarrassing the State so much that over $74,000 was appropriated to the institution as part of a rebuilding program. In its Thirty-Fourth Annual Report (1900), the State Board of Charities wrote that "the buildings of the Thomas Asylum, the education and training, the institution affords have led to a greatly improved condition, morally, mentally and physically, of the children, and the asylum, through its relation with the different reservations, is quietly exerting a beneficial influence upon the adult Indians, especially upon those of the Cattaraugus reservation, upon which the asylum is located."[31]

A third change in superintendents was welcomed. In April 1895, the state appointed George I. Lincoln as the head of the Thomas Asylum. During his tenure, capital improvements flourished, with the entire campus being rebuilt by 1905, just in time for the school's fiftieth anniversary. The influx of state appropriations aided Lincoln in the reconstruction of the school, which also paralleled his reorganization plan. In 1895, Lincoln started a kindergarten, and by 1899 the school witnessed its first commencement exercises for students in the sixth-grade—the highest grade in the school until 1905, when seventh and eighth grades were added, coinciding with Lincoln receiving legislative approval to change the name of the school. In 1905, athletics were incorporated into the program; Lincoln reported taking great pride in the school's football team.[32]

W.H. Gratwick, of the State Board of Charities, approved Lincoln's reorganization and focus for the school, observing that "the scope of work had broadened with the change in architecture. Now a liberal education is offered to the Indian children who are fortunate enough to be taken under the care of the state in this institution." In effect, while the educational components may have expanded, Gratwick's papers also indicate a continuation of the practice that combined manual labor education, with the boys still performing general husbandry and the girls still working in the laundry, kitchen, sewing room and bakery.[33]

In 1907, Lincoln passed away as the result of a stroke, and the former head teacher, John C. Brennan, eventually became the next superintendent. Until his death in 1943, Brennan maintained Lincoln's philosophical approach to running the school.

In 1942, Brennan hired the school's first and only full-time social worker, a Miss Frances Kinkead, who was assigned to counsel the residents and to advise the superintendent and remained employed at the school until its eventual closing. Archival documents are filled with Kinkead's monthly and annual reports detailing the personal histories of the children who resided at Thomas during her tenure, as well as monthly newsletters about school events and alumni news and newspaper clippings.[34]

Brennan was succeeded by Hjalimar Scoe, who reportedly ran the school with an iron fist, instilling assimilationist practices that included punishing the children for speaking their Native languages. In 1946, Willard Beatty, Director of Indian Education, toured the school and reported his surprise "to find metal barriers in the windows which would effectively preclude their use as exits in the event of fire, and despite the superintendent's explanation that this was to prevent the youngsters from getting out at night, seems an unnecessary precaution in view of the fact that the Indian Service operates more than sixty boarding schools in none of which we have found it necessary to bar the windows."[35] Later in the report, Beatty noted that Superintendent Scoe had referred to several examples of the "restrictions which he deemed necessary to place upon the children that we began to wonder if we had been misinformed and were visiting a school for delinquents."[36]

On August 31, 1956, newspapers across the state reported Governor Averell Harriman's announcement that the Thomas Indian School would be closed on or about September 1, 1957. The governor stated that the action was "the culmination of a program of integration through which Indian children are now being reared and educated in the community like all other children by sending them to regular public schools and placing them in family boarding homes and childcare institutions."[37] This rationale for closing the school ironically mirrored the reasons the school had been established and maintained (for over a century) in the first place: to integrate the Indian child into the life of the dominant society. Prior to the school's closing, its number of residents had peaked at 140 in December 1953; however, enrollment dwindled to 65 at the time of Harriman's announcement.

Students care for an ill classmate in the Thomas Indian School's infirmary during a nursing demonstration.
Courtesy of New York State Archives, NYSA_A1913-77_B2_61

After his announcement, Harriman appointed a committee to suggest how the physical plant of the school should be used in the future. As it transpired, most of the institution's stately buildings were simply left to ruin and eventually condemned and/or demolished by the Seneca Nation. In the heart of the Seneca Nation's Cattaraugus territory, a few buildings remain from the place commonly referred to as "Salem" (a nickname derived from the earlier name of "asylum"), or from the Thomas Indian School. Some are still in use by the Seneca Nation government today, such as the former Hospital building, which is used for office space. Current tribal government buildings, a senior citizen residential home, an early childhood center, an Indian health services clinic, and a tribal library are just some of the newer buildings built on the land once occupied by the school.

