

INTERVIEW

DAVID RAASCH, JUDGE, STOCKBRIDGE-MUNSEE TRIBAL COURT, BOWLER, WISCONSIN

In October 2009, David Raasch was elected Judge of the Stockbridge-Munsee Tribal Court. Judge Raasch also serves as a tribal justice specialist for Fox Valley Technical College, providing training and technical assistance to tribal communities across the country.

*Interviewed by Aaron Arnold**

What do you see as the biggest obstacles facing tribal courts today?

The biggest obstacle that I see in tribal courts today is they lack criminal jurisdiction over non-Indians because of the *Oliphant* decision.¹ [There are] domestic violence cases involving intermarriage with non-Indians, the infiltration of methamphetamines, especially in the border tribes, coming in from Mexico or Canada. There's a lack of federal law enforcement and insufficient tribal law enforcement.² Even with adequate law enforcement, [tribal courts] lack jurisdiction to prosecute these cases and I'm not sure if those prosecutions

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1. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194-95 (1978), the U.S. Supreme Court held that tribal courts do not have inherent criminal jurisdiction over non-Indians and may not assume such jurisdiction unless specifically authorized to do so by Congress.

2. See U.S. DEP'T OF JUSTICE, REPORT OF THE EXECUTIVE COMMITTEE FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENTS (1997), available at <http://www.usdoj.gov/otj/icredact.htm>.

rank as a priority in federal or state systems if they happen in Indian country.

Do you have any ideas about how that fundamental problem can be addressed?

I think the only way to correct [the jurisdiction problem] is through legislation, through Congress—like the *Duro* fix,³ do a fix on *Oliphant*. It can and should be fixed. In some tribes, 54 percent of the crimes against Native Americans are committed by non-Indians.⁴ It's like a free pass.

Any other major obstacles you see facing tribal court systems?

Of course, we'd like the resources that the states have, especially in tribes where they're closing down tribal detention centers because they're inadequate. You never hear of that in the state system. You never hear of them closing a prison; they'll fix it and bring it up to standards, but in Indian country they simply close them and leave them with a great difficulty of lengthy distances to travel and that sort of thing.

You've had some experience in dealing with both tribal and non-tribal justice systems. What would you say are the fundamental differences between Indian and non-Indian justice?

I think the non-Indian justice system deals primarily with law and I think tribal justice systems try to focus more on relationships, and community health, and less punitive-type remedies and more healing—restorative, if that's a good word—that concept.

3. In *Duro v. Reina*, 495 U.S. 676, 688 (1990), the U.S. Supreme Court held that tribal courts do not have criminal jurisdiction over non-member Indians. Congress responded to this decision by enacting the “*Duro* fix,” 25 U.S.C. § 1301(2) (2006), legislation recognizing the inherent authority of tribal courts to exercise criminal jurisdiction within their reservations over all Indians, including non-members.

4. See Rob Capriccioso, *Law expert: State of federal Indian law contributes to epidemic of violence*, INDIAN COUNTRY TODAY, Mar. 31, 2009, available at <http://www.indiancountrytoday.com/home/content/41971652.html> (noting that “approximately one-quarter of all cases of family violence against Indians involve a non-Indian perpetrator”); Eileen Shimizu, *Blackfeet want remedy for Oliphant v. Suquamish*, INDIAN COUNTRY TODAY, Mar. 20, 2009, available at <http://www.indiancountrytoday.com/archive/41568937.html> (detailing lobbying efforts for a legislative solution to *Oliphant*).

And along those lines, what do think are the most common misconceptions that people in the state court system have about tribal courts?

I think one of the great misconceptions is, because many of the tribal judges are not law-trained, that perhaps we cannot afford justice or due process or be fair. I think there's also the misconception, at least I've heard some of the federal courts' concerns, that because there's no separation of powers in many of the tribal constitutions that the courts are simply acting at the direction of the tribal councils.

Let me follow up on that. How important do you feel it is that tribal judges be law-trained?

I don't think it's necessary. Growing up in an Indian community, knowing the people, knowing the community, knowing the problems. . . I think tribal judges are more problem-solvers than, say, state judges. I don't think we have to be law-trained to be problem-solvers. I don't think we have to be law-trained to be healers. I don't think we have to be law-trained to administer justice or provide due process.

How important do you feel it is that tribal court judges be tribal members and, even a step farther, for judges to be members of the particular tribe that they're going to be sitting in?

