North Dakota Law Review

Volume 80 | Number 2 Article 2

2004

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Miller, Colin (2004) "Banishment from within and Without: Analyzing Indigenous Sentencing under International Human Rights Standards," *North Dakota Law Review*: Vol. 80: No. 2, Article 2.
Available at: https://commons.und.edu/ndlr/vol80/iss2/2

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BANISHMENT FROM WITHIN AND WITHOUT: ANALYZING INDIGENOUS SENTENCING UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS

COLIN MILLER

I. INTRODUCTION

Centuries of imperialism and forced assimilation have pushed indigenous cultures to the brink of extinction. An important part of this cultural genocide has involved "westernized" cultures subordinating indigenous penal codes and systems. Recently, tribal groups in countries such as Canada and the United States, dissatisfied with the effect of punitive legal systems on their members, have attempted to re-introduce ancient punishments such as banishment to rehabilitate their members. Several officials and commentators in these countries have responded that this form of punishment is cruel and unusual, violating national and international human rights standards.[1]

This paper will argue that banishment should be allowed and found consistent with human rights norms on one of two grounds. First, indigenous tribes should be able to defend banishment based on cultural relativism. While this defense is often used to defend pernicious practices, it is legitimate in the banishment context. Initially, indigenous groups validly view banishment as a less severe punishment than most of society because of a distinct world-view based on subsistence and living in harmony with the land. Also, because indigenous tribes are self-contained

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1. Critics have also leveled several other attacks against banishment that will not be addressed in this paper. First, some have argued that allowing banishment will undermine the universality—and thus the legitimacy—of mainstream sentencing guidelines. *See, e.g.*, John Balzar, *Two Alaska Indian Youths Banished to Islands for Robbery*, L.A. TIMES, July 15, 1994, at A3 (stating "[p]rosecutors objected to the experiment, arguing that it would open the door to all sorts of cultural exceptions and challenges to state law"). Others argued that the punishment was too lenient. *See, e.g.*, Michael Sangiacomo, *2 Youths Face Tribal Justice; May be Sentenced to Remote Islands*, PLAIN DEALER (Cleveland), Sept. 1, 1994, at 1A (noting "[o]thers look on the banishment as an extended vacation for the boys who grew up hunting and fishing on the remote islands") [hereinafter Sangiacomo, *2 Youths*]. In the case of the banishment of two Alaska teens, there were questions of whether the teens were actually isolated from society and each other, especially after they were moved closer to their reservation after it was discovered that they were on federal land. William C. Bradford, *Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution*, 76 N.D. L. REV. 551, 595 (2000). Finally, there are questions of double jeopardy because—again in the case of the Alaska teens—banishment ended up not being a substitute for traditional sentencing. *Id.* at 596 n.246. Instead, the boys were sentenced to time in prison even after completing their banishment. *Id.* at 596.

and not covered under majoritarian laws, recognizing a cultural relativism defense would not infringe upon the rights of nonindigenous citizens.

Second, countries should ratify recent "group rights" documents that give indigenous groups sovereignty and an international juridical personality. While these documents are not binding, they could eventually be incorporated into customary international law. Nations should ratify these documents to prevent the extinction of indigenous cultures based on both deontological and teleological theories.

Part I of this paper will look at the history, aspects, and purposes of banishment in indigenous cultures. Particularly, it will discuss modern applications of this sentence resulting from tribal circle sentencing. Part II will discuss the arguments raised against banishment. It will discuss how banishment potentially violates international human rights standards under the literal language of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment,[2] the Standard Minimum Rules for the Treatment of Prisoners,[3] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[4] and the International Covenant on Civil and Political Rights.[5] Finally, Part III will analyze why banishment should be allowed. It will first focus on the unique powerlessness, isolation, and near extinction of indigenous groups. Next, it will address the recent "third generation" group rights documents under consideration by several human rights bodies and why these documents should be adopted and voluntarily incorporated to create customary international law supporting alternative indigenous sentencing. Finally, it will consider why indigenous groups should validly be able to use cultural relativism to defend banishment.

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2. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988) [hereinafter Body of Principles].

3. Standard Minimum Rules for Treatment of Prisoners, E.S.C. Res. 663 (XXIV) C, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957) [hereinafter Standard Minimum Rules].

4. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72 (1984) [hereinafter Convention Against Torture].

5. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1996) [hereinafter ICCPR].

II. THE HISTORY, ASPECTS, AND PURPOSES OF BANISHMENT

A. THE HISTORY OF BANISHMENT

Societies employing widely divergent governments and value systems have employed banishment in different forms;[6] although in modern society, "the punishment is not allowed . . . ."[7] Banishment perhaps is most deeply rooted in certain tribal cultures in the Americas, which have used the punishment for centuries.[8] For instance, the Cheyenne Law of Killing makes reference to the traditional punishment of banishment for murder.[9]

B. MODERN APPLICATIONS OF BANISHMENT

In Canada and the United States, majoritarian courts have begun to transfer cases involving indigenous defendants to tribal courts, which have begun re-imposing the previously dormant sentence of banishment.[10] In Canada, tribes have begun reclaiming judicial sovereignty through the proliferation of sentencing circles.[11] The key features of these circles are that the community meets as a group to decide on sentencing, the offender consents to the sentencing circle being conducted, and sentencing is achieved by consensus of the circle. The primary goals these circles seek to achieve are the restoration of the victim and re-integration of the offender into the community. In *R. v. Taylor*,[12] a Lac La Ronge Indian found guilty of sexual

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6. *See, e.g.*. Rutherford v. Blankenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979); Stephanie J. Kim, Note, *Sentencing and Cultural Differences: Banishment of the American Indian Robbers*, 29 JOHN MARSHALL L. REV. 239, 256 (1995) (noting that "[b]anishment as a punishment has existed throughout the world since ancient times"); Balzar, *supra* note 1, at A3 (indicating that [a]mong others, ancient Greeks employed banishment for severe crimes, and England previously banished criminals to the United States and Australia").

7. Kim, *supra* note 6, at 260; *see also Blankenship*, 468 F. Supp. at 1360-61 (holding that banishing an individual from a state was against public policy); State v. Doughtie, 74 S.E.2d 922, 923 (N.C. 1953) (holding that North Carolina courts could not impose a sentence of banishment from the state). These latter cases refer to the practice of banishment by the majoritarian criminal justice system. There, banishment merely refers to prohibiting a United States citizen from returning to a particular city or state. As will be seen, this form of punishment is much less severe than the indigenous practice of banishment in degree if not in permanence.

8. R. v. Taylor, [1997] 163 Sask. R. 29 (Sask. C.A.), WestLaw, SASK-CS-ALL database, at *2 (stating that "First Nations people have for centuries used banishment as a method of redress for wrongdoing"). Because many indigenous cultures highly revere nature, they used banishment rather than creating prisons that remove the offender from nature. *See* Kim, *supra* note 6, at 256 (stating that "[t]he absence of prisons prior to Columbus's arrival called for these forms of punishment"). Banishment calls for the offender to reconnect with nature rather than to disconnect through physical barriers such as prison walls.

9. K.N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY 167 (1941).

10. Luke McNamara, *Appellate Scrutiny of Circle Sentencing*, 27 MAN. L.J. 209, 209 (2000).

11. *Id.*

12. *Taylor*, at *1 (WestLaw, SASK-CS-ALL database). The importance of these circles in reclaiming indigenous culture merits further discussion. Sentencing circles are a new form of

assault requested and received a sentencing circle.[13] The sentencing circle eventually agreed[14] on a sentence of "banishment to a remote island in northern Saskatchewan for one year, followed by probation for three years."[15] Similarly, in *R. v. Lucas*,[16] an indigenous sexual offender in the Yukon

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restorative justice that have recently been adopted in Minnesota and Canada. These circles combine Native American and Aboriginal practices with majoritarian Western legal conceptions. They were initiated because of the failures of the majoritarian justice system and "emphasize[] rehabilitation and restoration over retribution." Rashmi Goel, *No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases*, 15 WISC. WOMEN'S L.J. 293, 317 (2000). While there are many variations on circle sentencing, the basic structure of the circles utilized by the First Nation aboriginals will be presented as an example.

An accused pleads guilty to a crime in criminal court and voluntarily decides to attend a sentencing circle if the prosecutor consents and certain criteria are met. These circles mainly exist in small, tightly knit communities such as reservations. At a minimum, circles include the offender, victim, judge, prosecutor, and members of the community. Both the victim and offender may invite anyone else—such as family and friends—to sit in the circle. Typically, the offender and victim also each have healing circles with those they will invite to the sentencing circle. The purpose of these circles is for the victim to express her feelings to those she loves and trusts before going before the community and for the offender to begin taking accountability for her actions. Any community member may come to participate in the sentencing circle, and social workers, psychologists and other experts may also be included, if necessary. *See id.* at 313.

All of these individuals sit in a circle, facing one another. *Id.* at 314. Often, each simply sits in a chair with no barrier separating individuals. *Id.* One at a time, each individual is given the opportunity to express her opinion and be heard by the others. *Id.* Often, some symbolic item is passed around the circle, and the holder is the only one who can speak. *Id.* Each individual is treated equally, and no individual has more power than anyone else. *Id.* After each individual has spoken, the group reaches consensus on what sanction will best (1) restore the victim to her prior position; (2) rehabilitate the offender and reintegrate her back into the community; and (3) serve the needs of the community. *See id.* at 313-16.

The judge then later records the sentence at the courthouse, and, usually, follow up circles are held in subsequent months to check on the progress of both the victim and offender. *Id.* at 314. These circles have had well over a ninety percent success rate in Canada. *Id.*

Almost universally, those involved with circle sentencing have stated that the purpose of the circles is to allow for the community to come up with creative sanctions not recognized by the traditional justice system. Kay Pranis, *Peacemaking Circles: Restorative Justice in Practice Allows Victims and Offenders to Begin Repairing the Harm*, CORRECTIONS TODAY, Dec. 1997, at 75.

This purpose is not merely related to the outcome reached but also to the collaborative process needed to achieve it. This form of justice is seen as belonging to the community; circle sentencing "is an exercise in building community, because it brings community members together in a forum which . . . encourages each community member to offer his or her gifts or capacities to the process of finding solutions and implementing them." *Id.* at 76. The point of the process is that community members are confronted with a different factual circumstance in each circle and must craft a specific remedy that meets the need of the victim and offender involved. *See id.* (stating that "[e]ach time the community gathers around a difficult problem and finds a way to make the situation better, the community builds its capacity to solve problems").