Since the Thomas Indian School was a state-operated institution at the time of its closing in 1957, all of its records and sealed documents were sent to Albany, to be housed in the New York State Archives in perpetuity.

Reconciling the Past

As a Native American educator, I began researching what has evolved into an in-depth account of the sociological impact of Thomas Indian School on the Seneca Nation by correlating factual documentation with the personal histories and stories as relayed to me by Thomas survivors. I am neither a historian nor cultural anthropologist—just a woman who is passionate about helping my Native community embark on a process of healing.

Just over a decade ago, as I was about to start the year-long residency at the New York State Archives, I secured permission from my mother and nineteen of her peers to access their sealed case files, which had been housed in the archival collections since 1957. As I sought their permission, I learned that not one of them actually knew these case files existed or that they had been preserved all these years in the Archives.

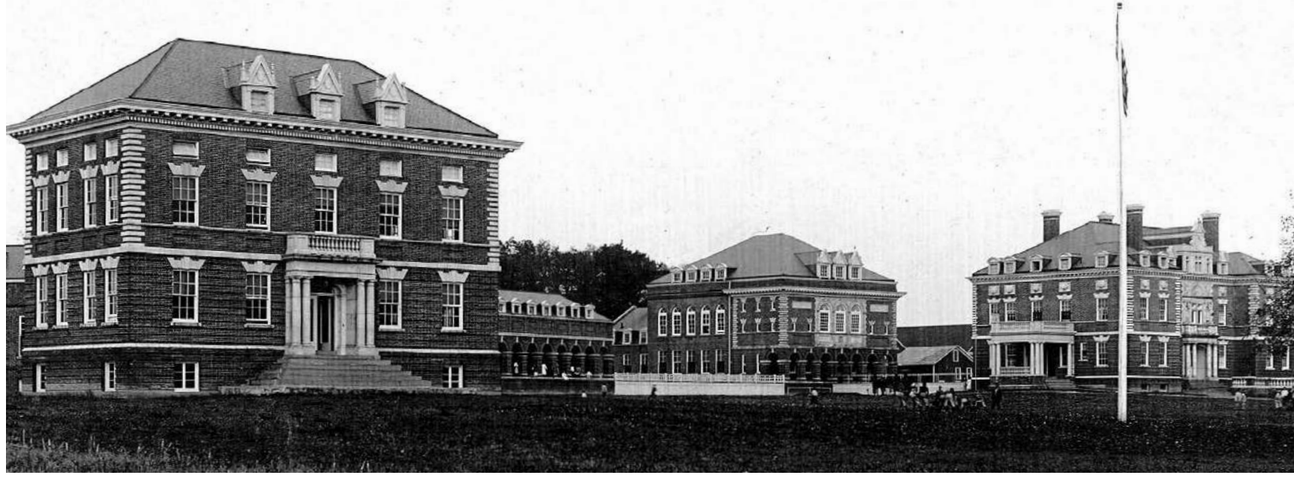
My research began not with these sealed files, however, but with an examination of public records, particularly (but not limited to) those dating from the time of my mother's stay at the Thomas Indian School. My intent was to gain a deeper understanding of the institution, as summarized in the sections above. Those records contained superintendents' reports, annual reports, centennial reports, social worker reports, school newsletters, agricultural accounts, dining hall ledgers, civil service newsletters, other state agency reports, and photographs. In the school's 102-year history, nine superintendents and two interim superintendents were employed. From numerous reports contained within the archival records, the conditions of the school—from finances and operations to education labor—varied as a result of each individual superintendent's method of overseeing both facility operations and the thousands of children who were residents of the school.

With the assistance of state archivists, I reserved and planned special days in which to access the aforementioned sealed records of twenty former Thomas Indian School residents, some of whom are still living today and yet others of whom have passed away since 2007. I discovered that these twenty orphaned, destitute and/or neglected Native American children had been referred to the school by either a parent or guardian unable to care for the child, a county welfare agency seeking to place the child in foster care, or directly from children's court. Final determinations on admissions were made by the school's Superintendent and noted in each case file. The children's sealed case files contained a multitude of personal documents, such as intake case summaries prepared by social workers, completed application forms, birth certificates, court documents, detailed medical documentation, social worker case reports and summaries, house matron anecdotal records, wage earner records, personal mail correspondence, and transfer forms.