I think it's extremely important that tribal judges be tribal members of the court that they're sitting in, simply because you're making decisions that affect the community and if you're part of the community you'll have a greater understanding of that community. You're not running a remote justice system if you are from that community, or familiar with that community, or a member of that community.

Do you have any feelings about how important it is for tribal courts to have a separation of powers from the tribal council?

I think it is extremely important that there is judicial independence. Whether there's a separation of powers in the tribal constitution, or they amend the constitution to create a separation of powers or not, I think that judicial independence should be recognized by tribal councils and one way to do that is to let the community decide who the judges are, not have council-appointed judges and to remove all perceptions of influence. I

think it's extremely important that the judiciary be independent and be perceived to be independent of any tribal council.

Let me move on to the issue of the relationships between tribal courts and state courts. In general, how important do you think it is for state and tribal court systems to develop strong communication and collaborative relationships?

I think it's extremely important because in today's society nobody lives in isolation anymore. Many times, as we found out in developing the relationships in Wisconsin, the state and tribal courts are not only dealing with many of the same questions—and I'm more familiar with the Public Law 280⁵ side of it—not only asking the same jurisdictional questions, but many times dealing with the same people. And many times, where there is intermarriage between a tribal member and a non-Indian, I think that [communication] fills those gaps.

How do you feel state and tribal court practitioners can most effectively build these relationships? How do you feel judges can most effectively create these relationships?

I've had this discussion many times and many people think there has to be legislation or formal agreements, MOUs, MOAs, or protocols.⁶ Basically, it's the simple thing that you and I are doing now—we're talking. I think the fact that we can sit down and talk, and we don't have to agree on everything, but we'll understand everything better and we'll understand each other and we can still work together. So I think it's a ques-

5. Enacted in 1953, Public Law 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 28 U.S.C. § 1321-1326 (2006)) mandated the transfer of the federal government's criminal and civil jurisdiction over cases occurring on tribal lands to the state governments in several enumerated states: California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska (upon statehood). The law also allowed others states the option of assuming criminal and civil jurisdiction over cases occurring on tribal lands within their borders. Public Law 280 has been the source of much controversy and has greatly complicated questions of criminal jurisdiction and law enforcement responsibility in the affected tribes and states. *See, e.g.,* CAROLE GOLDBERG ET AL., LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 (2007), available at http://www.tribal-institute.org/download/pl280_study.pdf.

6. *See, e.g.,* JERRY GARDNER, TRIBAL LAW & POLICY INST., IMPROVING THE RELATIONSHIP BETWEEN INDIAN NATIONS, THE FEDERAL GOVERNMENT, AND STATE GOVERNMENTS, <http://www.tribal-institute.org/articles/mou.htm> (calling for the "use of written cooperative agreements - such as Memorandums of Understanding (MOUs) - to improve the relationship between" state governments, the federal government, and Indian nations).

tion of how to start talking and say, “how can we work together or how can we be better at what we do? How can we help each other increase the ability to respond to the needs of the communities or the people we’re working with?”

Assuming that these two different systems can start to develop stronger relationships, what do you think state courts can learn about the administration of justice from tribal courts?

I think that they can learn that locking people up and punishing is not improving our society. It’s keeping people safe from some people, but I don’t think the majority of people in our jail systems, at least, are really a threat to society, to life and property. I know the local jail here is filled with driving after revocation and drunk drivers. I think there’s an ability for tribes to work with their spiritual beliefs, their traditions, their customs to deal with some of the underlying issues that cause these people to be in the behavioral patterns they are and I don’t think the state really does a good job of that. I think they tend to lock them up and hope that they’ve changed when they get out, but we know that hasn’t happened because we now incarcerate more people per capita than any country in the world.

Do you know of any examples of where a state court system has consciously tried to take a practice from tribal courts and incorporate it in its own system?

Absolutely. Judge Edward Brunner, who’s on the District Court of Appeals here in Wisconsin, employed a restorative justice process in a couple of different cases when he was on the circuit court bench, one of them involving the death of a young Indian girl at a house party. Of course, he had to impose the prison sentence, but stayed the sentence under certain conditions and he really worked with the victim’s family to ensure that their wishes and feelings were listened to, as well as the needs of the offender—trying to heal and make this a productive person again. I think that’s one of the underlying reasons he won the William Rehnquist Award.⁷

7. See Rosland B. Gammon, *Brunner receives national recognition*, Wis. L.J., Aug. 2, 2006, available at <http://www.wislawjournal.com/archive/2006/0802/brunner.html>.