13. *Taylor*, at *3 (WestLaw, SASK-CS-ALL database).

14. Actually, the sentencing circle reached consensus over the objection of the Crown—the prosecutor in Canada—forming an additional basis upon which to appeal the sentence. *Taylor*, at *3-*4 (WestLaw, SASK-CS-ALL database).

15. McNamara, *supra* note 10, at 231.

16. [1995] 56 B.C.A.C. 141 (Y.T. C.A.), WestLaw, CAN-ALLCASES database, at *5. Although the court found banishment to be primarily rehabilitative, it is important to note that indigenous justice systems also included punitive sanctions: "Retaliatory (private) and retributive

Territory was "'banished' for a period of 12 months . . . to a First Nation 'bush settlement' called No-Gold"[17] by a quasi-sentencing circle.[18]

The United States had its first modern experience with this form of banishment in 1994 with the sentencing of two Tlingit teenagers (Guthrie and Roberts) convicted of armed robbery and assault with a deadly weapon.[19] Because the crime did not occur on a reservation, the district attorneys initially charged the two.[20] Subsequently, a "Tlingit elder . . . secured a form of plea bargain unique in American history."[21] The Superior Court judge agreed that, upon guilty pleas by Guthrie and Roberts and payment of a $25,000 bond, he would release the two to "the Kuye'di Kuiu Kwaan Tribal Court (Tlingit TPM court)."[22] This transfer was conditioned on the understanding that the court would impose a "sentence of a year-long banishment to make Guthrie and Roberts ruminate on their crime, purify their spirits, and make restitution to [the victim]."[23]

C. ASPECTS OF BANISHMENT

While the aspects of the punishment vary among tribes,[24] certain central features can be ascertained from the recent banishments in Canada

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(public) death and mutilation were also known as forms of 'punishment.'" Samuel J. Brakel, *American Indian Tribal Courts*, in INDIANS AND CRIMINAL JUSTICE 145, 149 (Laurence French ed., 1982).

17. McNamara, *supra* note 10, at 214.

18. *Id.* As in *Taylor*, the Crown dissented, this time "not support[ing] the holding of a circle." *Id.* at 213. While a literal sentencing circle was not held, "[a]ll persons who were present and thought to be of importance by the accused and his counsel were heard. They were sworn at once and sat as a group and shared each other's company while testifying. Each was able to defer to another in answering questions." *Id.* at 214 (quoting R. v. Lucas, [1995] 56 B.C.A.C. 141, at para.1). While this sentencing deviated from the sentencing circle form, "the disposition clearly reflected the principles of community-based and culturally appropriate sentencing." *Id.*

19. Balzar, *supra* note 1, at A1. The two teenagers called for a pizza and then assaulted the deliveryman from behind with a baseball bat. The teens then robbed their victim, and the attack "fractur[ed] his skull in multiple places and le[ft] him deaf and partially blind." Bradford, *supra* note 1, at 590.

20. The teens were charged "as adults with first-degree armed robbery and assault with a deadly weapon. Under Washington law, these charges carried sentences of three to five and one-half years in prison upon conviction." Bradford, *supra* note 1, at 590.

21. *Id.* at 590-91.

22. *Id.* at 591. The case was unique because, "in the post-Crow Dog era no state court had ever previously referred a criminal case over which it had original jurisdiction and which arose off-reservation to an Indian tribal court." *Id.* at 591 n.215.

23. *Id.* at 591. The elders also had to "promise[] that Guthrie and Roberts, while banished, would cut enough pine logs so that upon their restoration to the tribe they would be able to build [the victim] a new duplex and sell enough lumber to pay for the $3,000 worth of uncovered medical bills." *Id.* at 591 n.217.

24. For instance, the Cheyenne Law of Killing states that "[b]anishment involves permanent disability to attend renewal of the Arrows, or to eat or smoke from a Cheyenne utensil without polluting it. It involves during the period of effective banishment disability to acquire coup honors [or other civil honors, or to officially perform acts of chieftainship ? but not disability to

and the United States. In *R. v. Taylor*, Taylor was clandestinely taken "to a remote location chosen by the Justice Committee' (composed of tribal officials).[25] Once there, Taylor had to "remain within a two mile radius of the cabin at all times unless given permission by the Chairman of the . . . Justice Committee."[26] The Committee was required to provide Taylor with (1) a cabin with a wood stove, (2) "sufficient utensils for cooking and eating and storing of water, (3) sufficient tools for the cutting of fire wood, [and] (4) sufficient material for snaring of animals for food."[27]

With these tools, Taylor was supposed to make additions to the cabin he was given—such as installing insulation—and eventually build himself a new cabin.[28] Also, none of these tools were to be "gas or electrical powered . . . unless authorized by the Justice Committee or Probation Services."[29] Taylor was also "responsible for his own clothing while at the cabin."[30]

At the same time, the Committee provided Taylor with "sufficient food every three weeks to allow for . . . proper sustenance. . . ."[31] Taylor was also provided with a first aid kit and course materials for anger management, alcoholism, and general education.[32] He was allowed to procure (at his own expense) a two-way radio for cases of emergency, and a resource person visited him to check his status.[33] Otherwise, Taylor was to have no contact with any persons while banished except those persons authorized to visit him by the Committee or Probation Services and members of his immediate family.[34] Family members were limited to one visit per month for three hours.[35]

The period of banishment was approximately one year.[36] A few members of the sentencing circle noted that the sentence was particularly harsh

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effectively engage in ordinary civil transactions of marriage, gift, and the like ?]". LLEWELLYN & HOEBEL, *supra* note 9, at 167 (alterations in original).

25. R. v. Taylor, [1997] 163 Sask. R. 29 (Sask. C.A.), WestLaw, SASK-CS-ALL database, at *11.

26. *Id.* at *13.

27. *Id.*

28. *Id.* at *14.

29. *Id.*

30. *Id.*

31. *Id.* at *13.

32. *Id.*

33. *Id.* at *13-*14.

34. *Id.* at *13.

35. *Id.* at *13-*14.

36. *Id.* at *12.

and more suspect than prior banishments because of the severe winter conditions in Northern Saskatchewan.[37]

In the case of the Tlingit teenagers, they "were taken to a fishing boat for transport to . . . unidentified islands" off the Alaskan coast immediately after sentencing.[38] The teenagers were to remain on the islands for twelve to eighteen months before being re-evaluated by the Superior Court.[39] Tribal elders provided the offenders with a limited supply of food for a couple of weeks and "primitive" tools for hunting (such as fishing poles) and cooking.[40] Unlike in *Taylor*, the teenagers were not given food beyond this initial period.[41] The elders also assisted the offenders in building twelve-by-eighteen foot one-room shelters with tarp roofs.[42] Finally, elders gave the offenders two-way radios to communicate with the outside world in case of emergency.[43]

The boys were only to take trips off the island when there were "medical emergencies and then under very strict guidelines."[44] There were supposed to be no visitors to the island except elders checking on the boys' status; unfortunately, this condition was breached, especially after the boys had to be moved much closer to the mainland after it was discovered that they were on federal land.[45]

D. PURPOSES OF BANISHMENT

The largest dispute in the *Taylor* case was whether banishment was primarily punitive or rehabilitative.[46] If the punishment was more punitive, it would be more susceptible to classification as cruel and unusual punishment and less defensible as necessary to preserve indigenous culture.[47] The

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37. *Id.*

38. *Experiment in Tribal Justice: 2 Youths are Banished*, N.Y. TIMES, Sept. 3, 1994, § 1, at 6

39. Thomas W. Haines, *"Sorry Isn't Enough"—Contrite Kids Welcome Tribal Judgment*, SEATTLE TIMES, July 16, 1994, at A1. Banishment was not always temporary in certain tribes. *See Justice Banished*, PLAIN DEALER (Cleveland), Aug. 13, 1995, at 2C (stating "[i]n ancient times, driving a person out of his community for a crime was akin to a sentence of death").

40. Balzar, *supra* note 1, at A3; *Tribe Banishes Duo to Alaskan Islands*, WASH. POST, Sept. 4, 1994, at A30.

41. Balzar, *supra* note 1, at A3.

42. Bradford, *supra* note 1, at 595.

43. Michael Sangiacomo, *A Different Kind of Justice: Alaskan Indian Court May Open Door to Alternatives*, PLAIN DEALER (Cleveland), Sept. 11, 1994, at 1A [hereinafter Sangiacomo, *Different*].

44. Michael Sangiacomo, *Judge Admits Teens Banishment a Failure*, PLAIN DEALER (Cleveland), Aug. 30, 1995, at 4A.

45. *Id.*

46. R. v. Taylor, [1997] 163 Sask. R. 29 (Sask. C.A.), WestLaw, SASK-CS-ALL database, at *19.

47. *Id.*

Saskatchewan Court of Appeals decided not to classify banishment as punitive, holding that "banishment . . . tends to be more an individualized measure having as its central purpose the influencing of the offender's future behaviour . . . than a punitive measure . . . ."[48] Native Americans in the United States have also "used this traditional form of punishment for rehabilitative purposes."[49]

It is important to note that individual rehabilitation is only one goal of the punishment. The punishment is also intended to restore the victim to his previous position and, ultimately, to re-integrate the offender back into the tribe as a productive member of the community.[50] The Cheyenne Law of Killing describes banishment "combined with an almost certain . . . commutation []as a technique of multiple excellence. By removing the murderer it lessened provocation to revenge; it disciplined the offender; allowance was made for the return of the culprit; but only when dangers of social disruption were over."[51]

The comments of those involved in the banishment of the Tlingit teenagers confirm the rehabilitative, restorative, and re-integrative goals of the punishment. Roberts, one of the banished teens, "said his year of banishment transformed him. Away from the 'negativity' of friends, troubles and temptations, he faced his own demons—and resolved to change. . . ."[52] His comments also revealed the relevance of the punishment to indigenous culture: "It was a time for self-respect, introspection, purification. It helped me get back to my roots," he said.[53] Instead of being separated from nature through the prison artifice, Roberts was able to reconnect with the pureness and primacy of nature.

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48. *Id.*

49. Kim, *supra* note 6, at 256.

50. *See* RENNARD STRICKLAND, FIRE AND THE SPIRITS 168-74 (1975); Kim, *supra* note 6 (stating that "[t]he American Indian approach to criminal justice called for rehabilitation of the criminal and assistance for the victim in order for the tribe to accept the criminal back into their tribal group").