But my most important discovery was that the files contained many of the answers to the survivors' lingering questions, mainly related to their lack of understanding as to why they were isolated from their families and communities. For me personally, I soon realized my mother's sealed file contained the answers she had longed to know for over seventy years. During and after her ten-year stay, my mother could never understand why her extended family never came to her rescue. She resented the fact that her Aunt Betty (Bennett) Granich did not adopt her or raise her through foster care as she did with other children. Yet when I accessed her sealed case file in the NYS Archives, I discovered that correspondence between Aunt Betty and Miss Frances Kinkead, the school's social worker, chronicled that Aunt Granich did want to adopt my mother, but was refused by Kinkead. My mother did not discover this until she read her file for the first time about ten years ago, about five years after my Great Aunt Betty had passed away.

Through a comparison of the public records and the sealed case files, I came to realize the ironic nature of the relationship between the residents and Kinkead, the social worker. Furthermore, interviews with the twenty former residents confirmed my hypothesis that Kinkead's perspectives, beliefs and decision-making allowed her to hold more power and authority over the lives of the children than that of the school's superintendents and headmasters.

Kinkead's monthly reports provided an accounting of the residents, her responsibilities as the sole social worker at Thomas, and her personal summaries of the many trips taken and conferences attended, as well as recommendations to the Board of Trustees. Public records also contain copies of the school newsletter that she wrote. In each of these documents, which detail current activities of the school and children, Kinkead nonchalantly recounts her knowledge



An exterior view of the Thomas Indian School, including Stewart Hall, the dormitories, and the administration building. Courtesy of New York State Archives, NYSA_A1913-77_3

of the residents who had entered the military, were transferred to other Native American residential boarding schools such as Chilocco and Haskell, or were placed in wage homes for employment.

However, no written documentation is included in the files that would provide explanation of decisions regarding any transfer of these students. For instance, my mother's sister, Barbara Bennett, was sent to Haskell Institute, presumably perhaps because she excelled in athletics; my mother was sent to a "wage home" at the age of 15 to work for an affluent family as a live-in maid. But to this date, my mother has no idea why she was chosen, along with three other Thomas girls, to pack her meager belongings and be transported to the Dunkirk-Fredonia area of Chautauqua County. For many of these young women, working in a wage home became their first experience living with a family outside of the institution.

Initially, I was unable to determine how Kinkead came to know these details of the lives of residents outside the walls of Thomas Indian School. Upon closer examination of documents included in the sealed case files, I discovered my answer when I compared the contents from the public records to those contained in the sealed files. For example, I found letters written to Kinkead by former residents who were in the military. In one particular letter, the author confesses his realization to Kinkead that he finds it ironic how she has been the recipient of his letters throughout his military career. Understandably, as a result of his lack of relationship to his biological family or connection to anyone from his Native community, the young man admitted that he simply did not have anyone else to write to while in the army.

Examples of other letters written to Kinkead were sent to her from residents who worked at summer camps. In one of the camp letters written by my mother, she relays the story of her feelings of excitement when the camp counselors discovered she was American Indian and asked her if she could provide the campers with Native American lore at an evening campfire—only to realize sadly that she had absolutely no knowledge of her Native culture and history because she had not learned it at Thomas Indian School.

In conversations, former residents informed me that while away and during times devoted to writing letters back home, their home *was* Thomas Indian School, and Kinkead had therefore become the individual to whom all personal communication was sent. For those young women who worked in wage homes, the wealthy women of the households in which they worked provided Kinkead with anecdotal notes describing the former residents' transitions into their homes, as well as an accounting of the money earned and yet forwarded back to Kinkead, with detailed receipts left in the sealed case files. Other letters included former residents humbly asking Kinkead for money from their accounts to pay for clothing and shoes or other personal items.