What was the reaction, if you know, among other state court judges, when they saw this approach being used?

Well, he obviously got enough letters of support for the award and I know of other cases There was a young lady who was killed in a drunk driving accident who had a small child. The offender's sentence included having to keep a job and having to walk or ride his bike or somehow go past this accident scene everyday on his way to work as a reminder and to work and set aside money for the surviving child's college benefits. I think what state court judges can learn from us is some sort of creativity in working with the victims and the offenders and the public in general. The trouble is they're sometimes so bound by mandatory sentences.

That case you just described—the DWI case where the girl was killed—was that a state court case or a tribal court case?

State court. Judge Brunner handled that one also.

Do you see Judge Brunner's approach spreading to other judges?

I do. In fact, when we have these informal roundtable discussions between state and tribal courts, many of these state judges inquire if they can transfer their case or use tribal traditions or cultures or practices as part of the sentencing, such as sending a Native offender back to the tribe to go to sweat lodges and that sort of thing. We're getting a lot of inquiries about that.

Let me flip that question around then. In the state court systems, we feel like we're undergoing a period of change, where judges and lawyers are starting to talk about things like restorative justice and problem-solving justice and therapeutic jurisprudence, many of which have roots in traditional tribal justice. Some of those ideas have spawned specific practices, like drug courts, mental health courts, and such. Do you feel that these innovations taking place in the state courts can inform the work that's going on in tribal courts and is it appropriate for tribal courts to borrow lessons from the state courts about innovations that are taking place there?

I think any idea we can get from any place—whether it's a state court or any other institution or culture that works to protect women and children and to heal people who have addic-

tions and underlying issues—has value. I don't think it makes much difference where the source idea comes from; I think it's the result of the idea that's important. So yes, if they have an idea that works, I'm certainly open to trying anything that works, conventional or unconventional.

Again, in the state court systems, especially with groups like the Center for Court Innovation, we're always trying to innovate and change and reform and find better ways for the justice system to get better results. What do you feel the role of innovation is in tribal court systems and how does it fit in with the desire to retain traditional practices?

We've been innovative all of our lives. That's one of the reasons we're still here. We have overcome or survived tremendous oppressive tactics of the federal government. We've been invaded; we haven't been conquered. We've been innovative in ways of survival for centuries and so I think to hang on to old traditions could sometimes be harmful and I think we've always innovated ways to move forward and to look to the future. I think innovation is just part of us.

Do you feel that tribes are doing a good job of sharing these innovations with each other in the area of tribal justice? Do you think that the tribes are sharing this information so that everyone can take advantage of what's working?

I think we can do a much better job of sharing information not just between tribes, but within tribes. There are many great ideas being used and we hear about them at conferences. We should be hearing about them at staff meetings and we're not, so I think we can do a much better job of sharing innovative ideas. It's not that we have to copy the idea, but we take concepts and we work with them and we can manipulate them and mold those into our community. You know, it's like the bird doesn't use every stick it picks up to make a nest. It only takes the ones that fit its nest.

Do you have any specific ideas about how practitioners like yourself, or outside organizations like us, or the government, or others can work together to accomplish that, to share this information better?

I think through publications is one good thing. I think, not being fearful that someone is going to say, "You can't do that

because it violates some statute or some mandatory sentencing rule.” I think we just have to be open and have honest open dialogue, not keep things to ourselves. I always think if a person found a cure for all cancers and then decided he wasn’t going to share it unless he sold it; that would be a crime. I think we should share and we don’t have to copy the ideas or the innovations or the programs, but we certainly can gather thoughts and ideas and improve what we’re doing.

I’m also interested in the relationship between tribal law and tribal culture. How important do you feel tribal law is in supporting or restoring tribal culture?

That’s a tough question. The tribal law I think is absolutely necessary today because many tribes have, I hate to say lost, but misplaced the use of their culture and their traditional practices. So I think the law is very important, with the understanding that the law is simply a guideline. I don’t think it’s an absolute. Laws should have cultural components as far as, “What do you do when the law is broken? What did they do before?” I think you can blend the two together, but the law is necessary because the culture isn’t fully understood by all Native American people and it’s certainly not understood by non-Native American people.

I’d like to ask you about peacemaking. I was speaking with Judge Barbara Smith,⁸ and she mentioned that when she wanted to learn about peacemaking, she went to Wisconsin and you were one of her mentors in that area. Could you explain what peacemaking means to you and how it fits into tribal justice?