51. LLEWELLYN & HOEBEL, *supra* note 9, at 158. Contrast this with the permanent banishment decried by the Supreme Court. For instance, in *Trop v. Dulles*, the Court found that permanent banishment and denationalization from the United States was cruel and unusual because a denationalized citizen is stateless, "a condition deplored in the international community of democracies." 356 U.S. 86, 102 (1958). The Court also found that denationalization was cruel and unusual because it "subjects the individual to a fate of ever-increasing fear and distress." *Id.* at 98-99. The banishment in this case was permanent; the banished individual could never again regain his United States citizenship. Conversely, as previously noted, the central goal of banishment is the ultimate rehabilitation and re-integration of the offender back into the tribe.

52. Debra Carlton Harrell, *Tlingit Man Says He's Transformed After Year Alone; The Lessons of Banishment*, SEATTLE POST-INTELLIGENCER, Jan. 15, 1998, at A1.

53. *Id.*

The superior court judge who referred the case to circle sentencing concurred, stating that "he believe[d] Roberts' banishment helped smooth the way for his reform."[54] The mother of the other banished teen concurred, stating she was "really happy that the banishment took place . . . [i]t was a turning point in Simon's life."[55]

III. THE ARGUMENT AGAINST BANISHMENT

A. DOMESTIC CHALLENGES TO BANISHMENT

Several sources have objected to the recent imposition of banishment by tribal courts in Canada and the United States based on domestic law. After the sentencing circle imposed banishment in *R. v. Taylor*,[56] the Crown appealed on the ground that the punishment was punitive and constituted cruel and unusual punishment.[57] While Judge Bayda of the Saskatchewan Court of Appeals ultimately found the banishment to be a legitimate punishment, he recognized that he was doing so on "limited information" and further acknowledged that banishment was suspect because it involved "deprivation[,]. . . [s]partan amenities, [and] lack of intimate personal contact . . . ."[58] Bayda was also careful to limit his decision to the particular conditions of banishment in the case before him, leaving open the possibility that slightly more severe forms of banishment could be found unconstitutional.[59]

In Canada, then, banishment could ultimately be found unconstitutional through appellate review. In this case, tribes would be able to challenge such a decision in the Canadian Supreme Court. The Canadian Congress could also proscribe banishment because "[f]ederal paramountcy and the plenary doctrine authorizing a congressional override are reflected in Canada to a degree with relevant variations, although [it] also ha[s] constitutional protection for aboriginal and treaty rights."[60] Canada can thus regulate tribes under the Indian Act, but it usually is less coercive, often engaging in "direct negotiations" with tribes.[61]

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54. *Id.*

55. *Id.*

56. R. v. Taylor, [1997] 163 Sask. R. 29 (Sask. C.A.), WestLaw, SASK-CS-ALL database, at *3.

57. *Id.* at *19.

58. *Id.*

59. *Id.* at *19-*20. Judge Bayda also cited *R. v. Malboeuf* as an example of a case where the banishment was proper. *Id.* (citing *Malboeuf*, [1982] 16 Sask. R. 77 (Sask. C.A.)).

60. Brad W. Morse, *A View From the North: Aboriginal and Treaty Issues in Canada*, 7 ST. THOMAS L. REV. 671, 676 (1995).

61. *Id.* at 677.

In the United States, others responded similarly to the banishment of the Tlingit teenagers.[62] At least one court in the United States has, at least partially, found that a tribal court could not impose a sentence under which "the defendant was penalized more harshly because she entered the alternative court than someone charged with an identical offense whom did not enter the alternative court."[63] Another has found that sentencing circles may not deviate from established sentencing guidelines absent categorical authorization from the prosecutor.[64]

There are parallel tracks that banishment cases can follow. When a case is referred from the traditional justice system to a sentencing circle, the circle must make a recommendation that the judge then can translate into an order in state or federal court.[65] Thus, if a judge entered a circle's recommendation of banishment and an appellate court found the punishment to be

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62. *See, e.g.*, Bradford, *supra* note 1, at 591-92 (stating that "critics condemned banishment as a cruel and unusual punishment in violation of the constitutional rights of the defendants or as a violation of Alaskan child welfare laws").

63. Blackfeet Tribe v. Rutherford, No. 00-AC-41 (Blackfeet Ct. App. Aug. 16, 2000), summary *available at* http://www.american.edu/academic.depts/spa/justice/publications/2003caselaw1.pdf (last visited Aug. 1, 2003). While the decision was not clear in its justification, it did seem to indicate that the problem was not solely with the sentence imposed but with the fact that that the offender's due process rights were violated. *Id.*

64. In 2000, Minnesota adopted sentencing circles. In *State v. Pearson*, Pearson "pleaded guilty to felony theft by wrongfully obtaining public assistance." 609 N.W.2d 630, 631 (Minn. Ct. App. 2000) *rev'd*, 636 N.W.2d 845 (Minn. Ct. App. 2002). The court then referred the case to a sentencing circle that "recommended a stay of adjudication . . . and that Pearson be required to pay restitution, obtain credit counseling and financial management help, perform community volunteer work, and participate in support/follow-up circles." *Id.* at 632. The trial court then adopted this sentence and stayed adjudication, a result it ordinarily could not have ordered because there were not "special circumstances." *Id.* at 632-34. The Court of Appeals reversed, holding that the statute authorizing restorative justice programs did "not indicate a legislative intent to authorize restorative justice programs to assign a sanction that would be an improper sentence if imposed by the district court." *Id.* at 633.

The Supreme Court of Minnesota then reversed, but only on the basis that, in this specific case, the state agreed that there would be no limit on the sentencing circle's ability to craft an alternative sanction unauthorized by law. *See* State v. Pearson, 637 N.W.2d 845, 848 (Minn. 2002). The decision explicitly acknowledged that it was not resolving the broader question of whether sentencing circles could adopt alternative sanctions where the state only conditionally consented to circle adjudication. *See id.* (holding that "we need not attempt . . . to answer the questions left open by the legislature . . .").

In a special concurrence, Justices Page and Anderson argued that the statute should be construed broadly to allow sentencing circles to impose sanctions otherwise unauthorized by law. They identified the central purpose of sentencing circles as reintegrating the offender back into the community by allowing community members "to actively and meaningfully participate in the criminal justice process." *Id.* at 850 (Page, J., concurring specially). While this case involved a proescutorial challenge on the basis of the tribal sentence being too light, it also indicates that the traditional justice system will not be entirely accommodating to the alternative sentence of banishment. One might expect, then, that it will not be long before the government brings a human rights claim against a Native American tribe for banishing one of its members.

65. *See Pearson*, 637 N.W.2d at 851.

unconstitutional, the decision could then be challenged in the Supreme Court or a state court of last resort.[66]

If, however, the case originated in a tribal forum, the courts would likely have no jurisdiction to hear a challenge to a sentence of banishment. In *Santa Clara Pueblo v. Martinez*,[67] the Supreme Court held that federal courts have no jurisdiction over almost all complaints under the Indian Civil Rights Act;[68] instead, federal courts can only hear indigenous habeas cases.[69]

Still, there is precedent holding that habeas corpus review exists for certain types of banishment. In 1991, the Senecas of the Tonawanda Reservation banished "five tribal members who sought to overthrow the traditional government of chiefs . . . ."[70] These members were found guilty of treason and "ordered . . . banished from Tonowanda Seneca Territory."[71] The banishment order to each of the members informed them as follows.

> [Y]our name is removed from the tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian Citizenship and permanently lose any and all rights afforded our members. YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY.[72]

Under the literal wording of the Indian Civil Rights Act, habeas review is only available when the petitioner has been "detained,"[73] but courts have interpreted this provision to confer jurisdiction when there is a sufficient deprivation of liberty.[74] While the district court found no jurisdiction, in *Poodry v. Tonawanda Band of Seneca Indians*,[75] "[t]he Second Circuit Court of Appeals . . . reversed this ruling and held that the banishment decision. . . could be reviewed by the federal court."[76] The case was then

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66. *See id.*

67. 436 U.S. 49 (1978).

68. *Santa Clara Pueblo*, 436 U.S. at 72.

69. *Id.*

70. Robert B. Porter, *Building a New Longhouse : The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 BUFF L. REV. 805, 877 (1998).

71. *Id.* at 878.

72. *Id.* at 878 n.337 (quoting *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 895 (2d Cir. 1996) (emphasis in original)).

73. *See* 25 U.S.C. §1303 (1994) (stating that habeas corpus review is available to challenge detention).

74. Porter, *supra* note 70, at 879.

75. 85 F.3d 874, 895 (2d Cir. 1996).

76. Porter, *supra* note 70, at 879.

remanded, and the matter has not yet been resolved, with the tribe still contending it has the right to impose banishment.[77] If such a challenge were made to a sentence of temporary banishment, similar litigation might ensue, with the tribe defending its sovereignty in federal court.

Conversely, other precedent implies federal habeas review might not be available. In *Shenandoah v. United States*,[78] a federal district court denied habeas review to tribal members who suffered from a less severe form of banishment.[79] These members were not asked to leave the reservation, and they retained some tribal rights (such as heath·care) while losing others only temporarily.[80] Thus, although they lost their "voice . . . preventing [them] from participating in the Nation's political process and the Nation's religious, cultural and social events," tribal authorities "offered a process to restore plaintiffs' voices . . . ."[81] The court found the banishment in *Poodry* to be "much more severe"[82] and denied habeas review, relying heavily on the fact that "the punishments imposed were not permanent . . . ."[83]

Because the banishment analyzed in this paper is similarly temporary, a court could deny habeas review. Further, "[t]he Poodry [*sic*] decision was unprecedented," and no subsequent case has allowed habeas review of any form of banishment.[84] Still, the banishment analyzed in this paper is certainly more severe than the banishment in *Shenandoah* as it involves temporary denial of all tribal rights and physical removal from the reservation.

Even if tribal banishment cannot be reviewed and found unconstitutional, Congress could easily pass legislation prohibiting banishment under its plenary power over Native American tribes.[85] A state could also potentially proscribe banishment through legislation although the Indian Civil Rights Act has practically foreclosed most state regulation of tribal

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77. *Id.* at 880.

78. No. 96-CV-258 (RSP/GJD), 1997 WL 214947 (N.D.N.Y. Apr. 14, 1997).

79. Porter, *supra* note 70, at 861-62.

80. *Id.*

81. *Shenandoah*, 1997 WL 214947, at *7.

82. *Id.* at *8.

83. Porter, *supra* note 70, at 862. Although part of the defense was also that no "actual banishment had occurred," this should not be relevant. *Id.* In *Poodry*, the court held that "the existence of the orders of permanent banishment alone—even absent attempts to enforce them—would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 895 (2d Cir. 1996).