Reading these letters, I began to comprehend the mindset of Kinkead, a spinster charged with the oversight and care of hundreds of Thomas residents. In several cases, her decision-making, put simply, was mean and unjust. For instance, children under her supervision were once allowed to go home during the summer months, but Kinkead changed this policy in an effort to further isolate the children from their families and communities.

In the end, many, but not all, who lived at Thomas thrived despite the hardships. My mother, for example, became strong and independent, refusing to turn out to be "just another drunk Indian" as the children were

often described by the white matrons who worked at Thomas. Unfortunately, those words became a self-fulfilling prophecy for many who did not survive. I became witness to this on several occasions when I accompanied my mother to funerals of friends with whom she lived at Thomas, those who passed away in their thirties and forties—too early for their time. To this day, my mother is considered a *survivor.*

In October 2017, at my mother's request, I took her to see the mansion where she worked as a wage earner. The house presently serves as a home for the S.U.N.Y Fredonia college president. Its former owners, the Van Buren family, sold the stately white stucco manor to the university before relocating to Mayville, New York. Invited by the college President Ginny Horvath to enter the front door for the first time—only having ever been allowed entrance via the servants' area in the back of the house—my mother sought understanding of her life as an abandoned and orphaned Seneca girl. While touring the home, she recalled in detail each room of the house as it appeared in the 1950s—the glassware cabinet in the butler's pantry, the secret staircase to the second attic where her room and bathroom were located, the hidden floor buzzer located in the middle of the dining room that rang into the kitchen, and the small area where her own tiny kitchen table was located. While being served afternoon tea, my mother relayed the story of her darkest hour of isolation and desperation, a story that revolved around a silver charm bracelet given to her from Mrs. Van Buren and that she wore for the first time that day as a symbol of her own resiliency. We shared tea biscuits, tears, and laughter that afternoon, while my mother quietly found peace and reconciliation.

Conclusion

A new field of science called epigenetics (literally "above the gene") has begun to provide scientifically-based research to support the theories associated with historical trauma. For some, Thomas Indian School embodied both victimization and agency for Native people, as there exists a diversity of experiences, attitudes, and feelings from those who attended the institution and resided in its military barracks-style housing. These experiences, as relayed to me by the former residents, ranged from positive to horrifying. Some claimed that the school equipped them with important skills and training to succeed in the outside world, whereas documented evidence has demonstrated that others were in fact victims of physical and sexual abuse. For descendants of the boarding school residents, remnants of multigenerational trauma—resulting in alcohol and drug abuse, depression and other manifestations of post-traumatic stress disorder—continue to affect families and the Native communities throughout the state of New York and Canada.

The results are far-reaching. Native communities and families touched by the residential boarding school era have been on a path toward healing. We lost family—the whole sense of it—and are trying to regain that again. Families and siblings were forcibly separated from one another. Many residents never returned to their Native communities or families; worse, the boarding school institution *became* their families. In Canada, legal action and reparations have begun on behalf of First Nations peoples who were abused at government and church-run residential schools. Apologies have been offered by the Canadian prime minister. Yet in the United States, we have not witnessed similar action or restitution. Documentaries, such as *Unseen Tears: The Impact of Native American Residential Boarding Schools in WNY,* have been produced and continue to be used as healing mechanisms so that we can talk about the impact without blaming but with the desire to regain all that was lost. Today, we continue to move beyond this tragedy by employing indigenous strategies of resilience, coupled with a rebirth and return to our traditional teachings. Those teachings are grounded in what is referred to as the *Gaiwiio,* or the good mind. Haudenosaunee worldview philosophy is grounded in the *Gaiwiio,* which teaches us to begin each day in thankfulness for all that the Creator has provided for us and to think with a Good Mind and a Good Heart in all that we say and do.