I sort of said this before. The adversarial system is very rigid; it has very rigid sets of policies and procedures in law and they all, especially in the criminal area, come down to a finding of guilt or innocence and of course “guilty” then leads to a sentencing, a punitive stage. Peacemaking doesn’t work that way. Peacemaking looks at the relationships that have been damaged. “What can we do to sort of repair this?” I don’t like “restore” because we can’t restore them back as if nothing happened, but maybe we can repair them and make them

8. [Ed. Note – This issue contains an interview with Barbara Smith, who currently serves as the Chief Justice of the Supreme Court of the Chickasaw Nation.]

stronger—look at the relationship of the parties involved, or the community involved, and how we get that to be better and stronger.

Peacemaking is more of an educational process than an adversarial process. In peacemaking we get to learn about the feelings of the other person; we get to learn ideas. Some of the peacemaking that I've been involved in, where people can simply be at each other's throats for years and years and years simply because they've never talked—it goes on to that same simple communication process of conversing with each other like you would build relationships between state and tribal agencies or practitioners. It's the same thing with peacemaking: it's about the relationships involved and less about the law. We find it extremely beneficial and not only that, but I think for future generations we're setting an example of how to resolve differences and disputes, rather than calling 911 or suing somebody. We're teaching our young ones that there is a different way, a better way. Will it work in every case? No. I'm not that idealistic to think that we can heal everybody or resolve every problem, but I think we could sell most of our prisons if we did more of this.

Do you feel that peacemaking can translate into the state court system?

Absolutely. It already has. They call it mediation; it's a form of peacemaking. Peacemaking's deeper than that, though. It goes down to—not so much compromise, but more understanding. But they're already using alternative methods of dispute resolution rather than pounding the gavel and making findings.

So you think expanding that kind of approach into more kinds of cases would be a way to get away from the punitive, adversarial nature of these cases?

Absolutely. In fact, I always hoped when I was a judge that I'd become unemployed because of peacemaking.

Any other thoughts you'd like to share about the state of tribal courts today and where you see them going?

I think we've been in sort of a cultural and traditional revival for some 20 years now. It took us a while to recover after

the Indian Reorganization Act⁹ and it took us a while to recover and establish our governments and survive, but I think we're starting now to look more at language, and traditions, and practices, and I think a lot of Native Americans are finding a lot of pride in that. I think they're finding a lot of sacredness in being different. I have a lot of hope for the future. I have a lot of hope, I think the traditional ways, or the traditional philosophies, the peacemaking processes, that sort of thing—those are ways to address some of those issues in our communities, especially the alcohol abuse, drug abuse, those sorts of things. We all know that the other system hasn't reduced any of those numbers at all, so I'm hopeful for the future and I hope more tribes incorporate their own justice systems, and not so much the adversarial system, but more of the: "How did they do it before the Europeans got here? What worked then? Can we use some of those things that worked then? Can we incorporate those into what we do today?" And reverse the roles and say, "our dispute resolution is the original dispute resolution and if our original stuff doesn't work, we'll have a trial and use the adversarial system as the ADR."

9. Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at §§ 25 U.S.C. 461-479 (2006)). Also referred to as the "Wheeler-Howard Act" or the "Indian New Deal," the Indian Reorganization Act, among other things, encouraged the creation of tribal constitutions (generally based on the American model). See, e.g., Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006).

INTERVIEW

BARBARA SMITH, CHIEF JUSTICE, CHICKASAW NATION SUPREME COURT, ADA, OKLAHOMA

Barbara Smith is Chief Justice of the Supreme Court of the Chickasaw Nation. She is currently serving her third three-year term on the Supreme Court. She previously served as District Court Judge for the Chickasaw Nation.

*Interviewed by Aaron Arnold**

In your experience, how important is it for tribal court judges to be members of the tribes in which they sit?

I think it's very important. The problem has been in recent years that a whole lot of tribes didn't have people they can draw from. The Chickasaw Nation—we're pretty fortunate because we have a tradition and history of being well-educated, so we have had people to draw from. If you're a tribal judge [for the Chickasaw Nation], you have to live within the nation boundaries. I was living in Norman [Oklahoma]; I had to move across the river into the nation in order to be a tribal judge.

When I first started I didn't think it really mattered, but the longer I have done this . . . I do see that it is important for judges to be Native first and I think it is important, really important if you can, to draw from your own citizenship for your tribal judges. Like the states or the United States, we don't

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