84. Porter, *supra* note 70, at 879.

85. *See* Edo Banach, *The Roma and the Native Americans: Encapsulated Communities Within Larger Constitutional Regimes*, 14 FLA. J. INT'L L. 353, 361 (stating that "the United States Supreme Court acknowledges that Congress has plenary power to legislate over Indians and Indian tribes").

affairs.[86] Unfortunately, in either case, Native American tribes would be unlikely to have any domestic redress besides convincing the legislature to repeal the legislation.[87]

B. POTENTIAL INTERNATIONAL CHALLENGES TO BANISHMENT

Should a government similarly challenge banishment in an international forum, it would likely have much support for finding the punishment violates international human rights standards.

1. *Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment*

If Canada or the United States decided to challenge the validity of tribal banishment in an international forum, they would find literal support in the Body of Principles for the Protection of all Persons Under any Form of Detention or Imprisonment.[88] The United Nations General Assembly adopted this document on December 9, 1988.[89] Principle 1 of the treaty begins with the general proposition that "[a]ll persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person."[90]

One specific principle arguably violated in banishment is the requirement that "[a] detained or imprisoned person . . . have the right to be visited by and to correspond with, in particular, members of his family and . . . be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."[91] Of course, under banishment, the entire purpose of the sentence is to isolate the offender completely for a term of months. In *Taylor*, the offender could only have visits from his immediate family while the Tlingit teens were supposed to have no personal visits.[92] While a certain

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86. Previously, "Public Law 280 . . . gave the states power . . . over Native Americans on Native American land." Banach, *supra* note 85, at 364. This law was "amended by the Indian Civil Rights Act . . . , which prevented a state from assuming jurisdiction over reservations without the consent of its Indian tribes." *Id.* at 364 n.75. Further, the "Supreme Court has made it clear that the states barely have any actual authority over the sovereign tribes. *Id.* at 364.

87. *Id.* at 365.

88. Banished offenders should be protected under this treaty because the term "[i]mprisoned person" includes any person deprived of personal liberty as a result of conviction for an offense. Body of Principles, *supra* note 2, at (c). Certainly, individuals confined to an island or bush settlement are deprived of the requisite personal liberty.

89. Tullio Treves, *The UN Body of Principles for the Protection of Detained or Imprisoned Persons*, 84 AM. J. INT'L L. 578, 578 (1990).

90. Body of Principles, *supra* note 2, at Principle 1.

91. *Id.* at Principle 19.

92. *See supra* notes 46 and 48 and accompanying text.

degree of isolation is inherently necessary in banishment, it would be difficult to say that the near exclusion of contact with the outside world in these cases was "reasonable."

Principle 24 provides a further opportunity to find banishment unacceptable. That principle requires that "medical care and treatment . . . be provided whenever necessary" to prisoners.[93] This principle would seem to be especially essential in the case of individuals banished to a freezing Alaskan island with minimal provision of food and heating sources. In the case of the banished Tlingit teens, "[b]oth boys . . . had physical problems during their banishment."[94] Roberts "was rushed to a hospital with appendicitis," and later "suffer[ed] from an infected toe and scabies" without treatment.[95] Meanwhile, officials had to take Guthrie off the island to remove a wisdom tooth, and he later had problems with another wisdom tooth that had to be removed.[96]

While none of these maladies presented an extreme emergency, one could easily imagine a situation where a banished offender suffered a heart attack, stroke, or other illness that required immediate attention. Because banished offenders need to be isolated from society, they are necessarily placed at a great distance from "civilization"—"15 hours away by boat . . ." in the case of the Tlingit teenagers.[97] This distance could realistically be expected to prevent adequate treatment in cases of emergency. Guthrie recounted an experience where he was hiking and fell into a swamp hole, soaking his clothing. He explained how "it was snowing and it was really cold . . . . The added weight . . . slowed me down a lot. It started to get dark, and I could have died then."[98] If Guthrie had been farther away from his cabin, he indeed could have died with no assistance for over half a day.

Another principle that would seem facially to prohibit banishment is Principle 6, which holds that "[n]o person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or

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93. Body of Principles, *supra* note 2, at Principle 19.

94. Michael Sangiacomo, *'Banishment' of Indian Teens Under Review; Lead Tribal Judge Says Process Has Been Corrupted*, PLAIN DEALER (Cleveland), Aug. 9, 1995, at 13A [hereinafter Sangiacomo, *Banishment*].

95. *Id.*

96. *Id.*

97. *Id.* The boys were later moved to an island ten minutes away when it was discovered that they were on federal land. *Id.* This presented many problems, however, as the teenagers began to get visits from both relatives and strangers, undermining the purposes of banishment. *Id.* This led to tribal judges trying to work out a plan where the teenagers would be moved farther away. *Id.*

98. THE EAGLE AND THE RAVEN: A PURIFICATION BY BANISHMENT (Vision Maker Video 1996).

degrading treatment or punishment."[99] As important as this language is the universality of the prohibition, "no circumstances whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment."[100] This proscription is arguably even broader than the proscription contained in the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment for two reasons. First, the Convention is absolute, allowing for no exceptions. Second, the footnote to Principle 6 indicates that "[t]he term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses . . . ."[101]

Of course, the problem with this and other principles is that the Body of Principles is not a treaty, so it has "no binding force as such."[102] Still, the document was approved "by consensus by the United Nations General Assembly"—of which both Canada and the United States are members—and there is a widespread belief that the Principles may lead "to the crystallization of some principles into customary law."[103]

2. *The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture) and the International Covenant on Civil and Political Rights*

The Convention Against Torture came into force in 1984.[104] Canada ratified the Convention on June 24, 1987,[105] and the treaty came into force in the United States on November 20, 1994.[106] While banishment could not be seen as a form of torture,[107] it could be construed as an "act[] of cruel,

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99. Body of Principles, *supra* note 2, at Principle 6.

100. *Id.*

101. *Id.*

102. Treves, *supra* note 89, at 585.

103. *Id.*

104. Nan D. Miller, Comment, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L L.J. 139, 141 n.10 (1995).

105. Lawyers' Right Watch Canada, *International Law**, *at* http://www.lrwc.org/standard.php (last visited April 10, 2003) [hereinafter Right Watch].

106. DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS 125 (3. ed. 2001).

107. Under the Convention:

> "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

inhuman or degrading treatment or punishment . . . "[108] under the Convention. This is especially true because the Convention covers "not only . . . punishment, but also . . . other cruel, inhuman, and degrading treatments and is therefore far broader than its antecedents."[109] Regrettably, "as with other human rights documents, the Convention does not define" these forms of punishment, so "the international standard for the humane treatment of prisoners must be derived from the work of the interpreting bodies."[110]

a. European Court of Human Rights Cases

The body that has principally interpreted a similar provision has been the European Court of Human Rights. In *Soering v. United Kingdom*,[111] the court held that inhuman treatment must be evaluated by the totality of the circumstances.[112] While this test might still be ambiguous, the court also held that "inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical."[113] This standard seems to relate to the mindset of the judges imposing punishments. If a judge intends to cause severe suffering to an offender, she violates the Convention. On this level, at least, it seems that a government could legitimately claim cultural relativism as a defense. If a government—as represented by its judges—legitimately feels a punishment will not cause severe suffering based on its culture, it is hard to argue it has acted deliberately.

Still, the prisoner is offered further protection by *Soering*, which held that "treatment of an individual may be said to be degrading if it grossly humiliates [the prisoner] before others or drives him to act against his own will or conscience."[114] By focusing on the humiliation of the victim, this standard will often preclude a governmental cultural relativism defense

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Convention Against Torture, *supra* note 4, at art. 1. There is no coercion or intent to procure a confession under banishment because the offender has already admitted his guilt. It would also be difficult to argue that tribal authorities intend to inflict severe pain through banishment when its stated purpose is rehabilitation. Instead, banishment seems only to involve hardships that are incidental.

108. *Id.* at art. 16.

109. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 262 (1993).

110. Miller, *supra* note 104, at 146, 149.

111. 161 Eur.Ct.H.R. (ser. A) (1989), *available at* http://www.kentlaw.edu/classes/bbrown/Soering%20case%20ECHR.doc (last visited Apr. 12, 2003).

112. *Soering*, http://www.kentlaw.edu/classes/bbrown/Soering%20case%20ECHR.doc, at para. 105.

113. *Id.* at para. 104.

114. *Id.*

against a prisoner's claim. The important point in the banishment context, however, is that an indigenous offender can only be subject to a sentencing circle through his own consent. Thus, the challenge would likely come from the majoritarian government.[115]

Here, the European Court's decision in *Hilton v. United Kingdom*[116] is particularly instructive. There, the court considered whether a particular case of solitary confinement constituted inhuman or degrading treatment.[117] Using the "totality of the conditions," the court found that the conditions of confinement were extremely unsatisfactory and that the prisoner did suffer from some adverse psychological effects.[118] However, the deciding factor, in finding the confinement to be acceptable was that the solitary confinement of the prisoner was often at his own request for fear of hostilities from other prisoners.[119]

While few would argue that a particularly egregious case of torture would be acceptable because the prisoner "consented," the singular nature of banishment makes it seem acceptable under the Covenant.[120] Part of the reason outsiders may consider banishment humiliating for the prisoner is a misunderstanding of language. According to the tribal elder who secured the alternate sentencing, "[p]art of the problem here is the interpretation of the word banishment . . . . We don't look on it as banishment, but as a purification rite."[121] The banishment of an offender from the tribe to an island does not reflect the tribe expelling shameful members; it reflects the tribe asking the offender to re-connect with his roots to respect his heritage.

In fact, traditional sentencing would be more shameful to the tribe and the offender. Without facing banishment, the offenders would "never be accepted back in the tribe."[122] Conversely, at the end of the banishment, offenders are welcomed back into their tribe with a great feast and the crime is never spoken of again.[123] At this point, it is also constructive to consider

115. Of course, an offender might consent to a sentencing circle but then disagree with the imposition of banishment. Also, an offender may initially agree to banishment but then be unable to cope with it in practice.

116. 3 Eur. H.R. Rep. 104 (1978).

117. Miller, *supra* note 104, at 151-52 (citing *Hilton*, 3 Eur. H.R. Rep. At 125-27, paras. 88-102).

118. *Id.* (citing *Hilton*, 3 Eur. H.R. Rep. At 125-27, paras. 88-102).

119. *Id.* (citing *Hilton*, 3 Eur. H.R. Rep. At 124-25, paras. 93-94).