ENDNOTES

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20. *Id.*
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31. *Thirty-Fourth Annual Report of the Board of Charities of the State of New York* (1900).
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33. Note especially W.R. Gratwick's *Reports of The Committee on The Thomas Asylum for Orphan and Destitute Indian Children,* 1903 through 1905, and *The Annual Reports of The Thomas Indian School,* 1895 through 1905; *see also The Annual Reports S.B.C.C.,* 1900–1905.
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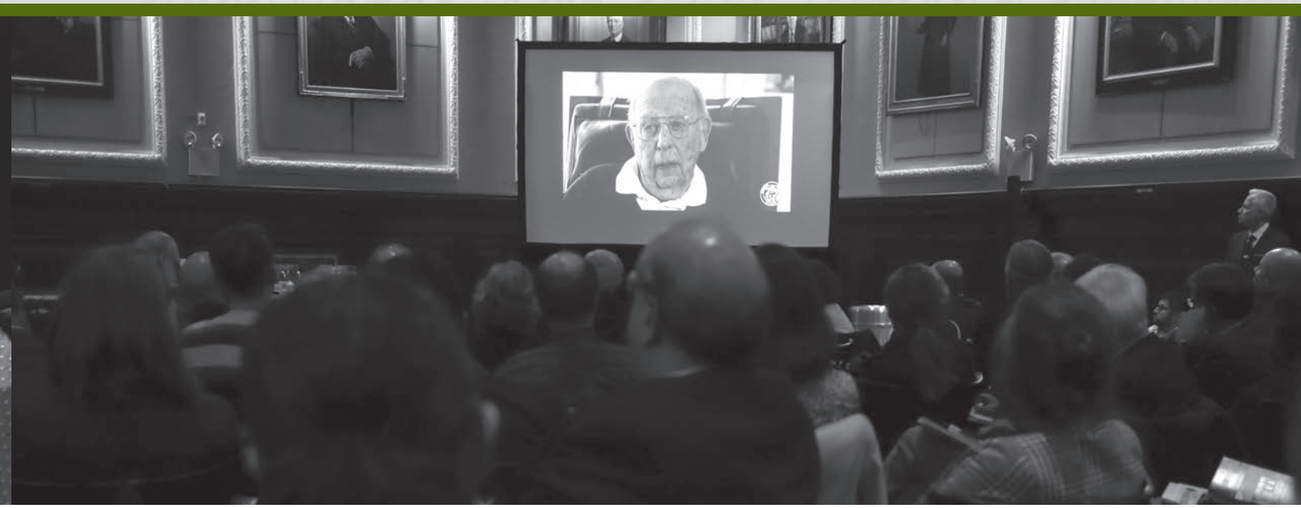
Tribal Courts in New York:

Case Study of the Oneida Indian Nation



On November 20, 2018, the Society partnered with the **Oneida Indian Nation** for a program that explored why Native American nations decide to develop their own court systems, basic laws that govern tribal court systems and jurisdiction, and how the NYS courts and tribal courts can interact and work together. **Hon. Albert M. Rosenblatt** emceed the event, which began with a performance of Oneida Nation dancers and featured a conversation with Oneida Indian Nation Representative **Ray Halbritter** and **Michael R. Smith,** a lightning round with **Peter D. Carmen** and **Meghan Murphy Beakman,** and a judicial panel with **Hon. Marcy L. Kahn** moderating and **Hon. Robert G. Hurlbutt** and **Hon. Mark A. Montour** participating.

This program marked the first time the Society presented on Native American law and tribal jurisdiction concerns, and it was a resounding success! Attendees stated the event was "one of the best programs I've attended in my 20+ years of membership in the City Bar" and it included "truly devoted and thoughtful speakers." If you didn't get a chance to see it, or want to watch it again, you can now view the program on our website, at nycourts.gov/history.

Tribal Courts in New York: Case Study of the Oneida Indian Nation also included a video presentation from **Hon. Richard D. Simons,** who helped establish the Oneida Indian Nation Court with **Hon. Stewart F. Hancock, Jr**. after both retired from the Court of Appeals. Judge Simons, who recently retired from the Oneida Court as well, describes in the presentation how he and Judge Hancock met with the Men's Council and Clan Mothers about their ideas for the Court. Then the Nation together with the two judges, respectful of both the state and Nation laws, developed a body of law.

For the Society's Oral History Project, Judge Rosenblatt interviewed Judge Simons about his role in developing the Oneida Court. This made an important historical moment for the Society's Oral History archives. This joins Judge Simons' Court of Appeals oral history, as well as several of his fellow Court of Appeals judges, other State Court judges, and legal luminaries.

As with the program itself, our growing oral history collection, including both of Judge Simons' oral histories, is available on our website at nycourts.gov/history.

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