120. While no court has ever held explicitly that an otherwise cruel punishment could be acceptable solely because the prisoner consented, some authors have at least considered this possibility. *See, e.g.*, Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 617 (2000) (rejecting the proposition that a defendant's consent can waive Eight Amendment protections).

121. Sangiacomo, *2 Youths*, *supra* note 1, at 1A.

122. Balzar, *supra* note 1, at A3.

123. Sangiacomo, *Different*, *supra* note 43, at 1A.

how traditional forms of punishment sometimes considered inhuman compare with banishment.

b. Death Row Phenomenon Generally

The conclusion in *Soering* is as significant to banishment as the criteria it established for determining inhuman treatment.[124] In *Soering*, the court found that extradition of a German national to the United States would expose him to "death row phenomenon,"[125] despite the fact that the death penalty itself had not yet been found to constitute inhuman treatment.[126] This "phenomenon" refers to the anguish resulting from being confined to death row (specifically, in Virginia):

> . . . the delays[,] the appeal and review procedures following a death sentence, psychological trauma, the fact . . . that the judge or jury in determining sentence is not obliged to take into account the defendant's age and mental state at the time of the offense; the extreme conditions of his future detention on "death row" in Mecklenburg Correctional Center, where he expects to be the victim of violence and sexual abuse because of his age, color and nationality; and the execution itself including the ritual of execution.[127]

The court explicitly qualified this holding by stating that it was based on the specifics of the prisoner and the death row conditions in the particular state where he would be confined.[128] In Virginia, "a condemned prisoner can expect to spend . . . six to eight years" on death row before being executed.[129] Prisoners also face "the risk of homosexual abuse and physical attack . . . ."[130] Meanwhile, "[a]t the time of the killings [Soering] was only 18 years old and there [wa]s some psychiatric evidence . . . that he 'was suffering from [such] an abnormality of mind . . . as substantially impaired his mental responsibility for his acts.'"[131]

In some senses, the banishment of the Tlingit teenagers was similar to Soering's imminent extradition to Virginia's death row. Roberts and Guthrie were both fifteen when they committed their crime, three years younger

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124. 161 Eur.Ct.H.R. (ser. A) (1989), *available at* http://www.drugtext.org/library/legal/evrm1.html (last visited Apr. 12, 2003).

125. *Id.* at para. 122.

126. *Id.* at para. 101.

127. *Id.* at para. 105.

128. *Id.* at para. 106.

129. *Id.*

130. *Id.* at para. 107.

131. *Id.* at para. 108.

than Soering.[132] There was no evidence of mental deficiency in either Guthrie or Roberts, but both indicated that they were suicidal in the early days of their banishment.[133] While the Tlingits faced no fear of sexual abuse or human attack, they were forced to gather food and wood in the harsh Alaskan winter while surrounded by wolves and other dangerous animals.[134] Guthrie admitted that, because of all the dangerous animals, he "was scared to go outside at night" at first.[135]

While these factors were similar, two key aspects of banishment make it less suspect. First, death row phenomenon primarily exists because "the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death."[136] Second, as previously noted, the average time spent on death row in Virginia was between six to eight years.[137] This extended period of time spent merely anticipating death perpetually deteriorates the prisoner's mental and emotional condition. Conversely, banishment typically lasts for only six to eighteen months. Also, the offender knows that, after his release, he will be completely free and welcomed back into his tribe. This encourages the rehabilitation that is the central focus in banishment. Far from being despondent, the offender is encouraged to improve so he can reintegrate into his tribe.

It is also important to note that the United Nations Human Rights Committee has subsequently rejected claims alleging that extradition would subject prisoners to death row phenomenon. The U.N. "Human Rights Committee's primary purpose is to evaluate complaints brought pursuant to the First Optional Protocol of the International Covenant on Civil and Political Rights"[138] (ICCPR). Article 7 of the ICCPR prohibits torture and "cruel, inhuman, or degrading treatment or punishment."[139] In at least two cases, the Human Rights Committee has rejected claims that particular

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132. Harrell, *supra* note 52, at A1.

133. The banishment of Guthrie and Roberts was tracked in a documentary marking their progress. When asked about "Being depressed and suicidal tendencies," Roberts responded that he was not suicidal, but he "thought about it" in the early days of banishment. Guthrie similarly responded, "It was lonely, depressing. It was pretty bad. I almost jumped ship there for the first couple of days." THE EAGLE AND THE RAVEN: A PURIFICATION BY BANISHMENT, *supra* note 98.

134. *Id*

135. *Id.*

136. Soering v. The United Kingdom, 161 Eur.Ct.H.R. (ser. A) (1989), *available at* http://www.drugtext.org/library/legal/evrm1.html, at para. 106 (last visited Apr. 12, 2003).

137. *Id.*

138. Miller, *supra* note 104, at 152.

139. ICCPR, *supra* note 5, at art. 7.

cases of death row phenomenon violate Article 7.[140] Although these cases merely distinguished and did not overrule *Soering*, they certainly narrowed the applicability of death row phenomenon by holding that prolonged stays on death row are not inhuman if they result from the prisoner "availing himself of appellate remedies."[141] Canada and the United States both have ratified the ICCPR, although the United States has indicated that it is not self-executing.[142] Conversely, the Privy Court in England[143] and the Supreme Court of Zimbabwe[144] applied *Soering*'s reasoning in finding human rights violations for extended stays on death row.

c. Solitary Confinement Generally

Until the late nineteenth century United States prisons frequently "used solitary confinement as the sole means of incarceration . . . ."[145] Eventually in *In re Medley*,[146] the Supreme Court found that a punishment consisting solely of solitary confinement was "an additional punishment of the most important and painful character . . ." and thus violative of the Eighth Amendment.[147] Part of the basis for considering solitary confinement to be an "additional punishment" is that "the administrative decision to place a prisoner in isolation is not based on the underlying offense . . . but instead on activities that occur within the prison . . . ."[148]

While the conditions of solitary confinement obviously differ, the punishment contains certain key features. Prisoners in solitary confinement

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140. *See, e.g.*, Cox v. Canada, Communication No. 539/1993, (Nov. 1994), U.N. Doc. A/48/40, para. 17.2 (rejecting application of death row phenomenon to article 7 despite evidence of potential psychological stress and the possibility of fifteen years on death row before execution); Kindler v. Canada, Communication No. 470/1991, (July 1993), U.N. Doc. CCPR/C/48/D/470/1991, para. 15.3 (acknowledging the validity of death row phenomenon but rejecting it in this case under article 7 because of lack of specificity in Kindler's submissions).

141. *Kindler*, Communication No. 470/1991, para. 6.4.

142. *See* WEISSBRODT ET AL, *supra* note 106, at 125-26 (stating that the United States has ratified the Covenant but declared that it is not self-executing); Right Watch, *supra* note 105 (noting "Canada signed this covenant on May 19, 1976.").

143. Pratt & Morgan v. Attorney General for Jamaica, [1994] 2 A.C. 1, 35 (P.C. 1993) (holding that keeping prisoners on death row for fourteen years constituted an inhuman act). "[D]uring the nineteenth century," the Privy Council "had been the supreme appellate tribunal for the British Empire and is now developing into a human rights court for the British Commonwealth." Daniel P. Blank, Book Note, *Mumia Abu-Jamal and the "Death Row Phenomenon,"* 48 STAN. L. REV. 1625, 1633 (1996).

144. Pratt & Morgan, 2 A.C. at 31 (citing the unreported decision in Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, Judgment No. S.C. 73/93 (June 24, 1993)).

145. Miller, *supra* note 104, at 155.

146. 134 U.S. 160 (1890).

147. *Medley*, 134 U.S. at 171.

148. Miller, *supra* note 104, at 156.

are prevented from "[p]articipation in any social function, or any form of contact with other prisoners . . . ."[149] The cell in which the prisoner stays is barren and dim, and he or she is "completely isolated from the natural environment and from most of the natural rhythms of life."[150] It is this lack of "social stimulation" that is potentially detrimental to inmates.[151]

Studies by Dr. Stuart Grassian, in connection with a class action suit, found that inmates subjected to solitary confinement in a Massachusetts prison displayed remarkably consistent psychiatric symptoms.[152] These symptoms—which have been referred to as "Reduced Environmental Stimulation" Syndrome—"includ[e] generalized hypersensitivity to external stimuli, perceptual distortions, hallucination, derealized experiences, anxiety, difficulties with thinking, concentration and memory, and impulse control."[153] This syndrome is consistent with earlier studies finding that solitary confinement can lead to "a 'hallucinatory, paranoid, confusional psychosis' . . . ."[154]

The Human Rights Committee is the primary body that has found human rights violations based on solitary confinement. In the early 1980s, the Committee, in its Annual Report, indicated that "[e]ven such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to . . . article (7) . . ." of the Protocol.[155] Based on this report, the Committee has "receive[d] numerous communications alleging violations of Article 7 and 10 due to solitary confinement conditions."[156] Article 7 prohibits torture and "cruel, inhuman, or degrading treatment or punishment."[157] Meanwhile, Article 10 states that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[158]

In a few cases, the Committee has found violations of the Protocol based on particular cases of solitary confinement. In one case, the Committee found violations of both articles "[w]here a hostage was kept in

149. *Id.* at 157, n.128 (describing conditions in high-security German prisons).

150. *Id.* at 158.

151. *Id.*

152. *Id.* at 162.

153. *Id.* Importantly, for the most part, "the inmates denied ever having experienced these symptoms prior to their solitary confinement and reported that symptoms subsided rapidly after their release from isolation." *Id.*

154. *Id.* at 161.

155. Miller, *supra* note 104, at 153 (quoting the Annual Report of the Committee to the General Assembly, (1981-1982) II Y.B. Hum. Rts. Comm., 383, U.N. Doc. CCPR/3/Add.1 (1989)).

156. *Id.*

157. ICCPR, *supra* note 5, at art. 7.

158. *Id.* at art. 10.

a damp, windowless cell underground for twenty-four hours a day with only a mattress . . . ."[159] In another, the Committee again found violations of both articles when a prisoner "was held for one month in 'La Isla,' a prison wing of small windowless cells where artificial light was left on for twenty-four hours a day."[160]

In one sense, banishment is similar to solitary confinement. Banished offenders are entirely excluded from social functions and contact with others for extended periods. In most other senses, however, the punishments are distinct. Banishment is not an additional punishment based on behavior in prison; rather, it is the original punishment intended for the offense. Rather than being completely isolated from the natural environment, banished offenders are completely integrated into nature. While they do not interact with other people, banished individuals are exposed to significant environmental stimuli and not confined by barren walls.

3. *Standard Minimum Rules for the Treatment of Prisoners*

The United Nations Economic and Social Council approved the Standard Minimum Rules for the Treatment of Prisoners in 1957.[161] These Rules "have been increasingly recognized as a generally acceptable body of basic minimal requirements."[162] In the United States, six states have explicitly adopted the Rules, and while the "1962 Model Penal Code and the correctional standards developed by the National Advisory Commission on Criminal Justice Standards and Goals in 1973" based its provisions on the Rules. [163] Most importantly, Minnesota, one of the states adopting the Rules, is the first state experimenting with the use of sentencing circles in the United States. Meanwhile, Canada has endorsed the Rules and incorporated most of its provisions into its "law and correctional policy."[164]

The Standard Minimum Rules for the Treatment of Principles largely focus on the health and physical condition of the prisoner. Article 32(2) of the Rules prohibits "any other punishment that may be prejudicial to the physical or mental health of a prisoner."[165] Certainly, placing offenders on islands in the bitter cold of the Alaskan winter with minimal heating and

159. Miller, *supra* note 104, at 153-54.

160. *Id.* at 154.

161. *Id.* at 147.

162. Daniel L. Skoler, *World Implementation of the United Nations Standard Minimum Rules for Treatment of Prisoners*, 10 GEO. WASH. J. INT'L L. & ECON. 453, 455 (1975).

163. Miller, *supra* note 104, at 148.

164. Correctional Services of Canada, *United Nations Standard Minimum Rules for the Treatment of Prisoners*, http://www.csc-scc.gc.ca/text/pblct/rights/50yrs/50yrs-07_e.shtml.

165. Standard Minimum Rules, *supra* note 3, at art. 32.

limited food presents a substantial possibility that the offenders will become extremely ill. As previously noted, both the Tlingit teenagers suffered from serious illness likely related to the extreme conditions on their islands.[166]

4. *Article 27 of the International Covenant on Civil and Political Rights Offers No Protection to Indigenous Group Rights*

The plain language of Article 27 of the International Covenant on Civil and Political Rights appears to provide protection for indigenous group rights, at least in a limited sense. That article holds that "minorities . . . shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[167]

Unfortunately, the United Nations Human Rights Committee has construed this right as "an individual right to participation in the group, not a group right per se."[168] In *Lovelace*, the Committee found "that a Maliseet Indian woman's Article 27 rights were violated by a Canadian law which took away her status as an Indian upon her marriage to a non-Indian, thereby preventing her from returning to her reservation upon the termination of the marriage."[169] Unfortunately, the implication of this decision is that an indigenous tribe could not defend its cultural practices against majoritarian challenge: "[W]ere the Committee faced with a group-based claim by the Maliseet tribe for the exclusion of a tribal woman from the reservation due to her marriage outside the tribe, it would be unlikely to honor it . . . ."[170] In the same sense, then, a tribe would unlikely be able to challenge a law prohibiting the imposition of banishment in tribal courts.

Thus, the Committee has distorted an Article ostensibly devoted to securing group rights, interpreting it "to accord with [majoritarian] individualist assumptions."[171] While this is beneficial to the extent that individual tribal members now have the ability to challenge their exclusion from their tribes, it leaves the tribes themselves with no power to defend the practices that make them distinct. Therefore, viewed properly, Article 27 actually undermines the ability of tribes to practice their culture.

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166. Sangiacomo, *Banishment*, *supra* note 94, at 13A.

167. ICCR, *supra* note 5, at art. 27.

168. Richard Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691, 708 (1993).

169. *Id.* (quoting Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, Annex 18, at 166-75, U.N. Doc. A/36/40 (1981)).

170. *Id.* at 709.

171. *Id.* at 708.

IV. WHY BANISHMENT SHOULD BE ALLOWED

If a country found banishment to be unconstitutional under domestic law, a tribe would likely presently have no remedy under any international law document to preserve its sovereignty.[172] Therefore, this section first argues that several international "group rights" documents should be ratified to develop customary international law protecting the sovereignty of indigenous tribes.

Alternatively, if a country attempted to procure a ruling from an international court that banishment violates international human rights standards, the tribe imposing the sentence could raise a defense of cultural relativism. While this defense has been widely criticized—especially as utilized by Middle Eastern countries—it should be seen as a valid defense for indigenous tribes, primarily because (1) tribes are self-contained, and the laws governing them do not affect the majority population; and (2) banishment is legitimately seen as less severe by indigenous groups based on a distinct world-view.

A. INTRODUCTION—THE MISTREATMENT OF INDIGENOUS GROUPS

Before considering the two main justifications for allowing banishment and similar indigenous punishments, the precarious position of indigenous culture must be acknowledged as providing context. The first major point recognized by most scholars is that "[i]ndigenous cultures throughout the world have faced eradication by discrimination, assimilation, genocide, and most recently, the accelerating pace of economic development."[173] In terms of a cultural relativism defense, this categorical cultural genocide distinguishes indigenous culture from the cultures of Middle Eastern countries, which most often raise the cultural relativism defense. A Native American tribe could legitimately claim that its inability to engage in unique cultural practices would destroy the vestiges of its culture to which it is still clinging; however, a Middle Eastern culture would have more difficulty claiming it would lose its identity if its subjugation of women were prohibited.[174]

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172. *See infra* note 186 and accompanying text.

173. Herz, *supra* note 168, at 691.

174. *See, e.g.*, Heather S. Archer, Comment, *Effect of United Nations Draft Declaration on Indigenous Rights on Current Policies of Member States*, 5 J. INT'L LEGAL STUD. 205, 238 (1999) ("Without any one of these rights, the indigenous group's culture will ultimately fail"); Bradford, *supra* note 1, at n.259 (stating "[t]he past century has been particularly devastating to the integrity of traditional tribal cultures, and the destruction of traditional spirituality, which bound individuals to a disciplinary code of personal and collective conduct and responsibility, is a 'loss of inestimable value . . .'").

"How people resolve, or rather, how the legal system requires people to resolve, their disputes, has everything to do with what kind of people they are and what kind of people their children will become."[175] Tribal legal systems reflect "the closed nature of tribal communities and the [concomitant] obligations of individual tribal members to perpetuate established norms."[176] A punishment such as banishment is "integrally related to an overall process of keeping the peace and ensuring that internal disputes [a]re minimized and the functioning of the community undisturbed."[177]

Rather than utilizing an adversarial litigation-based system that focuses on individual culpability, many tribes used cooperative justice resulting in restorative and rehabilitative punishments that enhance the community. If tribes were forced to adopt litigation and traditional individualized sanctioning, it would "increase the likelihood that their members w[ould] focus exclusively on the vindication of their individual rights, and thus, marginalize their relationship to each other and their communities."[178] By thus losing their group mentality, "tribal communities w[ould] become increasingly indistinct from American society at large," assimilated to the point of extinction.[179]

Concurrently, "the political marginality of Native American groups virtually assures that law makers and enforcers will tend to be insensitive to Native American concerns, if not wholly ignorant of them."[180] This makes the adoption of the international agreements recognizing indigenous "group rights" essential. Not only are indigenous groups relatively disempowered compared with other minority groups, but their ultimate goal—and the ultimate solution for them—is not assimilation and "equal" protection through universal rights.

The position of indigenous groups is distinct from the position of virtually any other minority group. Here, the United States provides an instructive example. In the United States, "[w]omen, blacks, and poor white males had grown up . . . without ever having known a separate nation of their own . . . ."[181] In seeking to overcome disenfranchisement, "representatives deputized by these groups petitioned forcefully for [their] full

175. Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 276 (1997).

176. *Id.* at 255.

177. *Id.*

178. *Id.* at 273.

179. *Id.* at 274.

180. Herz, *supra* note 168, at 693.

181. David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 422 (1994).

inclusion . . . ."[182] In contrast, "American Indians . . . did not grow up within the territorial United States" and "almost universally . . . resisted" assimilation.[183]

The inclusion of Native Americans into the majoritarian culture also differed substantively from the inclusion of other groups. After being given equal rights, the other minority groups functionally "stood before the government on the same footing as all other citizens, entitled to command their representatives through the system of democratic accountability."[184] While their voices may still be marginalized in this system, it is still their system. For Native Americans, "the promise of majoritarianism [was] not one of self-determination; it is rather one of subjection to an alien power."[185]

Indigenous groups seeking protection against the majoritarian government of the country in which they reside currently have no international means of redress; "[t]o this day, international law does not recognize assertions of collective cultural rights by aboriginal peoples against state sovereignty, treaties between indigenous peoples and states, or indigenous peoples' rights to self-determination."[186] This absolute powerlessness distinguishes indigenous individuals from other minorities.[187]

B. GOVERNMENTS SHOULD RATIFY GROUP RIGHTS DOCUMENTS TO CREATE CUSTOMARY INTERNATIONAL LAW

Some scholars have classified human rights into three "generations." The first, and most categorically accepted, generation includes the "civil and political rights enshrined as universal moral imperatives in the United Nations Charter, the Universal Declaration of Human Rights, and the International Covenant of Civil and Political Rights."[188] These documents

182. *Id.* at 422-23.

183. *Id.*

184. *Id.* at 423. It is, of course, false to state that women and non-indigenous racial minorities are substantively "equal." Many sources "argu[e] that individual enfranchisement and rights are not sufficient to secure justice for women and minorities." *Id.* at 423 n.62.

185. *Id.* at 423-24; *see also* Philip Frickey, *Context and Legitimacy in Federal Indian Law*, 94 MICH. L. REV. 1973, 1975 (1996) (arguing that "Native Americans are essentially foreigners in their own country, both culturally and legally").

186. Herz, *supra* note 168, at 696.

187. *See id.* at 696 (stating that "[t]he international system is particularly unsympathetic to the concerns of indigenous minority groups" in relation to other minority groups"); Porter, *supra* note 175, at 275 (stating that "[t]he indigenous people, the smallest and most fragile minority within the American polity, run the greatest risk of actually disappearing out of existence").

188. Bradford, *supra* note 1, at 597 n.249.

generally enshrine "negative" rights, merely obligating states to avoid interference with these individual rights.[189]

The international community has been less prompt and universal[190] in adopting second-generation rights: "essentially individual entitlements to economic, social, and cultural benefits . . . ."[191] Although these "positive" rights require affirmative action on the part of states in securing entitlements to their citizens, "much of the international community" supports them, at least in principle.[192]

Finally, the most recent and least recognized "'third generation' human rights . . . are designed to endow indigenous groups *qua* groups with legal personality and standing to bring complaints against states for violation of collective rights of indigenous peoples."[193] There have been several reasons for the static recognition of these rights. The most benign factor is a lack of understanding: "Americans genuinely seem perplexed by the issue of group rights."[194] Yet, there are likely more pernicious forces behind this ostensible insouciance. There is a valid argument that "[s]tates have a vested interest in not recognizing group claims because doing so would undermine their exclusivity as actors on the international scene."[195]

As previously stated, a majoritarian government is currently immune from tribal group challenges;[196] "states themselves are the dominant players within the international law system,"[197] and indigenous groups have no independent recognition. A country's national Constitution is absolutely su=preme, and no indigenous legal documents are seen as crafting out exceptions to its universality. If group rights documents are adopted, there is some legitimacy to the argument that indigenous groups can challenge the majority government's laws internationally.

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189. *See id.* (stating that these agreements "obligate state noninterference in what have generally been considered individual rights").

190. *Id.*; *see also* Herz, *supra* note 168, at 691-92 (arguing that "[a] collective identity apart from and yet within the state's collective identity undermines the state's claim to territorial sovereignty as well as its status as the representative of all citizens").

191. Bradford, *supra* note 1, at 597 n.249.

192. This "'[p]rogressive realization' . . . reflects the reality that the realization of economic, social and cultural rights depends on the availability of resources and societal structures rather than state abstention." WEISSBRODT ET AL., *supra* note 106, at 91.

193. Bradford, *supra* note 1, at 597 n.249.

194. Lawrence Rosenn, Book Review, *The Right to be Different: Indigenous Peoples and the Quest for a Unified Theory*, 107 YALE L.J. 227, 227 (1997); *see also* Herz, *supra* note 168, at 692 (stating that "[a] general insensitivity to communal rights resonates in both the American and international legal systems").

195. Herz, *supra* note 168, at 694.

196. *See supra* note 186 and accompanying text.

197. Herz, *supra* note 168, at 694.

The most controlling yet least expansive iteration of indigenous group rights is found in the International Labor Organization's Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169).[198] Article 8 of ILO 169 acknowledges that indigenous " . . . peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights."[199] While ILO 169 entered into force on September 5, 1991, its analysis is (perhaps purposefully) circular. While Article 8 recognizes indigenous rights, it proscribes these rights according to both national and customary international law. This circumspection means the recognition is a nullity; indigenous rights only begin where majoritarian proscription ends. Further, the United States has refused to ratify ILO 169 and appears unlikely to ever become a party.[200] Canada has refused to ratify it as well.[201]

The previous version of the ILO Convention was widely criticized as "an ineffective tool for the protection of indigenous rights because the predominant thrust of the document was the assimilation of indigenous peoples into mainstream society."[202] While the new Convention is not literally assimilationist, it does adopt an assimilationist theory of indigenous rights, both defining and circumscribing majority rights based on majoritarian culture.

The still unratified Proposed American Declaration on the Rights of Indigenous Peoples[203] contains a more expansive and explicit recognition of collective indigenous rights. Article II (2) recognizes that "[i]ndigenous peoples have collective rights that are indispensable to the enjoyment of the individual human rights of their members."[204] Significantly, the Proposed

198. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Jun. 27, 1989, 169 I.L.O. 1989 [hereinafter ILO 169].

199. *Id.* at art. 8.

200. *See* Elizabeth A. Pearce, *Self-Determination for Native Americans: Land Rights and the Utility of Domestic and International Law*, 22 COLUM. HUM. RTS. L REV. 361, 387 (1991) (arguing that the United States is unlikely ever to ratify ILO 169).

201. Laurie Sargent, *The Indigenous Peoples of Bolivia's Amazon Basin Region and ILO Convention No. 169: Real Rights or Rhetoric*, 29 U. MIAMI INTER-AM. L. REV. 451, 487 (1998).

202. Pearce, *supra* note 200, at 379. Despite the weaknesses of the preceding ILO 107, "[t]he United States declined to ratify ILO 107 even though it was widely approved." *Id.* at 387.

203. Proposed American Declaration on the Rights of Indigenous People, Feb. 26, 1997, Inter-Am. C.H.R, OEA/Ser/L/11.95, doc. 6 1333d (1997), *available at* http://www.cidh.oas.org/indigenous.htm (last visited May 26, 2003).

204. *Id.* at art. II(2). "Accordingly[,] the states recognize *inter alia* the right of the indigenous people to collective action, to their cultures, to profess and practice their spiritual beliefs, and to use their languages." *Id.*

Declaration extends this acknowledgement to indigenous legal practices.[205] Such a categorical deference to tribal court sovereignty would presumably provide sufficient protection for indigenous punishments such as banishment, particularly when the defendant consents to the sentence. Unfortunately, there has been minimal progress by the Inter-American Commission in adopting the Proposed Draft since its signing in February 1997.[206]

Another declaration currently under consideration is the United Nations' Draft Declaration on the Rights of Indigenous Peoples.[207] The United Nations' declaration appears to be an intermediate response, combining aspects of the ILO Convention and the American Declaration to an unsatisfying result. Article 33 seems analogous to Article 8 of the ILO Convention, stating that "indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards."[208] Again, circumscribing collective indigenous rights by reference to majoritarian human rights standards makes such acknowledgement a nullity.

Conversely, Article 12 declares quite unambiguously that "[i]ndigenous people have the right to practise and revitalize their cultural traditions and customs."[209] This article provides perhaps the broadest deference to collective indigenous rights and would provide the greatest support to banishment.[210] Because the article authorizes revitalization, governments could not challenge banishment because the punishment lay dormant on reservations for decades.[211]

Regrettably, the Human Rights Working Commission has neither resolved this conflict nor completed deliberations on a final declaration in

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205. *Id.* at art. XVI(2) (stating "Indigenous peoples have the right to maintain and reinforce their indigenous legal systems and also to apply them to matters within their communities, including systems related to such matters as conflict resolution, crime prevention and maintenance of peace and harmony"). The Proposed Declaration also acknowledges collective rights in "indigenous ways of life, customs, traditions, forms of social, economic and political organization, institutions, practices, beliefs and values, use of dress, and languages." *Id.* at art. VII(3).

206. The fact that the Commission took eight years merely to prepare the Proposed Declaration is disheartening as well.

207. Draft Declaration on the Rights of Indigenous Peoples, U.N., ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., U.N. Doc. E/CN.4/Sub.2/1994/56 (1994) [hereinafter Draft Declaration].

208. *Id.* at art. 33.

209. *Id.* at art. 12.

210. *See* Archer, *supra* note 174, at 206 (arguing that "[t]he draft Declaration . . . marks a steady increase in the protection of rights for indigenous peoples").

211. Draft Declaration, *supra* note 207, at art. 12. In fact, this is exactly the point of the Article. Forced assimilation deracinated indigenous populations from their cultural traditions, and they should now be able to participate in practices proscribed by the majority culture.

its nine years of deliberation.[212] What is promising, however, is the conclusion to the Draft Declaration, which states emphatically that the previous "rights constitute the *minimum* standards for the survival, dignity and well-being of the indigenous peoples of the world."[213] The Draft Declaration also contains a powerful mechanism for the enforcement of indigenous group rights, granting these groups "the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts . . . ."[214] Unfortunately, the Working Group members quite prophetically realized that this stronger language would likely prevent ratification while "the ILO's less stringent standards would give that body's instrument a greater chance of ratification."[215]

A further problem with these declarations is that, as declarations, they are not binding on states that are parties to them.[216] Still, there is the hope that "group rights" declarations, once ratified, would be accepted to the same degree as the Universal Declaration on Human Rights. Several sources have noted that "virtually all states today have embraced" the Declaration, resulting in customary international law.[217] Based on this universality, these sources have posited that even practices defended on the basis of cultural relativism must be "generally consistent with the basic thrust of the Universal Declaration."[218]

The hope would be that a majority of nations would choose to comply with these declarations and allow tribal groups to assert tribal sovereignty; consequently, "[c]ommon practices might come to have the status of an international customary law of indigenous rights as a greater number of nations find it advantageous to their international reputations and connections to give effect to such customs."[219]

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212. The Commission on Human Rights had a goal of having the draft Declaration "approved by the General Assembly by 2004 . . . .", but there is no indication this goal is close to being realized. Archer, *supra* note 174, at 213. Instead, "[m]omentum for the draft Declaration seems to be diminishing . . . ." *Id.* at 218.

213. Draft Declaration, *supra* note 207, at art. 42 (emphasis added).

214. *Id.* at art. 39.

215. Pearce, *supra* note 200, at 380.

216. *See* Archer, *supra* note 174, at 206 (stating "The Draft Declaration is not legally binding, so States are not required to alter their behavior."); W. Michael Reisman, *International Law and the Inner Worlds of Others*, 9 ST. THOMAS L. REV. 25, 30 (1996) (noting "It remains to be seen whether the words of these noble instruments will be transformed into effective practice or will simply serve as handsome contemporary display vessels for collecting the alligator tears that have been shed for centuries for the victims of cultural imperialisms").

217. Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 414 (1984).

218. *Id* at 418.

219. Rosenn, *supra* note 194, at 232.

There are several reasons why nations should recognize the propriety in preserving indigenous traditions. Under deontological theories, every group, as a collection of individuals, has moral worth and must be respected under a categorical imperative.[220] Under this theory, "eradication of a culture is in some sense a moral transgression in itself, wholly apart from any effects on the culture's constituents."[221] Under Kant's Kingdom of Ends, individuals and groups must always be treated as ends and never as means.[222] This does not mean that a governmental body cannot use a group as means toward its own ends; instead, it means that the body must respect the group as an autonomous actor vested with self-direction.

This principle is violated when international bodies do not recognize indigenous tribes, their agreements, or their group claims of human rights violations. Properly understood, groups in indigenous culture "have an intrinsic moral value. . ." equal to the individual in atomized "western" culture.[223] Granting such a group sovereignty is thus equal to granting autonomy to the individual.

Teleological claims also support the recognition of indigenous group rights; "[t]his argument proceeds from the belief that every culture has instrumental or utilitarian value to the world at large."[224] Atomized western liberalism is but one filter through which the world is experienced (and altered). Such a unilateral world-view is limiting and stunts a broader understanding of the world. "Each culture, in its unique context, records these experiences in ways that provide meaning, guidance and codes of rectitude that serve as compasses for the individual as he or she navigates the vicissitudes of life."[225] To lose even one of these cultures is to lose an ". . . indispensable sites for human growth, definition, and expression."[226]

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220. *See* Herz, *supra* note 168, at 697.

221. *See id.* at 697 (stating that "[t]here is moral value in communal experience, just as there is in societal or individual experience").

222. *See* R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271, 273-283 (2002).

223. Herz, *supra* note 168, at 697.

224. *Id.*

225. Reisman, *supra* note 216, at 25.

226. Herz, *supra* note 168, at 697.

C. CULTURAL RELATIVISM PROVIDES A VALID DEFENSE FOR BANISHMENT

1. *Introduction*

Those navigating the defense of cultural relativism must address a difficult dichotomy. On one hand, many argue that, to the extent that "human nature is relatively universal, . . . basic human rights must at least initially be assumed to be similarly universal . . . ."[227] This categorical presumption finds some support in the fact that "[t]here is a striking similarity in many of the basic values that we seek to protect through human rights."[228] Critics attack minority cultures to the extent they deviate in their protection of these "universal" human rights. Specifically, "[c]ritics claim Indian governments protect ways of life at variance with legal and political values that ought to transcend racial or cultural specificity."[229]

Mediating against this argument is the counter-argument rejecting the popular assumption "that cultural relativism . . . is something essentially un-Western," "resid[ing] in (non-Western) 'traditional' communities, such as pre-colonial African villages, Native American tribes and traditional Islamic social systems."[230] The idea here is that liberalism itself is a culture. "Aboriginal variations upon western conceptions of justice and the rule of law cannot be criticized by nonindigenous outsiders, for external criticism is a form of moral imperialism involving an implicit assumption that Aboriginal forms of life are morally inferior to "civilized" society."[231] Further, the United States' participation in international agreements is replete with reservations and the failure to ratify nearly universally recognized human rights conventions.

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227. Donnelly, *supra* note 217, at 415.

228. *Id.* at 414.

229. Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1314 (1993). With respect to these critics, the majority of their criticism is focused on indigenous discrimination "on the basis of race or cultural difference, . . . deviat[ing] from principles of equality." *Id.* at 1337. Admittedly, it is more difficult to defend inequality than punishments both the society and the offender recognize as coherent with their world view.

230. Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L. J. 775, 790-91 (2001).

231. Macklem, *supra* note 229, at 1314.

2. *Cultural Relativism is Particularly Applicable Here*

a. Cultural Relativism is a More Valid Defense in a Homogenous Community

A defense of cultural relativism is most difficult to raise when "the culture of a group can only be maintained at the expense of the rights of another community, or via the agency of the state."[232] In such cases, granting rights to one group cuts back against the rights of another group. A particularly instructive example of this process is the recent political reorganization in Fiji. Until 1987, the island was under British rule, which separated the Indo-Fijians and indigenous Fijians.[233] In 1987, a military coup led to overthrow of the government and promulgation of a new constitution with reference to human rights norms that indigenous Fijians thought "belonged to an alien political and cultural tradition."[234]

Indigenous Fijians eventually convinced Indo-Fijians to establish a commission to review the military promulgated Constitution. This commission was given the mandate of "[t]ak[ing] into account that the Constitution shall guarantee full protection and promotion of the rights, interests and concerns of the indigenous Fijian[s] . . . ."[235] As a result of this mandate, the commission created a new Constitution that many consider to "provide[] an uneasy mixture of newer international norms and a privileged position for indigenous Fijians . . . ."[236] As an example, the Constitution allows the entirely indigenous Great Council of Chiefs effectively to have "a veto power over constitutional and frequently, legislative changes . . . ."[237] Indigenous Fijians, living with Indo-Fijians and covered by a categorical Constitution, can thus stunt political change affecting other cultures based on their unique cultural perspective.

Conversely, indigenous American tribes seeking to justify banishment through cultural relativism impose on the dominant culture to a much lesser degree. This is primarily because aboriginal tribes in Canada and the United States "live in reservations where contact with other communities is minimal."[238] They are governed by separate legal documents, and decisions

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232. Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095, 1136 (2000).

233. *Id.* at 1129-30.

234. *Id.* at 1131.

235. *Id.* (citing SIR PAUL REEVES, ET AL., THE FIJI ISLANDS: TOWARD A UNITED FUTURE: REPORT OF THE FIJI CONSTITUTION REVIEW COMMISSION 754-55 (1996)).

236. *Id.* at 1133.

237. *Id.* at 1132.

238. *Id.* at 1137.

on indigenous rights in these countries have no bearing on the rights of other citizens under their national constitutions.[239] In this sense, there is no practical conflict between the indigenous and the national culture; instead, the "issue is purely between local values and international standards . . . ."[240]

b. Banishment is Legitimately Based on a Different World-View by Indigenous Groups

Much of customary international law is based on "natural law" conceptions that posit an intrinsic right to life, liberty, and property.[241] To this degree, authoritarian regimes that either categorically deny rights to a specific gender or race or disparately treat similarly situated individuals are indefensible based on culture. Even Native American cultures attempting to treat women differently from men have found their claims, that this dichotomy is necessary to preserve their culture, rejected.[242]

Many members of indigenous cultures, however, would legitimately view being banished to an undeveloped island and forced to "live off the land" less negatively than most "westernized" citizens. This is principally because the Anglo-Saxon "tradition views nature as God's gift to man, for man's dominion, at the time of creation."[243] For instance, "[i]n America, this conception laid the foundation for the pioneer ideal, in which the domination of nature is understood to be indispensable to the divinely ordained, linear march of progress."[244] A non-indigenous individual, acclimated to the consumerist majoritarian society, could well find that being exiled into nature with none of life's luxuries was both cruel and unusual.

Unfortunately, some sources have extrapolated from this viewpoint and superimposed their own views on to the distinct indigenous viewpoint. One source has noted that, "[b]y branding punishment 'cruel and unusual' simply because . . . [banished offenders are] obligated to procure their own sustenance in wilderness conditions and to provide for their own medical

239. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51 (1978).

240. Ghai, *supra* note 232, at 1136.

241. Herz, *supra* note 168, at 694-95 (arguing that "international law theory was based upon the prevailing view of that time: that natural law . . . governed the lives of all men").

242. *Id.* at 708 n.133 (citing Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, Annex 18, at 166-75, U.N. Doc. A/36/40 (1981); *see also* Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976) (holding that a tribe could not treat the children of female members who had married non-members differently from the children of male members who had married non-members on the basis of maintaining the tribe's integrity). This decision was eventually overruled by the Supreme Court, which found that complaints under the Indian Civil Rights Act must be heard in tribal courts and not the federal courts.

243. Herz, *supra* note 168, at 693.

244. *Id.*

care, several commentators betrayed a lack of understanding of and appreciation for the Tlingit relationship to the natural environment . . . ."[245] Instead of having the impulse to dominate nature, "to the extent one can generalize, Native American cosmology is based on the sacred *primacy* of the natural world—of which man is merely a constituent . . . ."[246]

It is instructive here to consider socialization's effect on the individual's view of punishment. A cross-cultural study between Japan and the United States found that "[t]he Japanese view of punishment appears very different" from the American perspective.[247] Whereas offenders are routinely incarcerated in the United States, there is a general "Japanese reluctance to incarcerate offenders" based on the belief that being isolated from others is a severe (and perhaps cruel) punishment.[248] This is consistent with the Japanese "network view of individuals" but conflicts with the atomized American view of individuals.[249]

It seems fair to extrapolate from this and other studies a general theory that a culture will perceive a punishment as more severe the more removed that punishment is from the culture's everyday experience. This theory is essential to an understanding of why banishment would not be seen as cruel or inhuman under many indigenous cultures.

As much as one can generalize, the foundation of Native American culture is subsistence.[250] Although difficult to define, subsistence essentially coheres with the above-identified indigenous world-view. It reflects the close relation between indigenous groups and both the natural and spiritual world.[251] Subsistence is a culture "passed from generation to generation intact, through the repetition of legends and observance of ceremonials which were largely concerned with the use of land, water, and the resources contained therein."[252]

Although not so limited, subsistence is a communal activity that teaches successive generations how to "live off the land" through the teaching of:

> [c]ountless tasks, such as the maintenance of equipment. . ., preparing the outfit for major hunting and fishing expeditions, setting and checking traplines, dressing and packing hundreds of

245. Bradford, *supra* note 1, at n.221.

246. Herz, *supra* note 168, at 693 (emphasis added).

247. V. Lee Hamilton, et al., *Punishment and the Individual in the United States and Japan*, 22 LAW & SOC'Y REV. 301, 304 (1988).

248. *Id.*

249. *Id.*

250. Mary Kancewick & Eric Smith, *Subsistence in Alaska: Towards A Native Priority*, 59 UMKC L. REV. 645, 649-50 (1991).

251. *Id.*

252. *Id.* at 650.

> pounds of meat, cutting and drying thousands of pounds of fish, gathering berries and edible plants, tanning skins and hides, making things from them—clothing, footgear, containers, sleds, tents, kayaks. . . .[253]

In this manner, then, not only is banishment consistent with the underpinnings of many indigenous cultures, but it is also designed for the offender to re-connect with his ancestors and nature. It is only at this point that we can see the true necessity of indigenous groups retaining this alternative sentencing practice. Being exposed to westernized jails only further separates the offender from his tribe. A sentence such as banishment allows the offender to reconnect with his roots and re-integrate into his tribe.

In the same sense that the Marxist says the capitalist can never truly understand communism, the non-native can never truly appreciate the indigenous connection with the land. Centuries of repetition have "intricately woven [subsistence] into the fabric of [indigenous] social, psychological and religious life."[254] The non-native simply cannot critically conceptualize this way of living through *a priori* reasoning because he "does not have a thousands of years old subsistence relationship with the lands . . . ."[255] For the native, this relationship with the land is part of who he is as a person, and, more importantly, as a member of his tribal community; "[f]or the non-Native, the activities of hunting and fishing and gathering are not tribal community activities, shaping tribal relationships, celebrations, history, for generations back into time immemorial."[256]

IV. CONCLUSION

Banishment reflects one of many attempts by indigenous tribes to reclaim sovereignty and preserve their existence. Considered under current "universal" human rights documents, banishment would likely be considered as cruel and inhumane. Such a narrow perspective, however, would deny what is unique both about the punishment and indigenous tribes themselves. Understood under indigenous subsistence, banishment is not a severe punishment for tribal offenders who have necessarily consented to the sentencing circle imposing it. Hopefully, through ratification and incorporation of the draft declarations on indigenous group rights, customary international law will develop, recognizing the right of tribes to engage in alternative sentencing.

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253. *Id.* at 651.
254. *Id.*
255. *Id.* at 651.
256. *Id.* at 652.